



**Mohamed & 7 others v County Executive Committee Member, Finance,
Wajir County & 3 others (Employment and Labour Relations Petition
E001 of 2024) [2024] KEELRC 2284 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2284 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS AT GARISSA
EMPLOYMENT AND LABOUR RELATIONS PETITION E001 OF 2024
AN MWAURE, J
SEPTEMBER 20, 2024**

BETWEEN

**HON ABDIKADIR DUBOW MOHAMED 1ST PETITIONER
HON RASHID BILLOW ADAN 2ND PETITIONER
HON AYUB ABDI OSMAN 3RD PETITIONER
HON MOHAMED NUR FARAH 4TH PETITIONER
HON SHAMSH ISSA JIMALE 5TH PETITIONER
HON ABDIRASHID ADAN HUSSEIN 6TH PETITIONER
HON MOHAMMED SALAD IBRAHIM 7TH PETITIONER
HON HAMUD ABDI HASSAN 8TH PETITIONER**

AND

**THE COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE, WAJIR
COUNTY 1ST RESPONDENT
WAJIR COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT
SALARIES & REMUNERATION COMMISSION 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT**

RULING

1. The Petitioners/Applicants filed a Notice of Motion dated 6th February 2024 seeking the following orders: -



- a. spent
- b. pending the inter parties hearing of this application, a conservatory order do issue stopping the implementation of Kenya Gazette Vol. CXXIV-NO. 145 dated 27/7/2022 on the reviewing downwards of mileages and abolishment of plenary allowances of the petitioners as published by the 3rd Respondent.
- c. pending the hearing and determination of the Petition, a conservatory order do issue stopping any intended and/or future reviewing downwards of mileages and abolishing plenary allowances by the 3rd Respondent.
- d. pending the hearing and determination of this Motion, an order be and is hereby issued directing the 1st, 2nd and 3rd Respondents to reinstate the mileages and abolishes plenary allowances of the Petitioners as before the said review.
- e. An order be and is issued that the Applicants' petition be heard and dispensed off within reasonable time.
- f. Costs be in the cause.

Petitioners/ Applicants Case

2. The Petitioners/Applicants aver that on 27/7/2022, the 3rd Respondent published in the Kenya Gazette Vol CXXIV-NO.145 the downward review of mileages and abolishment of plenary allowances of the Petitioners.
3. The Petitioners/Applicants aver that the 3rd Respondent did not consult and/or allow any form of public participation and/or involve them. This amounts to unfair labour practices as the process of settling to the decision was opaque.
4. The Petitioners/Applicants state that vide a letter dated 7/5/2023, they protested the 3rd Respondent's decision which the 3rd Respondent responded vide a letter dated 23/5/2023 promising to take their submissions into consideration which has not been effected to date.
5. It is the Petitioners/Applicants' case that the Respondents should have been informed that they take up other socio-economic roles as leaders of their communities and have considerable attachment to their electorates who relied on them.
6. The Petitioners/Applicants aver that the monies reviewed downwards as mileages and abolished plenary allowances have never been accounted for considering that the budget and allocation to the county has immeasurably increased since then.
7. It's the Petitioners/Applicants case that there is imminent danger of violation of the constitution if the court does not intervene in a timely manner and hear and determine this dispute at the earliest opportunity.
8. The Petitioners/Applicants aver that the Respondents will suffer no prejudice if the orders sought are granted, however, if they are not granted, the Petitioners' rights will continue to be violated.

4th Respondent's Case

9. In opposition to the Application, the 4th Respondent filed a Grounds of Opposition dated 28th February 2024 on grounds that:



