



**Ombati v Governor Nyamira County & another (Petition E024 of 2023)  
[2023] KEELRC 3051 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3051 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E024 OF 2023**

**CN BAARI, J**

**NOVEMBER 30, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTIONS  
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER**

**ARTICLES 2, 10, 20, 21, 22, 23, 27, 28, 41, 47, 48 &  
258, OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF RULES 4, 10, 11, 12 & 20 OF THE CONSTITUTION OF KENYA  
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS OF THE INDIVIDUAL) HIGH COURT  
PRACTICE AND PROCEDURE RULES 2013)**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**BETWEEN**

**DR. TIMOTHY OMBATI ..... PETITIONER**

**AND**

**THE GOVERNOR NYAMIRA COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF NYAMIRA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before Court is the Applicant/Petitioner’s motion application dated 11<sup>th</sup> September, 2023, brought pursuant to Articles 10, 40, 47 and 50 of *the Constitution*, Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Procedure Rules. The Applicant/Petitioner seeks orders THAT: -



- i. Spent.
  - ii. Spent.
  - iii. Pending the hearing and determination of this petition, this Honourable Court be pleased to issue conservatory orders suspending the decision of the Respondents terminating the Applicant/Petitioner's employment as communicated vide a letter dated 6<sup>th</sup> September, 2023, and consequently reinstate the Applicant.
  - iv. Costs be awarded.
2. The application is supported by grounds on the face thereof and the affidavit of Dr. Timothy M. Ombati, the Applicant/Petitioner herein. The crux of the application is that the Applicant was served with a notice to show cause why he should not be terminated dated 2<sup>nd</sup> August, 2023, on the basis that he lied to the 1<sup>st</sup> Respondent that a consignment of drugs would be delivered on time, but which did not happen, and further having failed to heed a request to step aside.
  3. The Applicant avers that he was appointed to the office of County Executive Committee Member for Nyamira County, primarily in charge of the Department of Health services. He avers that his duties and remuneration were enumerated in a letter dated 27<sup>th</sup> October, 2022.
  4. The Applicant/Petitioner states that he initiated the procurement of drugs for the county hospitals when the initial stocks ran low, and that Mission for Essential Drugs and Suppliers (MEDS) was tasked to supply drugs worth Kshs 22 million to the County. He further states procurement, processes were approved by relevant officers in the procurement health and finance departments.
  5. It is his case that MEDS scheduled delivery of the consignment, but did not deliver the full consignment as agreed and did not communicate delay in the delivery, and ended up making a partial delivery of just 4 trucks.
  6. The Applicant avers that the 1<sup>st</sup> Respondent called him to express his displeasure at the delay of the delivery for the launch that had been planned earlier, following which, he was asked to step aside.
  7. The Applicant states that the notice to show cause issued, also suspended him from service. It is his position that though he responded to the show cause notice explaining his predicament, he was issued with a letter dated 6<sup>th</sup> September, 2023, terminating his services.
  8. The Respondents opposed the motion vide a replying affidavit sworn on 29<sup>th</sup> September, 2023 by one Amos Kimwomi Nyaribo, the 1<sup>st</sup> Respondent herein.
  9. The Respondents aver that the Department of Health Services procured drugs and non-pharmaceuticals worth Kshs. 22,489,617 from MEDS, which was to be distributed to 126 health facilities across the County.
  10. The Respondents further state that on or about 6<sup>th</sup> July, 2023, the Petitioner/Applicant prompted the 1<sup>st</sup> Respondent that the procured consignment was due to be delivered, and asked him to commission and launch the distribution of the drugs and non-Pharmaceuticals to the various destinations.
  11. It is the 1<sup>st</sup> Respondent's position that he insisted that the full consignment be delivered before the launch, thus informing the date of the launch. The 1<sup>st</sup> Respondent avers that the Petitioner/Applicant did not at any time during the launch, mention to him that the consignments that had been delivered were not complete.



12. The 1<sup>st</sup> Respondent states that the Petitioner/Applicant misrepresented facts and made him believe that what he was launching was the entire consignment of the procured drugs, and did not even thereafter, let him know that there were batches which were yet to be delivered, until after there was an emergency incident at Ikonge Girls Secondary School where students had been admitted in Ekerenyio hospital for various medical complaints and there were no drugs to be administered.
13. The 1<sup>st</sup> Respondent avers that it is from that incident that he learnt that not all drugs and non-pharmaceuticals had been delivered at the time of launch, and that there were more batches which were yet to be delivered.
14. It is the 1<sup>st</sup> Respondent's case that he thereafter ordered for an audit and the audit report highlighted a number of issues among them, lack of transparency and accountability, variance on drugs ordered and delivery notes/invoices and the lack of inspection and acceptance committee report for the commodities procured and delivered.
15. The 1<sup>st</sup> Respondent further avers that it is pursuant to the report that a show cause notice was issued to the Applicant, who in response, acknowledged that he had indeed misinformed him, which fact he had attributed to lack of accurate information from the supplier as to what quantity and net worth of the supplies had been delivered as at the time and date of the launch.
16. The 1<sup>st</sup> Respondent avers that the Petitioner/Applicant's actions are contrary to the principles of good governance, integrity, transparency and accountability, and does not promote confidence in the integrity of the office, nor the honesty in the execution of public duties as provided for under Article 73 of *the Constitution*.
17. The 1<sup>st</sup> Respondent states that from advice by counsel, the Petitioner/Applicant has not met the threshold for the grant of conservatory orders.
18. Parties canvassed the motion by way of written submissions.

