



**Bulemi v Lake Victoria North Water Works; Luvusi & another
(Interested Parties) (Employment and Labour Relations Petition
E006 of 2022) [2023] KEELRC 187 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 187 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS PETITION E006 OF 2022**

**JW KELL, J
JANUARY 26, 2023**

BETWEEN

STEPHEN OSCAR BULEMI PETITIONER

AND

**LAKE VICTORIA NORTH WATER WORKS DEVELOPMENT
AGENCY RESPONDENT**

AND

EDWARD LUVUSI INTERESTED PARTY

FRANK OWEN WAFULA INTERESTED PARTY

JUDGMENT

1. The Petitioner brought the instant petition pursuant to the provisions of Article 22 and 258 of *the Constitution* seeking the following reliefs:-
 - a. A declaration that the interested parties' fundamental rights and freedoms have been violated by the Respondent.
 - b. An order quashing the advertisement, interviews and recruitment of persons for the position of Manager Human Resource Management and Development and Manager Corporate Communication.
 - c. An order directing the Respondent to confirm the 1st and 2nd Interested parties to the positions of Manager Human Resource Management and Development and Manager Corporate Communication respectively.
 - d. Costs of this Application.



- e. Any other relief that this Honourable court may deem just to grant.
2. The Petition is supported by affidavit of the petitioner in which he produces list of documents dated 13th June 2022.
3. The Petition is opposed by the respondent who entered appearance and filed replying affidavit by Nelly Mkoko, acting Chief Manager Corporate Services of the respondent sworn on the 31st August 2022 and received in court on the 2nd September, 2022 and a further replying by the same deponent of 16th September 2022.
4. The Petitioner filed replying affidavit in response dated 19th September 2022 and received in court on the 20th September 2022.

Petitioner's case in summary

5. The Petitioner who simply said he was a male adult of sound mind brought the petition alleging that the interested parties and 3 other employees were appointed to acting positions on various dates from 20th July 2020 acting for 24 months. The petitioner then focuses on two of the said officers (the interested parties) and states that they acted for a period more than 6 months (letters of appointment at pages 36-46 of the Petition). The petitioner alleges that during the period the interested parties were acting they were paid 20% of their basic salary as acting allowance.
6. The Petition's constitutional basis was stated to be Article 10 which establishes the national values and principles of governance, Article 19 provides for rights and fundamental freedoms, article 22 provides for enforcement of bill of rights, Article 27(i) provides for equality and freedom from discrimination, article 41(1) provides for right to fair labour practices and Article 236 provides for protection of public officers.
7. On the violations, the Petitioner avers that the interested parties were appointed to acting positions for more than 24 months in contravention of the *Public Service Commission Act*. That respondent's act of seeking to fill the positions while the interested parties had been acting through a competitive process amounts to unfair labour practice and infringement of legitimate expectation and the rights of those employees. That having served for more than 2 years continuously to the satisfaction of the board the employees deserve to be declared substantive holders of the positions and are entitled to general damages and salaries for the period acted beyond the 6 months.
8. There was no substantive affidavit in support of the petition other than one under the compromised Notice of Motion which appeared to take issue with the Masters degree requirement which the interested parties apparently lacked and which the petitioner states was discriminatory against them. The petitioner relied on documents filed being the acting position letters, the advertisement and print out of details of the adverts.

Respondent's case in summary

9. The Respondent states that the petition is incompetent as the issues raised do not meet constitutional threshold, that the issues of recruitment are pure employment matters, that when various positions including those held by the 2 Interested parties fell vacant in the Respondent's hierarchy that required recruitment, the process could not proceed because the board of directors was not fully constituted.
10. That the recruitment process was put on hold by the respondent's parent Ministry of Water, Sanitation and Irrigation vide its letter dated 22nd October 2020(NM1) leading to the interested



parties appointment to acting position on the various dates. That when the Board was constituted it requested for approval from the aforesaid parent ministry vide letter dated 2nd February 2022(NM4) which approval was granted on the 8th March 2022(NM5) and advertisement was done for approved positions of Manager, Human Resources Management and Development, Manager Corporate Communications , Manager Internal Audit, Manager Legal Services and Legal Officer (NM6 being the advert and NM7 the specific job requirements).