1. under Article 156(4)(b) of the constitution , the 4th Respondent is mandated to represent the national government in civil proceedings which national/county governments are parties.
2. the 3rd Respondent is an independent commission established under Article 249(2)(b) of the constitution with specific mandate and are subject only to the constitution and the law and are not subject to the direction or control of any agency or authority while discharging their constitutional mandate.
3. under Article 230(4) of the constitution and section 11 of the Salaries and Remuneration Act, the 3rd Respondent is solely mandated to independently determine the salaries and allowances of state and public officers in Kenya.
4. in discharging their constitutional mandate, the 3rd Respondent intention is to cure the mischief in public finance and deal with the complexities in determining the salaries and allowances and/or benefits of state and public officers in accordance with the mandate bestowed to them under the constitution .
5. decision reached by SRC independently was to review the allowances of state and public officers for the benefit of the country and the same is within their constitutional mandate and other relevant law and not in any way ultra vires as the 3rd Respondent did not overstep its constitutional mandate.
6. the Notice of Motion does not disclose any constitutional violation by the 3rd Respondent as she was discharging her constitutional responsibility. The application is misconceived, incompetent and bad in law as the orders sought have no basis in law which are meant to curb the 3rd Respondent's constitutional powers.
7. the 3rd Respondent is mandated under the constitution to review salaries and allowances for state and public servants and this Honourable Court should not issue any conservatory orders and/or stop the implementation of the Kenyan gazettes which reviewed the mileages.
8. the application is made in bad faith, its frivolous and vexatious and a total waste of valuable judicial time and resources, the same should be dismissed with costs to the 4th Respondent.

3rd Respondent's Case

10. In opposition to the Application, the 3rd Respondent filed a Replying Affidavit dated 15th March 2024.
11. The 3rd Respondent avers that each election establishes new employment agreements between the MCAs and electorate and it is responsible for reviewing and setting the remuneration and benefits for the MCAs for each electoral period.
12. It's the 3rd Respondent's case that the remuneration and benefits set for the previous electoral terms no longer apply as each electoral term initiates a new contractual agreement. Therefore, past remuneration and benefits cannot be reinstated as they are not applicable to the current electoral term contract.
13. The 3rd Respondent avers that it reviewed and set transport benefits for MCAs under the 3rd remuneration and benefits review cycle that:
 - i. A motor vehicle reimbursement of Kshs 2,212, 000 for the purchase of a car of engine capacity not exceeding 1800cc.
 - ii. Mileage allowance at the rate of Ksh 77.35 per km.



- iii. Car maintenance allowance at the rate of Kshs 30,167 per month.
14. It's the 3rd Respondent's case that the rationale for mileage allowance was based on the vehicle's engine capacity limited to 1800cc and introduction of a car maintenance at the rate of Kshs 30,167 per month.
 15. The 3rd Respondent avers that restructured transport benefit was therefore enhanced in the 3rd remuneration review cycle.
 16. It's the 3rd Respondent's case that prior to setting the MCAs remuneration and benefits under the 3rd review cycle, it carried out a comprehensive job evaluation for the MCA role. The County Assembly Forum submitted the MCA job description to it and based on this the plenary duties and responsibilities were assessed and informed the value of their job.
 17. The 3rd Respondent avers that upon conclusion of the job evaluation process, it shared the job evaluation results with the County Assembly Forum and obtained feedback. Subsequently, it set the remuneration and benefits of MCAs under the 3rd review cycle and set the gross remuneration including compensation for plenary duties.
 18. The plenary sitting allowance ceased to be paid as a stand alone allowance so as to avoid double compensation.
 19. It's the 3rd Respondent's case that prior to setting the remuneration and benefits for MCAs under the 3rd review cycle, it undertook extensive stakeholder engagement and public participation.
 20. It placed an advertisement in the daily newspapers on 22/2/2022 inviting members of the public including the MCAs to submit their views on the proposed remuneration and benefits for MCAs.
 21. Further, vide a letter ref no. TS/JE/3/33 Vol.XI (71) dated 8/11/2021 the county assemblies were invited through the County Assembly Forum to submit their views on the proposed remuneration and benefits for state officers in the county assembly under the 3rd review cycle.
 22. It's the 3rd Respondent's case that if the conservatory orders sought are issued, it would distort the remuneration and benefit structures across the 47 counties occasioning disparities in pay for the same job.
 23. The 3rd Respondent avers that the application does not meet the minimum threshold required for grant of conservatory orders as the Petitioners/Applicants have not sufficiently demonstrated the alleged constitutional breaches and violation by the 3rd Respondent.

3rd Respondent's Submissions

24. The 3rd Respondent submitted that conservatory orders are aimed at preserving the substratum of the matter pending determination of the main issues in dispute. The remuneration structure in dispute has been in place since July 2022 and continues to be implemented across 47 counties, therefore, nothing can be preserved.
25. It's the 3rd Respondent's submission that the application has not met the minimum threshold for grant of conservatory orders as the Petitioners have not demonstrated the constitutional breaches and violations by the 3rd Respondent or shown how the substratum of the petition will be rendered nugatory if the orders are not granted.
26. The 3rd Respondent submitted that the Petitioners have not met the requirements for grant of an order of mandamus as it has discharged its public duty by publishing the set remuneration and benefits for the Petitioner in the impugned gazette notice.



