



REPUBLIC OF KENYA



**Wanjohi v Karatina University; Kakiya & another (Interested Parties) (Employment and Labour Relations Petition E004 of 2022) [2023] KEELRC 410 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 410 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E004 OF 2022  
ON MAKAU, J  
FEBRUARY 15, 2023**

**BETWEEN**

**JULIAN MACHERU WANJOHI ..... PETITIONER**

**AND**

**KARATINA UNIVERSITY ..... RESPONDENT**

**AND**

**GRACE GIRANGWA KAKIYA ..... INTERESTED PARTY**

**ETHICS & ANTI -CORRUPTION COMMISSION ..... INTERESTED PARTY**

**RULING**

1. On May 26, 2022 the Petitioner filed this suit challenging the appointment of the 1<sup>st</sup> Interested Party as the respondent's Finance officer. The suit sought to quash the said appointment on ground that it was not done through fair competition as required by the *Constitution of Kenya*.
2. Contemporaneously with the petition, the petitioner filed a Notice of Motion dated May 20, 2022 seeking the following orders:-
  - a. Spent
  - b. Spent
  - c. Pending hearing and determination of the petition, conservatory orders be and are issued suspending the 1<sup>st</sup> Interested Party's appointment to the office of the Finance Officer of the Respondent.
3. The ground upon which the application stands are set out on the body of the motion and the supporting affidavit sworn on the even date by the petitioner. In brief the applicant avers that on October 5, 2021 the respondent advertised the post of finance officer but all the applicants including



- the 1<sup>st</sup> Interested party were found to be unqualified and a re-advertisement was done citing the same qualifications.
4. The 1<sup>st</sup> interested party re-applied and she was subsequently appointed to the position of finance officer. The applicant contended that the appointment was done without fair competition in violation of Article 10, 27, 73 and 232 of the *Constitution of Kenya*. Besides the 1<sup>st</sup> interested party was accused of having pending misconduct allegation coupled with allegation that while acting as the finance officer and the incharge of Finance Department, the respondent was marred with a lot of financial improprieties and integrity related issues as set out in the petition and the Supporting Affidavit.
  5. The respondent opposed the application and the petition vide the Replying Affidavit sworn on June 15, 2022 by Dr Humphrey Omondi, Registrar Planning and Administration. In brief he deposed that the position of Finance Officer was advertised on September 14, 2021. The requirements were set out in the respondent's website at [www.karu.ac.ke](http://www.karu.ac.ke). Fourteen applications were received but only 3 candidates were shortlisted.
  6. However, the council directed that the post be re-advertised taking into account all levels of entry into the position. The re-advertisement was done on January 18, 2022 indicating requirements for direct entry and for those already serving in the University. The said requirements were then posted on the respondent's website at [www.karu.ac.ke](http://www.karu.ac.ke). Twenty-two candidates including the 1<sup>st</sup> interested party applied, three were shortlisted and they were interviewed by the university council.
  7. The 1<sup>st</sup> interested party scored 27.6 out of possible 30 points and emerged the best candidate. Subsequently she was appointed to the post of Finance Officer on merit after a competitive recruitment process conducted in compliance with the respondent's HR Policy and the *Constitution of Kenya*.
  8. As regards the alleged misconduct and integrity issues, the affiant deposed that the allegation made against the 1<sup>st</sup> interested party by a whistle blower were considered during the interview but they were found to be without merit. It was further deposed that there is no disciplinary or administrative action that has been taken against the 1<sup>st</sup> interested party, nor are there any court proceedings instituted against the 1<sup>st</sup> interested party by the EACC (2<sup>nd</sup> Interested Party herein). He therefore prayed for the motion and the petition to be dismissed with costs.
  9. The 1<sup>st</sup> Interested party also opposed the application and the petition vide her Replying Affidavit sworn on July 8, 2022. In brief she reiterates the averments made by the respondent which I have summarized above. She deposed that her appointment was in accordance with law and there is no competent institution that has found culpable of any gross misconduct, violation of leadership and integrity standards set out in Chapter VI of the *Constitution* or any other law, nor has she been convicted of any criminal offence.
  10. Further she contended that she possessed both academic and professional qualifications required for the position of finance officer and therefore her appointment was merited, open, free and fair.
  11. She further deposed that the respondent's books of account have undergone both internal and external audit by the Auditor General and no financial impropriety or integrity issues were found. Further all other allegations levelled against her in the petition and the supporting affidavit lacks merits and they have not been substantiated. Consequently she prayed for both the motion and petition to be dismissed with costs.
  12. The 2<sup>nd</sup> interested party filed Replying Affidavit sworn on June 16, 2022 by Mr Ben Kaverenge an investigator with the EACC. He confirmed that the allegations raised against the 1<sup>st</sup> interested party in the petition and the supporting affidavit dated May 20, 2022 were received by the 2<sup>nd</sup> interested party



and are subject to active investigations and once completed, recommendations will be made to the Director of Public Prosecutions in accordance with Section 35 of the [Anti-Corruption and Economic Crimes](#) (ACEC) Act.

