



**Njoroge v Nairobi Water & Sewerage Company Limited (Petition E122 of 2022) [2023] KEELRC 1752 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1752 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E122 OF 2022**

**SC RUTTO, J**

**JULY 14, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 3,  
10, 20, 21(1), 22, 23, 25(B), 28, 30, 41, 47, 162(2) AND 258(1) OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA  
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

**PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**PENNINAH KITHIA NJOROGE ..... PETITIONER**

**AND**

**NAIROBI WATER & SEWERAGE COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. The Petitioner/Applicant moved this Court *vide* a Notice of Motion Application dated July 14, 2022. The Motion Application which is supported by the Affidavit of the Applicant seeks the following orders:
  1. Spent
  2. Spent
  3. That this Honourable Court be pleased to issue an interim order of injunction restraining the Respondent by itself, its servants, agents and/or employees from filing and/or appointing any person to the position of Customer



Care Supervisor (grade 6)-Informal Settlement Region pursuant to the Respondent's internal advertisement dated November 17, 2021 and circular dated November 15, 2021 pending the hearing and determination of the Petition interpartes.

4. Costs for this Application be provided for.

2. The Application is premised on grounds that: -

- a. The Applicant was appointed to the role of acting Customer Care Supervisor (grade 6)-Informal Settlement Region by the Respondent on September 26, 2017. It was not indicated for how long she was to hold the position on an acting capacity.
- b. The Respondent extended the appointment of the Applicant on ten (10) further occasions, with the current extension running from April 26, 2022 to October 25, 2022.
- c. That as such, the Applicant still holds the above mentioned position on an acting capacity, nearly five (5) years after she was appointed to the said position on an acting capacity.
- d. The Respondent advertised for the said position vide its Internal Advertisement dated November 17, 2021 and Circular dated November 15, 2021 purportedly seeking to fill the position of Customer Care Supervisor (grade 6) Informal Settlement Region, despite the Applicant having served in the said role for nearly five (5) years, and as such, is now the substantive holder of that position in accordance with the law.
- e. The Respondent's action of causing the Applicant to serve in the office of Customer Care Supervisor (grade 6) - Informal Settlement Region on an acting capacity beyond the lawful period amounted to constructive confirmation of the Applicant as a substantive holder of the office.
- f. The actions of the Respondent of advertising for the said position and even shortlisting potential employees for interviews, conducting interviews and/or appointment to the said position amount to infringement of the Applicant's Constitutional and Employment Rights.
- g. Unless the orders sought herein are granted, the Applicant is at risk of losing her position as Customer Care Supervisor (grade 6) Informal Settlement Region, which position she now ought to hold at a substantive capacity, which will thereby render the Petition herein moot.

3. Upon being served with the Application, the Respondent filed a Replying Affidavit sworn on October 13, 2022 by Titus Tuitoek, who describes himself as its Human Resource Manager. Briefly, he avers that:-

- a. Vide an internal memo dated July 24, 2014, the Applicant was reassigned from her previous position as data entry clerk to Customer Care Assistant.



- b. Both the Applicant's previous and new appointment were within the same remuneration grade (Job grade 8) and as such she was paid in accordance with the company's pay structure.
  - c. The Applicant continued to work in the aforementioned position until she was appointed as the Acting Customer Care Supervisor – Informal Settlement Region vide an internal memo dated September 26, 2017.
  - d. The said appointment was made in accordance with the Respondent's Human Resource Policy and Procedures Manual which provides that an employee may appointed in an acting capacity for a period of 6 months or such other period as the appointing authority may deem fit.
  - e. The Applicant immediately took up the position and started drawing a Special Duty Allowance in accordance with clause 6.3 of the Respondent's Human Resource Policy and Procedures Manual.
  - f. It is a mandatory requirement under Clause 4.2 of the Respondent's Human Resources Policy and Procedures Manual that any recruitment for a substantive position must be done through a selection process involving advertising, shortlisting and conducting interviews.
  - g. Contrary to Applicant's averments, she was appointed to the position of Acting Customer Service Supervisor without being subjected to a competitive recruitment process and as such, she has never been confirmed to be the substantive holder of the said position.
  - h. It is on the above basis that the Respondent issued an advertisement on November 17, 2021, inviting interested Applicants to put in their Applications for consideration for the position of Customer Care Supervisor- Informal Settlements Region.
  - i. The Applicant did not protest the said advertisement and instead put in her application for the said position. However, despite being shortlisted, she was not selected as there was a more suitable candidate for the position.
  - j. Vide a letter dated June 24, 2022, the Respondent confirmed that another candidate had been appointed to the position, and the role was subsequently filed.
  - k. In view of the subject position having already been filed, the present application has been overtaken by events and the same should be dismissed forthwith.
  - l. The Applicant is attempting to frustrate the Respondent's recruitment process upon realizing that she was not the most qualified candidate for the Advertised position.
4. The Application was canvassed by way of written submissions. It was the Applicant's submission that she has established a prima facie case and will suffer irreparable loss unless the Court intervenes. The Applicant further submitted that the balance of convenience tilts in favour of granting the orders she has sought.



