



**Muiruri v County Government of Nyeri (Employment and Labour Relations Cause E007 of 2022) [2023] KEELRC 848 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 848 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E007 OF 2022**

**ON MAKAU, J  
APRIL 13, 2023**

**BETWEEN**

**SOSPETER KIBE MUIRURI ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF NYERI ..... RESPONDENT**

**RULING**

1. The application for consideration is the Notice of Motion dated May 30, 2022 brought under Section 77 of the [County Government Act](#), Section 1,1A & B, and 3A of the [Civil Procedure Act](#). The application seeks the following orders:-
  1. That this application be certified as urgent heard on a priority basis and service of the same be dispensed with in the 1<sup>st</sup> instance.
  2. That this Honourable court be pleased to issue orders restraining the Respondent its agents, assignees, servants, employees or anybody claiming under or in its name from advertising, interviewing, shortlisting, recruiting and employing anybody in the post of Principal Superintendent Engineer, Engineer road, Job Group Q in the department of transport, public works, infrastructure and energy until the hearing and final determination of the Kenya Public Service Commission Appeal No 5/2022/3276.
  3. That this Honourable court be pleased to issue orders restraining the Respondent from replacing, transferring, interdicting, demoting and or changing the claimants employment rank and status of Principal Superintending Engineer, Engineer road, Job Group Q in the department of transport, public works, infrastructure and energy to a lower rank or in any way reverting back to the rank of Engineer (1).



4. That the Respondent be ordered to pay the Applicant the stipulated salary of total earnings of Kshs 146,910.00 for the rank of Principal Superintending Engineer, Engineer road, Job Group Q pending the hearing and final determination of the Kenya Public Service Commission Appeal No 5/2022/3276.
  5. That this Honourable court be pleased to issue orders restraining the Respondent from slashing the Claimant/Applicant's salary of total earnings of Kshs 146,910.00 to that of Kshs 99,580.00 Q pending the hearing and final determination of the Kenya Public Service Commission Appeal No 5/2022/3276.
  6. That this Honourable court be pleased to issue orders restraining the Respondent from taking any disciplinary action against the claimant/Applicant in respect of this matter.
  7. That costs be in the cause.
2. The application is premised on the grounds set out on the body of the motion and the supporting Affidavit sworn on May 30, 2022. In brief the applicant contends that he was employed in April 2022 as a Principal Superintending Engineer of Roads Job Group Q and was paid the due salary of Kshs 146,900.00. However in May 2022 his salary was slashed and reverted to that of his earlier position of Engineer I. The said action was taken until he accepts to the respondent's demand that he resigns from his earlier position of Engineer 1 which was permanent and pensionable. He contends that the change of terms to 3 years contract in his new position in Job Group Q is unlawful and discriminatory because under the scheme of service that position is on permanent and pensionable terms. For the foregoing reasons, he contends that he has filed appeal against the respondent's decision before the PSC and unless the conservatory order sought herein is granted he will suffer irreparable loss and damage.
  3. The respondent has opposed the application vide the Replying Affidavit sworn on June 13, 2022 by its County Secretary Mr David Kiriri Ruga. In brief he deposed that in the beginning of the year the County Public Service Board advertised various positions including Principal Superintending Engineer, Job Group Q. The applicant applied, succeeded in the interview and was appointed to hold the office for a contract term of 3 years. The contract commenced on March 23, 2022 and by signing the contract he translated from permanent and pensionable terms to contractual term.
  4. To avoid conflicting terms and conditions, the County Public Service Board advised him to resign from the permanent and pensionable scheme of service but he failed to comply. Consequently, the Board communicated its decision to him that in the absence of his resignation he was to continue serving in his previous position.
  5. The alleged demotion was denied and the court was urged not to make any orders to avoid prejudicing the proceedings before the PSC which turn on the issue whether the applicant can continue serving under two schemes of service.
  6. On June 28, 2022 the court directed the parties to dispose of the application by written submissions. In the meanwhile the applicant changed advocate by appointing the firm of Mathenge Mwiti Advocates who filed submission to dispose of the Application.
  7. On November 25, 2022, the respondent filed further Affidavit sworn on November 23, 2022 by its counsel Mr Daniel Kinyua Irungu alleging that newly appointed Advocate for the applicant, Mr



Mathenge Mwiti, had not taken out a practicing certificate for year 2022 and therefore the submissions filed on behalf of the applicant was a nullity and should be expunged from the record.

