



**Nabulindo v County Public Service Board, Busia County & 2 others (Employment and Labour Relations Petition E013 of 2022) [2023] KEELRC 686 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 686 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS PETITION E013 OF 2022**

**JW KELI, J  
MARCH 16, 2023**

**BETWEEN**

**KENNETH NABULINDO ..... PETITIONER**

**AND**

**COUNTY PUBLIC SERVICE BOARD, BUSIA COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BUSIA ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY SECRETARY, BUSIA COUNTY GOVERNMENT . 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner/Applicant lodged a petition in court dated 6<sup>th</sup> December 2022 received in court on the 9<sup>th</sup> December 2022n seeking the following reliefs against the respondents:-
  - i. A declaration be issued that the petitioner’s enjoyment of the rights and fundamental freedoms secured in the Bill of Rights under Article 25,27,35,41, 47.50 and 51 of the Constitution have been threatened and infringed or are threatened by the Respondents failing, neglecting and or refusing to give the petitioner a hearing for the adverse administrative process of deploying and or demotion.
  - ii. A declaration that the deployment of the Petitioner by the Respondents contained in the letter dated 23<sup>rd</sup> November 2022 relating to the Petitioner herein and all processes flowing from the said letter were procedural, illegal null and void.
  - iii. A declaration that the Petitioner continues in the Respondents service in a position of Municipal Manager And Secretaryto The Municipal Boardand for that purpose the petitioner to report to the Municipal Manager And Secretaryto the Municipal Boardto perform those functions and duties allocated to the said office and to continue in the service of the County Government Public Service in accordance with the law.



- iv. In the alternative, an order be issued compelling the Respondents to compensate the petitioner for the remainder of his term in the Municipal Board and therefore determine the employment relationship herein.
- v. An order of a permanent injunction restraining the Respondents jointly or severally, either acting in person, or through its agents, employees, servants. And/or by any person and/or entity acting or purporting to act on their joint or several instructions, from implementing and enforcing the impugned letter dated 23<sup>rd</sup> November, 2022 relating to the Petitioner herein.
- vi. The Court does find that the Petitioner is entitled to an award of damages for violation of the Petitioner's constitutional rights.
- vii. The Respondents be condemned to apply the costs of this petition
- viii. Any other or further orders, writs and or directions this Honourable court deems fit and just to grant.

### **Notice Of Motion**

2. The Petitioner/applicant on even date also filed Notice of motion of even date of the petition seeking the following reliefs:-
  - a. That this application be certified urgent, service be dispensed with and heard exparte in the 1<sup>st</sup> instance.
  - b. That this honourable court be pleased to issue temporary injunctions restraining the Respondent jointly or severally, either acting in person, or through its agents, employees, servants, and/or by any person and/or entity acting or purporting to act on their joint or several instructions from implementing and enforcing the impugned letter dated 23<sup>rd</sup> November, 2022 relating to the petitioner herein until hearing and determination of this applications.
  - c. That this Honourable court be pleased to issue temporary injunctions restraining the Respondents jointly or severally, either acting in person, or through its agents, employees, servants, and/or by any person and/or entity acting or purporting to act on their joint or several instructions, from implementing and enforcing the impugned letter dated 23<sup>rd</sup> November 2022 relating to the Petitioner herein until hearing and determination of this petition.
  - d. That a conservatory order be and is hereby issued staying the implementation and enforcement of the decisions of the Respondents purported transfer of the Petitioner and appointment Kennedy David Maende contained in the impugned letter dated 23<sup>rd</sup> November, 2022 relating the petitioner herein until hearing and determination of this petition.
  - e. That this honorable court be pleased to issue orders quashing and removing from this honorable court decisions, actions and undertaking done pursuant to the impugned letter herein dated 23<sup>rd</sup> November, 2022.
  - f. That this Honourable court be pleased to issue orders declaring the decision of the Respondents herein to separate the offices of the Municipal Manager and that of secretary to the Board as unlawful and illegal sine they offend section 14 (2) of the [Urban Areas and Cities \(Amendment\) Act](#) No. 3 of 2019, my position as Municipal Manager automatically made me the Secretary and Ex-Officio member of the Municipal Board constituted under Section 13 and 14 of the [Urban Areas and Cities Act](#) No. 13 of 2011.



