



Yego v Nandi County Public Service Board & 3 others (Employment and Labour Relations Cause E071 of 2024) [2024] KEELRC 2750 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2750 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE E071 OF 2024
MA ONYANGO, J
NOVEMBER 7, 2024**

BETWEEN

LABAN KIPCHIRCHIR YEGO CLAIMANT

AND

NANDI COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

NANDI COUNTY ASSEMBLY SERVICE BOARD 2ND RESPONDENT

NANDI COUNTY SECRETARY 3RD RESPONDENT

CLERK OF THE COUNTY ASSEMBLY-NANDI 4TH RESPONDENT

RULING

1. Vide a Notice of Motion dated 23rd August 2024 brought under section 3A & 3B of the [Civil Procedure Act](#) an, Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules and Article 159 of [the Constitution](#), the Claimant seeks the following orders against the Respondents. -
 - a. Spent
 - b. Spent
 - c. That there be stay of execution and implementation of the directions issued by the office of the County Secretary and the clerk of the County Assembly vide the letters dated 1st August, 2024 pending hearing and determination of the main suit.
 - d. That this Honorable court issues an order vacating, varying and setting aside the directives issued on 1st August, 2023 by the County Secretary.
 - e. That this Honourable court be pleased to issue a declaratory order that the Claimant be retained in his current position as the Senior Clerk Assistant and all the attendant tasks and benefits as of law be accorded to him.



- f. That such other others be made in the interest of justice as may be expedient.
- g. Costs be in the cause.
2. The application is supported by the affidavit sworn by the Claimant on 23rd August 2024.
3. The grounds upon which the application is made as contained in that affidavit and at the foot of the application are that the Claimant was employed by the County Government of Nandi in 2014 and worked under the County Executive until 2017 when he was transferred to the County Assembly without being issued with any change of terms of employment. That while working in the County Assembly he was by letter dated 24th April, 2020 promoted to the position of Senior Office Administrator by the County Assembly Service Board. That by letter dated 29th December, 2022 he was redesignated by the County Assembly Service Board to Senior Clerk Assistant 1, Job Group P with effect from 1st December, 2022. in after a rigorous interview process.
4. He avers that he has been working in the office of the Clerk in the County Assembly from October, 2017 until 1st August, 2024 when he was issued with a letter of transfer; that the Claimant was not issued with any fresh terms of service depicting when the alleged Secondment would begin or end and the applicable terms of service during the said period other than being informed that he merited and was the perfect fit for the vacancy available at the County Assembly and that his services were needed there moving forward; that despite the lack of the said fresh terms of service, the Claimant proceeded to work in the County Assembly, received payments from the County Assembly away from his previous payment point, received two subsequent promotions, gaining benefits relating to the same position including obtaining a staff mortgage.
5. The Claimant further avers that through his pay slips, the expected date of retirement is scheduled to be 31st October, 2045 and his designation as Senior Clerk Assistant 1 as of 29th December 2022 to date, a promotion from the position of the Assistant Director Administration, a position he held from 24th April, 2020.
6. According to the Claimant, the directives of 1st August 2024 which were to the effect that the Claimant be transferred to the position he held as at 2019 is deliberate and meant to subject him to pecuniary embarrassment, deny him his right to conducive working environment and intended to technically oppress him to resigning from his position.
7. It is the Claimant's position that his deployment to the County Assembly was a transfer of service and not Secondment as postulated and as such the attempts to revert him to the initial position is a witch hunt aimed at demoting him from the position he holds.
8. The 1st Respondent opposed the Application through grounds of opposition dated 18th September 2024 being that:
 - a. This application and the claim are incurably defective, misconceived, frivolous, incompetent and an abuse of the court process as the same is untenable and devoid of substance and full of misrepresentations of facts tailored to hoodwink this Honourable Court.
 - b. The claim and the application are incurably defective, misconceived, frivolous, incompetent and an abuse of the court process as this Court has no jurisdiction to entertain them in the first instance.
 - c. The claim and the application dated 23rd August, 2024 offend the provisions of Article 234(2)(i) of *the Constitution* as read with section 77 of the *County Governments Act*, Sections 85,86,87(2) and 88 of the *Public Service Commission Act* and Section 9(2) of the *Fair*



Administrative Action Act as the petitioner has failed or neglected to exhaust the available dispute resolution mechanism provided for therein.

