



REPUBLIC OF KENYA



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**Lolmingani & another v Lelelit & another (Employment and Labour Relations
Petition E019 of 2022) [2023] KEELRC 280 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 280 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E019 OF 2022**

DN NDERITU, J

FEBRUARY 2, 2023

**CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 27(1) & (2), 28, 29(D), 41, AND 47 CONSTITUTION OF KENYA AND IN
THE MATTER OF CONTRAVENTION SECTION 58(4)(A) &(5), AND 58A, COUNTY
GOVERNMENT ACT AND IN THE MATTER OF:IRREGULAR AND UNLAWFUL
APPOINTMENT AND CONTEMPORANEOUS REMOVAL FROM OFFICE OF THE
CHAIRPERSON AND MEMBER OF THE SAMBURU COUNTY PUBLIC SERVICE BOARD**

BETWEEN

PAUL LOLMINGANI, CHAIRMAN 1ST PETITIONER

LINUS LENOLNGENJE, MEMBER 2ND PETITIONER

AND

**HON. JOHNATHAN LATI LELELIT GOVERNOR, COUNTY GOVERNMENT
OF SAMBURU 1ST RESPONDENT**

**HON. FRED LEKOREN LANGEES SPEAKER, COUNTY ASSEMBLY OF
SAMBURU 2ND RESPONDENT**

RULING

I. Introduction

1. In a petition dated November 21, 2022 drawn by Akola Advocates & Associates the Petitioners are seeking the following -

1. The Honourable Court be pleased to determine the following questions
 - i. Whether the authority, power and/or discretion of the 1st and 2nd Respondent to facilitate empanelment of a recruitment panel and ultimate recruitment of members



of the County Public Board is amenable and/or subject to oversight and supervision by the Honourable Court.

- ii. Whether the decision by the 1st Respondent to empanel a selection panel for the recruitment of a chairperson and one member of the Samburu County Public Service Board, violates the 1st Respondents legal authority donated under Section 58A, [County Government Act](#).
 - iii. Whether the impugned process commenced by the Respondents violates the Petitioner's fundamental rights and freedoms and the same is for immediate vacation and setting aside.
- II. The Honourable Court be pleased to issue the following Orders That:
- i. A declaration be and is hereby issued to declare that the commenced process of recruitment of a chair person and one member of the Samburu County Public Board, including the appointment of the selection panel violates the petitioners' rights to fair labour practices, due process, equal protection of law and non-discrimination, right to human dignity, freedom and security of the person, right to property, right to fair administrative action and right to fair hearing enshrined in Articles 27,28, 29, 40, 47 and 50 of the [Constitution](#) as particularizes in this Petition, and further violates the values of public service and national values under Article 232 and 10, Constitution respectively.
 - ii. A judicial review order of certiorari be and is hereby issued calling up and quashing the impugned decision of the 1st Respondent dated October 28, 2022 and referenced SCG/CA/CPSB/SP Vol 3/22; and all consequential actions thereon.
 - iii. A judicial review Order of prohibition be and is hereby issued barring the 1st and 2nd Respondents from in any way howsoever, commencing and proceeding with the process of recruitment of a chairperson and one member of the Samburu County Public Service Board, including the appointment of the Selection panel, in respect of the Petitioners' offices during pendency of their lawful tenure.
 - iv. The Hon Court be pleased to award a reasonable amount in general damages for the violations of the Petitioners' fundamental rights and freedoms, as evinced herein.
 - v. Costs of the Petition be awarded for each of the Petitioners on a full indemnity basis.

2. Along with the petition the Petitioners filed a notice of motion of even date under a certificate of urgency seeking, *inter alia*, some interim conservatory orders in the following terms –

1. That the Honourable Court be and is hereby pleased, to certify the Application herewith as urgent, and the same be heard *ex-parte* at first instance.
2. That pending the hearing and determination of this Application inter-partes or until further orders of this Honourable Court, the Honourable Court be and is hereby pleased to issue an appropriate temporary Conservatory order staying, restraining, and injuncting the recruitment of a chairperson and one member of the Samburu County Public Service Board including injuncting the appointment and/or operationalization of the selection panel nominated via the 1st Respondent's letter dated October 28, 2022 and Ref SCG/CA/CPSB/ Vol.3/22; and all consequential actions thereon in respect of the Petitioners' offices including restraining the vetting of nominees to the Samburu County Public Service Selection Panel.