- g. That this Honourable court be pleased to issue any such or further orders it deems fit and justifiable to grant in the circumstances.
3. Which application was based on the several grounds and the affidavit of Kenneth Nabalindo of even date annexed thereto. The grounds are as summarized below:-
  4. That Applicant was appointed by the 1<sup>st</sup> Respondent on behalf of the 3<sup>rd</sup> respondent as a Town Administrator, Job Group “P” on an inter alia permanent and pensionable terms.
  5. That Applicant served the Respondents jointly and severally in accordance with his term of service in the duration of his employment in the aforesaid capacity until 2019 when a new vacancy arose.
  6. That Applicant was employed by the 1<sup>st</sup> Respondent herein on behalf of the 3<sup>rd</sup> Respondent as a Municipal Manager on permanent and pensionable basis and on such other terms well within the knowledge of the Respondents herein having successfully done a competitive interview.
  7. That vide a letter dated 14<sup>th</sup> July, 2022, the 1<sup>st</sup> Respondent on behalf of the 3<sup>rd</sup> Respondent duly confirmed his appointment in the position of Municipal Manager having successfully completed the mandatory six (6) months of probation and satisfying the conditions precedent to his confirmation.
  8. That pursuant to the appointment aforesaid in paragraph 4 herein and as advised by his record attorneys herein by virtue of Section 14 (2) of the Urban Areas and cities ( Amendment ) Act No. 3 of 2019 his position as Municipal Manager automatically made him the Secretary and Ex-Officio member of the Municipal Board constituted under Section 13 and 14 of the Urban Areas and Cities Act No. 13 of 2011.
  9. That in utter disregard and misinterpretation of the mandatory provisions of the law and in particular section 14 (2) ( e ) of the Urban Areas and Cities ( Amendment ) Act No. 3 of 2019, the 3<sup>rd</sup> Respondent in a letter dated 10<sup>th</sup> March 2021 purportedly separated the office of the Board Secretary from that of the Municipal Manager.
  10. That applicant was advised by his Attorney herein that in designating Sections 13 A and 14 (2) of Amendment Act No. 3 of 2019 Parliament was cognizant of its obligations under Article 201 of the Constitution of Kenya, 2020 which inter alia include ensuring sustainable use of public resources.
  11. That he was advised by his record attorneys that the aforesaid acts of the 3<sup>rd</sup> Respondent are unlawful, Illegal and flies on the face of Section 14 (2) ( e ) of the Amendment Act No. 3 of 2019 referred to hereinabove since there is nothing in the parent Act No. 13 of 2011 nor the Amendment Act No. 3 of 2019 that either grants the 3<sup>rd</sup> Respondent or any respondent herein powers to vary the express provisions of the said statutes nor did parliament intend that the provisions therein be “ transitional” as the Respondents claim in their impugned letter and if in indeed parliament had intended the same to be transitory, the Respondents would have mooted advising the Law Reform Commission to “ harmonize” the Sections 13 A and 14(2) of the Amendment Act No. 3 of 2019 nor was there anything that would have stopped Parliament itself from stating so.
  12. That the 3<sup>rd</sup> Respondent in a subsequent letter dated 26<sup>th</sup> October 2022 wrote a further letter perpetuating its illegalities by purporting that the office of the Municipal Manager created under Section 28 of the Act No. 13 of 2011 and that of the Board Secretary created by Section 13 A of the Amendment Act No. 3 of 2019 are distinct offices. That he was advised by his record attorneys that by dint of Section 14 (2) of the Amendment Act NO. 3 of 2019 , the person appointed Board Secretary is one and same person appointed as Municipal Manager Under Section 28 of the Act No. 13 of 2011 and that nowhere within the wording of Section 14 ( 2) ( e) of Amendment Act No. 3 of 2019 or elsewhere



in the aforesaid statutes had parliament intended that the Act or provisions thereof be transitional in application.

