



**Kenya Ports Authority v Dock Workers Union (Cause E099 of 2021)
[2023] KEELRC 1506 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1506 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E099 OF 2021**

M MBARÚ, J

JUNE 15, 2023

BETWEEN

KENYA PORTS AUTHORITY CLAIMANT

AND

DOCK WORKERS UNION RESPONDENT

RULING

1. The respondent, Dock Workers Union filed application dated January 26, 2023 seeking for orders that pending the finalisation and conclusion of the conciliation duly ordered by the court and the adoption and determination of the suit matter, parties be directed to maintain the *status quo* in respect of the acting positions which should remain in force.
2. The application is supported by the affidavit of Simon Kiprono Sang, the General Secretary of the respondent union and on the grounds that the claimant filed this claim to stop the impending strike by the respondent and the court, in the ruling delivered on December 3, 2021 directed parties to ventilate the dispute through the appointed a conciliator. In the interim, the claimant amended and changed the organisation structure which were not brought to the attention of the court.
3. The issue in dispute which precipitated the issuance of the strike notice was as a consequence of refusal by the claimant to appoint the employees who had acted in higher positions beyond 6 months contemplated in the human resource manual, 2017. The claimant purported to reverse those acting positions immediately after the court delivered its ruling on December 3, 2022 and as a consequence, this application is filed seeking stay of the decision pending conclusion of conciliation. The conciliator has not filed a report on the submissions by the parties.
4. Mr Sang also aver that the court stopped the respondent from demoting any employee who had been appointed to higher positions in the orders of March 15, 2022 and several members of the respondent are currently appointed to management positions to which the circular of March 1, 2022 has been



directed and the respondent is apprehensive that the appointment may affect the positions currently protected by the orders issued on February 10, 2022 and March 15, 2022 and for these reasons, this application should be allowed as the conciliator report will be rendered nugatory.

5. In his Further Affidavit, Mr Sang aver that the promotion of employees of the claimant translates to the new organisational structure and he has therefore written to the claimant's Board of directors on the skewed manner in which the claimant is implementing the new structure. The claimant has been conducted promotional interviews as pre-qualification to the new grading system and in disregard to the operating human resource policy manual, 2017. This new grading system has far reaching effects on the instant suit but the claimant has failed to bring this to the attention of the court. the claimant is guilty of failing to make material disclosure to the court with regard to ongoing implementation of the new grading system.
6. In reply, the claimant filed Grounds of Opposition and Replying Affidavit of Bildad Kisero the manager administration within the human resource division and aver that the demand by the respondent for an automatic promotion of some unionisable employees of the claimant in speculative for the reasons that the 3 positions advertised internally on 1st March 2022 relates to senior management positions within the claimant's establishment. The 3 positions sought to be filled competitively are Principal Electrical Engineer (Project, w/shop & Air Conditioning Grade, (HMI), senior Maintenance Engineer (WS & Aircon) Grade (HM2) and Senior Legal Officer (Litigation & Disputes) (HM2).
7. These senior management positions in the claimant's establishment are way above the alleged impugned positions that the respondent seeks to impose automatic promotions of its members and therefore the claimant is candid to the court.
8. Mr Kisero also aver that appointment and promotions in the public service should strictly be in accordance with mandatory constitutional principles under Article 232 of the Constitution among other legal and policy requirements in place. The claim that the claimant has not made an attempt to comply with the conciliation process is unfounded since this process was undertaken in good faith though the appointed conciliator and the claimant has submitted its representations to the conciliator and is awaiting the report to be filed in court.
9. The intention of the respondent is to cripple operations of the claimant to the detriment of the employees and the application being speculative should be dismissed with costs.
10. The respondent filed a Supplementary Affidavit of Simon Kiprono Sang and aver that the claimant has since come up with an internal advertisement of February 27, 2023 which expressly direct heads of departments to fill up positions which are vacant in their respective departments. There is no express caution to the department heads to take into consideration of the orders of February 10 or March 15, 2022 respectively and the respondent is apprehensive that the claimant may go ahead and act in disobedience.
11. Mr Sang aver that the respondent has since written to the claimant on March 6, 2023 seeking assurance that the court orders would be obeyed. The claimant has not acted in good faith.
12. Both parties attended court and made oral submissions and what comes out clearly to the court is that pending the conciliator filing the due report to the court, several other internal processes of the claimant and which interests the respondent union are held in abeyance and leading to anxiety and this instant application is one such indicator.
13. On November 15, 2021 the claimant filed this suit following notice of an impending industrial action. The claimant was also seeking urgent orders to restrain the respondent from engaging or undertaking the industrial action.



