



**Fwamba v Moi Teaching and Referral Hospital; National Council
for Persons Living With Disabilities (Interested Party) (Petition
E003 of 2023) [2023] KEELRC 1991 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1991 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E003 OF 2023
MA ONYANGO, J
JULY 31, 2023**

BETWEEN

MARGARET NALIAKA FWAMBA PETITIONER

AND

MOI TEACHING AND REFERRAL HOSPITAL RESPONDENT

AND

**NATIONAL COUNCIL FOR PERSONS LIVING WITH
DISABILITIES INTERESTED PARTY**

RULING

1. Before me for determination is an application dated 29th June 2023 filed under certificate of urgency on even date. The application is made under Articles 1,2,3,10,22(1)(2)(3) and (4), 23, 27, 35, 46, 47, 48, 50, 54, 81(1),90, 177(1)(c), 232,258 and 259 of *the Constitution* of Kenya 2010 as read together with Section 2 of Persons with Disability Act, No. 14 of 2003, Section 70920 9b0 of the Public Service Commission of Kenya (PSC) K. Act 2020, Regulation 70(2) of the Public Service REGULATIONS, Section 1A, 1B, 3, 3A 63(e) of the *Civil Procedure Act* and Order 40 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law.
2. The Petitioner seeks the following orders against the Respondent:
 - a. Spent.
 - b. That pending the hearing and determination of this Application inter-parties the Honourable Court be pleased to issue a temporary conservatory order of injunction restraining the Respondent and/or the interested party, their agents and/or employees jointly and severally from retiring the petitioner from the respondent.



- c. That pending the hearing and determination of the petition, this Honourable Court be pleased to issue a temporary conservatory order of injunction restraining the Respondent and/or the interested party, their agents and/or employee jointly and severally from denying the Petitioner the privilege to continue working in public service as a person with disability whose mandatory retirement age is 65 years.
 - d. That costs of this Application be provided for.
3. The application is supported by the grounds on the face thereof and the affidavit of the Petitioner sworn on 29th June 2023. In brief, the Petitioner states that she is a person living with disability whose mandatory retirement age is 65 years. That she has been issued with a disability identification card and tax exemption certificate. That she has been working with the Respondent from 1992. That sometime in 2005 she sustained a back injury while in the course of executing her duties with the Respondent and has since then undergone numerous surgeries which culminated in her being unable to walk without a walking frame. That the foregoing is well known to the Respondent with whom she has exchanged several correspondences.
 4. The Petitioner avers that the Respondent has through various letters intimated and threatened to send her on terminal leave and finally retire her on 30th June 2023 which action would be illegal, irregular and discriminatory and actuated with malice as the Respondent is aware of her medical condition.
 5. She avers that the Respondent refused to acknowledge her as a person living with disability and only did so after a lot of effort as is evident from the correspondence on record.
 6. The Petitioner states that unless this court grants the orders sought her rights will be infringed and the same cannot be compensated by damages.
 7. The application is opposed by the Respondent through the replying affidavit of PAUL MULWO, the Respondent's Senior Human Resource Officer sworn on 11th July 2023. He states the application must fail as the orders sought have been overtaken by events, the applicant having already retired upon attaining the mandatory retirement age of 60 years.
 8. It is further the averment of Mr. Mulwo that the applicant does not meet the threshold for grant of the conservatory orders sought in her application.
 9. It is further the averment of Mr. Mulwo that retirement of persons with disability is provided for in Regulation 70(2)(b) of Public Service Regulations which provides that retirement of persons with disability at 65 years is not automatic. That the Applicant submitted her Tax Exemption Certificate and Disability Card on 28th September 2022 outside the period provided for in the Regulations.
 10. It is the averment of Mr. Mulwo that the Respondent, being a public institution, is guided by statutes and applies the law without discrimination.
 11. Mr. Mulwo states that the Respondent issued notice of retirement to the applicant on 10th June 2022, a year prior to her retirement date of 2nd July 2023. That the applicant had sufficient time to approach this court but did not do so until 29th June 2023.
 12. It is further Mr. Mulwo's averment that the orders sought by the Applicant are strange in law as conservatory orders facilitate functioning within public agencies and in public interest matters and consequently are not available to the applicant.
 13. It is Mr. Mulwo's position that the applicant has not demonstrated the existence of a prima facie case with high probability of success and that there is danger that the suit will be rendered nugatory.



