



Kenya County Government Workers Union v County Government of Bomet & another (Cause E016 of 2022) [2023] KEELRC 696 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 696 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E016 OF 2022
DN NDERITU, J
MARCH 22, 2023**

BETWEEN
KENYA COUNTY GOVERNMENT WORKERS UNION CLAIMANT
AND
COUNTY GOVERNMENT OF BOMET 1ST RESPONDENT
COUNTY PUBLIC SERVICE BOARD OF BOMET 2ND RESPONDENT

RULING

1. Vide a Memorandum of claim dated 24th October, 2022 filed through James Oketch & Co Advocates the Claimant commenced this cause praying for judgment in the following terms –
 1. A declaration that the Claimant’s members’ Fundamental Rights and Freedoms under articles 41, 47, and 50 of the Constitution have been violated by the Respondents.
 2. A declaration that the notice of termination letters/extension of contract letters together with the letters of unilateral conversion of employment terms in relation to the Claimant’s members are irregular, unlawful and contrary to the law hence null and void ab initio.
 3. An order do issue quashing the decisions as contained in the notice of termination letters/extension of contract letters together with the letters of unilateral conversion of employment term is in relation to the Claimant’s members; against the Respondents, its agents, officers or persons acting under their instructions.
 4. An order do issue against the Respondents, its agents, officers or persons acting under their instructions from arbitrarily, subjectively, and unlawfully reviewing the Claimant’s members’ salary/terms and conditions downwards.
 5. An order do issue against the Respondents, its agents, officers or persons acting under their instruction prohibiting them from interviewing, recruiting and/or employing replacement



labour and/or employees in the same position, and to perform the same or similar work as the Claimant's members.

6. An order do issue unconditionally reinstating the Claimant's members to their former position without any loss of benefits and without any conditionality and in terms and conditions in accordance with the *Employment Act*.
 7. An order do issue to the Respondents to pay all pending salaries, benefits and emoluments that are due and owing to the Claimant's members.
 8. In the alternative to prayer (6) the Respondents be ordered to fully compensate the Claimant's members for the unlawful and unfair termination being twelve(12) months gross salary as at the time of their termination and that the Claimant's members be paid actual pecuniary loss suffered since the date of termination, including salary and allowances as would have been earned, and all other accruing allowances, from their respective dates of appointment to date.
 9. In the alternative to prayer (6) the Respondent be ordered to the Respondents issue the Claimant members with a Certificate of Service.
 10. Costs of this Claim.
 11. Any other relief that this Honourable court may deem just to grant.
2. Alongside the Memorandum of claim the Claimant filed a verifying affidavit, witness statements, list of documents and bundles and copies of the said documents.
 3. Contemporaneously with the claim the Claimant also filed a Notice of Motion (the application) of even date under a certificate of urgency seeking the following orders –
 1. The Application be certified as urgent and service be dispensed in the first instance.
 2. An interlocutory injunction of stay do issue against the Respondents, it agents, officers or persons acting under their instructions from implementation the decisions as contained in the notice of termination letters/extension of contract letters together with the letters of unilateral conversion of employment terms in relation to the Claimant's members pending the hearing and determination of this Application and Claim.
 3. A temporary injunction do issue against the Respondents, its agents, officers or persons acting under their instruction from arbitrarily, subjectively and unlawfully reviewing the Claimant's members salary/terms and conditions downwards pending the hearing and determination of this application and Claim.
 4. A temporary injunction do issue against the Respondents, its agents, officers or persons acting under their instruction prohibiting them from interviewing, recruiting and/or employing replacement labour and/or employees in the same position, and to perform the same or similar work as the Claimant's members pending hearing and determination of the Application and Claim.
 5. The costs of and occasioned by this Application be awarded to the Claimant/Applicant.
 4. The application is expressed to brought under the provisions of sections 41, 43, and 45 of the *Employment Act*, rules 17(1)(4)(5) and rule 28 of the *Employment and Labour Relations Court (Procedure) Rules (2016)*, articles 10(2)(b)(c), 27(1), 28, 41(1)(2)(a) and 47(1)(2) of the *Constitution* of Kenya, and all other enabling provisions of the law.



