



Gicheha v Nairobi County Water & Sewerage Company Limited (Petition E083 of 2022) [2023] KEELRC 632 (KLR) (14 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 632 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E083 OF 2022
JK GAKERI, J
MARCH 14, 2023**

BETWEEN

KAGIRI MUKUNDI GICHEHA PETITIONER

AND

NAIROBI COUNTY WATER & SEWERAGE COMPANY LIMITED RESPONDENT

RULING

1. This is the determination of the Applicant's Notice of Motion dated 24th May, 2022 seeking Orders That;
 1. Spent.
 2. Spent.
 3. This Honourable Court be pleased to issue an interim order of injunction restraining the Respondent either by itself, its servants, agents and/or employees from conducting interviews and/or filling the position of Regional Manager In-charge of Informal Settlements Region pursuant to the Respondent's Internal Advertisement dated 17th November, 2021 and circular dated 13th May, 2022 pending hearing and determination of this petition.
 4. The costs of this application be provided for.
2. The Notice of Motion filed under Certificate of Urgency is expressed under Articles 20, 22, 50(1), 23(3), 159(2)(d), 165 and 258 of *the Constitution* of Kenya, 2010, Rule 18, 19 and 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules, 2013 and all other enabling provisions of the law.
3. The Notice of motion is based on the grounds set out on its face and supported by the Affidavit sworn by the Applicant, Kagiri Mukundi Gicheha who deposes that he was seconded to the Respondent



- from Nairobi City Council in 2005 when the Respondent was formed and was appointed Acting Operations and Maintenance Manager in January 2012 until January 2016 and was paid acting allowance.
4. That from December 2016 to March 2018, he was the resident Engineer at the Northern Collector Tunnel Project and was appointed Acting Regional Manager Informal Settlements in March 2018, a position he holds to date.
 5. The affiant deposes that all managers were at the same pay grade but his salary and allowances were less than those of other managers with whom he joined at the same time as he had been acting.
 6. That the position was advertised on 14th January, 2021 and he protested by letter dated 29th March, 2021 but received no response and the position was advertised again on 17th November, 2021 and protested again to the Managing Director (MD), by letter dated 30th November, 2021 which was responded to. That the MD stated that;
 - a. The Masters degree was a requirement of the Respondent's competency framework.
 - b. The Attorney General's opinion applied to mainstream public service.
 - c. An employee appointed to act would be required to do so for a maximum period of 6 months or as determined by the appointing authority.
 7. That the MD failed to address himself to the law and responsibilities of an employer.
 8. The affiant states that on 10th February, 2022, he wrote to the MD seeking clarification of his response dated 13th January, 2022 and seeking the respondent's competency framework he had mentioned in the letter but no response was forthcoming.
 9. The affiant states that some of the Respondent's directors and managers had no Masters degrees.
 10. That attempts to obtain the competency framework from the Corporation Secretary fell through.
 11. That by circular dated 13th May, 2022, the Respondent shortlisted potential candidates for the position and his name was not one of them which he deemed unfair, having acted in the position since March 2018.
 12. The applicant alleges unfair treatment and discrimination as the Masters qualification was not provided for in the Respondent's Evaluation Manual or by the Public Service Commission and non-payment of acting allowance on time and remuneration is not commensurate with the position and he was losing Kshs.117,500/= per month compared to other colleagues.

Respondent's case

13. In its grounds of opposition, the Respondent states that the Notice of Motion is unmerited, misconceived and an abuse of the court process and failed the basic test for interlocutory injunction in *Giella V Cassman Brown Co. Ltd (1973) EA 358* as no prima facie case had been established, no irreparable loss had been demonstrated and the balance tilted against the applicant.
14. The Respondent avers that the application was intended to frustrate the Respondent's recruitment process on realizing that he did not meet the requirements for the position.
15. It is the Respondent's case that if the orders sought were granted, it would enable the applicant use the court to influence the recruitment process in his favour and compromise the rights of other applicants.
16. That the application be dismissed in the interest of justice and interim orders vacated.



