



Munialo v The County Public Service Board County Government of Elgeyo Marakwet & another; Commission on Administrative Justice (Interested Party) (Petition E007 of 2024) [2024] KEELRC 2283 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2283 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E007 OF 2024
MA ONYANGO, J
SEPTEMBER 20, 2024**

BETWEEN

JOEL MUNIALO PETITIONER

AND

THE COUNTY PUBLIC SERVICE BOARD COUNTY GOVERNMENT OF ELGEYO MARAKWET 1ST RESPONDENT

THE COUNTY SECRETARY ELGEYO MARAKWET COUNTY 2ND RESPONDENT

AND

COMMISSION ON ADMINISTRATIVE JUSTICE INTERESTED PARTY

RULING

1. On 18th April, 2024 the Respondents published an advertisement for several vacancies in the County Government of Elgeyo Marakwet website, among them, the position of the Office of the County Attorney.
2. The advertisement specified the requirements for the position as follows:
 - a. Duties and Responsibilities
 - i. Be the principal legal adviser to the County Executive Committee and as such shall attend the meetings of the County Executive Committee as an ex officio member of the Executive Committee;



- ii. Represent the County Executive in court or in any other legal proceedings to which the County Executive is a party, other than criminal proceedings and manage the litigation and dispute resolution function of the County;
- iii. Advise the Governor, County Executive Committee Members and all departments in the county executive and agencies on legislative and other legal matters;
- iv. Undertake legal research on matters that affect the County Government and promote the compliance with the law by the County Executive;
- v. Be the depository of all County laws and legal documents, agreements, MoUs, and other title documents of the County including title deeds and Logbooks;
- vi. Have custody of the County Seal and keep record of all instruments executed under seal;
- vii. Prosecute offences resulting from the County legislations in County Courts;
- viii. Negotiate, draft, vet and interpret documents and agreements, MoUs, treaties and other legal instruments for and on behalf of the County Executive and its agencies;
- ix. Be responsible for drafting and revision of county laws, policies, and coordinate the publication in the relevant Gazette of all Policies, Regulations and Acts of the County Assembly;
- x. Liaise with the Office of the Attorney-General, County Assembly and any other office when need arises;
- xi. Liaise with the Office of the County Attorney in any other County when need arises and on matters of mutual interest;
- xii. Liaise with the County's external lawyers to ensure the interests of the County are well protected in all matters; and perform any other function as may be necessary for the effective discharge of the duties and the exercise of the powers of the County Attorney.

b. Requirements for Appointment

- i. Be a Kenyan Citizen
- ii. Be a holder of Bachelor of Laws (LLB) degree from a reputable and recognized university;
- iii. Have a postgraduate Diploma in Legal Studies from the Council of Legal Education and be admitted as an advocate of the High Court of Kenya with a current Practicing Certificate;
- iv. Master's Degree in Social Sciences from a reputable University will be an added advantage;
- v. Be a member of Law Society of Kenya in good standing;
- vi. Have not less than ten (10) years post-admission experience, with at least five (5) years in public Sector in Kenya;
- vii. Must demonstrate a mastery of *the Constitution* of Kenya 2010;
- viii. Demonstrate an understanding of financial management in the public sector