14. The court seized of the matters, on 3 December 2021 delivered a ruling and restrained the respondent from engaging in any form of industrial action following notice dated November 10, 2021 since it was premature for want of exhaustion of the statutory conciliation procedures. Further, the court directed parties that pending the hearing and determination of the suit they were to submit themselves to the relevant statutory conciliation proceedings with respect to all grievances or disputes mentioned in the strike notice of November 10, 2021 and to report to the court as may be appropriate for further orders in the suit.
15. The report of the conciliation proceedings therefore becomes relevant and important in these proceedings and unless such report is filed in the positive or negative, parties are stuck.
16. Therefore, on 10 February 2022 parties attended court to report on the progress of the conciliation proceedings which had not concluded and therefore orders and directions issued that pending conclusion of the conciliation proceedings parties to maintain the status quo with respect to acting appointments in issue subsisting as at the date of ruling delivered herein on December 3, 2021.
17. Further, on March 15, 2022 parties attended court and the following orders and directions issued;

As Counsel confirms that there is no Employees to be demoted, by consent and pending further orders by the court on the interparties hearing no Employee to be demoted and any decision demoting an Employee after orders given on February 10, 2022 be stayed accordingly.
18. Still the conciliation report has not been filed despite these subsisting orders and directions.
19. The basis of the instant application is that the claimant should be restrained from appointing any person to the positions and or filling those positions which are protected and or preserved by the orders issued on 10 February and 15 March 2022.
20. The notice of March 1, 2022 related to the positions of;
 1. Port Electrical Engineering Department – two (2) positions
 - a. Principal Electrical Engineer (Projects, W/shops & Air Conditioning) Grade HM1, Post No 820-4001
 - b. Senior Maintenance Engineer (WS & Aircon) Grade HM2 Post No 820-4003
 2. Litigation & Disputes Department – one (1) Position
 - a. Post of Senior Legal Officer (Litigation & Disputes) Grade HM2, Post No 210-1003
21. In the Supplementary Affidavit of Mr Sang for the respondent dated March 22, 2023 he has attached notice dated February 27, 2023 for Internal Advertisement of Vacant Critical Roles in Grades KPA4 – KPA10 on the basis that critical positions be promptly filled so that the service delivery is not negatively affected.
22. The notice of March 1, 2022 related to 2 positions in post No.820-4001 and one (1) position in Post No 210-1003 whereas the notice of 27 February 2023 relates to post in Grade KPA4 to KPA10. However, this does not resolve the suit herein. Such concerns by the respondent will continue to arise until the core issues to the dispute herein are resolved one way or the other.
23. The court has since received the Conciliator’s letter dated March 28, 2023 but without the required report on the grounds that the respondent requested the same not be forwarded as they intend to have



it amended further. The respondent too wrote to the conciliator and copied the court on the objection to the submissions of the report on the grounds that it was without their input.

24. The court is taken back to the due report on the conciliation proceedings.
25. The conclusion of this outstanding matter is imperative. Parties were to engage in good faith. The magnitude of this report is noted and conclusion shall only be achieved where there is full cooperation of the parties with the appointed conciliator and to avoid similar application such as herein, the intervention of the court at this stage is necessary – to regulate the conciliation time lines forthwith.
26. Accordingly, orders sought by the respondent shall not issue as couched for the court to have the due conciliation proceedings report within the next 30 days;
 - a. Parties will attend before the conciliator as required and within the next 14 days and upon which the report due shall be concluded and filed with the court;
 - b. The attendance shall be in good faith and full cooperation of the parties;
 - c. For ease of these time lines, parties shall attend court after 14 and 30 days respectively to report progress (a) above;
 - d. Mention on July 3, 2023 and July 24, 2023 if the filing of the report (a) above is not achieved earlier.
 - e. Orders of February 10 and March 15, 2022 shall remain in force.

DELIVERED IN OPEN COURT AT MOMBASA THIS 15TH DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