27. It is the 3rd Respondent's submission that it not only met the threshold set for public participation but went past it by engaging the County Assemblies Forum collectively and opened the forum to the Petitioners to individually submit their view pursuant to the invitation.

Analysis and Determination

28. The main issue for determination is whether the Petitioners/Applicants are entitled to the conservatory orders sought.
29. Conservatory orders were defined in Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co. Ltd v MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR as:
- “A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”
30. The principles for grant of conservatory orders was summarised in *Board of Management of Uburu Secondary School v City County Director of Education & 2 Others* [2015] eKLR, as: -
- i. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - iii. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”
31. In *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43, the Court while expounding on what a prima-facie case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.
32. Further, the Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* (2015) eKLR referred to Lord Diplock in *American Cyanamid v Ethicon Limited* (1975) AC 396, when the Judge stated thus: -
- “If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.”
33. The court's observation is that the petitioners have not established with certainty how the 1st and 2nd respondent infringed their constitutional rights. The 1st respondent as he rightly states in their submissions does not possess the requisite authority or capacity to review or amend a gazette notice. The 1st and 2nd respondent also have no mandate to review remuneration of its staff. The responsibility to review salaries and remunerations of state officers as per the *constitution* of Kenya 2010 lies within the purview of the authorities mandated by law to undertake such tasks. The court therefore holds that the 1st and 2nd respondents are not proper parties to the said dispute due to the reason that they



do not have the mandate to review or publish gazettes and therefore the court finds there is no value that will be added to have the two respondents as parties to this suit. They are therefore struck off from the application hereto.

34. As for the 3rd and 4th respondents the court has critically considered the prayers in this notice of motion application and the supporting affidavit and petitioners submissions. The pleadings of the respondents and their submissions have also been considered.
35. The principles of granting the conservatory orders inter alia is demonstration of an arguable case and proof of constitutional violations. The 3rd respondent is the commission mandated under article 230 (40 (a) of the constitution to set and regularly review the remuneration of all state officers. Then article 230(5) provide that the 3rd respondent's to ensure that the public compensation bill is fiscally sustainable.
36. The 3rd respondent states that due to the disruptions of Covid 19 they invited the relevant stakeholders on 22nd February 2022 and placed an advertisement in the daily newspapers inviting members of the public including members of county assembly to submit their views of the 3rd respondents proposed remuneration and benefits of members of county assembly.
37. Even prior to that the 3rd respondent had invited all county assemblies through the County Assembly forum to submit their views on the proposed remuneration for offices of County Assembly as per their letter dated 8th November 2021. The 3rd respondent avers that they received some memoranda of views to consider them including memoranda from County Assembly forum.
38. The 3rd respondent therefore as per their pleadings and supportive documents complied with the principles set out in article 230(5) of the constitution . The said article 230(5) of the constitution states as follows:
 - (5) In performing its functions, the Commission shall take the following principles into account —
 - (a) the need to ensure that the total public compensation bill is fiscally sustainable;
 - (b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions;
 - (c) the need to recognise productivity and performance; and
 - (d) transparency and fairness.
39. The court finds the petitioners have not proved the principles for granting of conservatory orders as set out inter alia in the case of Board of Management of Uthiru Secondary School v City County Director of Education and 2 Others supra were complied with. The said principles were already hereinbefore cited.
40. The court also finds that apart from generalised statements the petitioners have not proved how their constitutional rights were violated by the respondents.
41. As it is, the remuneration and benefit structures provided in gazette notice No CXXIV No 145 dated 27th July 2022 are already implemented in the 47 counties since July 2022. If orders are granted to stay the said notice they will occasion serious disparities in pay for the same job across the counties.
42. In any event, even if the petitioners succeed in the main petition they will lack in sufficient remedies.



43. In conclusion, the petitioners failed to demonstrate a prima facie case in their application vide the notice of motion dated 6th February 2024. Their application is therefore dismissed.
44. Each party will meet their respective costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