Applicant's submissions

17. The Applicant's counsel isolated no specific issues for determination but addressed the fact that the applicant had acted in two positions for almost 10 years and had lost income.
18. In the latter case, counsel submitted that the income lost was equivalent to Kshs.117,500/= per month being the difference between the salary of the Acting Regional Manager- Informal Settlements Region and the substantive position.
19. That the applicant applied for the position in 2021 but was not shortlisted allegedly on the ground that he was not qualified for the position and it was subsequently advertised internally on 21st January, 2021 but a Maters qualification was required contrary to the Human Resource Policy and Procedures Manual, Public Service Commission circular and guidelines issued by the Attorney General.
20. That the position was re-advertised on 17th November, 2021.
21. Counsel submitted that the Applicant should be treated as having been confirmed by operation of law.
22. The sentiments of Mathew Nderi J. in Susan Khakasa Oyatsi V Judicial Service Commission (2022) eKLR were relied upon to urge that Section 5(7)(c) of the *Employment Act*, 2007 recognized the Human Resource Instruments are the employment policy and was a mandatory guide with statutory underpinnings and bound both the employer and the employee.
23. The learned judge cited the earlier decision in Edah Cheronoi Maiywa V University of Nairobi Enterprises & Services Ltd (2020) eKLR.
24. Counsel urged that by virtue of Clause 6.3 of the Respondent's Human Resource Policy and Procedures Manual, the applicant had a legitimate expectation that he would be confirmed to the position of Regional Manager after 6 months.
25. That the Respondent violated the Applicant's right to fair labour practice.
26. Counsel further urged that the applicant was qualified for position and the Respondent had enjoyed exemplary service from him.
27. The sentiments of the Court in Kenya Shoe and Leather Workers Union V Slapper Shoe Industries (2015) eKLR and Silas Kaumbotho Mbutura V Meru Central Dairy Co-operative Union Ltd (2015) eKLR were relied upon to reinforce the submission that the Respondent engaged in unfair labour practice by appointing the applicant in an acting capacity for a long period of time in violation of Section 41 of *the Constitution* of Kenya, 2010.
28. That other colleagues of the applicant had been confirmed in substantive appointments yet they did not hold undergraduate or post graduate degrees (counsel did not give illustrations to buttress the submission).
29. Counsel further submitted that the Respondent had enjoyed exemplary services from the applicant as the Regional Manager- Informal Settlement Region for over 5 years cheaply.
30. That denial of the competency framework was a violation of his right of access to information required for the exercise of his right to be appointed to the position of Regional Manager and be paid commensurate remuneration.
31. The court was invited to find that the applicant was the substantive holder of the position he was acting in and the threshold in *Giella V Cassman Brown Co. Ltd* had been met.



32. The Respondent isolated three issues for determination, namely;
 - i. Whether the applicant has established a prima facie case with a probability of success.
33. In urging this issue, the Respondent's counsel relied on the Court of Appeal decision in *Mrao V First American Bank Ltd & 2 others* (2003) eKLR to demonstrate the concept of prima facie case.
34. The decision in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (2014) eKLR was used to underscore the burden of proof of the party suing.
35. Counsel submitted that courts should not interfere with employer's managerial prerogative to appoint whoever it deemed fit as held in *Geoffrey Mworira V Water Resources Management Authority and 2 others* (2015) eKLR. That a court should only interfere if the employer was proceeding in a manner which is in contravention of *the Constitution* or legislation or agreement between the parties or unfair.
36. Counsel further submitted that in the instant case, it had not been shown that the Respondent had violated the Human Resource Manual or *the Constitution*.
37. That the Petitioner was appointed to act as Regional Manager without being subjected to a competitive recruitment process contrary to Clause 4.2 of the Respondent's Human Resource Manual that any recruitment for a substantive position must be through advertising, shortlisting and interviews, a fact the applicant was aware of and could not therefore claim the right of legitimate expectation of being confirmed.
38. Counsel urged that the Respondent could not be required to act contrary to the provisions of its Human Resource Manual to satisfy the applicant's expectations.
39. That the Respondent fixed the qualifications based on the competency requirements for the position and the advertisement complied with the provisions of the Human Resource Manual.
40. Counsel submitted that the Applicant filed the suit when he discovered that he did not meet the qualifications for the position to frustrate the recruitment process and the application before the court had no merit.
41. Counsel urged that the applicant had not established a prima facie case with a probability of success and hence the test in *Giella's case*, as all the three conditions had to be met.
42. As regards irreparable injury, counsel submitted that should the applicant prove his case, damages were an adequate remedy and had therefore not demonstrated irreparable injury.
43. On the balance of convenience, counsel submitted that the same lay in declining the injunction sought.
44. The court was urged to dismiss the application with costs.