3. That pending the hearing and determination of the Constitutional Petition, or until further orders of this Honourable Court, the Honourable Court be and is hereby pleased to issue an appropriate temporary Conservatory order staying, restraining and injunctioning the recruitment of a chairperson and one member of the Samburu County Public Service board including injunctioning the appointment and/or operationalization of the selection panel nominated via the 1st Respondent's letter dated October 28, 2022 and Ref SCG/CA/CPSB/Vol 3/22; and all consequential actions thereon in respect of the Petitioners' offices including restraining the vetting of nominees to the Samburu County Public Service Board Selection Panel.
 4. That an urgent date, and such further orders be set for the expeditious inter-partes hearing of the Petition.
 5. That this Honourable Court be pleased to grant such other appropriate relief as it may deem fit.
 6. That the costs of this Application be provided for on a full indemnity basis.
3. When the matter was brought to court for consideration of the above application this court issued some conservatory orders in the following terms –
1. That the said application be and is hereby certified urgent.
 2. That pending the hearing and determination of this application interpartes or until such further and or orders of this court a conservatory order of injunction be and is hereby issued staying, restraining, and injunctioning the recruitment of a chairperson and one member of the Samburu County Public Service Board, including appointment and or operationalization of the selection panel nominated by the 1st Respondent via a letter dated October 28, 2022 referenced SCG/CA/CPSB/SP/VOL3/22 and the vetting of the nominees to the Samburu County Public Service Board by the selection panel.
 3. That the said application, the petition, and a copy of this order be served upon the Respondents immediately.
 4. That the parties herein and or their Counsel appear before Court 1 virtually (Wasilwa J) on Tuesday, 6th December, 2022 for further orders and or directions.
4. On December 9, 2022 the 1st Respondent (the Applicant), through Mirugi Kariuki & Co Advocates filed a Notice of motion (the application) under a certificate of urgency seeking to set aside the aforementioned interim *ex-parte* conservatory orders in the following terms –
- a. That this Honourable court do certify the matter as urgent.
 - b. That this Honourable court be pleased to discharge the interim orders granted on November 23, 2022 be vacated and or discharged.
 - c. That the Petitioners be condemned to pay the costs of this application.
5. When the matter came up in court for directions on December 15, 2022 the court ordered that the application for setting aside of the *ex-parte* conservatory orders be heard and disposed of first pending the inter partes hearing of the notice of motion dated November 21, 2022. The court further ordered that the said application be canvassed by way of written submissions by counsel for all the parties. This ruling is therefore in regard to that application.



6. The application is expressed to be brought under the provisions of Rule 25 of the [Constitution of Kenya \(Protection of Fundamental rights and freedoms Practice and Procedure Rules\)](#). It is founded on the grounds on the face of it and supported by the affidavit of Hon Jonathan Lati Lelelit, the Governor Samburu County, sworn on December 8, 2022 with several annexures thereto.
7. The application is opposed and both Petitioners filed a replying affidavit each sworn on December 13, 2022.
8. Counsel for the Applicant filed written submissions on December 20, 2022 and Counsel for the Petitioners filed on even date. With the leave of court, Counsel for the 1st Respondent filed supplementary submissions on December 22, 2022.
9. The 2nd Respondent has so far remained dormant and or silent in regard to this application notwithstanding that he appointed Simiyu, Opondo, Kiranga & Co, Advocates to act for him in this petition as per a notice of appointment filed in court on December 9, 2022.

II. The Applicant's Case

10. The position taken by the 1st Respondent is contained in the supporting affidavit to the application, the written submissions and the supplementary written submissions by his Counsel. The 1st Respondent's case is that the Petitioners deliberately failed and or refused to disclose material facts in their petition and the application for the interim conservatory orders with a view of misleading the court and indeed misled the court into granting the *ex parte* interim conservatory orders alluded to above.
11. In the supporting affidavit the Applicant states that the 1st and 2nd Petitioners were appointed as chair and member of the Samburu County Service Board (the Board) respectively by the former governor of the County vide letters of appointment dated July 18, 2019.
12. On the same day that they were appointed, and the Applicant accuses the Petitioners of not disclosing this fact, the governor then, as the appointing authority, issued them with letters suspending them from serving in the Board. The Applicant has attached the said letters of suspension. Further, the Applicant states that in April, 2019 the Petitioners along with other persons, including the then governor, were arraigned in court and charged with various economic and corruption crimes under the [Anti-Corruption and Economic Crimes Act, 2003](#). A copy of the charge-sheet is attached, and again the Applicant accuses the Petitioners of not disclosing this fact to the court in their petition and the application for the ex-parte interim conservatory orders.
13. It is alleged that the said criminal proceedings are still pending in court and that the trial court issued orders barring the Petitioners from accessing the office until the case is heard and determined. The said order has not been availed as evidence and for scrutiny by this court.
14. The Applicant also accuses the Petitioners of not disclosing that they have never taken oath of office in order to assume the positions that they hold in the Board. The deponent alleges that by virtual of the pending criminal proceedings the Petitioners are not fit to hold the positions that they were appointed to in the Board.
15. The written submissions and the supplement thereto by the Counsel for the Applicant shall be considered in the part for determination in this ruling.

