



**Hussein & another v Governor, County Government of Mandera & 2 others
(Petition E143 of 2023) [2023] KEELRC 1882 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1882 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E143 OF 2023
B ONGAYA, J
AUGUST 4, 2023**

BETWEEN

SADAM MAALIM HUSSEIN 1ST PETITIONER

AHMED MAALIM ADOW 2ND PETITIONER

AND

**THE GOVERNOR, COUNTY GOVERNMENT OF MANDERA ... 1ST
RESPONDENT**

THE COUNTY GOVERNMENT OF MANDERA 2ND RESPONDENT

**THE COUNTY ASSEMBLY, COUNTY GOVERNMENT OF
MANDERA 3RD RESPONDENT**

RULING

1. The Petitioners filed a Notice of Motion Application dated 20th July 2023 seeking to be heard for Orders:
 1. (... Spent).
 2. (... Spent).
 3. THAT pending the hearing and determination of this Application, a conservatory order to issue suspending the appointment of HUSSEIN ADAM SOMO, the Interested Party herein, as the County Attorney of the 2nd Respondent and further restraining and prohibiting the Interested Party from continuing to discharge his mandate and undertaking any functions as the County Attorney of the 2nd Respondent or in any other manner acting as such.
 4. THAT pending the hearing and determination of the petition a conservatory order to issue suspending the appointment of HUSSEIN ADAM SOMO, the Interested Party herein, as the



County Attorney of the 2nd Respondent and further restraining and prohibiting the Interested Party from continuing to discharge his mandate and undertaking any functions as the County Attorney of the 2nd Respondent or in any other manner acting as such.

5. THAT costs of this Application be provided for.
2. The Application was based on the grounds outlined in the Application and in the Supporting Affidavit of Sadam Maalim Hussein. It was grounded on sections 7(8) and 8 of the [Public Appointments \(County Assemblies Approval\) Act](#) No. 5 of 2017 and section 5 of the [Office of the County Attorney Act, 2020](#).
3. In support of the Application, Mr. Hussein averred that while the 1st Respondent has the discretion to nominate and appoint a County Attorney with the approval of the 3rd Respondent, that discretion ought to be exercised lawfully and in line with the constitutional values and principles of recruitment, selection and appointment to public offices, as held by this Honourable Court in *Commission for Human Rights and Justice v Michelle Bibi Fondo & 2 others* [2022] eKLR.
4. Mr. Hussein further averred that the nomination, approval and appointment of the Interested Party by the Respondents was illegal, unlawful and null and void ab initio as it falls short of the constitutional and statutory muster, since the Interested Party was not qualified for the position of County Attorney as at the time of his appointment. He asserted that at the date of appointment, the Interested Party had not met the threshold for qualification as under section 5 (2) (a) of the Office of the County Attorney Act, which stipulates that a person qualifies as County Attorney if they are an advocate of the High Court of Kenya of at least five years standing.
5. That therefore in nominating and appointing the Interested Party who was clearly not qualified, the 1st Respondent breached Articles 73 and 232 of [the Constitution](#) and by extension, section 5(2)(a) of the Office of the County Attorney Act and sections 7(8) and 8 of the Public Appointments (County Assemblies Approvals) Act. It was Mr. Hussein's contention that the continued discharge of the mandate of the office of the County Attorney by the Interested Party is unlawful and unconstitutional and will result in loss of public money in terms of salaries, benefits and allowances.
6. The applicants urged the Court to exercise its unlimited jurisdiction under Article 165(3) (d) (ii) by suspending and invalidating the Interested Party's appointment. They asserted that unless the orders sought are granted, an illegality will be perpetuated unabated.
7. In response, the 1st and 2nd Respondents filed a Notice of Preliminary Objection dated 25th July 2023, on the grounds that the Court lacks jurisdiction to entertain and determine the issues raised herein as there is no employer-employee relationship between the Parties in this suit. Secondly, that the Petition and Application herein have been filed in contravention of the decision of the Court of Appeal in *Civil Appeal 119 & 139 of 2017 (Consolidated); Public Service Commission & 4 others v Cheruiyot & 20 others* [2022] KECA 15 (KLR), delivered on 8th February 2022. Lastly, that the Petition and Application herein are an abuse of the Court process and should be struck out with costs.
8. The 1st and 2nd Respondents also opposed the Application by way of a Replying Affidavit sworn by Billow Isaack Hussein on 28th July 2023.
9. The 3rd Respondent filed a Replying Affidavit sworn on 28th July 2023 by Ahmed H. Surow. Mr. Surow averred that the 3rd Respondent indeed received the name of the Interested Party as the County Attorney nominee from the 1st Respondent, proceeded to notify the public of the same and then approved the appointment. He contended that the Petitioners did not present any memorandum to the County Assembly objecting to the appointment of the Interested Party as required under section 7(10) of the Public Appointments (County Assemblies Approvals) Act. That in any event, the 1st



