



**Simiyu v Acting Chief Executive Officer, Kenya Medical Supplies Authority &
another (Cause E466 of 2020) [2023] KEELRC 142 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 142 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E466 OF 2020
JK GAKERI, J
JANUARY 26, 2023**

BETWEEN

FREDRICK WANYONYI SIMIYU CLAIMANT

AND

**ACTING CHIEF EXECUTIVE OFFICER, KENYA MEDICAL SUPPLIES
AUTHORITY 1ST RESPONDENT**

**BOARD OF DIRECTORS, KENYA MEDICAL SUPPLIES
AUTHORITY 2ND RESPONDENT**

RULING

1. This is a Notice of Motion Application by the Applicant dated 28th July, 2022 and filed on 29th July, 2022 praying for Orders That:-
 1. Spent
 2. Pending the hearing and determination of this Application, this court be pleased to issue an injunction restraining the Respondents herein, either by themselves or their servants/ agents from longlisting, shortlisting, interviewing, vetting, selecting, appointing or in any other manner continuing with the impugned recruitment exercise in respect of the office of the Corporations Secretary and Director Legal Services as published on the 2nd Respondent website on the 25th July, 2022.
 3. Pending the hearing and determination of this application, this court be pleased to issue a Notice to the Members of the Board of the 2nd Respondent, Mary Chao Mwadime, Dr. Nancy Njeru, Mary Atieno Awino, Reema Doshi and Terry Wanja Kiunge- Ramadhani to appear in person at the hearing of this application to show cause why they should not be held in contempt of the orders of this honourable court issued on 31st May 2021.



4. Upon hearing and determination of this application, this court be pleased to find the members of the 2nd Respondent herein, Mary Chao Mwadime, Dr. Nancy Njeru, Mary Atieno Awino, Reema Doshi and Terry Wanja Kiunge – Ramadhani, in contempt of the Orders of this honourable court as issued on 31st May, 2021.
5. The costs of this Application be provided for.
2. The Application is premised on grounds I – II set out on its face and supported by the Affidavit dated 28th Day of July 2022 by the Applicant who deposes that he commenced proceedings challenging interdiction by a Statement of Claim dated 30th August, 2020 and sought interim orders staying the interdiction and the Orders for stay was granted on 31st August 2020 pending the hearing and determination of the Application.
3. That after inter-partes hearing of the Application, Orders sought and the interdiction was stayed on 31st May, 2021.
4. That the Orders were extracted and served upon the Respondent for compliance though their counsel was in court when the ruling was delivered. That the effect of the orders was to reinstate the Applicant to be position of Director of Legal Services within the 2nd Respondent.
5. The Applicant further disposes that before the matter was set for hearing, the Respondents approached the Applicant for an out of court settlement of the dispute and the Applicant engaged in good faith in an endeavour to reach an amicable solution.
6. That in a rather malicious move, and in total disregard of the court orders made on 31st May, 2021, the 2nd Respondent published an advertisement purportedly declaring the Applicant’s position vacant and invited interested persons to apply for the positions for consideration.
7. That the advertisement run from 25th July, 2022 to 16th August, 2022 and multiple applications may have been received already.
8. The affiant states that the advertisement was done in total contravention of the court orders that stayed the interdiction and it appeared as if the 2nd Respondent had summarily dismissed the Applicant.
9. That the Respondents had violated the Applicant’s right to fair labour practices by advertising for a position with a holder still in office.
10. That the violation of court orders compromises the course of justice and undermines the authority and dignity of the court.

Respondents response

11. By a Replying Affidavit dated 23rd August, 2022 sworn by Mary Chao Mwadime, the Respondents deposes that the Ministry of Health, National Assembly, KEMSA (2nd Respondent) and the Office of Auditor General prepared reports on the operations of the 2nd Respondent.
12. That the Auditor General’s report stated that;

“The KEMSA Board should consider overhauling the business model which has failed to ensure a robust Supply Chain Management System that is efficient, effective, economical and transparent”.



13. That in addition, the National Assembly Departmental Committee on Health Inquiry Report on utilization of Covid-19 funds recommended inter alia;