13. That the overall objects of the Respondents were aimed at attaining some illegal and unlawful objectives punctuated by malice and political witch – hunt as shall be demonstrated below:-
14. That vide a letter dated 23<sup>rd</sup> November 2022, the 2<sup>nd</sup> Respondent issued and served the applicant with a deployment letter transferring him ( or his services) from a Municipal Manager to the Position of Principal Administrative Officer within the Department of Lands, Housing and Urban Development in an acting capacity in utter disregard of Principles of Labour relations.
15. That further to the impugned deployment aforesaid, and in making such impugned decision, the Respondents neither consulted nor gave him the reasons for such demotion ( guised as deployment). That the entire process was marred with irregularities’ to the extent that he was forced to do handover process whilst the Respondents have remained silent on the handover process in the office he had been deployed to.
16. That the applicant was advised by his record attorneys that the purported deployment is illegal, unlawful and unconstitutional for various reasons including but not limited to:-
  - (a) That the position of principal Administrative Officer ranks way below the position of municipal manager as such, the impugned deployment flies on the face of Article 41(1) of the Constitution of Kenya 2010 which guarantees every person the right to fair labour practices.
  - (b) That without prejudice to the generality of paragraph (a) above, the impugned deployment unfairly varies the terms of his employment to his disadvantage in two ways to wit:- It is illegally and unlawfully changes his terms of employment from permanent and pensionable to an acting capacity thus subjecting his stay in office to arbitrary and whimsical mercy of the Respondents and two, the impugned deployment unlawfully, illegally and unconstitutionally downgrades his job group to his disadvantage which is against not only established international labour practices, but also flies on the face of the explicit provisions of both the Constitution of Kenya 2010 and employment laws applicable in Kenya.
  - (c) That the decision to deploy the applicant allegedly “ following consultations” is not only grossly misleading, but is also procedurally and substantively unconstitutional for reasons that it was made in gross violation of his right to fair hearing (under Article 50 (2) ) fair administrative action ( under Article 47 ) of the Constitutional Kenya 2010.
  - (d) That the powers of the Respondents are well defined in the Constitution of Kenya 2010, County Government Act 2012 and all other enabling laws none of which confers on them jointly or severally law making powers such as they attempt to abrogate upon themselves nor does any law referenced herein confer upon the Respondents any power as they purport to do in their impugned actions to declare sections of Acts of parliament as not being in harmony which powers are exclusively reserved to the judiciary under the Constitution of Kenya 2010.
  - (e) That the impugned deployment is illegitimate and punctuated by malice, geopolitical and social alienation based on malice and intended only to use public service/resources against the constitutional edicts of social inclusivity and diversity in the public service.
  - (f) That the applicant had never been subjected to any disciplinary process or at all to warrant his demotion in the clothed chimeras of deployment.



## Response

17. The respondents filed replying affidavit to the application which affidavit was sworn on 7<sup>th</sup> February 2023 by Solomon Akadake Abwaku , Chief Officer department of lands, housing and urban development. The response in summary was that application was not merited as the Respondent have powers to transfer staff through the County Public Service Boards whose powers are delegatable to authorized officers.
18. That the petitioner on receipt of transfer letter dated 23<sup>rd</sup> November 2022 complied with the requirement of the transfer letter and moved out of office of the Municipal Manager and allowed the predecessor rendering the application already overtaken by events.
19. That it is s a prerogative of the respondents to reorganize and restructure departments including deploying and transfer of the petitioner included with a view to improve service delivery to the public.
20. That the Human Resources Policies and Procedures Manual of the Public Service in particular clause B31(1) and (2) allows the employer to transfer employees from one department to another. The Respondent denied altering terms of service of the petitioner from permanent and pensionable and denied that the transfer was a demotion as he continued to enjoy same salary and benefits of Job group R as per payslips of October 2022 prior to transfer was same as pay slip of December 2022 and January 2023 post the transfer.
21. The deponent further stated there was no evidence that there was competitive recruitment of the petitioner to his position as required under section 29 of the Urban Areas and Cities Act that requires competitive recruitment as no advertisement or interviews for the position of Municipal Manager was done.
22. The deponent further avers that the letters of 10<sup>th</sup> March 2021 and that of 26<sup>th</sup> October 2022 were erroneous as section 13A of the Urban Areas and cities did not intent to create two distinct offices of the manager and the secretary of the board.

