



**Sikulu v Public Service Commission & 12 others; Mwithiga & 2 others (Interested Parties) (Cause E729 of 2022) [2023] KEELRC 879 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 879 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE E729 OF 2022**  
**SC RUTTO, J**  
**APRIL 14, 2023**

**BETWEEN**

**REUBEN WAMUKOTA SIKULU ..... CLAIMANT**

**AND**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY FOR DEVOLUTION ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**PRINCIPAL SECRETARY MINISTRY FOR DEVOLUTION . 4<sup>TH</sup> RESPONDENT**

**CHARLES SUNKULI ..... 5<sup>TH</sup> RESPONDENT**

**SILAS GITARI ..... 6<sup>TH</sup> RESPONDENT**

**NYATHIRA AGOTHO ..... 7<sup>TH</sup> RESPONDENT**

**JACKSON MWANGI ..... 8<sup>TH</sup> RESPONDENT**

**ALFOSI MUNYALI ..... 9<sup>TH</sup> RESPONDENT**

**JAMES MWANZIA ..... 10<sup>TH</sup> RESPONDENT**

**PATRICK KARANJA ..... 11<sup>TH</sup> RESPONDENT**

**KENEDY NYAMBAT ..... 12<sup>TH</sup> RESPONDENT**

**EVANS CHELANG'A ..... 13<sup>TH</sup> RESPONDENT**

**AND**

**CATHERINE MWITHIGA ..... INTERESTED PARTY**

**DANIEL OKWIRI ..... INTERESTED PARTY**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**



## RULING

1. The claimant/applicant has moved this court vide a notice of motion application dated September 10, 2022 filed under a Certificate of Urgency. The motion application which is supported by the affidavit of the applicant seeks the following orders:
  1. Spent
  2. Spent.
  3. That pending the hearing and determination of this suit, this honorable court be pleased to grant a temporal injunctive order staying the respondents' decision to severely reprimand the claimant as communicated in their letter dated June 27, 2022 addressed to the claimant
  4. That pending the hearing and determination of this Application, this honorable court be pleased to grant a temporal injunctive Order staying the decision to promote all persons named and as communicated in their letter dated August 1, 2022.
  5. That pending the hearing and determination of this suit, this honorable court be pleased to compel the 1<sup>st</sup>- 4<sup>th</sup> respondents to furnish the claimant with all the proceedings and findings appertaining the interdiction and Severe Reprimand allegedly leveled and established against him as per the letters dated May 5, 2020 and June 27, 2022 respectively addressed and served to the claimant;
  6. Costs for this Application be provided by the Respondents.
  7. Any other orders deemed fit by the court.
2. The Application is premised on grounds that: -
  - a. On or about May 5, 2020 the claimant was ambushed with an interdiction letter dated same day by the 2<sup>nd</sup> respondent;
  - b. That he was unfoundedly subjected to the harsh consequences of the interdiction as stated in the said letter, and fell a victim of incidental anguish, sufferings and frustration inherent with the unjustifiable employment punishment from May 5, 2020 to March 17, 2021; that is for more than the 6 months prescribed legal period.
  - c. Other than being a procedural mishap, the said interdiction yielded to the subject Severe Reprimand of the claimant, which was also unprocedurally and illegally arrived at.
  - d. That the essential aspects and steps of the investigation, hearing and finding were conducted mysteriously and shrouded with unfounded opacity.
  - e. The continuous harassment and mistreatment of the claimant has obviated the claimant's hopes for career development and growth, therefore maintaining him at the lowest cadres of employment, despite his high-ranking core qualities and ever-growing potential for top echelon career opportunities.
  - f. The claimant has suffered irreparable harm and inconvenience, mental anguish and acute horrific frustrations which have materially depressed him.
  - g. The Severe Reprimand shall remain on the claimant's employment records to eternity.