8. The applicant responded by supplementary affidavit sworn by Mr Peter Oginga Advocate stating that he is a partner in Mathenge Mwiti Advocates, a law firm; that Mr Mathenge Mwiti is one of the partners and because he is in the United States of America for further studies, he did not take out a practicing certificate for 2022; that Mr Mathenge Mwiti did not attend court or sign any pleadings filed in this matter; that Mr Oginga had 2022 practicing certificate and he is the one who drew and signed all the documents for the applicant; and that the objection by the respondent is without merits and is a mere technicality which cannot defeat substances or merit of the applicant's application.

### Submissions

9. The applicant submitted that the court has jurisdiction to grant the order sought in the application by dint of Section 12 (3) (1) of the ELRC Act which empowers the court to grant order of injunction in case of urgency. It was submitted that the applicant seeks interim injunction to preserve his appeal pending before the PSC so that it does not dissipate and become a pyrrhic, nugatory or a mirage. In summary the applicant seeks for the substratum of the appeal to be preserved pending the determination of the appeal on merits. It was argued that the PSC lacks jurisdiction to issue interim, preservatory orders including injunction in cases of urgency like in the present case.
10. For emphasis reliance was placed on the case of *John Kakindu Makaru v County Government of Makueni & 6 others (2018 eKLR)* which cited the case of *Republic v IEBC & Another Ex parte Coalition of Reform and Democracy & 2 others (2017) eKLR* where the court held that where alternative remedy provided by statute is inadequate means of redress, the court would not exercise restraint.
11. Further, it was submitted that the appeal will suffer irreparable harm if the orders sought are declined because by the time the quasi-judicial process is completed, the respondent will continue with the impugned illegal action and expose him to irreversible damage. Further the substance of the appeal will have dissipated and destroyed, occasioning injustice of monumental proportion to the applicant.
12. For emphasis reliance was placed in the case of *Republic v County Assembly of Kiambu & 2 others Ex parte James Mbugua Kamau & 2 others (2021) eKLR* where the court held that the case required urgent relief which was not envisaged under section 77 of the County Government Act and Section 85 and 86 of the *Public Service Commission Act*. The court then went on to grant injunction order restraining the employer from recruiting any persons to replace the applicants pending the hearing and determination of their appeal by the PSC.
13. Further reliance was placed on the case of *Zena Achieng Mubamed v County Public Service Board, Kilifi & 6 others (2021) eKLR* where the court observed that the appeal process before the PSC is not time bound and there is no provision granting jurisdiction to issue interim reliefs pending appeal. The court went on to hold that the court cannot lock out a party seeking interim relief on the basis of exhaustion doctrine.
14. As regards the merits of the application, it was submitted that the applicant has laid a sufficient basis for granting the orders sought. The application seeks for orders restraining the respondents from recruiting anybody to the position of Principal Superintendent Engineer, Engineer Roads, Job Group Q pending his appeal before the PSC. It was argued that the principles for consideration are prima facie case, irreparable harm and balance of convenience as discussed in several decisions including *Giella v Cassman Brown & Co Ltd (1973) EA 358*.