## Preliminary: - Interim Orders

23. Lady Justice Christine Baari on the 14<sup>th</sup> December 2022 granted interim order to effect:-‘That a temporary injunction be and is hereby issued restraining the Respondents jointly and severally either acting in person or through its agents, employees, servants and /or by any person or purporting to act on their joint or several instructions, from implementing letter dated 23<sup>rd</sup> November 2022, relating to the Petitioner herein until this application is heard and determined.’
24. This order remains valid to date and has never been challenged.

## Written Submissions

25. The application was canvased by way of written submissions.  
The applicant’s written submission were undated and filed in court on the 7<sup>th</sup> February 2023.  
The respondents’ written submissions were dated 16<sup>th</sup> February 2023 and filed in court on the 21<sup>st</sup> February 2023.

## Issues for determination

26. The applicant addressed the merit of the application to be granted the interlocutory orders pending hearing and determination of the petition by addressing the questions of : establishment of a *prima*



*facie* case, demonstration of irreparable injury in the absence of the grant of the temporary injunction and balance of convenience.

27. The respondents identified and addressed the following issues:-Whether the petitioner met the requirement for grant of interim ordersWhether there as change of terms of contract as alleged by the petitionerRedeployment / transfer
28. The court having read through the pleadings opines that the issue for determination at this stage would be whether the applicant met the threshold for grant of the orders of temporary injunction and conservatory orders as sought .  
Whether the applicant met the threshold for grant of the interim orders of temporary injunction and conservatory as sought .

### **Applicant's case**

29. The Applicant states that he was recruited by the County Government of Busia County Public Service Board *vide* letter of Appointment as Municipal Manager Job Group R on the 19<sup>th</sup> September, 2019 ( KN-02) prior to that position the Applicant had been in service of the Respondents as Town Administrator Job Group P (KN -01).
30. The Applicant was on the 14<sup>th</sup> July, 2022 confirmed to appointment by the County Public Service Board and admitted to the permanent and pensionable establishment with effect from 14<sup>th</sup> April, 2020 ( KN -03).
31. It appears to the court there was an issue with the employer on role of the Applicant as Municipal Manager and Secretary of the Municipal Board as demonstrated by letters of 10<sup>th</sup> March, 2021 and 26<sup>th</sup> October, 2022 where the County Attorney Hon. Justice ( Emeritus ) MJ Anyara Emukule gave his opinion to effect that the office of the Secretary created under Section 13 A of the [Urban Areas and Cities \( Amendment Act 2019\)](#) is not tied to the office of Municipal Manager created under Section 28 of the [Act](#). The County Attorney interpreted Section 14 of the [Amended Act](#) as transitional cause pending appointed under SBA (*Supra*). Both parties challenge the said opinion in their pleadings.
32. The Applicant *vide* letter dated 23<sup>rd</sup> November, 2022 by the County Secretary of the County Government of Busia was deployed to the department of the Department of Lands Housing and Urban Development on an acting capacity as a Principal Administrative Officer to swap places with one Kenneth David Maende with immediate effect. This decision was stayed by court *vide* order of Lady Justice Christine Baari dated 14<sup>th</sup> December, 2022(*supra*).
33. The applicant submits the act of deployment to a rank below his substantive post in acting capacity was a violation of his fair labour rights and fair administrative action. That the deployment to lower rank on acting capacity amounted to demotion.

### **The Respondent case**

34. The respondents filed replying affidavit to the application which affidavit was sworn on 7<sup>th</sup> February 2023 by Solomon Akadake Abwaku , Chief Officer department of lands, housing and urban development. The response in summary was that application was not merited as the Respondent have powers to transfer staff through the County Public Service Boards whose powers are delegatable to authorized officers.