Determination

45. The only issue for determination is whether the Notice of Motion dated 27th May, 2022 is merited.
46. The applicant seeks an injunction to restrain the Respondents, its agents, servants or employees from conducting interviews and/or filing the position of Regional Manager-Informal Settlements Region pursuant to an advertisement dated 17th November, 2021 pending the hearing and determination of the petition.
47. It is not in despite that the Respondent appointed the applicant as Acting Regional Manager, Informal Settlements Region on 8th March, 2018 for an unspecified duration and as confirmed by the



- Respondent, the applicant started earning an acting allowances, the amount of which neither party expressly disclosed.
48. Puzzlingly, the applicant had previously acted as Operations and Maintenance Manager (January 2012 to December 2016) and had not been paid acting allowances due to him until he raised the issue and was to be paid in February 2022 through the payroll.
 49. It is also not in contest that the Respondent advertised the position the applicant was acting in internally on 14th January, 2021 and the advertisement required both an undergraduate and post graduate degree, 5 years experience, at least 2 years at management level.
 50. Applications had to be submitted by 28th January, 2021 and the applicant applied for the position but was not invited for an interview as he did not possess a post graduate degree. By an Internal Memo dated 28th March, 2021, the Claimant enquired from the Director, Human Resource and Administration why he had not been invited for the interview contending that he had been a manager for the required duration and the position did not require a Masters degrees as per the Competency Matrix 2005 which the Board of the Respondent allegedly adopted.
 51. Further, the Claimant relied on a Public Service Commission (PSC) Circular PSC/ADM/13/(6) dated 11th March, 2020 under reference “Review Of Requirements For Promotion Of Senior Officers In The Civil Office” which suspended the requirement of Strategic Leadership Development Programme (SLDP) and the Masters degree in the promotion of public officers to senior positions other than the Director positions or “Positions graded at CSG 5 and above.”
 52. The Respondent adduced no evidence that it responded to the Applicant’s concerns or what transpired.
 53. Intriguingly, the Respondent invited applications for the same position on 17th November, 2021 and shortlisted applicants. The Human Resource Manager of the Respondent deposed that the requirements for the position were arrived at on the basis of the competency requirements for the position.
 54. Strangely, the Respondent did not attach any career progression guidelines or other material to demonstrate how the academic qualifications for the position were arrived at or controvert the applicant’s contention that Competency Matrix 2005 was the operative document and had no requirement for the Masters degree.
 55. Clause 6.3 of the Respondent’s Human Resource Policy and Procedure Manual provide for payment of acting allowance to an employee who is appointed to act in an office higher than his/her substantive office by the Director of Human Resource and Administrative Services in consultation with Heads of Department/Directorates. The acting appointment must last for a minimum of 30 days for the allowance to be payable and if the position is vacant, the acting is for a maximum period of 6 months or as determined by the appointing authority. The appointment must be in writing. The clause fixes the acting allowance at 25% of the employee’s basic salary or the difference between the employee’s salary and the minimum salary of the post the employee is acting for the period in which the duties of the higher post are assumed.
 56. Notably, Clause 6.3 distinguishes between acting allowance and special duty allowance which occurs when an employee is called upon to perform the duties of a higher post. The allowance is lower than acting allowance.



57. The clause further provides that the appointing authority must consider the relevant personal qualifications, competence and seniority of the employee and an employee on a managerial grade appointed to act in a higher post was entitled to subsistence allowance.
58. It is common ground that the applicant was appointed to act in a higher post and the Respondent has been paying him acting and subsistence allowance as appropriate.
59. Impliedly, the applicant was qualified for the position otherwise the Respondent should have appointed him to perform the duties of the higher office and pay a special duty allowance which according to the Respondent's Human Resource Manual was payable to employees not qualified for appointment to act in a higher office.
60. The Respondent was obligated by its Human Resource Manual to consider the applicant's personal qualifications, competence and seniority and there is no evidence that it doubted the applicant's qualification or performance throughout the period he has been acting.
61. It is the Respondent's case that it advertised for the position on 14th January, 2021 and 17th November, 2021 in compliance with the Human Resource Manual which required an advertisement, shortlisting and interviews.
62. Be that as it may, the Respondent has not availed cogent evidence on where it extracted the requirement of the Masters degree qualification for the position of Regional Manager Informal Settlement Services.
63. Similarly, the Respondent has not provided a justifiable explanation as to why it appointed the applicant as the Acting Regional Manager Informal Settlements, if he did not qualify for the position which would have been a violation of the Clause 6.3 of the Human Resource Policy and Procedure Manual.
64. Although neither the applicant nor the Respondent availed Career Progression Guidelines or Competency Matrix or framework referred to by the parties, the burden of prove that the applicant was unqualified for the position lay squarely on the Respondent.
65. Needless to gainsay, the applicant urged that the Competency Matrix adopted by the Board in 2005 had not been amended and also relied on the PSC Circular dated 11th March, 2020 which suspended the requirement for a Masters degree for positions other than those of directors which the applicant was not.
66. A cursory perusal of the Attorney General's opinion dated 10th February, 2017, Ref A/G/CONF/2/4/35 Vol. 1, reveals that the Respondent is a public entity or body whose employees are public officers within the meaning of Article 260 of *the Constitution* of Kenya, 2010 and thus bound by the values and principles of public service enumerated in Article 232 and in particular fair competition and merit as the basis of appointment and promotion and other relevant regulatory framework in the public service. Intriguingly, the Respondent sought the Attorney General's opinion as to whether it was a public or private entity on 25th January, 2017 and did so again on 14th November, 2019 and the response was the same.
67. In sum, the Respondent adduced no evidence to controvert the applicant's assertion as regards the PSC Circular, non-existent competency framework or matrix and the Attorney General's legal opinion.
68. As a consequence, the applicant's contention that the position of Regional Manager-Informal Settlements did not require a Masters degree and was thus qualified to hold it substantively remains uncontroverted.



