



**Itote v Kenya Airports Authority (Cause E266 of 2023)
[2023] KEELRC 2992 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2992 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E266 OF 2023
JK GAKERI, J
NOVEMBER 22, 2023**

BETWEEN

NICHOLAS WARUHIU ITOTE APPLICANT

AND

KENYA AIRPORTS AUTHORITY RESPONDENT

RULING

1. Before the court for determination is the Applicant’s Notice of Motion dated 30th March, 2023 seeking Orders That;
 1. spent
 2. That pending the hearing and determination of this application inter-partes, the Honourable court be pleased to issue an order restraining and stopping the Respondent and/ or its appointed agents from processing any applications received and/ or yet to be received for recruitment of the job position of the Claimant/Applicant, namely Chief Fire Officer, Job Grade S7 at JKIA station, by dint of the advertisement conveying in the respondents internal Memo dated 8th March 2023 (Ref KAA/10/13/1/2 VOL.2) and further restraining the Respondent by itself, agents or assigns from interfering with the Claimant/Applicant duties as Chief Fire Officer, Job Grade S7 at JKIA station within the Respondents Operations & Safety Function or otherwise hunting, advertising, recruiting a new Chief Fire Officer, Job Grade S7 at JKIA station to replace the Claimant/Applicant.
 3. That pending the hearing and determination of this cause, the Honourable court be pleased to issue an order restraining and stopping the Respondent and/ or its appointed agents from processing any applications received and/ or yet to be received for recruitment of the job position of the Claimant/Applicant, namely Chief Fire Officer, Job Grade S7 at JKIA station, by dint of the advertisement conveying in the respondents internal Memo dated 8th



March 2023 (Ref KAA/10/13/1/2 Vol.2) and further restraining the Respondent by itself, agents or assigns from interfering with the Claimant/Applicant duties as Chief Fire Officer, Job Grade S7 at JKIA station within the Respondents Operations & Safety Function or otherwise hunting, advertising, recruiting a new Chief Fire Officer, Job Grade S7 at JKIA station to replace the Claimant/Applicant.

4. That the Claimant /Applicant be at liberty to pray for such further or other orders as the honourable Court may deem fit and just to grant.
5. That the costs of this Application be provided for.
2. The Notice of Motion filed under Certificate of Urgency is expressed under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, Order 51 Rules 1,3, and 10 of the Civil Procedure Rules, 2010, Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Articles 22(1) and 23(3)(c) of the Constitution and the High Court's residual jurisdiction under Articles 165(3) of the Constitution.
3. The Notice of Motion is based on the grounds set forth on its face and the Supporting Affidavit sworn by Nicholas Waruhiu Itote on 30th March, 2023 who deposes that he was appointed by the Respondent vide a letter dated 18th January 2011 to the position of a Fire Instructor in Grade S5 at the Respondents Head office but was later transferred to the Jomo Kenyatta International Airport Station.
4. The affiant states that the Respondent advertised the position of a Chief Fire Officer Job Grade S7 and the applicant applied and was appointed to the said position on the 15th May, 2019.
5. That vide a letter dated 9th July, 2021 the Respondent transferred the claimant from JKIA station to Moi International Airport in the same capacity as Chief Fire Officer Job Grade S7 effective 1st August, 2021.
6. The affiant further states that he was transferred to Moi International Airport (MIA) in the same job capacity but was surprised by the transfer as the position does not fall within MIA jobs structure/ organogram.
7. The affiant states that he had several discussions with the supervisor regarding the transfer and was assured that the position of Chief Fire Officer Grade S7 is likely to be included in the New Authorities structure since MIA is a category 9 Airport similar to JKIA status.
8. The applicant states that he was surprised when an internal Memo dated 8th March, 2023 was issued by the Respondent notifying the staff members of vacant positions including that of Chief Fire Officer, Grade S7 at the JKIA station which position he held.
9. The Applicant states that the Respondent's advertisement of a position held by the applicant circumvented the law and the Human Resource Policy.
10. The Applicant states that the Respondent's failure to apply the law and its Human Resource Policy has affected the applicant's legitimate expectation to serve the Authority dutifully thereby occasioning psychological torture, physical drain contrary to his fundamental constitutional rights in employment.
11. The Applicant states that he was apprehensive that without the courts intervention the Respondent will continue interfering with his employment as such and urges the court to grant the orders sought.

Replying Affidavit

12. In response to the application the Respondent filed a Replying Affidavit dated 22nd August, 2023 sworn by Anthony Njagi, the General Manager, Human Resource Development of the respondent.