Respondent exercised its discretion in line with the provisions of section 5(1) of the Office of the County Attorney Act.

10. Mr. Surow further averred that the Interested Party had by then diligently discharged his functions for nine months thereby delivering effective government services for the benefit of the people of Mandera County. He opined that it was, hence, not in the public interest to grant the prayers sought herein. Further, that both the petition and application herein do not disclose any contravention of the Constitution or the relevant statutory laws to warrant grant of the orders sought.
11. The Interested Party on the other hand filed a Replying Affidavit dated 28th July 2023. He averred that he was appointed County Attorney of the 2nd Respondent after nomination by the 1st Respondent and vetting and hearing approval by the 3rd Respondent. He asserted that he had at the time practised law for five (5) years and was substantively an Advocate of five years' standing as required under statute. He produced Practising Certificates for the years 2018, 2019, 2020, 2021 and 2022.
12. It was the Interested Party's averment that the Petitioners were fully aware of his appointment as County Attorney in 2022 but chose to challenge the same more than nine months later. He contended that the present application was averse to the public interest of the people of Mandera County, which is nationally classified a hardship area and one that has faced real difficulty in attracting professional and skilled technical staff. He further notified the Court that he had, since his assumption to the said office, undergone several high-level professional development trainings at the 2nd Respondent's costs and that such taxpayers' investment should not be wasted. He urged the Court to thus dismiss the application with costs and to allow him continue to discharge his duties in the said office.

Petitioners' (Applicants') Submissions

13. On the issue of jurisdiction of this Court, the applicants submitted that any member of the public, while acting in public interest, can institute court proceedings challenging the conduct of the Respondents who are public bodies, as was affirmed in *Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & another* [2013] eKLR. Further, that considering the extended boundaries on who can petition the Court under Article 258 of the Constitution, the Petitioners do not need to be employees and that the question must be whether the subject matter concerns employment and labour relations.
14. It was further submitted for the applicants that section 12 of the ELRC Act is elaborate that jurisdiction attaches to the Court with respect to disputes relating to employment and labour relations. That since the subject matter of the instant petition was the recruitment of the interested party and it was commonplace that recruitment is an element of employment, the Court has jurisdiction to entertain the matter before it. They asserted that the Court's jurisdiction to interpret the Constitution on issues relating to employment and labour relation was affirmed in the case of *United States International University (USIU) V Attorney General* [2012] eKLR, in which the Court also held that the Industrial Court (renamed ELRC) has jurisdiction to enforce Article 41 rights and all fundamental rights ancillary and incidental to employment and labour relations.
15. The applicants submitted that Civil Appeal 119 & 139 of 2017 as referenced by the 1st and 2nd respondents is distinguishable because the central issue in the said case was whether the ELRC had jurisdiction to determine the constitutionality of section 43(5) of the Elections Act.
16. In the upshot, the applicants submitted that the 1st and 2nd Respondents' objection is without merit and should be dismissed with costs.