### **The Applicant/Petitioner's Submissions**

19. It is the Applicant's submission that the materials presented before this Honourable Court do properly direct to a conclusion that there exists rights owed to the Applicant and which rights have been infringed by the Respondents herein.
20. It is further submitted that the Petitioner/ Applicant was summarily dismissed following failure by MEDS to meet their contractual obligation of supplying the county with drugs worth Kshs 22 million within the specified contractual period.
21. The Applicant submits further that as the CEC in charge of health services, he was unaware of this lapse and upon being informed, he reached out to the supplier who responded in writing stating that delivery was impacted by the political climate as the consignment could not be transported in the backdrop of nationwide protests which rocked the country.
22. It is the Petitioner/Applicant's submission that the petition herein, is arguable and the merit of which can only be interrogated at the hearing. It is further submitted that the Petitioner has proved sufficient grounds meriting grant of conservatory orders suspending the decision of the 1<sup>st</sup> Respondent to terminate the Petitioner/Applicant's employment vide a letter dated 6th September, 2023, and consequently reinstating the Applicant.



## The Respondents' Submissions

23. The Respondents submits that from a cursory glance of the orders being sought, the effect of it would be that the Petitioner seeks reinstatement to the position of County Executive Officer in charge of Health Services, which order would in effect determine the Petition at an interlocutory stage.
24. The Respondents submit that given the very nature of conservatory orders, there is need for this Court to exercise caution before granting the said orders as sought for by the Petitioner, and equally the Respondent invites this Court to ask itself, what the subject matter of the dispute; and has an action already been undertaken and completed; and what would be the effect of granting the conservatory order as sought by the Petitioner, vis-avis the petition and defense as filed.
25. The Respondents further submit that the orders being sought by the Petitioner in the form of conservatory orders in the application herein, are a preserve of the main petition and the same ought not be dealt with in the interlocutory stage, as in their very nature and language, the orders presuppose a final determination of the Petition with the resultant effect that the Court would have determined the Petition without affording the Respondent an opportunity to a defence. The Respondents had reliance on the decision in the case of Muslim for Human Rights & 2 others vs Attorney General & 2 others (2011) eKLR to support this position.
26. The Respondents submit that the Petitioner has failed to demonstrate that he has a prima facie case with high chances of success as he has failed to prove from the onset that the decision to terminate his services was unlawful, and/or that the termination process was un-procedural in line with sections 43, 44 and 45 of the *employment Act* and Article 73 of *the Constitution*.
27. The Respondents submit that the Petitioner's application has not met the threshold for the grant of conservatory orders and the same therefore, ought to be dismissed and the petition set down for hearing on its merits.

## Analysis and Determination

28. The Court defined a conservatory order in the case of Invesco Assurance Co. Ltd Vs MW (Minor Suing Through Next Friend And Mother (HW) (2016) eKLR as follows: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order for status quo for the preservation of the subject matter.”
29. Further, the Court of Appeal sitting at Nairobi in Muturi v Havi & 21 others (Civil Application E435 of 2021) [2022] KECA 938 (KLR) explained issuance of Conservatory Orders thus: -

“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....”
30. The Applicant's prayer is for a conservatory order suspending the decision of the Respondents terminating his employment as communicated vide a letter dated 6<sup>th</sup> September, 2023, and consequently reinstate the Applicant. It is his submission that he has proved sufficient grounds



meriting grant of conservatory orders suspending the decision of the 1<sup>st</sup> Respondent to terminate his employment.

31. The Respondents on their part, opposed the application on the basis that grant of the order sought will have the effect of determining the Petition at an interlocutory stage. The Respondents further submitted that there is need for this Court to exercise caution before granting the orders sought.
32. Indeed, the prayer sought is one for the reinstatement of the Applicant/Petitioner at the interim, and the sole issue for determination is whether this relief is available to the Applicant at this juncture.
33. In the case of *Joab Mehta Oudia v Coffee Development Board of Trustees* [2014] eKLR it was held that the Court cannot stay the termination of an employee at an interlocutory stage as it would amount to the Court unduly interfering with the decision already made by the management within its discretion.
34. Further, in *Kinyanjui v Rural Electrification & Renewable Energy Corporation* [2023] KEELRC 580 (KLR) the Court held that reinstatement is in the nature of a final order and prudence requires that such an order issues at the time when the matter is finally heard and determined.
35. In my view, once a termination is pronounced by the employer, there is nothing to be conserved by way of a conservatory order and such an order would not amount to setting aside the decision to terminate.
36. Further, granting a reinstatement at this point will as correctly submitted by the Respondents, have the effect of concluding the petition without according the parties an opportunity to ventilate their respective cases.
37. Again, by dint of Section 12(3) of the Employment and *Labour Relations Act*, the Applicant/Petitioner will not be without remedy if his petition succeeds, going by the numerous other reliefs that the Court is mandated to award under this section.
38. I therefore decline the invitation to conclude this petition at this stage, with the effect that the Applicant/Petitioner's motion fails and is dismissed.
39. Costs shall abide the cause.
40. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. D. Omari & Mr. Shadrack Wambui present for the Petitioner/Applicant

Mrs. Ligunya present for the Respondents