11. That the 2nd interested party applied for the position of Manager Corporate Services. The 1st interested party did not apply for any position(NM8 being a long list of the applicants). The Respondent produced minutes of the interviews of the shortlisted candidates of the advertised positions(NM11(a) under the further replying affidavit of which it stated that the 2nd interested party was no. 3 at the interviews and that the recruitment was per its human resources policy.

The reply to response

12. The Petitioner's sworn affidavit dated 19th September 2022 in response to the replying affidavit received in court on the 20th September 2022 among other stated that the board was not fully constituted as two directors had left the agency on expiry of their contracts in February 2022 as per Gazette notice(SOB1) and that one Mediatrice Wangira was an election candidate hence not possible to have been a member of the agency as he ought to have resigned(SOB2), that it was not the board to recruit but the finance and administration committee, that it was a fallacy that interviews were done and approved same day, that a written confirmation was not sought on availability of funds from the Ministry of National Treasury before the recruitment was done, that Nelly Mkokko could not sign affidavit on behalf of the respondent as she was not the Chief Executive Officer and that he knows of his own knowledge based on circular dated 7th February 2022 the respondent's human resources instrument had not been approved by the relevant committee and as such there was freeze on recruitment(SOB4).

Hearing

13. The Petition was canvassed by way of written submissions. The parties attempted out of court settlement but failed to reach an agreement. The court then issued directions that the petition be canvassed by way of written submissions. The parties complied.
14. The Petitioner's written submissions drawn by Wekesa and Wekesa & Company Advocates were dated 3rd November 2022 and filed in court on the 10th November 2022.
15. The Respondent's written submissions drawn by Simiyu & Partners LLP Advocates were dated 25th November 2022 and filed in court on the 28th November 2022.

Determination

Issues for determination

16. The Petitioner in their written submissions addressed the merits of the recruitment process, the competence of further replying affidavit, authority of the deponent Nelly Mkokko, whether the fundamental rights and freedom of the interested parties had been infringed and reliefs sought.
17. The Respondent addressed the following issues in their written submissions:-
 - a. Technical v substantive justice
 - b. Silence on the part of the 1 and 2nd interested parties



- c. Whether there was a valid constitutional question in court
 - d. Whether the petitioner has established any breach of his constitutional rights
 - e. Employment in acting capacity
 - f. Is the petitioner entitled to the reliefs sought
 - g. Who is entitled to costs of this suit
18. The court having perused the pleadings by the parties was of the considered opinion that the issues placed before court by the parties for determination of the dispute were as follows:-
- a. Competence of the replying affidavits and further affidavits sworn by Nelly Mkoko.
 - a. Competence of the Constitutional Petition
 - b. Whether the fundamental rights and freedom of the interested parties had been infringed by the Respondent
 - c. Whether the petitioner was entitled to reliefs sought
 - d. Cost of the petition.

Competence of the replying affidavits and further affidavits sworn by Nelly Mkoko.