13. The petitioner swore further affidavit on September 1, 2022 which reiterates his earlier averment that the 1<sup>st</sup> Interested party was not fit for appointment as Finance Officer and the respondent wrongfully appointed her despite objection filed by UASU and several instances she had been summoned to answer to questions of mismanagement of funds and insubordination by the respondent, EACC and the Auditor General.
14. The respondent and 1<sup>st</sup> interested party also filed further Affidavit sworn on October 25, 2022 and October 28, 2022 respectively which basically reiterates the averments in their earlier Replying Affidavit. The 1<sup>st</sup> interested party further filed a notice of preliminary objection dated October 27, 2022 seeking to have the petition struck out for offending the doctrine of exhaustion pursuant to Section 74, 88 and 89 of the [Public Service Commission Act](#).

### Submissions

15. The applicant submitted on the principles for granting conservatory orders as discussed in the case of [Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others](#) (2015)eKLR namely the applicant should;
  - a. Demonstrate an arguable *prima facie* with likelihood of success and likelihood of suffering prejudice if the order is denied.
  - b. Whether granting or denial of the order will enhance the constitutional values and objects of a specific rights or freedom in the bill of rights.
  - c. Whether denial of the order will render the petition or its substratum nugatory
  - d. Whether public interest will be served or prejudiced by granting or denying the order.
16. On the first issue, it was submitted that the appointment of the 1<sup>st</sup> interested party was unlawful since the process followed in the recruitment was marred with malpractices and outright bias to have the 1<sup>st</sup> interested party appointed. It was submitted that even after objection by UASU after the first advertisement, a second advertisement was done and the 1<sup>st</sup> interested party was appointed contrary to the HR Policy.
17. As regards the second issue of enhancement of constitutionary values, it was submitted that granting conservatory orders is necessary pending hearing and determination of the petition in order to protect the provisions in Article 10, 73 (2) (a) and 232 of the [Constitution](#). Reliance was placed on the case of [Republic v Masaai Mara university Council & another](#) (2021) eKLR where the court held that public officers are obliged under Article 73 and 232 of the [Constitution](#) to led by objectivity and impartiality in their decision making and not influenced favoritism or other improper motives.
18. As regards the substratum of the petition, it was submitted that denial of the conservatory order would mean that the 1<sup>st</sup> interested party will proceed to hold office as finance officer and render the petition nugatory. The respondent will stand the risk of losing funds at the expense of tax payers. In other words, the applicant submitted that failure to grant the conservatory orders will render the petition spent.
19. Finally, it was submitted that the respondent is established to secure and be of benefit to the public interest and granting of the order will affect students, teaching and non-teaching staff and general