14. It is further Mr. Mulwo's averment that the prayers sought ought to be dealt with in the petition and the court ought to exercise great caution when determining the application.
15. He prays that the application be dismissed.
16. The Petitioner filed a further affidavit sworn on 13th July 2023 in which she states that by letter dated 23rd February 2022 the Respondent directed the National Council for Persons With Disability to confirm that she had numbness of lower limbs and mobility was impossible without a walking frame and requested for assistance of the Council. That prior to that on 28th July 2020 the National Council for Persons With Disability had written to the Respondent informing it that the Applicant had a disability and was registered with the Council. The letter sought help from the Respondent to enable it process the Applicant's tax exemption.
17. That the Respondent had previously declined to assist the applicant to obtain a tax exemption certificate by letter dated 23rd January 2020.
18. The Applicant states that her first assessment was done on 2nd December 2019 and the second one on 29th March 2021. That she was later assessed by the Respondent on 12th January 2022 and her medical history documented in the Respondent's letter dated 12th January 2022. That it is after the said letter that a letter was written to the Council for assistance.
19. The petitioner states that neither herself nor her counsel are to blame for the time of filing of the petition. She further states that she is on leave as per Regulation 6.13.2 of the Respondent's Policy and Procedure Manual and as per Respondent's letter dated 9th May 2023.
20. It is the averment of the Applicant that the Respondent's Policy and Procedure Manual which came into force in August 2018 provides at section 13.7.1 that mandatory retirement age is 60 years and 65 years for persons living with disability.
21. The Applicant states that as confirmed by the Respondent she was issued with a PWD Card and Tax Exemption in 2019 and submitted the documents to the Respondent's human resource data base then. That the Respondent declined her formal bid to be recognized as a person living with disability and she tried appealing to the Respondent's CEO through her letter dated 3rd March 2023.
22. The Applicant states that this court has the power to reinstate her should the Respondent have already forcefully retired her as alluded.
23. She states that she has not cleared with the Respondent nor has her position been filled.
24. That she has approached the court with clean hands.
25. The application was heard orally on 13th July 2023. Mr. Oyaró Joseph instructed by the firm of Oyaró J Associates appeared for the Applicant while Ms. Ewang Tsigiga Ebude appeared for the Respondent. There was no appearance for the Interested Party who so far has not filed any documents or participated in the suit.
26. It was the submission of Mr. Oyaró that it is not in dispute that the Petitioner is a person living with disability duly registered in 2019. That it is further not in issue that the disability was sustained in 2005 while the Applicant was working with the Respondent. That the only issue is whether the decision to retire the applicant before she attained the mandatory 65 years for persons with disability is justifiable in law.



27. Mr. Oyaró submitted that according to the Public Service Act persons living with disability retire at 65 years.
28. He submitted that the second issue is whether the prayers sought in the application should be granted.
29. He submitted that the Petitioner has not yet been retired. That the Respondent's letter dated 9th May 2023 sent the petitioner on sick leave until 30th June 2023 when she would start her terminal leave of 30 days. That the terminal leave is supposed to lapse on 30th July 2023. That it is evident from the letter that there is an error on the dates. That the 3rd line of paragraph 2 of the letter states the applicant was required to take her 2023 annual leave of 15 days effective 11th May 2023 to 30th June 2023 and consecutively (thereafter) proceed on her 30 days terminal leave from 2nd June 2023 to 30th June 2023.
30. Mr. Oyaró submitted that there is another letter written to the Petitioner by the Respondent dated 10th June 2022. That the 2 letters contradict each other. That according to the applicant she is still on terminal leave so she has not retired.
31. Mr. Oyaró submitted that according to the Respondent's Policy Guidelines an employee is entitled to 30 days leave preceding retirement in addition to annual leave. That the petitioner had not taken the 30 days retirement leave. That even if the petitioner had been retired the court has powers to reinstate her.
32. Mr. Oyaró submitted that the applicant had established a prima facie case. That if the orders are not granted the petition is likely to be rendered nugatory.
33. With respect to public interest Mr. Oyaró submitted that if the orders sought are not granted the Respondent is likely to begin the recruitment process to replace the Applicant that will cost the public money for a futile cause.
34. For the Respondent Ms. Ewang submitted that the Petitioner is trying to subvert the law and using the Respondent to do so. That Regulation 70(2)(b) of the Public Service Regulations states that a person living with disability must have been registered as such at least 3 years before retirement. That the petitioner failed to inform the court that her documents in annexures PL1(a) and (b) were received by the Respondent on 28th September 2022. That what the Petitioner wanted the court to advance was an illegality. That only Public Service Commission had authority to consider the prayers that the Petitioner seeks from the court.
35. It was counsel's submission that the application has been overtaken by events. Referring to the letter dated 9th May 2023, counsel submitted that the retirement letter has never been voided.
36. Counsel submitted the orders being sought cannot be granted as the petitioner has not met the requirements for grant of what the petitioner has termed as "temporary conservatory orders of injunction". That the status quo is that the petitioner has retired.
37. In a brief rejoinder Mr. Oyaró submitted that the petitioner sustained her injuries while performing her duties assigned by the Respondent. That Regulation 70 should not be read to deny the Petitioner her rights. That she was deemed to be a person with disability by both the Respondent and the National Council for Persons With Disability.

Analysis and determination

38. I have carefully considered the application, the grounds and affidavits in support thereof as well as the documents attached thereto. I have further considered the replying affidavit and documents attached thereto and the submissions made by counsel for the Petitioner and the Respondent.