5. The application is based on the grounds on the face of it and supported with the affidavit of Roba S. Duba, the National Secretary General of the Claimant, sworn on 24th October, 2022 with voluminous annexures thereto. The same deponent swore a further affidavit on 30th December, 2022.
6. When the matter came up in court on 27th October, 2022 for the ex-parte hearing of the application under Certificate of urgency this court issued interim orders in the following terms –
 1. That the said application be and is hereby certified urgent.
 2. That pending the hearing and determination of the said application an ex-parte interlocutory injunction be and is hereby issued against the Respondents, their agents, officers or persons acting under their instructions or others howsoever from implementing the decisions as contained in the notices of termination letters and or extension of contract letters together with the letters of unilateral conversion of employment terms in relation to the members of the Claimant herein.
 3. That pending the hearing and determination of this application inter-partes an ex-parte temporary injunction be and is hereby issued against the Respondents, their agents, officers, persons acting under their instructions, or others howsoever, from arbitrarily subjectively, and unlawfully reviewing the salaries and or terms and conditions or employment of the members or the Claimant.
 4. That pending the hearing and determination of this application inter-partes an ex-parte temporary order of injunction be and is hereby issued against the Respondents, their agents, officers, or persons acting under their instructions, or howsoever from interviewing, recruiting, and or employing replacement labour and or employees in the same positions and to perform the same or similar work as currently performed by the concerned members of the Claimant.
 5. That this order together with the application and the pleadings herein be served upon the Respondents by close of business on Monday 31st October, 2022.
 6. That the parties and or their respective Counsel appear before this court virtually on Tuesday, 8th November, 2022 for further orders and or directions.
7. The above interim orders have since been extended from time to time and they remain in force pending the hearing and determination of the application inter-partes.
8. In response to the application the 1st Respondent through Andrew N. Matwere, Advocate filed a notice of Preliminary objection (PO) dated 4th November, 2022 in the following terms –
 1. That this Petition together with the Notice of Motion Application are premature before this Honourable court for reasons that, the same offends the doctrine of exhaustion which requires that, a party exhausts all available dispute resolution mechanisms provided by the law before filing a dispute in court, in particular;
 - a. Section 87(2) of the *Public Service Commission Act* No. 10 of 2017, read together with section 77 of the *County Government Act* No. 17 of 2012, a person shall not file any legal proceedings in a court of law with respect to matters within the jurisdiction of the Public Service Commission to hear and determine appeals from the County Public Service unless the appeal procedure provided for under section 87(2) has been exhausted.



- b. Section 86 of the *Public Service Commission Act* decrees that any person who is dissatisfied or affected by a decision of any authority or person in respect of a County Public Service may appeal to the Public Service Commission.
9. The 1st Respondent also filed grounds of opposition but I have not seen on record a replying affidavit responding to the facts raised in the application and the supporting affidavit.
 10. The 2nd Respondent filed a replying affidavit sworn by Peter Kiprono Bii, the Chief Executive Officer, in opposition to the application.
 11. However, the Claimant has filed an application dated 14th February, 2023 alleging that the Respondents are in contempt of the said interim orders and the contempt proceedings are pending the hearing and determination before this court.
 12. The effect of the interim orders issued by the court on 27th October, 2022 is that status quo prior to the issuance of the letters or contracts changing the terms and conditions of employment of the affected members of the Claimant be maintained and as such the said term contracts and or letters of change of terms were of no consequence until the application is heard inter-partes and determined. Without prejudice to the pending application for contempt of court alluded to above, this court presumes that the status quo alluded to above holds and should hold until the hearing and determination of the application as that is what the court ordered in the said ex-parte interim orders.
 13. By consent of Counsel for the parties it was agreed that the application be heard by way of written submissions. Counsel for the Claimant filed his submissions on 9th January, 2023, Counsel for the 1st Respondent filed on 19th January, 2023, and the 2nd Respondent, acting in person, filed on 19th January, 2023 through Peter Kiprono Bii, the Chief Executive officer.
 14. This court has carefully gone through the Memorandum of claim, the application and the Supporting affidavit and the annexures thereto, the further affidavit, the PO and grounds of opposition by the 1st Respondent, the replying affidavit by the 2nd Respondent, and the written submissions by all the parties.
 15. It is noteworthy that the interim orders that the Claimant is seeking in the application pending the hearing and determination of the main cause are to a large extent a replica of the orders that are pleaded in the main cause in the prayers set out at the introductory part of this ruling.
 16. In summary, the Claimant alleges that some of its members who have worked for the 1st Respondent and recruited by the 2nd Respondent from 2015 or diverse dates, and who have over time or by operation of law become or are deemed permanent and pensionable are at the risk of wrongful dismissal or unlawful termination following the Respondents' unilateral decision to change the terms and conditions of service purporting to convert the permanent and pensionable terms into term contracts without the consent and or consultation of the affected employees.
 17. The Respondents take a different view to the effect that the affected employees are not and have never been on permanent and pensionable terms. To a large extent, the Respondents allege that the affected members were employed in 2015 on two years term contracts which were to expire in 2017 but they continued to serve without renewal of the said contracts.
 18. The gist of this cause and the bone of contention is whether in those circumstances the Respondents can issue new short-term contracts which in effect mean that the affected employees may leave upon expiry of those new contracts if they fail to successfully apply for and secure the same jobs that they currently hold.