“That the Ministry of Health in consultation with SCAC in accordance with section 27 of the State Corporation Act, Cap 446 undertake a review of the structure and organization of the KEMSA and submit recommendations to the National Assembly on the re-organization of the authority within 60 days of tabling of the report.”
14. That the affiant further states Ethics & Anti-Corruption Commission also conducted investigations on the loss COVID 19 funds. That the investigations conducted in 2020 and 2021 demonstrated the need to streamline the Operations of the 2nd Respondent.
15. The affiant deposes that Section 10 of the KEMSA Act empowers the Authority to appoint officers as necessary to discharge its functions. That as early as 2014 SCAC had recommended a staff establishment of 343 employees.
16. That the Respondent decided to carry out a staff rationalization programme to streamline and optimize its operations.
17. That employees were required to comply with the provisions of *Employment Act*, Human Resource and Administration Policies and Procedure Manual, 2016.
18. That Section 40 of the *Employment Act* empowers the board to restructure its operations as long as the law is complied with.
19. That the Respondents Human Resource Manual had provisions for redundancy at Clause 24.7.
20. That it was ascertained that the Respondent had a work force of 900 against an establishment of 343 employees and was unsustainable and rationalization of work force commenced sometime in 2021.
21. That on 4th November, 2021, the Respondent issued a general notice to all staff on intended redundancy and they were notified of commencement of consultations and sensitization. The notice was to run for 30 days but before consultation could commence, Petitions No. 173, No. 174 and 187 of 2021 were filed challenging various issues including the general notice of redundancy. That the Petitions were dismissed on 27th May, 2022 and the authority could proceed with the consultations.
22. That by a notice dated 10th June, 2022, the Respondent informed staff that the consultation period contained in the earlier notice had been reinstated and employees could “consult with the management of the authority” and another notice was issued when the period lapsed.
23. That the authority commenced the advertisement of top management positions through the website for any interested person both staff and members of the public.
24. The affiant states that contrary to the Applicant’s assertions, the Authority had no intention to interdict or terminate the Applicant’s employment but his position was among those advertised in the intended re-organisation and the Applicant was at liberty to apply for the position.
25. The affiant further deposes that a total of 31 vacancies were advertised in furtherance of the intended redundancy.
26. That there was another pending case ELRC Petition No. E149 of 2022 Enos Namasaka and 9 others V KEMSA & other challenging the advertisement in question and the recruitment was stayed on 8th August, 2022 pending inter partes hearing on 19th September, 2022.



27. That the actions by the Authority were not carried out in contempt of the orders issued on 31st May, 2021 and the advertisement was published in furtherance of the decision to restructure as opposed to circumvent the court order.
28. The authority reiterates its willingness to resolve the suit herein out of court and the court barred the Respondent from interdicting the Applicant.

Claimant/Applicant's submissions

29. According to the Applicant, the issues for determination are;
 - i. Whether there is any validity to the Respondents assertion that the Claimant's position has been genuinely affected by the ongoing redundancy and re-organization.
 - ii. Whether the Respondents are in contempt of the court's orders issued on 31st May, 2021.
30. On the first issue, it was submitted that the Respondents action of advertising the Claimant's position without notice or communication had no legal basis and was malicious attempt to circumvent the orders of the court.
31. That there was no nexus between the Claimant's position and the ongoing redundancy since the process of redundancy involved declaring positions superfluous or abolishing of office yet his position was being advertised.
32. It was urged that the Claimant's position was statutorily ordained and could not be abolished through redundancy or re-organization.
33. It was further urged that redundancy could not take place if the position declared redundant remained in the organization structure.
34. Reliance was made on Clause 24.6 (b) of the KEMSA, Human Resource Policies and Procedure Manual, 2016 that "positions declared redundant will be removed from the Authority's establishment and no recruitment should be undertaken with regard to the redundant position".
35. That the purported redundancy was pretentious.
36. The decisions in Andrew Ondiek V DHL Supply Chain (2021) eKLR was relied upon to buttress the submissions.
37. It was submitted that the intention of the Respondent was to terminate the Claimant's employment by whatever means.
38. Counsel submitted that the Respondent had not notified the Claimant/Applicant that his position was affected by the redundancy contrary to the provisions of Section 40(1)(b) of the [Employment Act](#) or provided a report which adversely mentioned the Claimant's position.
39. As to whether the Respondents are in contempt of the court orders issued on 31st May, 2021, the counsel relies on the decision in Kenya Human Rights Commission V Attorney General and another (2018) eKLR on the nature of contempt of court.
40. In addition, the decision in Samuel M.N. Mweru & others V National Land Commission & 2 others (2020) eKLR was cited to underscore the elements of contempt as;
 - i. terms of the order,
 - ii. knowledge of these terms by the Respondent,



- iii. failure by the Respondent to comply with the terms of the order.
41. It was submitted that the foregoing conditions applied to the instant case and the court was urged to hold the Respondents in contempt.

Respondents submissions

42. On October 11th 2022 during a mention to confirm the filing of submissions, the Respondent was accorded 14 days to file and serve submissions. However, by 14th November when the court retired to prepare this ruling, the Respondents had not filed submissions.