19. The petitioner in his replying affidavit sworn on 19th September 2022 challenged the replying affidavit and further affidavits sworn by Nelly Mkoko on behalf of the respondent on the basis that her substantive position was a Manager Strategy and Planning and that the affidavit could only be signed the Chief Executive Officer of the respondent on behalf of the Board. The petitioner further took issue with the further affidavit of having been filed without leave of the court and stated the same ought to be expunged.
20. The Respondent submits that the petitioner’s own replying affidavit was filed outside the 30 days having been filed on 20th September 2022. That the further affidavit was a clarification of wrong exhibit filed under the replying affidavit. That no prejudice was occasioned. The petitioner urges the court not to interfere with its affidavits in the interest of justice and to buttress its case relies on the decision in Benel Development Limited v First Community Bank Limited(2021)e KLR where the court allowed a replying affidavit filed after defence had filed submissions stating that:- ‘ the court had obligation to grant a hearing to each party to the suit. In order to determine the application fairly on merit the court must consider the replying affidavit despite the same having been filed out of time.’”
21. On the question of capacity/authority of Nelly Mkoko to swear the aforesaid affidavits, the respondent submits that the deponent indicated she was the acting Chief Manager Corporate Services of the Respondent and having examined the history and records of the case she was conversant with the facts of the petition and was duly authorized and competent to swear the affidavits on behalf of the respondent . That the said Nelly was in attendance of the Finance and Administration meeting held on 4th to 6th May 2022 which dealt with the recruitment exercise(NM10). That the respondent to buttress its case that Nelly was competent and authorized to swear the aforesaid affidavits relied on the decision in Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another (2015) e KLR where the Court of Appeal stated :- ‘ In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then upto the appellants to demonstrate by evidence that they were not so authorized.”



Decision of the court

22. Article 159(2)(d) of *the Constitution* behooves this court to administer justice without undue regard to procedural technicalities. Guided by this constitutional duty the court proceeds to consider the issues raised by the petitioner on in the replying and further affidavits of the Respondent.
23. On whether Nelly Mkokko was competent and authorized to swear the affidavit being not the agency Chef Executive officer, the court agrees with the Court of appeal Position in Makupa Transit Shade Limited & Another v Kenya Ports Authority & Another (2015) e KLR and finds that Nelly Mkokko averred she was competent and authorized to swear the affidavit on behalf of the respondent. Having stated so if the petitioner doubted the authority they should have produced evidence to the contrary. No such evidence was laid before the court. That objection to the affidavits on basis of authority is dismissed.
24. On the filing of the further affidavit without leave of the court. Applying the provisions of Article 159(2)(d) of *the Constitution* that this court ought to administer justice without undue regard to procedural technicalities, the outstanding issue would be fair hearing. The court considers the prejudice to be suffered by the other party. The court noted that the petitioner had opportunity to address the document filed with the further affidavit in their written submissions and further other than the said Minutes no new issue was raised. The court then finds and determines no prejudice was occasioned to the petitioner on filing of the further affidavit.

Competence of the Constitutional Petition.

25. The Respondent stated that the petition did not meet threshold of a constitutional petition as the alleged violations were hinged on the recruitment process which was a pure employment issue.
26. The Petitioner did not address this issue in their replying affidavit of 19th September, 2022 nor in their submissions.
27. The Respondent submits that the petitioner should have approached the court by way of statement of claim or judicial review instead of a constitutional petition as the same was filed for other reasons other than to enforce any constitutional rights. To buttress its position the respondent relied on decision in Jane Angila Obando v Teachers Service Commission & 2 others (2020)e KLR where the court cited with approval decision in Harrikisson v Attorney General of Trinidad & Tobago (1980) AC 265, where the Privy Council had stated: ‘The right to apply to the High Court underof *the Constitution* for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.’
28. The Respondent further relied on the decision of Court of Appeal in Gabriel Mutava & 2 Others v Managing Director Kenya Ports Authority & Another (2016)eKLR Where the court adopted the holding in Harrikisson v Attorney General of Trinidad & Tobago (1980) AC 265(Supra).