- ix. Understand the diversity of the County;
 - x. Effective legal research, legislative drafting and report writing; and
 - xi. Meet requirements of Chapter Six of *the Constitution*.
 - xii. Possess training and certification for senior management and leadership;
 - xiii. Possess training and certification in Alternative Dispute Resolution (ADR) methods: and
 - xiv. ICT proficient.
3. The Petitioner/Applicant avers that the advertisement contravenes section 5 of the Office of County Attorney Act which provides for the appointment of the County Attorney as follows:
- 1. The County Attorney shall be appointed by the Governor with the approval of the county assembly.
 - 2. A person qualifies for appointment as County Attorney if such person—
 - a. is an Advocate of the High Court of Kenya of at least five years standing; and
 - b. meets the requirements of Chapter Six of *the Constitution*.
 - 3. The County Attorney shall take and subscribe to the oath or affirmation as set out in the First Schedule to this Act before assuming office.
4. Vide an application dated 15th May 2024 filed under certificate of urgency, the Petitioner/Applicant seeks the following orders:
- a. That this application be certified urgent and service thereof be dispensed with in the first instance.
 - b. That pending the hearing and determination of this application, Honourable Court be pleased to issue a conservatory order of stay restraining the Respondents from processing and/or taking any further action with respect to the advertisement for the Position of County Attorney as advertised in the County Government of Elgeyo Marakwet website on 18th April, 2024 or any other platform and specifically from short listing candidates, issuing invitations thereon, conducting interviews and making deliberations in respect of appointment of the purported successful candidate towards filling the said position in the impugned manner.
 - c. Pending the hearing and determination of this Petition, this Honourable Court be pleased to issue a conservatory order of stay restraining the Respondents from processing and/or taking any further action with respect to the advertisement for the Position of County Attorney as advertised in the County Government of Elgeyo Marakwet website on 18th April, 2024 or any other platform and specifically from short listing candidates, issuing invitations thereon, conducting interviews and making deliberations in respect of appointment of the purported successful candidate towards filling the said position in the impugned manner.
 - d. That this Honourable Court be pleased to issue any such orders as it may deem just and expedient to ensure the ends of justice are met.
 - e. That the costs of this application be provided for.



5. It is the Petitioner/Applicant's position that the Respondents did not explain the criteria for going beyond the scope of the requirements of the Act, that the advertisement is discriminatory as it locks out applicants qualified under the provisions of the Act and that the advertisement is unfair, opaque and/or vague and intended to confuse potential applicants.
6. The Petitioner/Applicant avers that the Respondents have acted in a brazen, illegal, egregious, discriminatory manner in violation of the Applicant's rights.
7. In response to the application the Respondents filed a replying affidavit of Joyce Kiplimo, a Legal Officer in the County Government of Elgeyo Marakwet in which the Respondents aver that the application together with the petition are frivolous, vexatious and amount to an abuse of court process and that the petition does not meet the threshold of a constitutional petition.
8. The Respondents further aver that the appointment of the County Attorney was done in compliance with the Public Appointments County Assemblies Approvals *Act No. 5 of 2017*. That a selection Panel was appointed and gazetted. That the selection panel acts independently as a recruiting agency yet it has not been joined as a party to the instant petition.
9. It is further the position of the Respondents that a County Attorney in Job Group T is a senior position in the Public Service hence the requirement of the high qualifications.
10. The Respondents further aver that the 5 years qualifying service provided for in the Act is a minimum requirement and the Respondents did not contravene the Act by requiring applicants to have more experience.
11. The Respondents aver that the petition and application are premature, that they have not violated the petitioner's rights and that the allegations in the petition and application are unfounded in fact and law. They pray for the dismissal of the application on grounds that the prayers therein are not merited.
12. The Application was argued orally. Mr. Omenta, counsel for the Petitioner/Applicant reiterated the averments in the application and supporting affidavit of Joel Muniolo, the Petitioner/Applicant. He submitted that the only requirement under the Act is at least 5 years post qualification experience and adherence to Chapter 6 of *the Constitution*. That the advertisement included more requirements among them 10 years post qualification experience, a Master's Degree in Social Sciences, demonstrated financial management in public service and certification for Senior Management, all of which are outside the requirements of the Act. He submitted that the advertisement was tailor-made for specific persons. He urged the court to grant the prayers sought.
13. Mr. Wafula for the Respondents relied on the replying affidavit of JOYCE KIPLIMO and submitted that the petition upon which the application was hinged did not disclose a constitutional cause of action.
14. Counsel further submitted that this is the first time the Respondents are engaging a County Attorney which is at Job Group T and thus a very senior position that required an experienced person as the office would be very involving. That this was not against *the Constitution* or County Attorneys Act. He submitted that section 5 of the Act is not couched in mandatory terms and only prescribes minimum qualifications.
15. He further submitted that the person complaining does not state who he is and whether he applied for the position and was not shortlisted nor how he had been or would be affected if the process proceeded. He relied on the case of Adrian Kamocho Njenga v Selection Panel for Appointment of Commissioners of IEBC & Others [2021] eKLR.