15. It was submitted that an applicant is required to demonstrate that his legal right has been violated without going to the merits of the appeal. It was contended that the applicant's right to fair labour practices under Article 41 of the [Constitution](#) has been violated. It was contended that his new contract did not require him to resign from his previous employment on permanent and pensionable terms. It was argued that his legitimate expectation to continue serving on permanent and pensionable basis would be violated by being compelled to resign from his position as Engineer 1 to a less favorable terms and conditions of employment. In the applicants view, his new appointment created a legitimate expectation that he would enjoy the terms of his new position without losing his permanent and pensionable terms of employment.
16. As regards irreparable injury, it was submitted that unless injunction is granted, the respondent will continue with its illegal action and occasion on the applicant irreversible damage. It was further submitted that the applicant will continue losing his benefit of Kshs 146,910.00 even though he continues working as Principal Superintendent Engineer, Engineer Roads, Job Group Q.
17. Finally it was submitted that if the court is in doubt whether the application is merited or regarding the infringement of the applicant's rights by the respondent, it should consider that the applicant stands the risk of losing his employment benefits including the permanent and pensionable terms of employment. In that regards, it was submitted that the balance of convenience tilts in favour of the applicant. Reliance was placed in [Chebii Kipkoech v Barnabas Tuitoek Margoria & Another \(2019\) eKLR](#).
18. The respondent, on the other hand submitted that the Applicant's counsel lacks practicing certificate for 2022 and therefore he was unqualified to file a notice of change of Advocate and written submissions for the applicant. Reliance was placed on section 9 of the [Advocates Act](#) which defines a qualified advocate. Further reliance was placed on Section 39 of the Act which bars an Advocate from actin as an agent for unqualified person. Support was also gathered from the case of [Cherack Management Ltd v National Social Security Services Fund Board of Trustees & Another \(2012\) eKLR](#) where the court held that contemptuous institution of proceedings by unqualified person cannot be excused as mere procedural lapses. The court went further to strike out the suit as incompetent.
19. It was also submitted that failure to take out a valid practicing certificate for a particular year, is separate disciplinary issues before the Law Society of Kenya against the advocate and it does not vitiate the proceedings or deny their law firm audience before the court. For emphasis reliance was placed on the [Kyalo Komu v Felix Maliti Mulingata \(2021\) eKLR](#) where the court held that non-compliance of advocate in taking out a practicing certificate is a technicality and an innocent litigant should not be punished or impended from accessing justice through a fault which is not his/her making.
20. Further reliance was placed on the case of [National Bank of Kenya v Anaj Warehousing Limited \(2015\) eKLR](#) where the Supreme Court held that a document of conveyance or an instrument does not become invalid under section 34(1)(a) of the [Advocates Act](#) only because it was prepared by an advocate who at the time lacked a current practicing certificate. On the basis of the cited precedents, the court was urged to find that the impugned documents are competent
21. As regards the merits of the motion, it was submitted that the Nyeri County Public Service Board externally advertised the position of Principal Superintendent Engineer, Engineer Roads, Job Group Q and the applicant herein applied. After the interviews he was appointed and signed a contract for a fixed term of 3 years effective March 23, 2022. The applicant signed the contract voluntarily on March 22, 2022. The contract was a new appointment and not a promotion.



22. In view of the foregoing it was submitted that the applicant has not met the threshold for grant of temporary injunction. It was argued that the applicant has not established a prima facie case with probability of success; not demonstrated irreparable injury if temporary injunction is declined; and has not shown that the balance of convenience tilts in his favour. It was submitted that the above must be demonstrated sequentially.
23. Reliance was placed on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) eKLR* where the Court of Appeal discussed the legal thresholds for granting interlocutory injunction.
24. Finally the court was urged to reject the application because the applicant is only trying to hold two concurrent schemes of service to the detriment of the employer.
25. In his rejoinder, the applicant submitted that the proceedings filed by the law firm of Mathenge Mwiti Advocates are competent because they were signed by Mr Oginga Advocate who at all material times to the suit, he had a practicing certificate. It was admitted that Mr Mathenge did not have practicing certificate for 2022 because he is in the USA for further studies.

### **Determination**

26. The issues for determination are:-
  - a. Whether the submissions and notice of Appointment filed by Mathenge Mwiti Advocates are incompetent.
  - b. Whether the interlocutory injunction sought should issue.

### **Incompetent documents**

27. The decision by the Supreme Court in the National Bank case aforesaid has clearly indicated that documents prepared by an advocate are not invalid merely because he/she did not have a current practicing certificate at the time. I need not say more on that issue because in the instant case, even if Mr Mathenge Mwiti Advocate did not have a practicing for 2022, he is not the one who prepared and signed the impugned documents. They were prepared by another Advocate in the law firm. Further the said documents are not the primary pleadings and therefore the main motion remains unchallenged.

### **Merits of the Application**

28. In the case of *Nguruman Limited*, supra, the Court of Appeal held that:-

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

  - a. Establish his case only at prima facie level,
  - b. Demonstrate irreparable injury if a temporary injunction is not granted; and
  - c. Allevy any doubts as to (b) by showing that the balance of convenience is in his favour.'



29. Prima facie case defined by the Court of Appeal in the case of *Mr Rao Limited v First American Bank of Africa (2003) eKLR* as;

' In civil cases it 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 as to call for an explanation or rebuttal from the latter.'

30. In the present case the applicant alleges that he was forced to resign from the schemes of service he was enjoying as Engineer 1 Job Group M before his new appointment as Principal Superintendent Engineer Roads Job Group Q. The former appointment was on permanent and pensionable terms while the letter was on 3 years fixed term. In his view the employer has demoted him and he is being discriminated against.