69. The principles governing the grant of an interlocutory injunction were articulated in *Giella V Cassman Brown Co. Ltd* (Supra) and further elaborated in *Nguruman Ltd V Jan Bonde Nielsen* (Supra).
70. In *Giella's* case, Spry J.A stated as follows;

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience (*E.A. Industries V Trufoods* (1972) E.A. 420).

i. Prima facie case

71. In *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (supra), the court stated as follows;

“... So what is a prima facie case? I would say that in civil case, it is a case in which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

72. In *Nguruman Ltd V Jan Bonde Nielsen & 2 others*, the court stated;

“... All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation.”

73. In the instant case, contrary to the Respondent's submission, the court is satisfied that the applicant has demonstrated prima facie that his rights have been violated or likely to be violated by the Respondent through the advertisement in January and November 2021.

74. As regards irreparable injury, the court is guided by the sentiments of the Court in *Francis Muriithi Ndirangu V Ruth Wanjiku Nderitu* (2016) eKLR as follows;

“... By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages not injury which cannot possibly be repaired and the fact that the plaintiff may have right to recover damages is no objection to the exercise the jurisdiction by injunction if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted if the act in respect of which relief is sought is likely to destroy the subject matter in question.” (Halsbury's law of England, 3rd Edition, Vol. 21 Paragraph 739 page 352).

75. Although the Respondent urges that the applicant's loss, if any, is compensatable by an award of damages, the facts of the case reveal that damages may not be adequately vindicate the applicant's rights.

76. It is common ground that the applicant joined the Respondent in 2000 after its incorporation. That he was seconded there by the Nairobi City Council, his former employer and has risen overtime to become the acting Regional Manager Informal Settlements and has served the Respondent well as evidenced by the different postings and acting appointments and looks forward to serve as the substantive holder of the office having acted since 2018.

77. Employment and rise in positions of responsibility overtime brings with it a sense of accomplishment and satisfaction something monetary compensation cannot do.



78. The Applicant previously acted as Manager, Operations and Maintenance from 2012 to 2016 without any allowance but was subsequently paid in 2022.
79. For the foregoing reasons, the court is satisfied that the applicant has met the 2nd condition for the grant of an injunction.
80. Finally, as regards the balance of convenience, the court is guided by the sentiments of the court in Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR as follows;

“The meaning of balance of convenience in favour of the Plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiffs, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the defendant if an injunction is granted but the suit is ultimately dismissed. Although it is called a balance of convenience, it is really the balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants should the inconvenience be equal, it is the Plaintiff who suffer. In other words, the Plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it”.

81. In the instant case, if the order sought is not granted, the Respondent is likely to interview the shortlisted candidates and fill the position of Regional Manager Informal Settlements and the position would not be available if the applicant won the petition, while a grant of the order will only delay the recruitment process for a short while even if the applicant lost the petition.
82. More significantly, the applicant has been acting in the position since March 2018 and his performance has not been questioned.
83. In the court’s view, a further delay in filling of the position of Regional Manager Informal Settlements would not inconvenience the Respondent irrespective of the outcome of the petition.
84. From the foregoing, it is evidence the balance of convenience is more favourable to the applicant than the Respondent.
85. For the above-stated reasons, the court is satisfied that the Notice of Motion dated 27th May, 2022 is merited and is granted in terms of prayer No. 3 that the Respondent be and hereby restrained either by itself, its servants, agents and/or employees from conducting interview and/or filling the position of Regional Manager In-charge of Informal Settlements Region pursuant to the Respondent’s Internal advertisement dated 17th November, 2021 and circular dated 13th May, 2022 pending hearing and determination of this petition.
86. Costs of this application shall be in the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF MARCH 2023

DR. JACOB GAKERI

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 March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

