



Ndalut & another v Nairobi City Water & Sewerage Company (Employment and Labour Relations Petition E099 of 2022) [2023] KEELRC 2754 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2754 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E099 OF 2022**

K OCHARO, J

OCTOBER 26, 2023

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES
3,10, 20, 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

KIPTOO NDALUT 1ST PETITIONER

GRIBBIN CHOGO LIBABU 2ND PETITIONER

AND

NAIROBI CITY WATER & SEWERAGE COMPANY RESPONDENT

RULING

Background

1. The Petitioners/Applicants filed a Notice of Motion dated 16th June 2022 brought under Certificate of Urgency seeking the following orders: -
 - a. Spent
 - b. Spent



- c. That the Honourable Court be pleased to issue an Interim Order of injunction against the Respondent, its servants, agents and/or employees restraining them from conducting interviews and/or filling the position of Security Officer of Informal Settlements Region pursuant to the Respondent's advertisement circular dated 13th May 2022 pending the hearing and determination of this Petition.
 - d. That the costs of this Application be provided for.
2. The Respondent opposed the Notice of Motion through a Replying Affidavit sworn on 8th August 2022 by one Titus Tutioek.
3. The Petitioners/Applicants filed written submissions dated 24th October 2022, and the Respondents filed submissions dated 16th January 2023 for and against the application respectively.

Petitioners/Applicants' Case

4. The Petitioners/Applicants' case is that they have held the positions of Acting Security Officers in the Respondent Company since 4th September 2019 and June 2018 respectively to date. The Applicants have served in those positions without any promotions for more than 3 and 4 years respectively, even after their evaluations by their Supervisors found their performance to be above average.
5. That the Respondent, vide an Internal Recruitment Circular dated 13th May 2022 advertised for the said positions of Security Officers, instead of confirming them into the positions substantively.
6. It is the Petitioners/Applicants' position that the actions of the Respondent of advertising for the said positions and shortlisting potential employees for interviews and/or appointing other candidates to the said positions infringe on their lawful expectation.
7. That unless the orders sought are granted the Petitioners/Applicants will lose their positions as Security officers of Northern Region and North Eastern Region respectively. On the flip side, the Respondent stands to suffer no harm or loss if the prayers sought by the Applicants are granted. The Petitioners/Applicants also argue that it is just and equitable that the application be granted as prayed.

Respondent's case

8. The Respondent admits through its Human Resource Manager, that the Petitioners/Applicants were indeed appointed to the position of Acting Security Officer-Informal Settlements Region and Acting Security Officer-Southern Region vide Internal Memos dated 9th April 2019 and 12th June 2018, respectively, for periods of 6 months each under the Respondent's Human Resources Policy and Procedures Manual. The Manual limits the period for appointment in an acting capacity to 6 months, or as may be determined by the appointing authority. Subsequently, vide an internal memo dated 30th October 2019, both Petitioners/Applicants were transferred to the Northern Region to serve in the same capacities, and their appointments in the acting capacity were extended a further 6 months. Thereafter, extensions were effected for consecutive 6-month periods on various dates to date.
9. The Respondent states that the Petitioners/Applicants' appointments, as well as the extensions, and the payment of acting allowances throughout the Petitioners/Applicants' period of service, in the acting capacity, flowed from the stipulations of the Respondent's Human Resource Policy and Procedures Manual.