19. The 1st Respondent is of the view that this court has no jurisdiction to hear and determine this cause. Of course, the Claimant is of a contrary opinion.
20. This is not the first time that the Respondents are experiencing a similar situation as the Claimant has variously referred to Kericho ELRC No. 225 of 2016 where similar issues were the subject matter. This court has perused the judgment and ruling in that cause.
21. After due consideration of all the materials placed before this court, I take the view that for this court to render holistic determination of the issues in controversy between the parties herein, it would make logical and legal sense for this court to hear the main cause as quickly as practically possible and have the issues determined and settled once and for all.
22. No matter how careful this court may wish to be in rendering a ruling on the application at this stage, it is my considered view that based on the materials placed before the court a detailed ruling on the instant application is likely to prejudge the main cause and delve into issues that shall determine the rights and obligations of the parties before the main cause is heard.
23. Suffice it at this juncture to state that the Claimant has made a prima facie case with a probability of success and if the status quo prior to the filing of this cause is not maintained it is likely to cause irreparable loss or damage to the affected members of the Claimant. Clearly, even the balance of convenience tilts heavily in favour of granting of the interim orders – See *Geilla V Cassman Brown*.
24. In the circumstances, and for the reasons stated in the foregoing paragraphs, and in the interest of justice, this court orders and directs as follows –
 - a. That the interim orders given by this court on 27th October, 2022, as expressed in the formal court order issued on 28th October, 2022 and as extended from time to time be and are hereby confirmed to subsist and maintain pending the hearing and determination of the main cause. For clarity the said orders shall now read as follows –
 - i. That pending the hearing and determination of main cause an interlocutory order of injunction be and is hereby issued against the Respondents, their agents, officers, or persons acting on their behalf, instructions, or behest, or others howsoever from implementing the decisions as contained in the notices of termination, letters and or extension of contract letters together with the unilateral letters of the Respondents purporting to interfere with the terms and conditions of employment for the affected members of the Claimant.
 - ii. That pending the hearing and determination of the main cause an interlocutory order of injunction be and is hereby issued against the Respondents, their agents, servants, officers, or others howsoever from reviewing or interfering with the salaries, allowances, or any other payments due and payable to the affected members of the Claimant, or any other terms and conditions of employment for the affected members.
 - iii. That pending the hearing and determination of the main cause an interlocutory order of injunction be and is hereby issued restraining the Respondents by themselves, agents, officers, or others howsoever from advertising, interviewing, recruiting, or employing persons to replace or occupy the vacancies and or positions occupied by the affected members of the Claimant, or in any other manner whatsoever replacing the affected members of the Claimant with persons to perform the same or similar work or duties as that of the affected members of the Claimant.



- iv. The costs of the application shall be in the cause.
- b. That for avoidance of doubt the status quo to be maintained is that subsisting and obtaining prior to the issuance of the letters, notices, contracts, or any other documents, correspondences, or instruments purporting to change or alter the terms and conditions of service of the affected members of the Claimant.
- c. That for ends of justice this court shall now proceed to hear and determine the main cause on priority basis and preferably the hearing shall proceed by way of written submissions.
- d. That to achieve (c) above the Respondents are directed to file and serve all their responses, witnesses' statements and documents to the claim within 14 days of this ruling.
- e. That the Claimant is granted leave to file and serve any responses to (d) within 14 days of service.
- f. That The Claimant shall file and serve written submissions within the period stated in (e) above.
- g. That the Respondents shall file and serve their written submissions within 14 days of service by the Claimant as directed above.
- h. That Mention on 3rd May, 2023 to confirm compliance and take a date for judgment.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 22ND DAY OF MARCH, 2023

DAVID NDERITU

JUDGE