- d. The Claim and the Application offend the doctrine of exhaustion by failing or neglecting to adhere to internal dispute resolution mechanisms provided by Section 77 of the County Governments Act, Sections 86 and 87(2) of the Public Service Commission Act before resorting to this Honourable Court.
 - e. The Claim and the Application do not raise any cause of action against the 1st Respondent and the same amounts to a fishing expedition mission intended to paint the Office of the 1st Respondent in bad light and expose it to unnecessary legal costs.
 - f. The Claimant herein has not resigned from the County Public Service and therefore remains an employee of the County executive.
 - g. The Claimant herein was procedurally seconded to the Nandi County Assembly and his services at the county public service have not been terminated.
9. The 1st Respondent also filed a Replying Affidavit sworn by Dr. Francis Sang on 20th September 2024 in which he reiterates the grounds of opposition.
 10. The 2nd and 4th Respondent opposed the application through the Replying affidavit sworn by Barnabas G.K Kosgei, the 2nd Respondent's Secretary, on 23rd September 2024. They averred that the application is vexatious to the extent that it insinuates that the Respondents have demoted the Claimant whereas the Letter of Deployment is explicit that the terms of service remain unchanged.
 11. According to the 2nd and 4th Respondents, the then Speaker of the County Assembly of Nandi, Hon. Joshua Kiptoo, sent out a request on 30th October 2017 to the 3rd Respondent herein in his capacity as the Head of the County Public Service for secondment of a staff from the County Government to the Assembly which request was allowed vide a letter dated 2nd November 2017 and recommended the Claimant for the secondment.
 12. It was averred that the 1st Respondent proceeded to second the Claimant to the County Assembly of Nandi and he was received in accordance with the rules governing secondment in public service.
 13. According to the 2nd and 4th Respondent, the need of the County Assembly that necessitated the secondment was extinguished over time due to continuous recruitment and capacity building and on 10th June 2024, the 2nd and 4th Respondents communicated to the County Secretary requesting to be allowed to return the Claimant to his substantive employer. That the 3rd Respondent accepted the release vide the letter dated 31st July 2024 and requested for the Claimant's payroll credentials to facilitate his reintegration into the County Government's Payroll.
 14. It is averred that as a consequence, on 1st August 2024 the Claimant was issued with a release letter and notified that his payroll data had been released back to the payroll manager and on 7th August 2024, the Claimant was released from the County Assembly.
 15. The 2nd and 4th Respondents contend that secondment in public service is a temporary instrument used by institutions to take care of shortfalls in human resource.
 16. They therefore denied the Claimant's allegation that he was engaged by the County Assembly vide a competitive recruitment process and prayed that the instant application be dismissed on grounds that the Claimant has come to court with unclean hands and does not deserve the intervention of this court by way of an equitable remedy.



17. The 2nd and 4th Respondents maintain that the orders sought by Claimant have been overtaken by events as he has already been released by the 2nd Respondent, been received and deployed by the 1st Respondent and that there is already a substantive officer holder undertaking the duties previously handled by the Claimant hence returning him to the Assembly to idle in public office is blatant waste of public resources.
18. The application was argued orally on 25th September 2024. Counsel Biwott appeared for the Claimant and submitted that the allegation by the Respondents that the Claimant was seconded to the County Assembly was not correct. He maintained that the Claimant was returned to the position he held in 2017 in violation of his rights. The Court was also told that the Claimant is currently working at the County Assembly and was yet to take up the office as the County Executive.
19. The 2nd and 4th Respondents were represented by Counsel Kenei who relied on the Replying Affidavit of Barnabas Koskei dated 23rd September 2024. According to Mr. Kenei, the Claimant in his application before court did not meet the conditions for stay of the implementation of the directives issued on 1st August 2023 by the County Secretary as enumerated in the classical case of *Giella vs Cassman Brown*. As to whether the Claimant has established a prima facie case, Counsel submitted that the Claimant in seeking to reverse a secondment from County Government to County Assembly has not demonstrated any right that would be infringed by the redeployment and argued that the letter dated 1st August 2024 is very explicit that the Claimant's benefits and terms of service will not be interfered with. As regards the condition of irreparable loss to be suffered, Counsel Kenei submitted that the Claimant has not demonstrated that he will loss financial benefits and according to him, this means that the benefits can be quantified. On a balance of convenience, it is argued that greater harm will be suffered by the Respondents if the orders sought are granted as there is already a person carrying out the duties of the claimant at the county assembly. It is further submitted that the Claimant's payroll credentials have already been submitted and was concluded on 20th August 2024, that a reversal will cause a greater inconvenience to the Respondent.
20. Counsel Kogo submitting on behalf of the 1st and 3rd Respondents relied on the grounds of opposition dated 18th September 2024 and the Replying Affidavit of Dr. Francis Sang dated 20th September 2024. Mr. Kogo submitted that the Claimant is an employee of the County Government and any decision of the 3rd Respondent should be within the jurisdiction of Public Service Commission as provided for in section 77 of the *County Governments Act*. That the filing of this suit by the Claimant is a violation of the rule of law.
21. Counsel further submitted that the Claimant had been seconded to the County Assembly and his deployment was not a transfer of service. He submitted that if the Claimant had been recruited to the County Assembly, then he ought to have resigned from the County Public Service to take up the position in the County Assembly.
22. The submissions of the 1st and 3rd Respondent was basically a reiteration of its responses to the Claimant's application.