10. The Petitioners could be confirmed into the positions substantively as by so doing, the Respondent could get into the space of violating its policies and procedures embodied in the Human Resource Policy and Procedure Manual. They would have been appointed to the positions without being subjected to a competitive recruitment process. This would be contrary to Clause 4.2 of the Respondent's Human Resource Policy and Procedures Manual which requires any recruitment for a substantive position to be done through a selection process involving advertising, shortlisting and conducting interviews.
11. That from the onset, the Petitioners/Applicants' appointments and extensions were subject to the positions being filled substantively. The Respondent points out that the various internal memos appointing the Petitioners/Applicants and extending their appointments evidence the foregoing. Consequently, the Respondent concludes that it is disingenuous for the Petitioners/Applicants to state that they had a legitimate expectation that they would be automatically confirmed without being subjected to a competitive recruitment process.
12. The Respondent admits that they did indeed issue an advertisement on 17th November 2021 inviting interested applicants to apply for the positions of Acting Security Officer for the Northern, Eastern and North Eastern Regions. The requirements indicated in the said advertisement corresponded with the competence requirements for the said position and the Respondent's analysis of the key responsibilities and skills required for the job. A key requirement was that the applicant should possess a Bachelor of Arts Degree in Criminology and Security Studies or a related field from a recognized university.
13. The Petitioners/Applicants applied for the position. They were not shortlisted as they did not meet the key requirements. None of them held a Bachelor of Arts degree. The Petitioners/Applicants appealed the Respondent's decision not to shortlist them vide letters dated 25 May 2022 and 30 May 2022. The Respondent responded to them individually, explaining the reasons why they could not be shortlisted.
14. On the Petitioners' claims regarding violation of their Constitutional rights, the Respondent avers that the recruitment process complied with the Respondent's Human Resources Policy and Procedures Manual; and that tailoring the process to suit the Petitioners' qualifications and competencies would amount to preferential treatment and was therefore untenable; and that the Petitioners have no valid claim and are merely attempting to sabotage the Respondent's recruitment process. They are attempting to use this Court's process to influence the recruitment process in their favour.
15. The Respondent concludes that the Petitioners/Applicants have not met the threshold for grant of the injunctive orders sought, by demonstrating that they have a prima facie case with a probability of success.

Analysis and determination

16. I have considered the Notice of Motion dated 16th June 2022, the Grounds thereof, the Supporting Affidavits sworn by the 1st and 2nd Petitioner/Applicants on 16th June 2022, the Respondent's Replying Affidavit sworn on 8th August 2022, the respective submissions filed by both parties and authorities relied on.
17. I find that a single central issue for determination, thus:
 - a. Whether the Petitioners/Applicants should be granted the Orders sought.



Whether the Petitioners/Applicants should be granted the Orders sought.

18. The Petitioners/Applicants' application dated 16th June 2022 is expressed to be under Article 20, 22, 50 (1), 23 (3), 159 (2)(d), 165 and 258 of the Constitution of Kenya 2010, Sections 18,19 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Practice and Procedure Rules 2013, and all other enabling provisions of law.
19. The conditions requisite for a grant of injunctions are set out in the locus classicus of *Giella vs Cassman Brown & Company Limited* (1973) E A 358, where the court expressed itself as follows:-

“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.”[Emphasis added]
20. The first condition that the Applicant must meet, therefore, is to demonstrate that they have a prima facie case with a probability of success.
21. A “prima facie with a probability of success” case was defined in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, as:

“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.”
22. The evidence presented before this Court by both the Petitioners/Applicants and the Respondent points to the appointments of the 1st and 2nd Applicants as Acting Security Officers (Grade 5) on 9th April 2019 and 12th June 2018, respectively, vide Internal Memos signed by one Eng. Nahashon Muguna, Acting Managing Director. The said Internal Memos are marked as Exhibit “KN-1” and attached to the 1st Petitioner's Affidavit in Support of Application and on the Respondent's Replying Affidavit. On the face of it, the Memo dated 9th April 2019 appointing the 1st Petitioner expressly states that the appointment is for six (6) months, subject to the position being filled competitively. The Memo dated 12th June 2018 appointing the 2nd Petitioner to the acting position is silent on the end date of his appointment.
23. Subsequently, both the 1st and 2nd Petitioners/Applicants were issued with several six (6) month extensions for service in their acting positions. Per the evidence before this Court, the 1st Petitioner/Applicant received extensions vide Internal Memos dated 9th April 2019, 17th October 2019, 7th May 2020, 12th October 2020, 14th April 2021, 5th October 2021, and 12th April 2022. The 2nd Petitioner/Applicant received extensions vide Internal Memos dated 28th January 2019, 12th July 2019, 17th February 2020, 22nd June 2020, 3rd December 2020, 16th June 2021, and 16th December 2021. It does not escape this Court's attention that a majority of the said internal memos also expressly state that the appointments are subject to the positions being filled competitively/substantively.