17. The Applicants submitted that the threshold for grant of conservatory orders have been set in a plethora of cases. Firstly, the landmark case of *Giella vs. Cassman Brown* (1973) EA 358 stated the principles governing the grant of interlocutory injunctions as follows: an applicant must show a prima facie case with a probability of success; an applicant must show that they might otherwise suffer irreparable injury that would not adequately be compensated by an award of damages; and if the court is in doubt, it will decide an application on the balance of convenience.
18. They also cited the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR in which the Court summarised the principles of grant of conservatory orders as:
 - i. The applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice.
 - ii. The court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of Rights.
 - iii. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
19. On whether there is a prima facie case, the applicants submitted that the Court simply requires to compute the time between the date of the Interested Party's admission to the Roll of Advocates on 27th March 2018 and the date of his nomination on 13th October 2022. That the answer is that the interested party was an Advocate of 4 years and 6 months standing at the time of his appointment and had not attained the mandatory requirement of an Advocate of at least five years' standing. They referred the Court to the decision in the case of *Nelson Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR on attaining mandatory experience.
20. They further submitted that the interested party's assumption of office does not place his appointment outside the reach of the Court. That the Court in the case of *Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another* [2011] eKLR asserted that the jurisdiction of the Court is dependent on the process and constitutionality of the appointment and that the Respondents could not say that the process was complete and thus the Court has no jurisdiction to address the grievances raised by the Petitioners.
21. The Applicants submitted that there is no public interest in condoning and perpetuating an illegality and that public interest will only be served if the interested party is suspended and restrained from discharging his mandate. That the 2nd respondent can easily pay him all withheld salaries during such suspension if this Court ultimately upholds his appointment. That conversely, the interested party will not be in a position to refund the said monies and recovery of the same will be a toll order.

Respondents and Interested Party' Submissions

22. The respondents and interested party submitted that there is no employer-employee relationship between the Petitioners and Respondents as envisaged under Article 162(2) of *the Constitution* and section 12 of the ELRC Act. They cited the case of *Public Service Commission & 4 others v Cheruiyot & 20 others* [2022] eKLR KECA 15 (KLR) in which the Court held that it was the High Court that had jurisdiction over the issues raised in the absence of an employer-employee relationship.
23. It was further the respondents' and interested party's submission that although this Court enjoys the same status as the High Court, it does not exercise the same jurisdiction as the High Court (see *Karisa*



Chengo & 2 others v Republic [2015] eKLR). They thus urged the Court to down its tools and dismiss both the Petition and the Motion Application herein for want of jurisdiction.

24. Without prejudice to the foregoing, the 1st and 2nd Respondents and Interested Party submitted that to warrant the grant of conservatory orders, the Petitioners must not only prove a prima facie case with a chance of success, but also prove that it would be in public interest for the orders sought to be granted. They further submitted that the Petitioners had not given credible explanation why they did not oppose the appointment of the Interested Party before the County Assembly. That the Petitioners had also failed to reveal to the Court that they were actually former employees of the 2nd Respondent employed as legal officers and had been required to report to the Interested Party. That it was therefore evident that the suit was not in the public interest but a failed attempt by the Petitioners to lobby the Interested Party for their reinstatement to duty. On this submission, they relied on the case of *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* [2018] eKLR.
25. It was further their submission that conservatory orders are orders in rem as opposed to in personam, which is the nature of the orders sought herein. That the orders sought do not therefore lend themselves in the circumstances and are not remedies in respect of a particular state of affairs, but attach to a particular person – the interested party (see *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR).
26. It was also the 1st and 2nd respondents' and the interested party's submission that the applicants have not shown the prejudice they stand to suffer. That they on the other hand have demonstrated that the petition herein is an abuse of the court process, has not been filed in good faith and is without merit.
27. The 3rd Respondent was of the view that the petitioners ought not to be granted conservatory orders as their application has not met the threshold for the same. In addition, that the orders sought are final in nature and ought not to be granted at an interlocutory stage as was reiterated in *Isaiah Luyara Odando & another v Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested Party)* [2022] eKLR.
28. The Court has considered the parties' respective submissions and the material on record. The 1st issue is whether the Court lacks jurisdiction to entertain the petition on account of want of a contract of service as per the cases cited for the respondents and the interested party. The Court returns that as urged and submitted by the petitioners, the submission is untenable. First, the dispute is about the appointment of the interested party as the County Attorney. The dispute is about validity of that contract of service between the interested party- and the respondents. The existence of the contract appears to place the decided cases that hold that there be a contract of service for the ELRC to enjoy jurisdiction. The Court considers that any person can file a suit or petition in the Court because section 12(2) of the ELRC Act, 2011 states that an application, claim, or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employers' organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. It appears to the Court that by that provisions, any person like the petitioners are entitled to move the Court as long as the issue in dispute is about formulation, interpretation, and implementation of a term and condition of service which may arise pre, post and during a contract of service. The Court further considers that the section appears to confer the Court jurisdiction in matters of employment, labour relations and related matters within the right of every person to move the Court as contemplated in Articles 22, 23 and 258 of *the Constitution*. Like in the instant case it is not simply that the matter arises and revolves around the mentioned contract of service but as well, the petitioners are entitled to move the Court in public interest litigation as is said to have been done provided the dispute relates to employment or labour relations or related matters as envisaged in Article 162 (2) (a) and section 12 (2) of the *Employment and Labour Relations Court Act*. The Court returns



