



Njoroge v Local Authorities Provident Fund (LAPFUND) & another (Employment and Labour Relations Petition E053 of 2024) [2024] KEELRC 2266 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2266 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E053 OF 2024
AN MWAURE, J
SEPTEMBER 20, 2024**

BETWEEN

LAWRENCE NJOROGE PETITIONER

AND

LOCAL AUTHORITIES PROVIDENT FUND (LAPFUND) 1ST RESPONDENT

BERNARD MBOGOH 2ND RESPONDENT

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 16th April 2024 seeking orders THAT: -
 1. spent
 2. pending the hearing and determination of this application, this Honourable Court be pleased to issue conservatory orders staying the implementation of the memo issued by the 2nd Respondent on 28/3/2024 titled ‘Organization and staff restructuring.’
 3. pending the hearing and determination of this application, this Honourable Court be pleased to issue conservatory orders restraining the Respondents from further carrying out internal staff promotions, appointments and restructuring.
 4. pending the hearing and determination of the petition, this Honourable Court be pleased to issue conservatory orders staying the implementation of the memo issued by the 2nd Respondent on 28/3/2024 titled ‘Organization and staff restructuring.’
 5. pending the hearing and determination of the petition, this Honourable Court be pleased to issue conservatory orders restraining the Respondents from further carrying out internal staff promotions, appointments and restructuring.
 6. the costs of this Application be provided for.



Petitioner/ Applicant's Case

2. The Petitioner/Applicant avers that the 2nd Respondent issued its employees a memo titled 'Organization and Staff Restructuring' on 28/3/2024 which was the eve of Easter Friday and the same was to take effect on 1/4/2024 (Easter Monday).
3. The Petitioner/Applicant avers that the 2nd Respondent through the memo handpicked a number of staff members for promotion without considering fair competition and merit.
4. The 2nd Respondent failed to invite its employees and members of the public to apply for these promotions and no interviews were carried out before the promotions. Additionally, it promoted some employees to positions which were 2 grades higher than their former positions without fair competition and merit.
5. The Petitioner avers that the appointments were hurriedly done as the 1st Respondent has no Board of Directors and the 2nd Respondent is currently on acting capacity and has been recently interviewed but no appointment has been done.
6. It is the Petitioner's case that the 2nd Respondent has taken advantage of the lacuna in the leadership to handpick and promote staff members who are affiliated to him.
7. The Petitioner avers that the promotions and appointments are contrary to the values and principles of fair competition and merit as espoused in *the Constitution* and Statute and this court should quash the memo.
8. It is the Petitioner's case that there is need to issue conservatory orders on the implementation of the memo as the promotions and appointments therein fell off the dictates of *the Constitution* and Statute pending the hearing and determination of the petition.

Respondents' Case

9. In opposition to the Application, the Respondents filed a replying affidavit dated 13th May 2024.
10. The Respondents avers that the impugned memo effected the change of the 1st Respondent's organizational structure with the aim of preparing it to achieve the goals and objectives of its 2023 - 2029 Strategic Plan, address its current business needs and improve its operational efficiency, staff performance, and services delivery to all its customers.
11. The Respondents aver that the memo was based on the review of the 1st Respondent's Human Resource Instruments which started in March 2023, and was done in consultation with the State Corporation Advisory Committee (SCAC), resulting in the development of the new, Organizational Structure, Grading Structure, Staff Establishment, Career Guidelines, and Human Resource Policy and Procedure Manual, which have undergone review by the parent ministry and approval by SCAC.
12. It is the Respondents' case that the memo was necessitated by the need to comply with the new reviewed and approved organizational structure which is meant to be implemented by the beginning of the next financial year, which, as at the date of the memo, was merely 2 months away.
13. The Respondents aver that there exists no legal or practical obligation that requires the advertisement of staff promotions or the conduct of interviews and competition of existing staff members in order to promote, as staff promotions are purely based on the merit of the performance of the individual staff member. Further, the 1st Respondent's employees are routinely subjected to performance reviews and



appraisals, and it is upon these reviews that employees were vetted throughout their years of satisfactory services.

14. It is the Respondent case that the court decision in Nairobi Constitutional & Human Rights Division *Petition No. 2 of 2023*, that quashed the appointment of a number of the 1st Respondent's Board members, but equally reinstated the previous Board members hence maintaining the full composition of the Board as at 28/3/2024.
15. The Respondents aver that the subject matter of this suit is the internal promotion of existing staff members which is a private matter with no external effects upon the public thus incapable of affecting public interest.
16. Further to the above, the 1st Respondent filed grounds of opposition dated 13th May 2024 in opposition to the Notice of Motion on grounds THAT: -
 1. The 1st Respondent named herein lacks the legal capacity to be sued.
 2. The Petitioner has not satisfied the stipulations for lifting the corporate veil in order to sue the 2nd Respondent.
 3. The suit is fatally defective and should be struck out in limine.