- h. That unless the orders sought are granted, the Claimant shall remain at the lowest cadres of employment.
3. Upon being served with the Application, both the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> to 13<sup>th</sup> Respondents and the 3<sup>rd</sup> Interested Party responded by filing Grounds of Opposition dated 25<sup>th</sup> January 2023, 9<sup>th</sup> November 2022 and 25<sup>th</sup> October 2022 respectively.
4. The 1<sup>st</sup> respondent's grounds of opposition is premised on the argument that the notice of motion application does not meet the judicially set threshold in the Supreme Court case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR for the grant of the stay orders sought. That under article 234(2)(b) of the *Constitution* as read with the *Public Service Commission Act*, 2017 and the *Public Service Commission Regulations*, 2020, the exercise of disciplinary control in the public service is under the mandate of the Public Service Commission. That under section 70 of the *PSC Act*, 2017 as read together with Regulation 63 of the *PSC Regulations*, 2020, a public officer may be interdicted whenever disciplinary action has been initiated against him/her. That by attempting to curtail the exercise of disciplinary control by the Respondents herein, the applicant is acting contrary to the *Constitution*, applicable laws and settled case law. That the orders sought if granted, would stand to hamper the lawful discharge, by the respondents, of their constitutional, statutory and regulatory mandate.
5. The 2<sup>nd</sup> to 13<sup>th</sup> respondents' argument is that the applicant herein has not demonstrated how they have violated his Constitutional Rights. That the allegations raised by the Applicant cannot meet the legal test as he has failed to particularize the alleged breaches with precision as was held in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR. It is further stated that the reprimand letter as undertaken against the Applicant is not illegal, ultra-vires or in breach of his constitutional principles as alleged.
6. The 2<sup>nd</sup> to 13<sup>th</sup> respondents further filed a replying affidavit sworn on February 6, 2023, by Mr. Leonard Ngotho Nyathira, who describes himself as the Director Human Resource Management and Development in the State Department for Devolution. Briefly, he avers that: -
- a. The State Department for Devolution received two letters from the 1<sup>st</sup> respondent conveying its decision to promote the applicant on merit together with other officers.
  - b. The authenticity of the promotion letters became suspect due to inherent technical errors which prompted the State Department to write to the 1<sup>st</sup> respondent who then informed the Department that the same were fraudulent and did not originate from the Commission.
  - c. Following this confirmation, the applicant was issued with a show cause letter for gross misconduct as provided for under the Human Resource Procedures and Policies Manual for Public Service and the Discipline Manual for the Public Service, 2016.
  - d. The applicant made his response via two unreferenced letters dated May 18, 2020 which were tabled in the Department Human Resource Management Advisory Committee on June 24, 2020.
  - e. The matter was investigated by a committee to which the applicant appeared before and made oral submissions.
  - f. The committee found the applicant guilty of engaging in unlawful conduct for furtherance of personal benefit by colluding with other accused officers to obtain fraudulent promotions.



- g. It was recommended inter alia, that the Applicant be severely reprimanded, the half salary that was to be paid during interdiction be withheld and that he reverts back to the position before the illegal promotion and any monies that may have been paid arising from the purported promotion be recovered.
  - h. The decision was communicated to the applicant on March 17, 2021 and another dated June 27, 2022 and effected as per the directive.
  - i. The disciplinary process was conducted within the confines of the law, that it was lawful, reasonable and procedurally fair.
7. On its part, the 3<sup>rd</sup> interested party filed Grounds of Opposition seeking to be excused from participation in subsequent proceedings.
  8. On October 25, 2022, the court directed that the Application be disposed off by way of written submissions. Besides the applicant, the other parties did not file written submissions as there were none on the court's physical record and could not be traced on the online portal. The court has had the opportunity to consider the applicant's submissions.

### **Analysis and Determination**

9. Flowing from the pleadings and submissions on record, it is evident that the main issue for determination is whether the Application meets the threshold for grant of injunctive orders. That is to say, whether the court should stay the respondents' decision to severely reprimand the applicant and the promotion of all persons named in the letter dated August 1, 2022. There is also a secondary issue in respect of access to information, which I will address later.
10. With regards to grant of injunctive orders at an interlocutory stage, the principles set out in the celebrated case of *Giella v Cassman Brown* [1973] EA 358 at page 360, still hold thus: -
 

“ .... 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 the balance of convenience. (*EA Industries v Trufoods*, [1972] EA 420.)”
11. What this means is that, the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the orders, he or she is likely to suffer irreparable injury.

### **Prima facie case**

12. The Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR defined a prima facie case in the following terms: -
 

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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 as to call for an explanation or rebuttal from the latter.”
13. In this regard, the main consideration ought to be whether the Applicant has established the existence of a right that has been apparently infringed by the Respondent as to require a rebuttal. It is also worth noting that a prima facie case is not a case which must succeed at the hearing of the main case.