39. The issues that arise for determination are whether the applicant meets the threshold for the grant of the orders sought and whether the applicant is entitled to the said orders.
40. The facts are not contested. The Petitioner is registered as a person with disability. She received a notice of retirement dated 10th June 2022 notifying her that she would be retiring on 2nd July 2023 upon attaining the mandatory retirement age of 60 years. She further received another letter dated 9th May 2023 advising her to take her annual leave and terminal leave as her last working day would be 30th June 2023. The petitioner however insists that as a person living with disability her mandatory retirement age should be 65 years.
41. The instant application, although not framed in the exact terms, seeks to stay the retirement of the petitioner pending the hearing and determination of her petition. The exact words used by the applicant are that “the court be pleased to issue a temporary conservatory order of injunction restraining the Respondent and/or Interested Party, from retiring the petitioner from the Respondent.”
42. Although the Respondent took issue with the wording of the prayer I do not think there is any doubt about what orders the applicant seeks. I further do not think the Respondent was prejudiced by the said framing of the prayer.
43. In *Gatirau Peter Munya vs. Dickon Mwenda Kithinji & 2 Others* [2014] eKLR the Supreme Court in considering whether it should issue a conservatory order pending an appeal, described conservatory orders as follows:
- “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.
44. In *Obuya Bagaka vs. Kenya School of Government*, the Court of Appeal stated:
- “There is, however, more to consider beyond the criteria in *Giella v Cassman Brown* when considering an application for conservatory orders. Applying the principles set by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (supra), considerations such as public interest should therefore be borne in mind by the court when considering whether to grant relief in the form of a conservatory order, whether at an interlocutory stage of the proceedings or upon full hearing.”
45. In *Muturi v Havi & 21 others* (Civil Application E435 of 2021) [2022] KECA 938 (KLR) (19 August 2022) (Judgment) the Court of Appeal held:
- “It is evident that the orders sought by the appellant were conservatory orders to preserve her position as the Deputy Secretary and Director of the Compliance and Ethics Directorate at the LSK. In order for the appellant to lay a proper basis for the issuance of conservatory orders, she had to first meet the threshold set in *Giella vs. Cassman Brown*, that is the three sequential requirements of first establishing a prima facie case with a probability of



success; secondly, showing that damages would not be an adequate remedy; and, thirdly, demonstrating that the balance of convenience tilts in her favour. Thereafter, she had to go further and meet the further threshold set in the Munya decision by showing that the public interest element was also in her favour.”

46. Applying the principles in above decisions to the instant application, the test to be applied in determining whether or not the Applicant merits the orders sought is first, whether she has established a prima facie case with a probability of success; secondly, whether damages would not be an adequate remedy; thirdly, by demonstrating that the balance of convenience tilts in her favour and, fourthly, by meeting the further threshold set in the Munya decision by showing that the public interest element is also in her favour.
47. Having demonstrated that she is registered as a person with disability and that the law provides for persons with disability to retire at 65 years, the applicant has established a prima facie case with a probability of success by placing information before the court upon which a tribunal properly directing its mind could conclude that her rights may have been infringed, such as to call for an explanation from the respondents. (see *Mrao Limited vs. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125).
48. The issue whether or not she was registered with the Respondent as per Regulation 70 of the Public Service Regulations or whether or not an order for reinstatement would be against the regulations as argued by the Respondent are matters for evidence at the hearing. The issue whether or not the Applicant’s constitutional rights have been violated by the Respondent are also for proof at the hearing of the petition.
49. On the second test, whether damages would not be an adequate remedy, the Applicants counsel has stated that this court has powers to reinstate the Applicant should the court find that she has been unlawfully retired. Should it not be possible to reinstate her, this court has powers to award her damages in addition to compensation for unlawful retirement as that would be tantamount to unfair termination of her employment.
50. Having found that the Applicant has not proved the second test I do not have to go further to consider the third and fourth tests.
51. As was held by the Court of Appeal in the case of *Muturi v Havi & 21 others*, where an applicant fails to meet the sequential test set in *Giella vs. Cassman Brown*, the court does not have to consider the public interest element that was underscored by the Supreme Court in the Munya decision.
52. Further, although the Applicant has alleged violation of her constitutional rights, she has not demonstrated any element of public interest that was involved in such violation. The submission by the applicant’s counsel that public funds would be expended unnecessarily in her replacement is mere speculation as no evidence was adduced of the intention to replace her or that such replacement would involve expenditure as to constitute a public interest matter. The court cannot base its decision on such a remote consideration.
53. There is another factor that works against the Applicant although it is not a traditional test that is usually considered in such applications. This is the delay in coming to court. The Applicant was aware about impending retirement from the time she received notice by letter dated 10th June 2022. She had ample opportunity to approach this court in time for this issue to be resolved before the stated retirement date. She however waited until the day before the expiry of the one-year notice when she moved the court under certificate of urgency to stay the retirement.



54. The upshot is that the application fails. The same is accordingly dismissed. The costs shall be in the cause.

DATED, DELIVERED AND SIGNED AT ELDORET

THIS 31ST DAY OF JULY, 2023.

M. ONYANGO

JUDGE