13. The affiant depones that the Applicant was appointed by the respondent on 13th May, 2003 as a Fireman Grade S4 and was posted to the JKIA station after completing Grade II course.
14. That on the 23rd February, 2010 the applicant tendered his resignation citing no opportunities for him to develop both personally and professionally which resignation was accepted on 2nd March, 2010.
15. The affiant states that on the 13th January, 2011 the applicant applied for a position of Fire Instructor and was appointed on the 1st February, 2011.
16. That pursuant to an internal reorganization arising from the terminal leave of the Chief Fire Officer, the applicant was appointed the Chief Fire Officer on the 23rd May, 2017 in an acting capacity pending recruitment of a substantive holder of the office.
17. The affiant deposes that the position of Chief Fire Officer was subsequently advertised and the applicant applied, was interviewed and appointed as the Chief Fire Officer JKIA effective 15th May, 2019.
18. That on 31st October, 2020 a fire truck was involved in an accident and sustained extensive damage with serious repercussions on JKIA provisions of fire cover. That the management of the Respondent requested the National Youth Service to provide a fire truck to provide Fire and Rescue but the applicant sent the fire truck back without consulting the relevant authorities.
19. That out of the incident the applicant was interdicted and a disciplinary hearing held on 24th and 25th February, 2015 and a recommendation was made to issue the applicant with a warning letter.
20. That further to the warning, the Applicant was transferred to the Moi International Airport, as part of the reorganization following the incidence of 31st October 2020 in the same capacity and terms and conditions.
21. The affiant states that the Applicant's transfer was an administrative action based on operational needs of the two airports and to improve and enhance operations at JKIA.
22. The affiant states that the Applicants job at Moi International Airport is guaranteed and there is no risk of separation as he has been working and has not been served with any letter separating him from the Authority.
23. The affiant states that the applicant is just like any other staff of the Authority who can be deployed to serve in any area depending on operational needs.
24. On the 23rd October, 2023 the court gave directions that the application be disposed off by way of written submissions.

Applicant's submissions

25. By the time the court was retiring to write this ruling the Applicant had not filed submissions.

Respondent's submissions

26. Counsel for the Respondent submitted that the Applicant's transfer to Moi International Airport was an administrative action based on operational needs of the two airports.
27. Counsel, further submitted that since the applicant obtained injunctive orders he has been reluctant to prosecute the application and has failed to comply with the courts orders on filling of submissions issued on 23rd October, 2023.



28. Counsel submitted that its clear the applicant obtained the orders for extraneous reasons other than secure his rights as an employee and urges the court to dismiss the application.

Determination

29. It is common ground that the Applicant is a serving employee of the Respondent and the instant Notice of Motion was precipitated by the Respondent's advertisement dated 8th March, 2023 following the Claimant's transfer to the Moi International Airport Mombasa in July 2021.
30. The singular issue for determination is whether the application meets the threshold for issuance of the orders prayed for.
31. The principles governing the grant of interim injunctive orders were enunciated in *Giella v Cassman Brown & Co. Ltd* (1975) EA 358 as follows; An applicant must show a prima facie case with a probability of success. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury and When in doubt, the court will decide on a balance of convenience.
32. The principle of prima facie case with probability of success was succinctly captured by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya & 2 others* (2003) eKLR as follows;
- “It is a case in which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently have been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
33. In the instant Notice of Motion, the Applicant was employed by the Respondent on the 18th January, 2011 as a Fire Instructor and currently serves as a Chief Fire Officer.
34. Its not disputed that the Applicant was transferred to Moi International Airport to serve in the same position as a Chief Fire Officer vide a letter dated 9th July, 2021.
35. Having been transferred, it would appear to suggest that the position of Chief Fire Officer at JKIA was vacant.
36. The Respondent through an internal memo dated 8th March, 2023 advertised career advancement opportunities among them was Chief Fire Officer Job Grade 7 at the JKIA station.
37. The position of Chief Fire Officer at JKIA has not been filled since 9th July, 2021 when the Applicant was transferred and the advertisement does not in any way appear to interfere with the position that the applicant serves as the Chief Fire Officer at the Moi International Airport.
38. In the court's view, the Applicant has failed to demonstrate that he has a prima facie case with probability of success.
39. As regards irreparable injury, the relevant principles were laid down by the Court of Appeal in *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR where the court stated;
- “Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient.
- The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”



40. The Applicant seeks an injunction to restrain the Respondent from processing applications for recruitment of Chief Fire Officer at the JKIA and has not demonstrated the irreparable injury he stands to suffer if the orders sought are not be granted as he has only demonstrated that he was transferred to the Moi International Airport and continues to serve in the position of Chief Fire Officer and left a vacancy at the JKIA station.
41. The court is unpersuaded that the Applicant has demonstrated that he stood to suffer irreparable injury if the orders sought are not granted.
42. Finally, considering the position of Chief Fire Officer at the JKIA that is crucial to the Kenya Airport Authority, there is need to have the same filled in an acting or substantive capacity. Recruitment for the said position does not in demonstrable way affect the position that the applicant holds at the Moi International Airport and granting the orders prayed for by the Applicant would be prejudicial to the Respondent.
43. The balance of convenience is not tilted in the Applicant's favour.
44. The Respondent stands to suffer more mischief or inconvenience if the orders sought are granted.
45. From the foregoing, it is clear that the application does not meet the threshold for grant of the orders sought, is for dismissal and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF NOVEMBER 2023

DR. JACOB GAKERI

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 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 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.

DR. JACOB GAKERI

JUDGE

