



**Nyamolo v National Syndemic Diseases Control Council (NSDCC) (Employment and Labour Relations Petition E102 of 2024) [2024] KEELRC 13575 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13575 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E102 OF 2024  
MN NDUMA, J  
DECEMBER 19, 2024**

**BETWEEN**

**KENNETH OLUOCH NYAMOLO ..... PETITIONER**

**AND**

**NATIONAL SYNDEMIC DISEASES CONTROL COUNCIL  
(NSDCC) ..... RESPONDENT**

**RULING**

1. The Applicant brought application dated 4th July 2024 seeking an order in the following terms:-
  1. Spent
  2. Spent
  3. Spent
  4. Pending the inter-partes hearing and determination of this petition, the honourable court be pleased to issue an order of mandamus compelling, the respondent to reinstate the petitioner in his current position as the Head Finance & Acting Deputy Director Finance & Administration.
  5. Spent
  6. The costs of this application be borne by the respondent
2. The application is premised on grounds 1 to 16 set out on the face of the application and buttressed in the supporting affidavit of the petitioner/applicant the nub of which is that the applicant was employed by the respondent as Acting Deputy Director Finance & Administration, Head Finance and the Chairperson for the Institutional Asset-Disposal Committee of the respondent.



3. The applicant has been in acting capacity as Deputy Director Finance & Administration for more than 3 years and is entitled to confirmation and payment of the differences in employment benefits amounting to Kshs. 6,815,294.00 as at 16/4/2024.
4. The petitioner/applicant while on leave received two letters dated 12/4/2024 and 16/4/2024.
5. That the letter dated 16/4/2024, contained four (4) charges of misconduct against the petitioner to wit: -
  1. Failure to adhere to lawful instructions.
  2. Unauthorized use and disclosure of confidential information
  3. Provision of false or misleading statements to the public.
  4. Employee harassment and bullying constituting intimidation.
6. The petitioner was made to 'step aside' from his role of Head of Finance for a duration of three (3) months to facilitate investigations and avoid undue influence. The applicant was entitled to full pay and benefits during the period.
7. The letter dated 12/4/2024 accused the petitioner of inappropriately copying a response to the CEO on performance issues to the Board members which conduct demonstrated lack of professionalism and gross-misconduct.
8. The applicant states that he was not given opportunity to respond to the allegations in violation of Article 41, 47, 73 and 236 of the Constitution of Kenya 2010.
9. That the respondent did not follow the respondent's (NSDCC) Human Resource Manual on Disciplinary Procedures or the Public Service Disciplinary Manual
10. That the decision to ask the petitioner to step aside was premeditated and was tainted with bias.
11. That allowing the applicant to remain in acting position for a period of over six (6) months, was also unfair labour practice in violation of Article 41(1) & (2) of the Constitution and was unfair and invalid.
12. The applicant seeks the reliefs sought pending the hearing and determination of the petition.

### **Replying Affidavit**

13. The respondent filed a replying affidavit sworn to by Dr. Ruth Laibon Maishe, the CEO of the respondent (NSDCC). The respondent deposes that the applicant is Head Finance at NSDCC and not the Acting Deputy Director Finance and Administration as alleged. The appointment as Head Finance was by a letter dated 22/10/2014.
14. That on 14/12/2020 the applicant was appointed Acting Deputy Director Finance & Administration and was paid acting allowance from 15/2/2020 to 31/1/2021 as per pay slips attached.
15. The Acting capacity was extended to 31/7/2022 and petitioner was paid acting allowance accordingly. That the acting position lapsed on 31/7/2022 as per letter dated 1/2/2022 which letter is attached and marked end of the acting period as at 31/7/2022.
16. The request to have the acting appointment extended was declined by full council on 27/9/2022 and the applicant was informed accordingly though the applicant insisted on continuing to serve in the Acting capacity by seeking clarification vide a memo dated 1/11/2022 which clarification was made to the petitioner by a letter dated 2/9/2022.



17. The respondent states that they have not terminated the employment contract of the applicant and the disciplinary process conducted by the respondent is within the confines of the law and procedure.
18. That investigations were conducted by Ad-hoc Committee of the Council and the applicant was given opportunity to respond to the charges and was provided with all requested documents and opportunity to be heard on 18/7/2024. That the Ad-hoc investigation committee completed its mandate and submitted its report to the full council on 29/7/2024. The applicant was then issued with a show cause letter dated 29/7/2024 as per section 5.4.2 of the NSDCC Human Resource and Administration Policies and Regulations 2009. That the disciplinary process followed Articles 27, 41, 43, 47, 50 and 236 of the Constitution.
19. That the applicant has not exhausted internal disciplinary machinery and has also violated the principle of avoidance.
20. That the respondent denies all the allegations contained in the supporting and supplementary affidavit, filed by the petitioner/applicant.

### **Determination**

21. The conditions for grant of an interlocutory injunction are now well settled in East Africa. An applicant must show a prima facie case with a probability of success, 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 and if the court is in doubt it will decide an application on the balance of convenience.
22. In the case of May Aliviza and another versus Attorney General of Kenya and SG EAC Application No. 3 of 2010 EAC's claim right 2005-2011, the Judges observed,

At this stage we must of course refrain from making any determination on the merits of the application or any defence on it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the reference.”

23. In the public law domain, such as in the present matter, the test for grant of conservatory orders was clarified by the Supreme Court of Kenya in the case of Gatarau Peter Munya v Dickson Mwenda Kitbinji & 2 others (2014) e KLR, where 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.”

24. In the present matter, the employment of the petitioner has not been terminated as is clearly set out under paragraph 55 of the replying affidavit and a disciplinary process is underway upon issuance of the notice to show cause to the applicant on 29/7/2024 in line with section 5.4.2. of the NSDCC Human Resource and Administration Policy and Regulations 2009. It would appear that this process had not been finalized as at the time the date of this ruling was set on 15/10/2024.



25. Under prayer 4 of the notice of motion, the applicant seeks “an order of mandamus compelling the respondent to reinstate the petitioner to his correct position as the Head Finance and Acting Deputy Director Finance and Administration”.
26. The court is not satisfied that the applicant has established a prima facie case with a probability of success that he no longer holds the position of Head Finance. Equally, the applicant has not established a prima facie case that he still held the position of Acting Deputy Director Finance and Administration as at the time of hearing of this application.
27. The respondents being a public institution, the court is well guided by the decision of the Supreme Court in *Munya case* (*supra*) and finds that it is in the best interest of both parties and the public that the issuance of an order that would pre-empt conclusion of a disciplinary process underway is unsuitable at this stage of the proceedings.
28. The application is accordingly dismissed with costs in the cause

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER 2024**

**MATHEWS NDUMA**

**JUDGE**

Appearance:

M/s. Nyaga for Petitioner/Applicant

Mr. Kioko for respondent

Mr. Kemboi – Court Assistant