16. Counsel submitted that the public interest outweighed the interests of the Petitioner/Applicant.
17. In a rejoinder, counsel Omenta submitted that the fact that the county was recruiting a County Attorney for the very first time did not justify going outside the requirements of the law, that there was no proof that the requirements of the Act were minimum qualifications and finally that the Applicant was obligated under Article 3 of *the Constitution* to defend, respect and uphold the same. That by filing the petition the Petitioner/Applicant speaks for all persons locked out by the advertisement.
18. I have considered the application and the response thereto. I have further considered the submissions by counsel. The issue for determination is whether the Applicant is entitled to the conservatory orders sought in his application.
19. While making oral submissions in court on the application before court none of the applicants made reference to the principles that govern the grant of the prayers sought in the application. the parties instead addressed the court on the substantive issues in the petition.
20. The present application being an interlocutory application seeking conservatory orders, the court must be cautious not to delve into the substantive issues in the petition at this stage.
21. While considering an interlocutory application in *Muslims for Human Rights (Milimani) & 2 Others v Attorney General & 2 Others* [2011] Eklr Ibrahim, J (as he then was) stated as follows: -

“A Court, therefore, dealing with an application for conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in the realm of the main Petition. In this discourse, I will, therefore, restrain myself from dealing with such issues.”
22. As was further cautioned by Mrima J in *Damour Florian Emmeric v Director of Immigration Services* [2022] eKLR, the court must be careful not to reach final conclusion and to make final findings in an application for conservatory orders. The Judge further observed that 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 that will or may operate adversely vis-a vis the case of either of the parties.
23. As I have already observed above, the parties herein argued the application as if they were submitting on the substantive suit and addressed the court only on the substantive issues in the petition. I will however not fall into the same trap and must limit myself to the issues in the application only.
24. The principles for consideration by a Court in exercising its discretion on whether or not to grant conservatory orders have been developed by Courts over time and are now well settled.
25. The Supreme Court in *Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others* set the principles for grant of conservatory orders as follows:

(86) 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.
26. In *Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others* [2015] eKLR, the Court summarized the principles for grant of conservatory orders 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.
27. Again, in *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others* Nairobi High Court Constitutional Petition *No.154 of 2016* (2016) eKLR the Court summarized three main principles for consideration on whether to grant or decline to grant conservatory orders as follows: -
- (a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
 - (b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - (c) The public interest must be considered before grant of a conservatory order.
28. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to consider that may vary from case to case.
29. In the instant application the Applicant seeks conservatory orders restraining the Respondents from filling the position of County Attorney. Counsel for the Applicant did not address the court on any of the principles enumerated in the cases referred to above that the court should consider in an application for grant of conservatory orders. Specifically, counsel did not state the prejudice his client would suffer or if the suit would be rendered nugatory or the nature of public interest that the court should consider. Counsel did not even attempt to demonstrate to the court that his client has a prima facie case.
30. Section 5 of The Office of the County Attorney Act provides for qualifications of a County Attorney as follows:
- “ 5. Appointment and qualifications for appointment of County Attorney
- (1) The County Attorney shall be appointed by the Governor with the approval of the county assembly.
 - (2) A person qualifies for appointment as County Attorney if such person—
 - (a) is an Advocate of the High Court of Kenya of at least five years standing; and
 - (b) meets the requirements of Chapter Six of *the Constitution*.



(3) The County Attorney shall take and subscribe to the oath or affirmation as set out in the First Schedule to this Act before assuming office." [Emphasis mine]

31. The Applicant's argument is that the advertisement by the Respondents imposed on applicants requirements that are not provided for in the Act. The wording in section 5 of the Act are "at least five years". This provision alone would negate the existence of a prima facie case.
32. The Applicant having not addressed the court on any of the principles for consideration in an application for conservatory orders, he has not satisfied the court that he is entitled to the orders sought in the application under reference.
33. The result is that the application is without merit and is dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 20TH DAY OF SEPTEMBER, 2024

MAUREEN ONYANGO

JUDGE