5. On its part, the Respondent submitted that the Applicant has failed to prove her case at a prima facie level and have only put forth baseless and unsubstantiated allegations. It was further submitted that she has failed to establish the irreparable harm that cannot be compensated by way of damages. It was the Respondent's position that the balance of convenience lies in refusing the Application.

### **Analysis and Determination**

6. 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 issue an interim injunction restraining the Respondent from filing the position of Customer Care Supervisor (grade 6)- Informal Settlement Region pursuant to the internal advertisement dated November 17, 2021 and Circular dated November 15, 2021.

7. Grant of injunctive orders at an interlocutory stage is guided by the principles set out in the celebrated case of *Giella vs Cassman Brown* [1973] EA 358 at page 360, 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.)”

8. Essentially, 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.

9. As to what constitutes a prima facie case, the Court of Appeal had this to say in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR: -

“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.”

10. 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. Worthy of noting, is that a *prima facie* case is not a case which must succeed at the hearing of the main suit.

11. In the instant case, the Applicant avers that she was appointed to act in the role of Customer Care Supervisor Grade 6 -Informal Settlement Region on September 26, 2017. That the said appointment was extended on ten occasions and cumulatively, has acted in the said position for nearly five years. She termed the Respondent's action of advertising for the said position and shortlisting applicants in that regard, as amounting to infringement of her constitutional and employment rights.

12. In rebuttal, the Respondent admitted the Applicant's assertions with regards to her appointment in an acting capacity with effect from September 26, 2017. According to the Respondent, it is a mandatory requirement under its Human Resource Policy and Procedures Manual that any recruitment for a substantive position must be done through a selection process involving advertising, shortlisting and conducting interviews. That the Applicant was appointed as Acting Customer Care Supervisor without being subjected to a competitive recruitment process and as such, has never been confirmed to be the first substantive holder of the said position. The Respondent further stated that following the advertisement for the said position on November 17, 2021, the Applicant applied and was shortlisted



but was not selected as there was a more suitable candidate. That vide a letter dated June 24, 2022, the Respondent confirmed another candidate to the position hence the role was substantively filled.

13. In light of the foregoing rival arguments, the pertinent issue that comes to the fore is whether the Respondent violated the Applicant's constitutional right by failing to confirm her in the position of Customer Care Supervisor despite serving in an acting capacity for close to five years.
14. As this is not an issue for determination at this stage, the Court will ultimately have to apply its mind upon considering the totality of the evidence on record. Therefore, upon applying the decision in the Mrao case (*supra*) to the instant Application, I am satisfied that the Applicant has proved that she has an arguable *prima facie* case.
15. Having found as much, the next question to ask is whether the Applicant has satisfied that she will suffer irreparable injury in the event the injunction is not granted.
16. The Court of Appeal in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR, had this to say with regards to what constitutes an irreparable injury: -

“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.”
17. In this case, the Respondent stated that the position of Customer Care Supervisor -Informal Settlement Region was already filled vide a letter dated June 24, 2022. To this end, it exhibited a letter issued to one Francis Odanga Odwory dated June 24, 2022. Evidently, this was before the instant Application was filed. The Applicant did not controvert this position. What this means is that at the time of filing the instant Application, the position in question had already been filled.
18. Be that as it may, 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.
19. Indeed, and as I note, the Applicant has sought damages and declaratory orders in the main suit. In this regard, the Applicant will stand to be granted either of the remedies set out above, in the event the Petition succeeds ultimately. As it stands, the Applicant does not stand to suffer irreparable injury in the event she is not granted the orders she seeks at this stage. In holding as much, I am guided by the determination in the Nguruman case (*supra*), where it was 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.”
20. In light of the foregoing the circumstances, I will decline to grant the injunctive orders as sought and direct that parties fast track the hearing of the Petition.
21. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY, 2023.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

Mr. Muyuga instructed by Mr. Kimamo for the Applicant

Ms. Yala instructed by Mr. Kivuva for the Respondent

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**