III. The Petitioners' Case

16. The Petitioners have opposed the application to set aside the ex-parte interim conservatory orders by way of two separate replying affidavits and through the written submissions filed by their Counsel.



The submissions by Counsel shall be considered in the succeeding section, alongside the reasoning of this court in determining the issues in controversy.

17. In his replying affidavit, the 1st Petitioner states that he was appointed the chair of the Board *vide* Gazette Notice No 6889 of July 26, 2019 in accordance with the provisions of the [Public Appointments \(County Assemblies Approval\) Act, 2017](#) while the 2nd Petitioner was appointed a member thereof.
18. The deponent states that they were each issued with a letter of appointment dated July 18, 2019 and they both assumed their respective positions in the Board. He states that they are not state officers as envisaged under Articles 74 and 260 of the [Constitution](#) and Section 40 of the [Leadership and Integrity Act](#).
19. He states that they are both on a non-renewable fixed term running from July 18, 2019 to July 15, 2025 as provided for in the letter of appointment. He states that they both properly assumed office in accordance with Section 58A of the [County Governments Act](#).
20. He is categorical that while he is one of the accused persons as alluded to in the preceding part of this ruling, as alleged by the Applicant, the pendency of that case does not affect the validity of his appointment as the chair of the Board and that of the 2nd Petitioner as a member thereof, both of which were carried out in accordance with the law. He pleads that they and the other accused persons in the criminal case remain innocent until proven guilty and that the Petitioners may only be removed from the Board in accordance with the law and not in any other manner. He states that they are entitled to benefit and protection of both substantive and procedural law in case of removal from the positions that they hold in the Board.
21. He argues that what the Respondents are intending to achieve by appointing other officers to the positions that he and the 2nd Petitioner hold in the Board is their removal from office through unlawful and un-procedural means. In any event, he states that the Board is quorate in the absence of the Petitioners, who are on suspension, and hence he states that the business of the Board is going on or should go on without any hinderance until their suspension is lifted, or they are procedurally and lawfully removed from office, or the criminal case is concluded in their favour which would lift the suspension automatically.
22. He states that if the conservatory interim orders are vacated the Respondents will proceed to carry out the unlawful appointments and put the business of the Board in jeopardy with double appointments and this shall occasion wastage of public resources.
23. The 2nd Petitioner has deposed his replying affidavit along the same lines as the 1st Petitioner as alluded to above. Further, he states that while they are both among the accused persons in the impugned criminal case the said charges have no bearing to their capacity and ability to hold the positions that they do in the Board wherein he is a member.
24. He has annexed an application by the Director of Public Prosecutions (DPP) seeking to withdraw the criminal case pleading that the criminal case is without merit and is of no consequence or relevance to this petition.
25. He states that they are legally in office and they may only be removed in accordance with the law. He states the Petitioners are at half-pay due to the suspension from office but the Applicant has deliberately opted to mislead the court that they are on full-pay. He reiterates that the Board is quorate as out of six members four members can transact business in accordance with the law.
26. He states that Counsel for the Applicant is fully aware of the pending withdrawal of the criminal charges and that the attempt to unlawfully remove the Petitioners from the Board is intended to



unlawfully deprive them of the opportunity to resume their full-time duties in the Board in view of the eminent collapse of the criminal case.

27. Both the Petitioners state that they did not deliberately fail to disclose or withhold any material facts or evidence to this court that may have led to the court arriving at a different position other than issuing the interim conservatory orders.
28. It is on the basis of the foregoing that the Petitioners have sought that the application to set aside the said *ex-parte* interim conservatory orders be dismissed with costs.