24. On the issue of appointments in acting capacities, the Respondent's Human Resources Policy and Procedures Manual, which is produced by the Respondent as Exhibit "TT-2" attached to its Replying Affidavit sworn on 8th August 2022, at Clause 6.3 provides in part as follows: -
- "An employee who is appointed by the MD/DHRAS to act upon a vacant post will be required to act upon such a post for a maximum period of six (6) months or as determined by the appointing authority. Such appointment shall be in writing".
25. The stipulation above places a wide discretionary authority on the Respondent to decide for how long an employee may serve in the acting capacity after the initial six months. The engagement of the Petitioners/Applicants as Acting Security Officers by the Respondent for more than 3 years and 4 years respectively, would appear not offensive to the Respondent's Human Resource Policy. The acting cannot be a reason that would wet the Petitioner's expectations that they could be substantively appointed, therefore.
26. Further, my perusal of the Respondent's Human Resources Policy and Procedures Manual does not unearth any provision whatsoever for automatic confirmation of an employee who is acting or has acted during the period when a position fell vacant within the ranks of the Respondent.
27. The Instrument insists on competitive recruitment and selection. This I find aligns with the Constitutional requirements of transparency, integrity and accountability under the national values and principles of governance. The insistence is also in accord with the contemplation under the County Government Act.
28. There is no dispute that the 1st and 2nd Petitioners/Applicants held the positions of Security Officers (Grade 5) for 3 years and 4 years respectively prior to filing this suit. There is also no dispute that their respective heads of department subjected them to appraisals where they were found to be satisfactory in their duties and recommended them for confirmation in 2020. Despite the foregoing, it is this Court's considered view that there was an obligation on the Respondent imposed by its Human Resource Policy to weigh the Petitioners/Applicants for the substantive positions against its competency framework thereunder.
29. This Court has held time and time again that as a general principle, it will not interfere with an employer's right to perform internal human resources functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function unless it can be shown that the functions are done with disregard to *the Constitution* or other legislation, the agreement between parties, or fair labour practices. This position has been upheld in several cases including *Kenya Plantation and Agricultural Workers Union vs James Finlay (K) Limited* [2013] eKLR and *Geoffrey Mworira vs Water Resources Management Authority & 2 Others* [2015].
30. The Petitioners/Applicants have not argued that the qualifications required by the Respondent for the substantive position in some way contravened *the Constitution*, legislation, or the agreement between parties, or were in some other way unfair. Sight has not been lost that the Petitioners/Applicants submitted to the recruitment procedure and applied for the substantive position. Their only grievance is that they were not shortlisted. As was stated in *John Ndiritu Nguyo v Kenya Ports Authority & William Kipkemboi Ruto* [2016] eKLR, the Petitioners condoned the actions of the Respondent. If they had a complaint regarding the recruitment procedure or qualifications, they should have approached the Court before applying for the position.
31. In light of the foregoing lengthy analysis, I am persuaded that the Petitioners/Applicants have not proved that they have a prima facie case with a probability of success.



32. The Honourable Court of Appeal in *Total Kenya Limited vs David Njane t/a Argwings Twin Service Station & 2 Others* [2018] eKLR, while applying the Court's finding in *Nguruman Ltd vs Jan Bode Nielsen & 2 Others* [2014] eKLR held that the three conditions for grant of injunction ought to be considered sequentially so that the second and third conditions cannot be considered once the first condition is not established. I am therefore not obliged to consider the other two conditions.
33. Nevertheless, in the interest of completeness, I return that the Petitioners/Applicants' application would also fail on the second ground for the reason that an award of damages would be sufficient to compensate any injury suffered by them emanating from this Court's failure to grant an injunction as prayed. I gather support for my said conclusion from the case of *Oyatsi v Judicial Service Commission* (Petition E111 of 2021) [2022] KEELRC 3 (KLR) (10 March 2022) (Judgment), where the successful litigant who complained of similar circumstances was awarded damages as compensation for her injury. The Petitioners/Applicants have not convinced his Court that a balance of convenience tilts in their favour. In my view, the balance of convenience tilts in favour of the Respondent who should be allowed to through its human resource function fill the positions for its efficient functioning.
34. In the upshot, I hereby dismiss the Petitioners/Applicants Notice of Motion dated 16th June 2022. Costs shall be in the cause.

Read, signed and delivered this 26th day of October, 2023.

OCHARO KEBIRA

JUDGE.

In presence of:

Mr. Musere for the Petitioners

Ms Yala holding brief for Kivuva for Respondent

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 15th March 2020 and subsequent directions of 21st 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.

OCHARO KEBIRA

JUDGE

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