35. That the petitioner on receipt of transfer letter dated 23<sup>rd</sup> November 2022 complied with the requirement of the transfer letter and moved out of office of the Municipal Manager and allowed the predecessor rendering the application already overtaken by events.
36. That it is s a prerogative of the respondents to reorganize and restructure departments including deploying and transfer of the petitioner included with a view to improve service delivery to the public.
37. That the Human Resources Policies and Procedures Manual of the Public Service in particular clause B31(1) and (2) allows the employer to transfer employees from one department to another. The Respondent denied altering terms of service of the petitioner from permanent and pensionable and denied that the transfer was a demotion as he continued to enjoy same salary and benefits of Job group R as per payslips of October 2022 prior to transfer was same as pay slip of December 2022 and January 2023 post the transfer.
38. The deponent further stated there was no evidence that there was competitive recruitment of the petitioner to his position as required under section 29 of the Urban Areas and Cities Act that requires competitive recruitment as no advertisement or interviews for the position of Municipal Manager was done.
39. The deponent further avers that the letters of 10<sup>th</sup> March 2021 and that of 26<sup>th</sup> October 2022 were erroneous as section 13A of the Urban Areas and cities did not intent to create two distinct offices of the manager and the secretary of the board.

## Decision

40. The parties addressed merit of the Application for temporary injunction based on the tripartite legal principles of *prima facie* case, demonstration of irreparable injury in the absence of temporary injunction and balance of convenience on each side as espoused by landmark decision in *Giella v Cassman Brown Co. Ltd.* [1973] EA 358 which established legal principles for grant of interim orders being , first, the Applicant must establish *prima facie* case with chances of success and secondly show or demonstrate that he will suffer irreparable loss that cannot be compensated by way of damages.( see Respondents’ submissions).
41. The Applicant relied on *Giella case* and *East African Industries v Trufoods* [1972] EA 420 and a recent case *Nguruman Limited v Jan Bonde Nielsen & 2 Others* 9 2014 eKLR where the Court of Appeal set out the three principles for grant of interlocutory injunction of *prima facie* case, injury to the Applicant he will suffer if temporary injunction order was not granted and balance of convenience on both sides.
42. The court considers that before it was an application for interim injunction orders and conservatory orders pending hearing and determination of a constitutional petition. The Court finds that the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Gibinji & 2 Others* [2014] eKLR on the principles to apply for grant of conservatory orders stated as follows:-

[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. 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.”

43. It appears to this court that the criteria for grant of temporary injunctions issuance under *Giella Case* was linked to private – party issues being the prospects of irreparable harm occurring during the pendency of the case and in *Gatirau Peter Munya* case conservatory orders should be granted on the interest merit of a case, bearing in mind the public interest, the constitutional value and proportionate magnitude and privity levels arbitrable to the relevant cause.
44. The Petition before the court is a mixture of constitutional issues and employment contract and the court then finds *Giella* and *Gatirau Peter Munya* decisions both applicable in the instant Application.

#### **Whether the grant of temporary injunction and conservatory orders was merited.**

45. The court already issued temporary injunction to stay the alleged transfer pending hearing and determination of the instant application vide order of Justice Baari of 14<sup>th</sup> December 2022. On merit the court holds that it will only interfere with internal management processes like deployment and transfers of the employer if illegalities are established. The employer has a right to transfer staff as it wishes for purposes of implementing its employment requirements as held by court of Appeal in Civil Appeal No. 261 of 2020 *Kenyatta University v Esther Njeri Maina*.
46. The court can only intervene in internal processes of employer on finding of illegalities as the employee must be protected from unfair labour practices. The Applicant submits that the letter dated 23<sup>rd</sup> November, 2022 amounted to demotion as the position of Acting Principle Administrator Officer was below rank of the Municipal Manager and not substantive. The Applicant to demonstrate that the deployment was demotion produced the organograms for the Municipal Board and for the Department of lands Housing and Urban Development (- a & b).
47. The Respondent denied the allegation of demotion based on salary payment of the Applicant having not been affected by the deployment ( SAA 1, SAA2, SAA3).
48. The Respondent further relied on Human Resources Policies and Procedures Manual for Public Service, May, 2016 to state it had powers to transfer employees under clauses B 31 which provides for transfer from one department to another as follows:- “B 31 (1) Employees who wish to move from one ministry to another will have to apply for vacant position as and when advertised. Further deployment of officers in there substantive capacity within a ministry will be undertaken by the Respective authorized officer on recommendation of MHR MAC.”