Petitioner/Applicant's Submissions

17. The Petitioner submitted he brought this petition under public interest; therefore, Article 258 of *the Constitution* donate locus standi to him enabling him challenge the constitutionality of the 2nd Respondent's actions in his capacity as a public officer.
18. The Petitioner/ Applicant submitted that impugned memo was published by the 2nd Respondent and not by the 1st Respondent's Board, therefore, the 2nd Respondent is a proper party to the suit. Further, there are no legal provisions requiring the Petitioner to lift the veil of incorporation prior to suing the 2nd Respondent.
19. It is the Petitioner's submission that the Petition relates to the constitutionality of the 2nd Respondent's action which raises triable constitutional issues hence satisfies the threshold of a prima facie case.
20. The Petitioner submitted that it stands to suffer prejudice in the absence of the conservatory orders if the officers whose appointments are challenged will assume office during the pendency of the petition to the detriment of the tax payers and pensioners who are contributories to the fund. This may occasion irreversible decisions to the detriment of the general public once the appointments are found to be unconstitutional by this court.
21. It's the Petitioner's submission that the substratum of the petition will be rendered nugatory in the absence of conservatory orders, as the petition challenge the irregular appointment of public officers which ought to have taken effect on 1/4/2024.

Respondents' Submissions

22. The Respondents submitted that the Petitioner/Applicant's has failed to present a prima facie case by not adducing any evidence of lack of qualification or merit of the persons named in the memo.
23. It is the Respondents submission that the Petitioner failed to present any arguments as to the loss or damage to any specific public right or interest under the bill of rights or written law that stands the risk of being infringed.



24. The Respondents submitted that as stated in the impugned memo, the organization restructuring was a result of extensive one year process involving stakeholder participation and was adopted upon approval of respective stakeholders.
25. Further, the appointees have served the 1st Respondent for many years and undergone continuous assessment of competency and satisfactory performance upon which they were promoted to fit the organizational needs of the new approved structure.
26. The Respondents submitted that the court ought not grant the conservatory orders as it would result in a final determination of the petition before it is tried on merit. The date of implementing the memo of 1/4/2024 has since passed and grant of the orders would prejudice the promoted employees without submission of proof by the Petition of the alleged lack of merit.

Analysis and Determination

27. Having considered the application, affidavits and submissions on record, the issue for determination is whether the Petitioner/Applicant is entitled to conservatory orders sought.
28. The Supreme Court in *Gatarau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR, the Supreme Court discussed the nature of conservatory orders as follows: -

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay.

Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.”

29. The Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (supra) further summarized the principles for grant of conservatory orders as;
 - a. The Appeal or intended appeal is arguable and not frivolous
 - b. Unless the orders sought are granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory
 - c. That it is in public interest that the conservatory orders be granted.”

30. Additionally, in *Muslim for Human Rights (Milimani) & 2 others v Attorney General & 2 others* (2011) eKLR, stated as follows;

“The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much



easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.”

31. The court as earlier stated considered the respective pleadings of the petitioners and the respondent. The respondent had embarked on the process of reviewing its human resource instrument in March 2023 with the Assistance of state Corporations advisory committee (SCAC). So the staff were informed by the acting chief executive officer of the new organizational structure and staff were placed in positions and grades in keeping with the instruments like grading structure, staff establishment and career guidelines all of which guide on public sector grading system, optimal staffing levels and career paths based on minimum qualifications and availability of vacancies. The developed documents were reviewed by the parent Ministry and SCAC approved them. Hence eight staff members were given different grading and that gave raise to this application.
32. The respondents filed a preliminary objection dated 26th April 2024 where they claim that the petitioner lacks the locus standi to sue and the 1st respondent lacks legal capacity to be sued.
33. The issue of the petitioner not having a locus standi the court would be persuaded by Kenya’s very progressive Constitution which gives leeway to any person to institute court proceedings claiming a right or fundamental freedom in the bill of rights has been denied, violated or is threatened against any person.
34. Equally article 22 and article 258 of *the Constitution* of Kenya 2010 gives leeway to every person to institute court proceedings claiming this constitution has been contravened or threatened with contravention.
35. So in this regard the court holds the petitioner has a right to file a suit if he is of the view that *the Constitution* has been threatened or violated and he has the capacity therefore to institute these proceedings.
36. However, the respondent is another case. Section 5(1) of the local authority Act establishes the Local Authority Provident Fund. Section 5(8) provides for the formation of the Board which has power to sue and to be sued. In particular section 5(8) states:

“The Board shall be a body corporate having perpetual succession and a common seal, and may in its corporate name sue and be sued, and may, for and in connection with the purposes of this Act, purchase, hold, manage and dispose of land and other property and enter into such contracts as it may consider to be necessary or expedient.”
37. The law provides very elaborately the composition of the board and its mandate. The fund therefore has no legal capacity to sue and be sued but the board is the one which has the power to sue and to be sued. The law is not passed in vain and since the law herein provides for the legal instrument to sue and be sued the court would be loathe to depart from the law. The respondent local authorities provident fund has no capacity to be sued.
38. Equally the Acting Chief Executive Officer of the Provident Fund is not the employer of the staff of the provident fund. He is also an employee of the provident fund and obviously signed the impugned letter on behalf of the fund and not because he is the employer or has capacity to be sued.
39. The court finds the petitioner failed to identify the rightful respondent and therefore sued the wrong entities/persons. In that case, the court holds the application is defective and cannot hold and so is dismissed accordingly.



40. In any event even if the respondents had capacity to be sued the court finds the petitioner had not met the legal threshold to deserve granting of conservatory orders since the respondents had followed the right channel to promote their staff members.
41. The aforesaid staff members were already placed in their new positions by 1st April 2024. The court will however not go into the merits or otherwise of this application having held that the respondents have no capacity to be sued. This application vide the notice of motion dated 16th April 2024 is therefore unmerited and is dismissed accordingly.
42. The court orders each party to meet their costs for his 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