Decision of the court

29. The court having perused the pleadings found the issue before it challenged the engagement of the interested parties in acting positions for a period of more than 6 months contrary to the provisions of section 34 (1) of the *Public Service Commission Act*. It was not in dispute that the said officers among other senior officers of the respondent were appointed to acting positions for more than 6 months. The petitioner isolated and focused on the case of these 2 particular employees for undisclosed reasons.
30. The Respondent explained the reasons for the prolonged delay in recruitment being the lack of approval by the parent Ministry (NM1) where the Cabinet Secretary put on hold all recruitment by the Respondent until further notice.
31. The Petitioner stated that this long acting and the subsequent competitive recruitment process instead of confirming the interested parties was unfair labour practice contrary to the provisions of Article 41.
33. The court found no other constitutional violations was pleaded with precision to have been violated as held in R v Anarita Karimi authority.
34. Did the instant petition meet constitutional threshold? The Court of Appeal position in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & Another (2016)e KLR was relevant to the instant case. The Court of Appeal stated:- ‘In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance.’
35. The Court of Appeal in Gabriel Mutava case (supra) further held: ‘Rules of natural justice are statutorily underpinned by Sections 41, 43 and 45 of the *Employment Act*. The duty of the employers to act fairly is now recognized in the Act as well as *the Constitution*. The court is mandated further by *the Constitution* and the Act to resolve all employment disputes expeditiously and its procedures have been rendered less technical. We are saying all these in answer to the appellants’ submissions on the twin question of the applicability of the rules of natural justice and *the Constitution* to the dispute. This was purely a labour dispute that could have been resolved by the application of the *Employment Act* as well as the Regulations.’
36. The court upholds the foregoing authorities and determines that the instant petition does not meet the threshold of a constitutional petition. The affected employees ought to approach the court by way of a claim if they were aggrieved by the acting position and the subsequent competitive recruitment process.
37. The court’s position being that the rights of employees are underpinned under the *Employment Act* and on finding of unfair labour practice the court may, if pleaded, grant compensation for constitutional violations pursuant to provisions of section 12(3) of the Employment and *Labour Relations Act* to wit :- ‘(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders (i) interim preservation orders including injunctions in cases of urgency; (ii) a prohibitory order; (iii) an order for specific performance; (iv) a declaratory order; (v) an award of compensation in any circumstances contemplated under this Act or any written law; (vi) an award of damages in any circumstances contemplated under this Act or any written law; (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as



the Court thinks fit to impose under circumstances contemplated under any written law; or (viii) any other appropriate relief as the Court may deem fit to grant.”

38. The court finds and determines that the instant petition does not meet constitutional threshold and was not proper for determination of the issues raised by the petitioner considering his own admission that the recruitment process was already complete with other employees having been appointed in to the positions the interested parties had been acting. The said employees were not enjoined in the petition yet they hold employment contracts in the challenged positions.

On merit of the petition.

39. The petitioner’s case was that there was unfair labour practice by the acting of the interested parties in position beyond 24 months contrary to section 34(1) of the *Public Service Commission Act*. The petitioner relied on the decision in Nairobi Cause No. 273 of 2019 Edar Cherono Maiywa V University of Nairobi Enterprises and Service Limited where the court held:- “I have found that the claimant’s prolonged appointment as the SHRAO in acting capacity for over 3 years without being given the substantive appointment was inordinate and amounted to discrimination and unfair labour practices on the part of the Respondent.”
40. The petitioner further relied on the decision in Susan Khakasa Oyatsi v Judicial Service Commission (2022)e KLR and on equity principle as espoused by Court of Appeal in Chase International Investment Corporation And Another V Laxman Kesbra and other (1978) KLR 907 and urged the court to deem the interested parties to be the substantive holders of the position they had acted in for a period of 24 months.

The Respondent’s position on merit of the petition

41. The Respondent submitted that under provisions of section 34(3) of the *Public Service Commission Act* an employee may act for a period between one month and six months and that the use of the word ‘may’ means there is discretion for longer acting period that is reasonable if good and sufficient explanation is provided. That in the Edah Cherono case where the claimant had acted for more than 6 months, in paragraph 44 the court found no evidence had been produced to explained the prolonged acting as well as delay in recruitment. That in Susan Khakasa Oyatsi case the acting period was 6 years and that In paragraph 134 the court found no reason why the clamant could not be promoted and remunerated correctly in distinguishing the instant case. The Respondent submitted that the interested parties had acted for less than 2 years in higher post while still hold subsnative post in further distinguishing the instant case. That further recruitment had been freezed by government (NM1-NM5) and that the interested parties returned to their substantive positions once recruitment was done hence no prejudice suffered. That the delay was not inordinate and relies on the decision on inordinate delay in Utalii Transport Company Limited & 3 others v NIC Bank Limited & another (2014)e KLR where the court set litmus test for inordinate delay to be, ‘ .. that it should an amount of delay that leads the court to the inescapable conclusion that it was inordinate and therefore inexcusable”.