Clause B32 is on transfers of service hence of no relevance to instant application. The court interprets B 31 to mean that the deployment of officers is on substantive post. In the instant case the court finds Applicant was not deployed in their substantive post of Municipal Manager but to acting in lower rank as per Organogram of the County Chief Office(KN-07). This was contrary to the Public Service Commission manual as cited.

49. The Court looked into the Public Service Commission County Public Service Human Resources Manual May, 2013 clause B 22 provides for re- designation and it provides that where an officer is redesignated for one cadre to another, the re-designation will be on a continuous basis to avoid loss of seniority. The said Manual clause B 22 (3) ( c) prohibits re- designation of officer if the same will disadvantage any Public Officer already serving in the relevant cadre or where the officer has not consented to the re-designation.
50. The court finds that the deployment in this case was tantamount to re-designation of the Applicant from his substantive post of Municipal Manager to acting capacity as a Principal Administrative



Officer. Clause B22 of the Public Service Commission County Public Service Human Resources Manual May, 2013 on re-designation applied. The court finds and determines that there was violation in deployment and re- designation of Applicant in act of not appointing him to a substantive post equivalent cadre to Municipal Manager and further the non- compliance with the County Public Service Human Resources Manual Clause B 22 (Supra).

51. The court finds that the fact that the salary earned was not affected, so far, cannot justify the breach of the Human Resources Manuals of both the Public Service Commission and the County Public Service Board. The Applicant held a substantive senior post and cannot be deployed to a lesser rank position on acting position without his consent. The deployment further amounts to violation of Article 236 of the Constitution prohibiting demotion in rank or removal from office of public officers without due process.
52. The court finds that there is a *prima facie* case established of violation of the fair labour and fair administrative action constitutional rights.
53. The court having found violation of fair labour and fair administrative action constitutional rights, the issue of whether the injury can be compensated by damages is neither here nor there as the court cannot condone such violations once established on *prima facie* basis.
54. The court finds that the balance of convenience lies with the Applicant who holds a valid contract of appointment and confirmation to position of Municipal Manager by the relevant body being the Busia County Public Service Board. The Court found no evidence produced to smirk the said appointment as alleged by deponent of Respondent. The County Public Service Board is the statutory body for making appointments for the County Government. The court found that the declaration sought on the provisions of section 13A and 14 Urban Areas and Cities Act 2011 was final in nature and not proper for determination in the application.
55. Consequently, the court allows the application dated 6<sup>th</sup> December, 2022 in the following terms:-
  - (a) A conservatory order and temporary injunction be and is hereby issued against the Respondents jointly and severally staying the implementation and enforcement against the Applicant deployment vide letter dated 23<sup>rd</sup> November, 2022 and stays Appointment of Kennedy David Maende pending the hearing and determination of the Petition.
  - (b) An Order is issued quashing any decision or action done pursuant to letter dated 23<sup>rd</sup> November, 2022 in violation of the interim order of temporary injunction granted on 14<sup>th</sup> December, 2022.
  - (c) Costs of the Application to the Applicant.
56. The main petition to be set down for hearing on priority basis.
57. It is so ordered.

**DATED, SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF MARCH, 2023.**

**JEMIMAH KELL,  
JUDGE.**

**In the Presence of :-**

**Court Assistant: Lucy Macheso**



**Petitioner:- Sore**

**Respondent: Absent**