- members of the public. Granting the order was therefore, according to the applicant, going to be in the public interest.
20. The respondent on the other hand, submitted that the principles for granting conservatory orders were enunciated by the Supreme Court in [Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others](#) (2014) eKLR thus conservatory orders are to be granted on:-
    - a. The inherent merit of the case
    - b. Public interest
    - c. Constitutional values
    - d. Proportionate magnitudes, and priority levels attributable to the relevant causes.
  21. On the first issue, it was submitted that the court has to access the materials placed before it to see if there is a *prima facie* case with likelihood of success and consider what is the public interest concern the court needs to preserve. Reliance was placed on the case of [Progress Welfare Association of Malindi & 3 others v County Government of Kilifi & 4 others](#) (2020) eKLR.
  22. Further it was submitted that the petition and the supporting affidavit do not show that the 1<sup>st</sup> Interested Party was appointed through favoritism. It was submitted that the re-advertisement was proper and it was guided by the schemes of service which have not been contested by the petitioner. It was further submitted that the said scheme of service were applied in all the other jobs.
  23. It was contended that a *prima facie* case is further hampered by the fact that the court lacks jurisdiction to delve on the alleged corruption as making a finding that the 1<sup>st</sup> interested party is not fit to hold office would be usurping the powers of the respondent which accorded by Section 35 of the [Universities Act](#). It would also be usurping the powers of the EACC which is investigating the same allegations.
  24. As regards proportioned magnitudes and preservation of the substratum, it was submitted that granting the order will not be necessary as it will only revert to Grade 14 but still continue with the responsibility of heading the Finance Department which she been doing since 2012. The court was urged to shy away from granting the conservatory order because it will not alter the substratum of the petition.
  25. As regards the issue of priority levels attributable to the relevant causes, it was submitted the respondent has internal mechanism and tools for managing its affairs including deployments, compulsory leaves, suspension among others and as such the court should avoid interfering with the same by granting conservatory orders. It was further submitted that the petition is not an independent public interest litigator as he seems to represents some interested staff of the respondent who came leaking him with confidential information and documents.
  26. It was submitted for the 1<sup>st</sup> interested party that this court lacks primary jurisdiction to hear and determine the petition before the parties exhaust internal appeal mechanism. It was submitted that the respondent being a Chartered Public University renders it a public body to which the provisions of the [Public Service Commission \(PSC\) Act](#) apply pursuant to Regulation 3 (2) (a) of the [Public Service Commission Regulation, 2020](#).
  27. Accordingly, it was submitted that the petitioner ought to have referred the dispute to the Public Service Commission for adjudication and if aggrieved by its decision, file appeal to this court. Besides it was contended that the petitioner did not obtain exemption from the statutory mechanism before filing the petition herein. Consequently it was submitted that the court lacks jurisdiction over the petition by dint of section 74, 88 and 89 of the [Public Service Commission Act](#) and Regulation 77 of



the *Public Service Commission Regulations, 2020*. Reliance was placed on the case of *Lenny Odira Seko v Senate, Pan Africa Christian University & 2 others* (2022) eKLR.

28. On the other hand, it was submitted that the petitioner has not met the threshold for granting conservatory orders including prima facie case, prejudice to be suffered if the order is denied, whether the petition will be rendered nugatory and whether granting the order is in the public interest. Based on the material before the court it was submitted that the 1<sup>st</sup> interested party was appointed following an open and competition recruitment process that complied with law and respondent's Regulation, and as such no prima facie case with probability of success has been proved. Further it was submitted that statutory mechanism of resolving the dispute herein has not been exhausted and therefore the petition is an abuse of the court process and the orders sought should be rejected.

### **Determination**

29. The issues commending themselves for determination are:
- a. Whether the petition and the motion offends the exhaustion doctrine vis a vis statutory mechanism provided by the *Public Service Commission Act* and the *Regulation* thereunder.
  - b. Whether the application meets the legal threshold for granting conservatory orders.

### **Exhaustion doctrine**

30. Section 9 (2) of the *Fair Administrative Actions Act* provides that:-

“The High Court or subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanism including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted.”

31. The 1<sup>st</sup> Interested Party states that *Public Service Commission Act* and *Regulations* provides for an alternative mechanism for settling the dispute herein. Regulation 3 of the *Public Service Commission Regulations of 2020* provides that:-

“Subject to Article 153 (3) (a) and 234 of the Constitution, these Regulations shall apply to Public bodies and all persons holding or acting in an office in a public body.

(2) For the purposes of these Regulations, “public body” includes-

- a. A State department, State Corporation, statutory commission, public University or ...”

32. The above provision squarely places the respondent under the provisions of the *Public Service Commission Regulations* with respect to appeal from disciplinary process and decisions by the respondent against its staff.

33. Regulation 68 then provides that:-

1. “A public officer who is dissatisfied with the disciplinary process may appeal against the process or the decision in accordance with Section 74 of the Act.
2. A public officer who is dissatisfied with the outcome of an appeal may apply for review in accordance with Section 75 of the Act.”



34. The petition herein is not related to disciplinary process against an employee of the respondent nor is it brought by or on behalf of an employee of the respondent. It is a petition by a public interest litigator challenging the process of recruitment and the qualification of the 1<sup>st</sup> interested party for the position of Finance officer of the respondent. Consequently, I dismiss as unmeritorious, the submission by the 1<sup>st</sup> interested party's that the court lacks original jurisdiction over the petition on account of the exhaustion doctrine.

### **Threshold for Granting Conservatory Orders**

35. In the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* (2014)eKLR the Supreme Court held that:-

“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 causes.”

