



**Makinda & 46 others v Siaya County Public Service Board & another; Siaya County Government Workers Union (Interested Party) (Employment and Labour Relations Cause E034 of 2022) [2023] KEELRC 946 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 946 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**EMPLOYMENT AND LABOUR RELATIONS CAUSE E034 OF 2022**  
**CN BAARI, J**  
**APRIL 27, 2023**

**BETWEEN**

**PAULINE MAKINDA & 46 OTHERS ..... CLAIMANT**

**AND**

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

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

**AND**

**SIAYA COUNTY GOVERNMENT WORKERS UNION ... INTERESTED PARTY**

**RULING**

1. This ruling relates to the Applicants' Motion dated July 25, 2022, expressed to be brought under Article 159 (2)(d) of the [Constitution](#), Section 12 of the [Employment and Labour Relations Court Act](#), Rules 7 and 17 of the Employment and Labour Relations Court (Procedure) Rules, and Rules 19 and 23 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) practice and procedure Rules](#). The Applicants seek orders THAT: -
  - i. Spent.
  - ii. Spent.
  - iii. Pending the hearing of the suit herein, there be an interim order/ conservatory order or an order of stay suspending any further process or proceedings in relation to the suitability test/ recruitment of contracted revenue collectors by the Respondents herein.
  - iv. The Costs of the application be in the cause.



2. The application is supported by grounds on the face of the motion and the supporting affidavit of Pauline Makinda, the first Applicant herein. The Applicants state that they were causal/contractual employees of the Respondents who, though their contracts had lapsed, continued to provide services to the Respondents in the positions they held prior to the lapse of their employment contracts.
3. The motion is premised on an exercise that is said to have begun as an internal suitability process for purposes of confirmation of casual/contracted employees, but which is further alleged to have metamorphosed into an external recruitment process.
4. The Applicant aver that the Respondents through the exercise, brought in revenue collectors who were said to have successfully gone through the exercise, but which names included persons that were never in the service of the Respondents.
5. It is the Applicants' position that the new revenue collectors were neither interviewed for the positions nor were their posts externally advertised.
6. The Applicants further aver that they are apprehensive that appointment letters would be issued to the new revenue collectors at their expense.
7. The Respondents opposed the motion through a replying affidavit sworn by Mr Wilfred Nyagudi, on November 9, 2022.
8. The Respondents' position is that in February, 2021, they resolved to change the terms of engagement of their revenue collectors, so as to address challenges that existed in revenue collection. It is their position that to effect this resolution, all casual posts were declared vacant so as to be filled competitively through the public Service Board.
9. The Respondents aver that although they had sent out an external advertisement for the positions, they further resolved to conduct suitability tests of the existing casual revenue collectors, with a view to retain in their service those that are qualified.
10. The Respondents further aver that suitability tests were conducted and that all the Applicants herein went through the test, and that out of the 329 casuals tested, only 221 qualified for retention. The Respondent states that none of the Applicants herein qualified for retention in their service.
11. The Respondents finally aver that the Applicants allegations are baseless, false and devoid of merit and pray that the application be dismissed.
12. Parties sought to canvass the application through written submissions. The Applicants filed submissions and which have been duly considered. The Respondents did not.

### **Determination**

13. The principles that guide the Court on whether or not to grant an interlocutory injunction were properly set out in *East African Industries vs Trufoods [1972] EA 420* as well as in the celebrated case of *Giella vs Cassman Brown & Co Ltd [1973] EA 358*.
14. Further, in [\*Nguruman Limited vs Jan Bonde Nielsen & 2 Others \[2014\] eKLR\*](#) the Court restated the law on granting of interlocutory orders as follows:

' In an interlocutory injunction application, the applicant has to satisfy the triple requirements to: -

- (a) Establish his case only at a prima facie level,



- (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.'

15. The first question is whether the Applicants herein have established a prima facie case to warrant grant of interim orders. The recruitments subject of this application were taking place in April, 2022, which in essence means that the exercise might by now have been concluded. In *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*, the Court of Appeal defined a prima facie case in the following words:

' In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.'

16. The Court of Appeal in *Nairobi Civil Appeal No 44 of 2014 Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another (2015) eKLR* while dealing with what a prima facie case is, made reference to Lord Diplock in *American Cyanamid vs Ethicon Limited (1975) AC 396*, where the Judge stated thus: -

' If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief.'

17. In considering whether or not a party has established a prima facie case, the court considers without making any findings, the scope of the remedy sought, weigh, albeit preliminarily, the pleadings, the factual basis, the respective parties' positions, the remedies sought and the law.

18. In my view, the Applicants having admitted that their contracts with the Respondents had lapsed, this in itself indication that there may not have been an infringement of a right. The Applicant have thus in my view not shown that they have a prima facie case against the Respondent.

19. Further, even where a party has demonstrated a prima facie case, interim orders would not normally be granted unless such a party shows that it might suffer irreparable injury that cannot adequately be compensated by an award of damages.

20. In the absence of valid contracts of service, the court is unable to quantify the magnitude of the injury that the Applicants will suffer, if at all, and that the injury is the kind that cannot be compensated through an award of damages.

21. Consequently, I find the Applicant's application lacking in merit and is hereby dismissed.

22. Costs shall abide the cause.

23. Orders of the Court.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**C. N. BAARI**

**JUDGE**



Appearance:

N/A for the Claimants

N/A for the Respondents

Christine Omolo – C/A