IV. Determination

29. This court has carefully gone through the application, the supporting affidavit, the replying affidavits, and the written submissions by Counsel for the parties. There is only one issue that commends itself to this court for determination – Should this court set aside the *ex-parte* interim conservatory orders issued on November 23, 2022?
30. The impugned *ex-parte* conservatory interim orders are set out verbatim in an earlier part of this ruling. The Applicant has applied to set aside the said interim conservatory orders on one main ground – That the Petitioners obtained the said interim conservatory orders without disclosing all the material facts.
31. The said material facts that the Applicant proffers that the Petitioners failed to disclose, and which the Applicant submits misled the court in issuing the said *ex-parte* interim conservatory orders are – That upon appointment to their respective positions in the Board the relatives were immediately suspended from office, that the Petitioners have never taken the oath of office, and that the Petitioners are facing criminal charges which are still pending in the anti-corruption court at Milimani in Anti-corruption case No 3 of 2019.
32. According to the Applicant had the Petitioners disclosed the above facts this court should not have issued the impugned *ex-parte* interim conservatory orders.
33. There are by now placed on record facts and truths that are not or should not be in dispute. One, the 1st and 2nd Petitioners were procedurally and regularly appointed as chair and member of the Board respectively vide appointment letters both dated July 18, 2019. Their appointments were notified in Gazette Notice No 6889 of July 26, 2019.
34. Two, and this has now been disclosed by the Applicant and admitted by the Petitioners, the Petitioners were suspended from office by the appointing authority, the governor, on July 18, 2019 *vide* letters of even date. It is therefore imperative that the Petitioners were suspended on half-pay on the same day that they were appointed.
35. Three, the Petitioners have not been removed from their respective positions to this day but have remained in suspension at half-pay as per the respective letters of suspension alluded to above. There are no internal or court proceedings pending seeking removal of the Petitioners from the positions that they hold in the Board.
36. Four, the Petitioners, as per the respective letters of appointment, unless lawfully and procedurally removed from office, were to remain in office from July 18, 2018 to July 15, 2025.
37. Five, the Petitioners, along with others, are facing economic crimes and or corruption charges in Milimani ACCC No 3 of 2019. The said case is still pending in court.
38. It is the foregoing facts and or truths that face this court in determining whether, had the Petitioners disclosed all the foregoing would the court have issued the *ex-parte* interim conservatory orders as it



- did. Viewed from a converse angle, now that the court is seized of all the foregoing facts and or truths from both sides, would the court in the prevailing circumstances still issue the interim conservatory orders, as it did? Better still, if the application to set aside the *ex-parte* interim conservatory orders is viewed in opposition to the application for the conservatory orders, would this court still issue the interim conservatory orders?
39. Counsel for the Applicant has submitted, without any evidence to support that allegation, that the Petitioners have been barred by the anti-corruption court from accessing the offices of the Board and hence they cannot execute their functions. Counsel submits that it is in the foregoing circumstances that the County Government of Samburu commenced the process of replacing the Petitioners in the Board.
 40. As indicated above the Petitioners are accused by the Applicant of not disclosing that they had been suspended from the Board on the same day that they were appointed, that they were facing the corruption charges in the aforementioned case, and that they had not taken the oath of office.
 41. Counsel for the Applicant has submitted that by virtual of all the foregoing the Petitioners are not qualified for the positions that they hold in the Board. Counsel submits that the Petitioners have failed to meet the leadership and integrity standards set out under Chapter six of the [Constitution](#), [Leadership and Integrity Act](#), and [Public Officers Ethics Act](#).
 42. Counsel submits that as at the time of appointment the Petitioners were already facing the corruption charges and they ought not to have been so appointed. Counsel submits that all the other members of the Board took oath of office but the Petitioners did not and as such they have never assumed their respective positions in the Board. Counsel has cited several decisions in support of this argument including [Bernard Ng'eno & Another V County Government of Bomet](#) (2019) eKLR.
 43. On the duty of an Applicant to disclose all facts when seeking *ex-parte* interim orders Counsel has cited [Aviation & Airport Services Workers Union \(K\) V Kenya Airport Authority & Another](#) (2014) eKLR, [Halima Haji Sarah V Multiple Hauliers \(E.A\) Limited & Another](#) (2022) eKLR, [Margaret Wangui Karugu V John Njenga Karugu & Another](#) (2018) eKLR, and [Gerald Munene Mugo V Muriithi Maganio & 2 Others](#) (2016) eKLR, among others.
 44. On the consequences of non-disclosure of material facts, Counsel has submitted that the interim *ex-parte* orders issued should be set aside and such a guilty party should not be allowed to obtain similar orders. He has cited [Sita UK Group Holdings Ltd V Surrwys](#) (2010) EWHC 698 (QB).
 45. Counsel for the Petitioners on the other hand has submitted that Counsel for the Applicant has mixed-up issues and appears to be challenging the fitness of the Petitioners to hold the positions that they do in the Board. He submits that the Petitioners are in office legally and the only way to remove them is in accordance with the law and not any other manner. He submits that had the Respondents been allowed to proceed with the intended recruitment of a chair and member of the Board the Petitioners would have been unlawfully removed from their positions. He submits that if the Applicant or indeed any other person is dissatisfied with the Petitioners occupying the positions that they do in the Board, the procedure for their removal should be based on the applicable law and the same followed to the letter.
 46. Counsel has cited The [Owners of Motor Vessel Lilian S V Caltex Kenya Ltd](#) as cited and followed in [Bahadurali Ebrahim Shamji V Al Noor Jamal & 2 Others](#) (*supra*) in advancing that the facts or materials alleged to have been withheld must be relevant and of value to the court in making the determination of the issues in contest. Counsel submits that even if all the allegations now made by the Applicant had been disclosed to the court, the court ought to have arrived at the same position and issue the conservatory orders as it did. He cites [Amos Mathenge Kabuthu V Simon Peter Mwangi](#)



