



**Kerore & another v Kenya Electricity Generating Company (Kengen) (Cause E706 of 2023) [2023] KEELRC 3438 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3438 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E706 OF 2023  
NZIOKI WA MAKAU, J  
NOVEMBER 21, 2023**

**BETWEEN**

**BENJAMIN KERORE & ANOTHER ..... CLAIMANT**

**AND**

**KENYA ELECTRICITY GENERATING COMPANY (KENGEN) RESPONDENT**

**RULING**

1. Before this Honourable Court for determination are the Claimants' Notice of Motion Application dated 30<sup>th</sup> August 2023 and the Respondent's Notice of Preliminary Objection dated 20<sup>th</sup> October 2023. In the Notice of Motion Application dated 30<sup>th</sup> August 2023, the Claimants/Applicants sought the following Orders:
  - a. Spent.
  - b. Spent.
  - c. THAT this honourable court do issue a temporary injunction restraining the Respondents, its agents, its servants or whosoever from commencing the employment term of all the shortlisted drivers resulting from the just concluded recruitment process pending the hearing and determination of this application.
  - d. THAT this honourable court do issue a temporary injunction restraining the 13 drivers offered employment by the Respondent from reporting to work on 1<sup>st</sup> September 2023 pending the hearing and determination of the main suit.
  - e. THAT the costs of this application be in the cause.



2. The Application, which was supported by the sworn Affidavit of the 2<sup>nd</sup> Claimant/Applicant, was premised on the grounds that the Respondent had posted on its website an advertisement dated 11<sup>th</sup> January 2023 seeking to recruit drivers to be stationed at its Olkaria Power Generation Plant, which plant is built on land formerly belonging to the Applicants and other members of the MAA Community. That the advert set out the required qualifications for the successful candidate and the Applicants herein applied for the driver positions within the prescribed application period. That the applicants were shortlisted, issued with interview invitation letters and further attended two interviews but the Respondent had instead issued offer letters to unqualified persons. According to the Applicants, the interview process was procedurally unfair and the result of it lacked merit and that the Respondent Company had further violated the Agreement dated 28<sup>th</sup> May 2016, signed between it and members of the displaced Olkaria Community for reservation of at least 30% of such employment opportunities to members of the said Community. The Applicants further averred that this Honourable Court ought to preserve the integrity of the said recruitment process that was unfair and marred with unjust practices and corruption and to revoke the same. They noted that the successful individuals were to report to duty on 1<sup>st</sup> of September 2023 and that there was a prima facie case for the grant of interim injunctive relief. They contended that they will suffer irreparable damage that cannot be compensated by an award of damages if the interim injunctive relief sought are not granted. That the balance of convenience lies in granting the Applicants the temporary injunction restraining the Respondent from commencing the employment term of the 13 employed drivers pending the hearing of the Application herein and the main suit. That there was imminent danger of the Respondent continually discriminating against the Applicants in the recruitment processes to their prejudice and that of other members of the MAA Community.

3. Respondent's Case

In response, the Respondent filed a Replying Affidavit sworn by Mr. George Ominde on 19<sup>th</sup> September 2023. Mr. Ominde averred that vide a resolution passed on 15<sup>th</sup> June 2022, the Respondent's Board of Directors resolved to approve recruitment of employees to fill various positions arising from several retirements and increased business expansion, among which were those of drivers. That the subject advertisement calling for drivers did not indicate or imply that those recruited as drivers would be posted to the Respondent's Olkaria Plant and that it was misleading for the Applicants to claim so. He notified the Court that the Respondent received a total of 4,785 applications for the position of driver, out of which 60 applicants were shortlisted for interviews. That further consideration was then made to include additional applicants to take care of stakeholder's interests and which brought the total to 145 applicants who were shortlisted and recommended to attend a Driver Competency Assessment at the AA. That following the said assessment, 57 applicants for the driver position were then recommended to attend oral interviews from 25<sup>th</sup> May 2023 to 7<sup>th</sup> June 2023 after which a total of 14 applicants were finally recommended for the posts of driver. It was Mr. Ominde's averment that the said 14 Applicants were subsequently issued with offer letters and had already reported to duty with effect from 1<sup>st</sup> September 2023. Mr. Ominde further averred that throughout the recruitment process, the Respondent, being a state corporation, was guided by the values and principles of public service codified under Article 232 of the [Constitution of Kenya](#). That the said principles included but was not limited to representation of Kenya's diverse ethnic communities and affording adequate and equal opportunities for appointment to members of all ethnic communities. He asserted that the Applicants' deposition that the Respondent had an agreement with their Community to reserve some employment opportunities for them at the Olkaria Plant was an outright lie as the said agreement did not have such a provision. That even if such provision existed, the same would amount to a grave constitutional infraction to the requirement of



representation of Kenya's diverse communities. Furthermore, the said recruitment was not only for the Olkaria Plant.