Decision of the court on merit of the petition

42. On interpretation of section 34(3) of the *Public Service Commission Act* it would appear that the word “may” used means that the delay can excused for reasonable grounds. In the case of Susan Khakasa Oyatsi v Judicial Service Commission (2022)e KLR the award was for period of acting beyond 18 months meaning the court found acting beyond 6 months to be permissible if explained. In the instant case there was evidence of freeze of recruitment by the government (NM1) and after the lifting competitive recruitment was done and the interested parties resumed their substantive posts. The



interested parties were afforded opportunity to apply for the positions and only the 2nd interested party applied. There was no evidence laid before the court to prove the process was unfair to the interested parties which could only have been done by way of affidavit by the contract holders. The allegation by the petitioner that the interested parties did not hold the qualification of masters degree was tantamount to hearsay. The said qualifications applied to all candidates not just the interested parties hence issue of discrimination does not arise. No evidence was produced to the contrary.

43. The court finds and determines that the prolonged acting by the interested parties beyond 6 months was justified and was not in any case inordinate considering the freezing of recruitment by the government which funds the respondent.

Whether the petitioner is entitled to reliefs sought

44. The petitioner had sought various reliefs addressed as hereinunder:-

A declaration that the interested parties' fundamental rights and freedoms have been violated by the Respondent.

45. The court having found no precise pleading of the constitutional rights violation besides the alleged fair labour rights on basis of the acting position beyond 6 months under section 34 of the [Public Service Commission Act](#), and having found the petition not to have met the constitutional threshold, the prayer is disallowed.

An order quashing the advertisement, interviews and recruitment of persons for the position of Manager Human Resource Management and Development and Manager Corporate Communication.

46. Evidence was led that the recruitment had been completed. No credible evidence was led to fault the process and in any event the prayer is overtaken by events.

An order directing the Respondent to confirm the 1st and 2nd Interested parties to the positions of Manager Human Resource Management and Development and Manager Corporate Communication respectively.

47. This prayer is overtaken by events. It would also be tantamount to interference with contracts of the substantive holders of the said positions if the prayer were to be granted without hearing the employees. The court further found no merit in the petition. The prayer is disallowed.

Costs of this Application.

48. On costs, the instant petition was brought without any notice to the respondent denying it opportunity to respond and perhaps avoid the petition. No demand letter was produced. There was no evidence before the court that the interested parties had even raised concern or complaint with the employer. The petition was further found not to meet constitutional threshold. The court finds that the instant petition was tantamount to abuse of court process. Consequently, the petition dated 13th June 2022 is dismissed with costs to the respondent.

Any other relief that this Honourable court may deem just to grant.

49. The Petitioner under written submissions seeks payment of salary arrears to the interested parties based on the substantive posts the acted in for 24 months. The claim is based on alleged salary scales. The court found this relief to be absurd. No such evidence was pleaded before court with the petitioner not having filed any substantive affidavit in support of the petition. Written Submissions are not pleadings



and no evidence can be produced by way of submissions. In any event the court found the acting was justified. The prayer is disallowed.

Conclusion and disposition

50. The court finds and determines that the instant petition was incompetent, failed to meet constitutional threshold and was without merit. Further the court holds the Petition was an abuse of court process as the claim was on alleged breach of a specific statutory provision. The court holds that the petition dated 13th June 2022 is incompetent and without merit. It is dismissed with costs to the Respondent.
51. It is so ordered.
52. Stay of 30 days.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 26TH JANUARY, 2023.

J. W. KELL,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant:- Absent

Respondent:Simiyu