Determination

23. I have carefully considered the application, the grounds contained therein, the rival affidavits in support and opposition to the Application, the grounds of opposition on record as well as the submissions made by counsels of the parties. The issues that fall for this court's determination are;
 - i. Whether the court has jurisdiction over the dispute in the suit herein.



- ii. Whether the Claimant has met the conditions for grant of the orders sought;
 - iii. What orders should issue
24. Counsel for the 1st and 3rd Respondent has raised the issue that this court has no jurisdiction to handle this matter in view of the provisions of section 77 of the County Governments Act. Jurisdiction is the authority or mandate which a court has to decide a matter before it. It is everything to a court and whenever the issue of jurisdiction is raised, the court should address it immediately. In the case of Owners of the motor vessel “Lillian s” v. Caltex Oil (Kenya Ltd. [1989] KLR1 the Court of Appeal held:
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step . . . A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
25. According to the 1st Respondent, the application before court offends the provisions of Article 234(2) (1) of the Constitution as read with section 77 of the County Governments Act, section 85,86,87(2) and 88 of the Public Service Act as the Claimant has failed to exhaust the available dispute resolution mechanisms provided.
26. The issue whether the Claimant is an employee of the County Government of Nandi is disputed with the Claimant insisting that he is an employee of the County Assembly while the Respondents aver that he is an employee of the County Public Service Board. This is therefore a matter for determination after hearing evidence from the parties.
27. In light of the foregoing I therefore, hold that the court has jurisdiction to determine the instant application at this interim stage.
28. I will now proceed to consider the application on merit. The issue for consideration is whether the injunctive order sought should issue.
29. The conditions for consideration in applications for injunctions were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the Court expressed itself in the following terms:
30. “Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”
31. As to what amounts to a prima facie case, in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123, the Court of Appeal held as follows:
32. “A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
33. In the present application, the Claimant avers that the Respondent’s directives issued on 1st August 2023 by the County Assembly are aimed at demoting him from his hard-earned position. In support of his case the Claimant has exhibited letters of promotion and redesignation by the County Assembly



from the position of Principal Administrative Assistant to Assistant Director Administration and Senior Clerk Assistant respectively. See Annexures LY-1 a, b, c and d and 2a and b of Claimant's supporting affidavit.

34. the 2nd and 4th Respondents I have filed Exhibit BK2 and BK3 to the 2nd and 4th Respondents' Replying Affidavit in which the Claimant is stated to have been seconded to Nandi County Assembly. The issue whether or not the Claimant was on secondment at the time material to this suit is therefore a matter warranting determination by this court in the main suit.
35. I thus find that the Claimant has established a prima facie case as defined in law.
36. On balance of convenience, the court is only called upon to consider the same when in doubt in respect of the first 2 principles in Giella case. Having established the first two principles, the Claimant has demonstrated that he is entitled to the orders sought in his application dated 23rd August 2024 which I grant as follows:
 - i. That there be and is hereby granted a stay of execution and implementation of the directions issued by the office of the County Secretary and the clerk of the County Assembly vide the letters dated 1st August, 2024 pending hearing and determination of the main suit.
 - ii. That the directives issued on 1st August, 2023 by the County Secretary be and are hereby stayed pending the hearing and determination of this case.
 - iii. That the Claimant be retained in his current position as the Senior Clerk Assistant and all the attendant tasks and benefits as of law be accorded to him pending the hearing and determination of this suit.
37. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 17TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