Determination

43. The singular issue for determination is whether the Application herein is merited.
44. It is common ground that the Claimant/Applicant is an employee of the Respondent having been engaged on 1st May, 2005.
45. It is also not in dispute that the Claimant/Applicant was interdicted on 25th August, 2020 for failure to properly advise the management and the Board on award of contracts and divulging information to unauthorised persons through leakage of the Respondents reports, documents and communications.
46. The Claimant/Applicant sought and obtained temporal stay of implementation of the interdiction pending the hearing and determination of the suit which the court confirmed by its ruling on 31st May, 2021.
47. The court stayed the letter of interdiction dated 25th August, 2020 pending the hearing and determination of the suit.
48. Consequently, KEMSA issued a General Notice of Potential Redundancy dated 4th November, 2021 which made reference to the scrutiny the organization had been subjected to due to mismanagement, lack of accountability coupled with the organization's response to the COVID-19 Pandemic which inter alia led to the disbandment of the previous Board of Directors and the appointment of a new board to spearhead transformation of the organization.
49. The notice further stated that a Government Task Force had recommended the restructuring of the organization to imbue efficiency in the discharge of its mandate.
50. That the proposed restructuring would involve changes in processes and would include re-examination of roles played by each employee and re-designation and alignment of roles to the approved staff numbers and the exercise could lead to redundancies.
51. The notice stated that consultations would take place within the one month of the notice and the organization would provide support to staff by provision of professionals and a platform to air their views.
52. The notice further stated that in identifying those affected, regard would be had to seniority, skills and competence, merit, ability and reliability. The notice made reference to the exit package without details.
53. Puzzlingly, the notice directed all staff to work from home effective 5th November, 2021 except those tasked with essential services.
54. The notice was reticent on the immediate steps to be taken by the Board or what the employees were expected to do.



55. The general notice was challenged in court and judgement delivered on 27th May, 2022.
56. Other than quashing the appointment of Lawrence Wahome, Robert Nyarango, Terry Kiunge and Linton Nyaga as Board Members of KEMSA, the Petitions were dismissed.
57. The learned judge was categorical that the sending home of employees enmass was not provided for by the law the circumstances of the case notwithstanding.
58. The Judge stated as follows;

“I therefore cannot find any justification in sending home all the employees of the Respondent to work from home and none has been presented to court by the Respondents”

59. Although the Chairperson of the KEMSA Board deposed that the redundancy notice was revived by a notice dated 10th June 2022, a copy was not provided and no other communication to or with staff until the senior positions were advertised on the Respondents website. The advertisement is the subject of another court case.
60. Although redundancy is one of the various ways of terminating the contract of employment at the instance of the employer, the law prescribes the framework to guide the process and imposes onerous obligations on the employer as explained by the Court of Appeal in Kenya Airways Limited V Aviation and Allied Workers Union of Kenya & 3 others (2014) eKLR.
61. From the documents provided by the Respondents, it is evident that no re-organization appear to have taken place nor consultations until the positions were advertised.
62. It is the Claimant/Applicant’s case that the advertisement of his position, which is a prescription of the KEMSA Act violated the orders of the court made on 31st May, 2021.
63. Instructively, the court order stayed the Claimant/Applicant’s interdiction letter dated 25th August, 2020 and nothing else.
64. Contrary to the Applicant’s submission that the court order reinstated him to his position, it did not as he was still an employee of the Respondent for the duration of the interdiction. The order stayed the interdiction only and did not curtail the Respondents powers to engage in other processes even if they had the effect of terminating the Claimant/Applicant’s employment, provided those processes were legitimate and were conducted in accordance with the law.
65. Granted that the purported redundancy was not a disciplinary process against the Claimant/Applicant, the court is of the view that the advertisement of the Claimant/Applicant’s position among many others, a matter challenged in court, did not amount contempt of the order made on 31st May, 2021.
66. There is no material before the court to justify a holding that the Respondents are guilty of contempt.
67. The court is further guided by the sentiments of Ibrahim J. (as he then was) in Econet Wireless Kenya Limited V Minister for Information & Communication of Kenya & another (2005) KLR 828 as follows;

“It is essential for the maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all times. The court will not condone, deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an



order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even in cases where the person affected by the order believes it to be illegal or void”

68. The onerous burden placed on the party suing for contempt was elaborated in *Gatharia K. Mutitika V Bahari Farms Ltd* (1985) KLR 227 where the court held;

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily . . . It must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt . . . However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge . . . The jurisdiction of committing for contempt being practically, arbitrary and unlimited should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the Judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject . . .”

69. The court is guided by these sentiments.

70. Needless to emphasize, the order made by the court on 31st May, 2021 was unambiguous and the Respondents were aware of it. However, it has not been demonstrated that the Respondents disobeyed the order or acted in its breach as the Claimant/Applicant was not interdicted.

71. Finally, the Claimant/Applicant made reference to discussions between the parties prior to the advertisements and the Respondents have expressed willingness to settle the matter amicably out of court.

72. The court is satisfied that parties should be given an opportunity to negotiate a settlement for adoption by the court. Further, parties are encouraged to negotiate in good faith.

73. In the upshot, the Notice of Motion dated 28th May, 2022 is partially successful to the extent that the Respondents either by themselves or their agents/servants are restrained from longlisting, shortlisting, interviewing, vetting, selecting, appointing or in any other manner continuing with the impugned recruitment exercise in respect of the Office of the Corporation Secretary and Director of Legal Services as published on the 2nd Respondent’s website on 25th July, 2022.

74. All other prayers are disallowed.

75. Costs shall be in the cause.

76. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF JANUARY 2023

DR. JACOB GAKERI

JUDGE

ORDER

From 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 *Civil 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.

DR. JACOB GAKERI

JUDGE

