



**Bare & 2 others v County Government of Mandera & 3 others (Employment and Labour Relations Cause E219 of 2022) [2023] KEELRC 1624 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1624 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E219 OF 2022**

**AN MWAURE, J**

**JULY 7, 2023**

**BETWEEN**

**IBRAHIM DAVID BARE & 2 OTHERS ..... CLAIMANT**

**AND**

**COUNTY GOVERNMENT OF MANDERA & 3 OTHERS ..... RESPONDENT**

**RULING**

1. The applicant vide notice of motion dated December 15, 2022
  1. For reasons shown this matter be certified very urgent, its service be dispensed with and heard *ex parte* in the first instance.
  2. Conservatory orders be and are hereby issued restraining the respondents and either by themselves, their servant or agents or any other person claiming to be under them, from proceedings with the shortlisting and/or interviews and/or appointments of the advertised positions of county coordinators of efficiency monitoring, sub county coordinators of efficient monitoring unit, deputy sub county coordinators of efficiency monitoring unit, sub county coordinators of delivery unit, deputy sub county coordinators of delivery unit, head of countering violence extremism coordinator and countering violence extremism sub county coordinator advertised on the November 24, 2022 pending the hearing and determination of this application and petitions.
  3. Conservatory orders do and are hereby issued suspending the appointments by the 3<sup>rd</sup> respondent's to the offices of efficiency and monitoring unit and that known as delivery unit pending the hearing and determinant of this motion and petition.



4. Conservatory orders be and are hereby issued restraining the respondents and either by themselves, their servants or agents or any other person claiming to be under them from proceedings with the shortlisting and/ or interview, or appointment of the positions of county coordinators of efficiency monitoring, sub county coordinators of efficiency monitoring unit, deputy sub county coordinators of efficiency monitoring unit, sub country coordinators of delivery unit, deputy sub county coordinators of delivery unit, head of countering violence extremism coordinator and countering violence extremism sub county coordinator advertised on the November 24, 2022 pending hearing and determination of the petition before the honourable court.
  5. The costs of the application be in cause.
2. The application is supported by the grounds listed thereto. As well the Ibrahim Daudi Bare the petitioner in his supporting affidavit dated December 15, 2022 deposed ad said that he was authorised to swear this affidavit of behalf of the other petitioners.
  3. He says they are registered voters of Mandera County. He further says that on November 24, 2022 the 1<sup>st</sup> and 2<sup>nd</sup> respondents advertised the under listed positions
    - i. County Coordinators Of Efficiency Monitoring, JG “3”  
Three (3) Posts Ref: Mcpb/00G/2022/11/01
    - ii. Sub County Coordinators of Efficient Monitoring Unit,  
JG “Q” Three (3) Posts Ref:  
Mcpsboog/2022/11/02
    - iii. Deputy Sub-County Coordinators of Efficiency Monitoring Unit, JG “P” Three (3) Posts Ref: Mcpsb/Oog/2022/11/03
    - iv. County Coordinators of Delivery Unit, JG “ R” Three (3) Posts Ref: Mcpsb/OOG/2022/11/04
    - v. Sub County Coordinators Of Delivery Unit, JG “Q” Three(3) Posts Ref: Mcpsb/OOG/2022/11/05
    - vi. Deputy Sub County Coordinators Of Delivery Unit, JG “P” Three (3) Posts Ref: Mcpsb/OOG/2022/11/06
    - vii. Head Of Countering Violence Extremism JG “P” one (1) post Ref: Mcpsb/OOG/2022/11/07
    - viii. Coordinator Countering Violence Extremism Sub -County Coordinators JG “n” Eight (8) posts Ref: Mcpsb/OOG/2022/11/08
  4. They say the advertised positions are not in the County Government Act neither are they in the constitution or even any written law.
  5. Further he depones that 3<sup>rd</sup> respondent has made appointments and created offices illegally by not following legal process and excluding constitutional offices that ought to have an input in creating public offices.



6. The deponent avers that the said appointments are in contravention of SR provisions under article 230(4) of the constitution and as also in contravention of articles 235, 10, 27, 174, 176, and 232 of the constitution as well as sections 60 and 63 of the county government act.
7. He further says the action of the respondents will cause waste to public resources and further more is a serious contravention of the constitution.
8. The deponent says that the people of Mandera should benefit from proper use of resources and the respondents should be held accountable to the offices they occupy and should act within the law. The deponents pray that the petition and the notice of motion be allowed.