- (2015) eKLR in support of the argument that only facts or evidence that would have had a bearing to the court's decision may be deemed to be material to the case. Counsel submits that if a fact or evidence would not have had a bearing in the direction that the court takes, such fact or evidence, as blatant as it may be, is not material in the circumstances.
47. This court has carefully gone through all the materials placed before it, including the affidavits, the written submissions, and the authorities cited. It is in the considered view of this court that what the Applicant is seeking through this application is for this court to find and ostensibly declare that the Petitioners are not fit to hold the positions that they do in the Board and hence declare that their positions should be taken up by others and that the Respondents should be allowed to go on with the purported recruitment and appointment.
 48. There is no dispute that the Petitioners were lawfully and procedurally appointed to the positions that they hold and that they have been on suspension at half-pay since July 18, 2019. Even if the Petitioners were unlawfully so appointed, it would still be incumbent upon the Respondents and the County Government of Samburu to follow the law and or obtain appropriate orders from a competent court for the removal of the Petitioners from office.
 49. Appointing a new chair and a member of the Board is not the proper and lawful way of removal of the Petitioners from office. Such a move is recipe for disaster and waste of public resources as it would result in double occupancy of the same positions and double expenditure on officers occupying the same positions. This is the very mischief that the Applicant is allegedly seeking to arrest.
 50. The Petitioners have exhibited their respective letters of appointment indicating that they should remain in office until July 15, 2025. The only way that the Petitioners may be removed from office and new appointments made is in accordance with the law or through a valid court order to that effect.
 51. If the interim conservatory orders are vacated it would amount to this court countenancing the removal of the Petitioners from their positions without the Respondents following the law or giving the Petitioner a hearing. The Petitioners are certainly entitled to benefit and protection of the law and justice demands so.
 52. It is in the considered view of this court, and I agree with Counsel for the Petitioners, that for interim *ex-parte* orders to be set aside on the basis of non-disclosure of material facts, and or evidence alleged to have been withheld such must be so relevant, germane, and pertinent to the issues in controversy that had the same been disclosed the court may not have issued the said orders.
 53. While the Petitioners failed to disclose the facts that have now been placed on record by the Applicant, this court is of the considered view that the said facts are not material to the effect that in their consideration the court may have failed to issue the *ex-parte* interim conservatory orders. In fact, now that the said materials have been placed before court, it is in the considered view of this court that even now the interim orders would still issue to preserve the *status quo* pending the inter-partes hearing of the application.
 54. The Petitioners have not been found guilty in the criminal case, they have not been lawfully and procedurally removed from office, and they have remained in office, albeit on suspension, since 2019. The Respondents and or the County Government of Samburu cannot now wake up from the slumber that they have been in since 2019 and purport to terminate the Petitioners without due process.
 55. For all the reasons stated above, this court declines to vacate the interim *ex-parte* conservatory orders.



V. Costs

56. Ordinarily, costs follow event. However, this court orders that costs of the application be in the petition.

VI. Orders

57. Flowing from the foregoing this court orders that the Notice of Motion dated December 8, 2022 by the 1st Respondent be and is hereby dismissed with costs in the petition.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2023.

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DAVID NDERITU

JUDGE