that the matter is within the Court's jurisdiction and the petitioners were entitled to move the Court within the tests set in Articles 22, 23 and 258 of *the Constitution*.

29. To answer the 2nd issue, there is no doubt that the interested party was admitted to the role of advocates on 27.03.2018 and the five years prescribed as qualification for appointment as a County Attorney per section 5 (1) of the County Attorney Act were lapsing on or about 27.03.2023. There is no doubt that the interested party was nominated as County Attorney on 14.10.2022 and appointed or sworn in office as such on 07.11.2022. That was long before he attained the 5 years prescribed to hold office. It imperative to note that the interested party has since attained the 5 years, 27.03.2023 having come and gone.
30. While it may appear that the interested party was appointed without due qualification, the Court has considered the prescribed procedure of determining and questioning such qualification. The notice was published that the 3rd respondent's Committee on Approvals was carrying out the approval hearings with respect of the the appointment of the interested party as the County Attorney. The relevant print media notices are exhibited on the replying affidavits inviting the public to provide information or memorandum on the suitability of the interested party to be approved for appointment as the County Attorney. The petitioners appear not to have provided any objection. That failure appears to the Court to operate as a bar to grant of a temporary relief in the instant case as prayed for. In particular, the failure operates to vitiate the otherwise prima facie case that the petitioners are acting in good faith to protect public interest and to enforce the constitutional provisions whereas they failed to avail themselves at the earliest opportunity to move the objection. Upon material on record, the petitioner's have given no good reason for failing to raise objections before the County Assembly and its Approval Committee. The Court finds that the petitioners have failed to establish a prima facie case in that regard and the 2nd issue is answered accordingly – the there is no prima facie case established at this stage.
31. The Court has also considered the purpose for which a conservatory order is to serve. It is to preserve the status so the substratum of the dispute is not rendered nugatory. In the instant case the interested party is already in office and there is no vacancy to be preserved in that regard. In that sense the petitioners appear to be guilty of belated arrival at the alter of justice as urged for the respondents. In particular, the Court considers that the balance of convenience favours the status quo being that pending the hearing and determination of the petition the interested party continues in office of the County Attorney. That is more so especially that in the intervening period, the objection based on disqualification of lack of five years' standing has since been overcome with effluxion of time. To answer the 3rd issue, the balance of convenience favours denial of the interim conservatory orders.
32. To answer the 4th issue, undoubtedly the issues raised touch the serious issues of leadership and integrity under chapter 6 of *the Constitution* as well as Articles 232 and 10 of *the Constitution*. However, the Court must also be alert that there are specific provisions of law on duty bearers about realisation of the integrity objectives of *the constitution*. It is only at the full hearing of the petition that the Court will be well informed on appropriate remedies and the persons or offices that should be directed by way of orders one way or the other. One crucial consideration will be whether the actors proceeded in good faith and whether the petitioners or other stakeholders acted in accordance with the applicable law in evaluating the manner the interested party was nominated, approved and subsequently appointed. Thus, the Court considers that the important integrity considerations are best answered after hearing and taking full evidence in the dispute.
33. Thus, the Court considers that the application will fail with costs in the cause,



34 In conclusion, the petitioner's application dated 20.07.2023 is hereby dismissed with costs in the cause and parties to take directions for expeditious hearing and determination of the main petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 04TH AUGUST, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