4. It was Mr. Ominde's assertion that though the Applicants met the minimum qualifications for recruitment, the Respondent was constrained to apply affirmative action while taking cognizance that certain members of the Applicants' families had received due consideration during previous recruitments. That therefore for purposes of balance and equity, the opportunity needed to go to other deserving members of the Community. He also stated that the Respondent never indicated either by conduct or implication that the Applicants had been successful in the interviews. He argued that the orders sought by the Applicants with effect to bar the successful drivers from reporting to work had been overtaken by events as the said drivers had already signed their respective employment contracts and reported for duty. He averred that it was evident the Applicants had not satisfied the threshold for grant of the interim injunctive orders sought and that their Application should be dismissed with costs.
5. The Respondent also filed a Notice of Preliminary Objection dated 20<sup>th</sup> October 2023 seeking the dismissal of the suit in limine on the grounds *inter alia* that the same is bad in law, inadmissible, incurably defective and incompetent for want of jurisdiction. In addition, that there is no employee-employer relationship between the Claimants and the Respondent and hence this Honourable Court lacks jurisdiction to hear and determine this suit.

6. Claimants/Applicants' Submissions

The Claimants/Applicants submitted that the following form the crux of the issues for the Court's determination:

- a. Whether this Court has the jurisdiction to hear and determine the Applicants' Application and Memorandum of Claim both dated 20<sup>th</sup> August 2023;
  - b. Whether the claim by the Applicants is competent and admissible before this Court; and
  - c. Whether the Applicants are entitled to an order of interim injunction sought in the application.
7. It was the Applicants' submission that jurisdiction in so far as a court's decision making power is concerned is indeed everything as was found in the land mark case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1. That similarly in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court expressed itself that a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law and cannot thus arrogate to itself jurisdiction exceeding that which is conferred upon it by law. That in the context of employment and labour disputes, this Court's jurisdiction is clearly defined by Article 162(2) of the *Constitution of Kenya*, read together with section 12 of the *Employment and Labour Relations Act*. The Applicants submitted that from their averments, they were prospective employees of the Respondent Company by virtue of having applied for the vacancies posted by the Respondent. That section 5 of the *Employment Act* provides that,

no employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee....in respect of recruitment...  
(Emphasis by the Applicants).



8. Further, that section 5(8)(a) of the Act provides that for purposes of the section, “employee” includes an applicant for employment. The Applicants referred to the case of Amos Ole Mpaka v Teachers Service Commission [2017] eKLR where the Odero J. stated as follows:

“It is clear from this provision of the law that the question of discrimination in the recruitment process is an employment dispute and one which falls under the Employment Act. Although the petitioner is not as yet an employee of the Respondent, the provisions of Section (5) nevertheless apply to him as Section 5 Subsection (8) extends the definition of an employee to cover a 'prospective employee'. An employee is defined for the purposes of Section 8 to include 'an applicant for employment'.

Based on the foregoing I find this is a matter which ought to be determined by the Employment and Labour Relations Court (Emphasis by the Applicants)

9. It was the Applicants' submission that this Court therefore has the jurisdiction to entertain the claim herein and that the Respondent's Preliminary Objection on the ground of jurisdiction consequently fails. The Applicants further submitted that from the foregoing submissions, their Claim before this Court is competent and admissible pursuant to the provisions of section 5(8)(a) of the Employment Act. As regards whether they are entitled to an order of interim injunction sought in their Application, the Claimants/Applicants agreed that the orders they sought had been overtaken by events with the shortlisted candidates having already reported to work. That it was in the interest of justice to withdraw the Application dated 30<sup>th</sup> August 2023 and proceed to prosecute the main Memorandum of Claim also dated 30<sup>th</sup> August 2023.

10. Respondent's Submissions

The Respondent submitted that from the provision of section 12 of the Employment and Labour Relations Court Act, it is apparent that the existence of an employer-employee relationship is a precondition for the exercise of this Court's jurisdiction. In this regard, it was guided by the holding in the case of National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) (3 February 2023) (Judgment) where the Court of Appeal held that decided cases are in agreement that constitutional issues can be determined by the ELRC only if they arise from an employer-employee dispute. It was the Respondent's submission that since there was no employer-employee relationship between the Claimants and the Respondent, this Court is divested of jurisdiction to hear and determine this suit. The Respondent submitted that the Court cannot grant adverse orders against non-parties to a suit and that issuing the orders sought in the Claimants' Application dated 30<sup>th</sup> August 2021 would be tantamount to condemning a party (the recruited Drivers) unheard contrary to the long-standing principles of natural justice. On this submission, it relied on the case of Peter Kinyua Kimemia & 3 others v Embakasi North Constituency Development Fund Account Manager & 2 others [2021] eKLR.

11. The Court is urged to find that it is divested of jurisdiction as no employee/employer relationship exists between the Claimants and the Respondent. This is contrary to section 5 of the Employment Act as read with Article 162(2)(a). The Employment & Labour Relations Court clearly has jurisdiction in terms of section 5 of the Act noting the Constitution is clear to which court is to handle such matters. The Claimants concede the injunctive orders they sought have been overtaken by events and it is in my considered view moot to discuss the merits or demerits of the motion by the Claimants. The application by the Claimants is dismissed with no order as to costs. The Respondent's preliminary objection being found deficient on the score of jurisdiction, is accordingly dismissed albeit with no order as to costs. Directions as to the disposal of the suit to follow after this Ruling.



It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