14. In the instant case, the Applicant avers that the decision to severely reprimand him was arrived at unprocedurally and illegally. That the essential aspects of the investigation, hearing and findings were conducted mysteriously and illegally. The Applicant has further termed the procedure as flawed. He further argues that the severe reprimand shall remain on his employment records to eternity and the same shall be prejudicial to him as the claims made against him are criminal in nature. The Applicant has further cited procedural issues which he says, marred his interdiction.
15. He further avers that the respondents have in one way or the other jointly or severally involved themselves in fraudulent activities that have led to loss of public funds. That because of exposing the bad deals involving the respondents, he was tagged as the bad person. That this has resonated with the various decision by the 1<sup>st</sup> to 5<sup>th</sup> respondents. That he is aware that the reason to deny him promotions is pegged on the deliberate intention by the respondents to reduce access to activities hence information and fraudulent engagements which they believe he shall whistle blow.
16. The applicant has further stated that the decision to deny him promotions both automatic and recommended his immediate supervisors, led to him being “deliberately and unjustifiably overlooked by the human resource”. He further states that the impugned promotions were not legal as the grounds that the Respondents are not the authorized officers who can purport to promote persons from the departments not under their docket.
17. On the other hand, the respondents have maintained that the reprimand was as a result of a forgery committed by the Applicant and that the same was arrived at, following due process.
18. In light of the foregoing issues which I have considered against the evidence on record, albeit in a cursory manner and upon applying the decision in the *Mrao case (supra)*, I am satisfied that the Applicant has proved that he has an arguable prima facie case.
19. I hasten to add that establishing a prima facie case is not an end in itself and cannot form sufficient basis to grant an interlocutory injunction. It is for this reason that the Court must undertake a further enquiry so as to be satisfied that the injury to be suffered by an Applicant in the event the injunction is not granted, will be irreparable.

### **Irreparable injury**

20. As to what constitutes irreparable injury, I find useful guidance in the determination by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, thus: -

“An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
21. In essence, the main consideration should be whether the Applicant will suffer irreparable injury in the event he is not granted the injunctive orders he seeks at this stage.
22. In support of his Application the Applicant has argued that he will continuously be subjected to irreparable career in the form of career retardation and victimisation. That further, as his colleagues advance both in career and financial benefits accruable in commensuration with the growth in career, he is facing an ever-present threat of dismissal, financial depravity and career retardation that grinds against his academic and work experience gains.



23. The question thus, will the Applicant suffer irreparable injury in the event he is not granted the injunctive orders he seeks at this stage? The answer to this question lies in the nature of the remedies available to the Applicant in the final determination of the claim.
24. Pursuant to section 12(3) of the *Employment and Labour Relations Court Act*, this court is clothed with powers to grant a wide range of orders ranging from award of damages; reinstatement; prohibitory orders; orders for specific performance and declaratory orders.
25. Indeed, and as I note, the applicant has sought damages and declaratory orders including a declaration that the severe reprimand is null and void for want of procedure. He has further prayed that the said reprimand be set aside. In addition, he seeks an order directing the respondents to expunge from his employment records all documents pertaining to his interdiction and severe reprimand.
26. In this regard, the applicant will stand to be granted either of the remedies set out above, in the event his Claim succeeds ultimately. Accordingly, the Applicant does not stand to suffer irreparable injury in the event he is not granted the orders he seeks at this stage. In the *Nguruman case (supra)*, the Court of Appeal further held that: -
 

“if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”
27. With regards to the orders to stay the promotions of the persons named in the letter dated August 1, 2022, it is noteworthy that the said persons are not parties to the suit. It thus follows that this court cannot grant adverse orders against the said persons. Besides, the applicant has not demonstrated the manner in which the said promotions have infringed on his rights and the irreparable harm he stands to suffer if the same are not stayed.
28. In the circumstances, I will decline to grant the injunctive orders as sought.

#### **Access to information**

29. The Applicant has sought to be furnished with information regarding the disciplinary process against him leading up to the severe reprimand. He avers that it is crucial for the information to be placed before this court. He maintains that he has requested for the same to be shared with him, which request has fallen on deaf ears hence amounting to an abuse of his constitutional right to access information as provided under article 35 of *the Constitution* 2010.
30. It is worthy to note that the Respondents did not advance any reasons justifying denial of access to the information sought by the Applicant.
31. Article 35 of the *Constitution* as well as section 4 of *Access to Information Act*, guarantees every person the right to access information held by the state or another person where that information is required for the exercise or protection of any right or fundamental freedom. In this case, it is apparent that the Applicant seeks the said information so as to advance his Claim before court.



32. My thinking accords with that of the court in the case of *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR where it was held that:-

“32. The *Constitution* therefore, grants citizens’ access to information as a constitutional right and only the same Constitution can limit that access...[34]. On the above basis, the right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted by the *Constitution* and is protected by the same Constitution.”

33. Accordingly, the Application is partly allowed to the extent that the 1<sup>st</sup> to 4<sup>th</sup> respondents are hereby ordered to supply the Applicant with all proceedings and findings in respect of the interdiction and severe reprimand.

34. The injunctive orders are declined with an order that costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of April, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

**Mr. Udoto instructed by Mr. Kipnge’no for the Applicant**

**Mr. Ogosso for the 1<sup>st</sup> Respondent**

**Mr. Kioko for the 2<sup>nd</sup> to 13<sup>th</sup> Respondents**

**Mr. Wambugu for the 3<sup>rd</sup> Interested Party**

**No appearance by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties**

**Abdimalik Hussein Court Assistant**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**