31. I have carefully considered the material before the court to see if the applicant has established that his legal right or right under his employment contract has been infringed or is being threatened with infringement. I am satisfied that the applicant applied for appointment as Principal Superintending Engineer Roads Job Group Q and he was appointed on 3 years contract. He signed the offer letter dated March 22, 2022.

32. Soon thereafter a dispute arose as to whether he should resign from the permanent and pensionable scheme of service to join the new scheme of fixed term contract. The applicant maintaining that the said position exists in the permanent and pensionable scheme of service. The appeal before the Public Service Commission is for determination whether the scheme of service mandates for the Job Group Q on permanent and pensionable terms.

33. The schemes of service for Principal Superintending Engineer Roads Job Group Q has not been shown to the court. Likewise the advertisement for the job has not been shown to the court to establish whether it was for a contract of 3 years of permanent and pensionable. However the applicant has filed an exhibit SKM 'a', a letter dated April 26, 2022 by the County Public Service Board which states that:-

' This has reference to the appointment letter dated March 22, 2022 as Principal Superintending Engineer.

Please be advised that the terms of appointment for the post as publicly advertised is three (3) years contract, and any successful candidate was expected to resign from any possible substantive office he/she held with any other employing entity.

The Board is yet to receive resignation from the substantive position despite one month having lapsed since you signed the contract.'

34. Vide a letter dated May 18, 2022, the applicant protested to the Secretary, Nyeri County Public Service Board that his salary for April and May had reverted to the earlier rate he was receiving as Engineer 1 Job Group M yet he was discharging duties of Principal Superintending Engineer Job Group Q. The letter further stated that:-

' I also wish to inform you that after you offered me the post of Principal Superintending Engineer (Roads) Job Group Q on March 22, 2022, I reported to the new duty station on April 1, 2022 (see copy of reporting letter attached).

The County Public Service Board delayed to submit my documents to my new duty station. I accepted the offer for the position vide my letter dated April 4, 2022. (See copy of



acceptance letter attached). Consequently, I was released from my former duties and duty station on April 8, 2022 (see copy of release letter attached).

From April 1, 2022 to date I have been and I continue to perform/ discharge the duties of the post of Principal Superintending Engineer (Roads) Job Group 'Q'.

I am now requesting to know the reasons behind the above shocking post and salary changed as well as overpayment recovery issues in my May, 2022 pay slip.'

35. Without going to the merits of the dispute pending before the Public Service Commission, I find on the basis of the above two letters filed by the applicant, that the County Public Service Board published an advertisement for the position of Principal Superintending Engineer Roads Job Group Q for a contract of 3 years term. The applicant applied, attended interview and succeeded. Thereafter he was given an offer letter stating the terms of service and he voluntarily accepted the offer. He was released from his former duty station and he reported to the new duty station where he continues to discharge his duties to date.
36. Altering the terms of service from Job Group Q to Job Group M without according a hearing points to violation of the applicant's right to fair administrative action and fair labour practices. It is also an affront to the rules of natural justice. Therefore based on Mrao Limited case, supra, I am satisfied that the applicant has established a prima facie case with probability of success.
37. As regards the issue of irreparable injury, the applicant is apprehensive that the respondent may replace him with another person or have him revert to his earlier position in job Group M and have his salary reduced accordingly.
38. Whereas the financial loss of salary can be compensated by damages, replacement and loss of status as a Principal Superintending Engineer Roads Job Group Q may not adequately be compensated by an award of damages. Consequently, I am satisfied that irreparable harm will be suffered by the applicant if injunction to restrain the employer from replacing or downgrading the applicant, is denied.
39. Although I am not in doubt on the issue of irreparable harm, I am also of the view that the balance of convenience tilts in favour of preserving the substratum of the appeal pending before the Public Service Commission. The said preservation will only be achieved if the appointment of the applicant as Principal Superintending Engineer Roads is not interfered with by being downgraded to Job Group M and/or being replaced by another person.
40. In conclusion, I find that the applicant has met the legal threshold for granting interlocutory injunction and therefore I allow the Notice of Motion dated May 30, 2022 by granting Order 2 and 3 in the motion. The applicant is also awarded costs of the Applications plus interest.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF APRIL, 2023.**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