### **Inherent Merit of the Case**

36. The Petitioner's case in the main petition is that the 1<sup>st</sup> Interested Party was not qualified for the appointment to the position of finance officer because of many integrity issues and complaints of gross misconduct hanging on her neck and that is why she was not interviewed after the first interview. In the petitioner's view the University council had by re-advertising the position disqualified the 1<sup>st</sup> Interested party.
37. Further, the petitioner alleges that the procedure followed for appointing the 1<sup>st</sup> interested party was not fair and competitive but one shrouded by secrecy and favoritism towards the 1<sup>st</sup> interested party. It is the petitioner's case that the second advertisement was tailor-made to favour appointment of the 1<sup>st</sup> interested party.
38. However, the 1<sup>st</sup> interested party and the respondent contend that the petition lacks merits and it has no chances of success. They contend that the 1<sup>st</sup> interested party is qualified for the job both academically and professionally, and that the recruitment process complied with the law and the respondent's regulations. They further contend that second advertisement was aligned with the schemes of service for all the positions advertised so as to indicate the levels of entry for both external and internal candidates.
39. I have considered the material placed before the court, there is no dispute the petition herein raises very serious allegations against both the respondent and the 1<sup>st</sup> interested party. It is also a fact that the said allegations have been placed on the 2<sup>nd</sup> interested party's table and are receiving the necessary attention. So far no criminal proceedings have been commenced against the 1<sup>st</sup> interested party. There are also no disciplinary proceeding which have been commenced against the 1<sup>st</sup> interested party.
40. The 1<sup>st</sup> interested party has presented evidence of her academic and professional qualifications which have not been contested. The petitioner has not rebutted the averments by the respondent that the 1<sup>st</sup> interested party has headed the finance department from 2012 and that during the interview she scored the highest compared to all the other 21 candidates.
41. As regards the second advertisement, the respondent and 1<sup>st</sup> interested party contended that the same was done in line with the schemes of service to factor the entry level for external and internal candidates. The said schemes of service have not been challenged by petitioner. Besides the advertisement was not in relation to the post of finances officer only.



42. To counter the foregoing, the petitioner filed documentary evidence especially the council minutes for December 22, 2021 marked "HO-4". Page 5 paragraph 9.4 is the council's decision:-

"That no candidate met the requirements for finance officer on account of duration served in Senior Management and as such, the position should be re-advertised taking into consideration both levels of entry as provided for in the schemes of service."

43. The re-advertisement was done in January 2022. The petitioner has exhibited minutes for shortlisting committee meeting of March 2, 2022 (Exh."H0-7"). The petitioner has further annexed Exh H0-8, score sheets of interviews by council done on March 21, 2022 showing that the 1<sup>st</sup> interested party scored 138 points while the other 2 candidates scored 102.5 and 103.5 respectively.

44. Finally the petitioner has also exhibited as "H0-9" the minutes of the University council by which the 1<sup>st</sup> interested was appointed after emerging the best candidate in the interviews. The question that arises is how then did the 1<sup>st</sup> interested party attain the qualification 3 months after the first interview on December 22, 2021. On the basis of the material before the court, I find that there cracks in the defence case through which the alleged merit of the petition leak through. Therefore the court has a duty to hear the petition on merits before a final is made.

#### **Preservation of the Substratum of the Petition**

45. The 1<sup>st</sup> interested party has been heading the Finance department since 2012 as Senior Accountant till her appointment as finance officer. The minutes of the council filed by the petitioner further indicate that she has been the acting finance officer since July 2019. The question that arises is whether granting or denying the orders sought would make any difference on the responsibilities by the 1<sup>st</sup> interested party.

46. I see no effect because there is no other Head of Finance department other than the 1<sup>st</sup> interested party. She will therefore still continue to play the role of the finance officer but in an acting capacity on the basis of the interim orders given on May 26, 2022, and the letter appointing her to act as such. This is in order to protect the substratum of the petition.

#### **Public Interest**

47. Public interest is a major factor to consider in determining whether to grant or deny conservatory orders. Without clear case of violation of the law and respondent's Regulation, the public interest dictates that the decisions of the respondent's council, in recruiting the staff of the university should not be hindered by the court.

48. However as observed above, the materials before the court raise suspicion of a violation of the law or Regulations by the respondent's council while recruiting the 1<sup>st</sup> interested party to the position of finance officer. She allegedly met the requirements for the appointment 3 months after the same council had rejected her appointment for failure to meet requirements. I find that it is not in the public interest for her to continue discharging duties of the substantive Finance Officer pending hearing and determination of the petition herein.

49. In conclusion and without going to the details of the petition, I grant the conservatory order sought in prayer (c) of the notice of motion dated May 20, 2022 with costs on ground of the inherent merit of the case, public interest and in order to preserve the substratum of the case.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF FEBRUARY, 2023.**



**ONESMUS N MAKAU**

**JUDGE**

**Order**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**