### **Respondents No 1, 2, & 3 submissions**

9. Respondents 4<sup>th</sup> and 5<sup>th</sup> respondent avers they associate with the submissions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submissions.
10. The respondents in their submissions provide the guiding principles in granting conservatory orders as in the case of Platinum Distiller Limited v Kenya Revenue where the court cited with approval the decision of Supreme court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others where court held:

“The guiding principle upon which Kenya courts makes finding in interlocutory applications for conservatory orders within the framework of article 23 of the constitution are settled. The law, as I understand it, is that in considering an application for conservatory orders, the court is not called upon and is indeed not required to make any definitive findings either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made a prima facie case before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory order will prejudice the applicant.
11. The respondent further provide that conservatory orders should be granted on inherent merit of a case bearing in mind the public interest, the constitutional value, and proportionate magnitudes and priority levels attributable to the relevant cause.
12. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent submit that the petitioners have not demonstrated violation of provision of the constitution or statue by the advertised positions.
13. They say the County Government has mandate to establish its structures as per executive order No 7 of 2013 approved by the 3<sup>rd</sup> respondent in consultation with 1<sup>st</sup> and 2<sup>nd</sup> respondents. The respondent further says the recruitment will be done openly and transparently.
14. The respondent further submit that the court in determining the application should consider who will suffer the greatest prejudice should the orders sought be granted. They say great detriment will be suffered by the people of Mandera County as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent will be disabled to perform their duties.
15. The respondents submit that petitioners will not suffer any prejudice if conservatory orders are not granted as the issues in question will remain alive. In conclusion the respondents submit that they have demonstrated that the petitioners have not established a prima facie for grant of conservatory order and further the executive order no 1 of 2018 is backed by law and recruitment will be free and fair



and competitive where the Board will independently recruit qualified and competent persons. They submit they have also demonstrated public interest in favour of disallowing the applicant and granting of an expedited hearing.

### **Analysis and determination**

16. The court has critically considered the application under notice of motion dated December 15, 2022. It has also considered the pleadings presented thereto as well as the submissions of the respective parties.
17. The petitioner approached the honourable court to give conservatory orders to restrain the respondents from shortlisting or holding interviews and appointments of the various positions hereinbefore listed. In particular they pray for conservatory order to restrain the respondents from appointing officers of efficiency and monitoring unit and that known as delivery unit pending determination of this motion and petition. They assert the said positions are not recognised in the county government act and in the constitution.
18. They claim the creation of these positions go against the article 230(4) of the constitution. They retaliate it is a waste of public resources to create such positions.
19. They also state that these appointments contravene articles 235 of the constitution and sections 60 and 65 of the County Government Act.
20. The court is cognizant that section 46 of the county Government Act gives county executive committee power to determine the organisation of the county and its various departments and further are mandated to establish and vary any department and determine the number of any departments and also abolish or change the nature of the departments. This clearly gives the county executive committee power to determine the organization of the county and its various departments and further are mandated to establish and vary any department and determine the number of any departments and also abolish or change the nature of the department. This clearly gives the county executive committee power to determine the positions that would be established according to the special needs of each county.
21. Article 176(2) of the constitution provide that each county government shall decentralise its functions and the provisions of its services to the extent that it is efficient and practicable to do so. The constitution therefore denotes power to the county government to decentralise its positions in order to serve its people efficiently and in practical manner.
22. Section 60 of the County government act allow the establishment of a public office within the county public service and the criterial for such establishment are well set out.
23. Section 65 of the said act provide the criteria for appointment for candidates which must satisfy the provisions set out in articles 10, 27 (4) and 56 (c) and 232 (1) of the constitution of Kenya 2010.
24. The petitioners have not raised any issue on suitability or otherwise of the shortlisted candidates but their application hinges on the fact that in shortlisting and holding interviews for those advertised positions the respondents are in breach of the law including the constitution.
25. The court is reluctant to grant conservatory orders of this nature and the court is of the view that the matter is still alive and upon hearing the petition a final and comprehensive determination will be rendered.
26. Flowing from the foregoing the court is of the considered view that the respondents are within the law to advertise for the positions as aforementioned.



27. The court holds that the petitioners failed to establish a prima facie to justify granting of conservatory orders as prayed as provided in the aforementioned case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others* supra. Hence the petitioner's application is dismissed accordingly.

28. This being a public interest litigation suit the court orders each party to meet their respective costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**ANNA NGIBUINI MWAURE**

**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> 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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

