



Lidalo & another v County Government of Kakamega & 2 others (Cause E016 of 2023) [2023] KEELRC 3241 (KLR) (7 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3241 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE E016 OF 2023
JW KELI, J
DECEMBER 7, 2023**

BETWEEN

HOWARD LIDALO 1ST CLAIMANT

MERCY IKHOYA 2ND CLAIMANT

AND

COUNTY GOVERNMENT OF KAKAMEGA 1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD OF KAKAMEGA 2ND RESPONDENT

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

RULING

1. The ruling is on application by way of Notice of Motion by the Claimant/Applicants dated 11th October 2023 seeking the orders:-
 - i. Spent.
 - ii. That pending the hearing and determination of this application inter partes, this court do order for stay of the process of the recruitment, interview, or any other action of replacing the Claimants/applicants from their positions with the 1st Respondent as per the advertisement posted on the 1st Defendant’s notice board and website.
 - iii. That pending the hearing and determination of this claim, this court do order for stay of the process of recruitment, interview or any other action of replacing the claimants/applicants from their positions with the 1st Respondent as per the advertisement posted on the 1st Respondent’s notice board and website.
 - iv. That the costs of this Application be provided for
2. The Notice of Motion was premised on the following grounds:-



- i. That this matter is fixed for mention on 19th October 2023.
 - ii. That the Claimants have challenged the decision of the 3rd Respondent and being implemented by 1st Respondent on the basis that the same did not comply with the law and the Constitution on right to be heard.
 - iii. That the 2nd Respondent has placed an advertisement calling for applications some of which are positions previously held by the Claimants and the subject matter of this claim.
 - iv. That if the 1st and 2nd Respondents are allowed to proceed with the said recruitment as intended, the claimants herein will be rendered nugatory as the prayer for re-instatement will be defeated on the basis that the said positions shall have been filled up.
 - v. That the Claimants will equally have been disenfranchised as the currently they cannot participate in the application unless and until this matter is heard and determined.
 - vi. That if the same is allowed to proceed then the Claimants will have been discriminated upon by the action of the Respondents.
 - vii. That it is thus necessary that the whole exercise be halted until this matter is heard and determined.
 - viii. That this application has been brought in good faith and in the interest of justice.
3. The Application was opposed by the 1st and 2nd Respondents through the Replying Affidavit of Catherine Gathoni Otenyo, the Chief Executive officer (CEO) and Secretary to the 2nd Respondent, sworn on 26th October 2023, on the grounds that:-
- a. The applicants' application is premature, made as an afterthought, and lacks merit and an abuse of the Court process intended to mislead the court.
 - b. The applicants who were accountants were summarily dismissed(CGO 4) from employment by the 1st Respondent on charges of misappropriation of public funds.
 - c. They were issued with show cause letters (CGO1) and suspended, and thereafter were invited to the disciplinary hearing(CGO2) each of them appeared before the Ad hoc Advisory Committee which through its report of 17th November 2020(CGO3) found the Claimant/ Applicants culpable of the charges leveled against them and recommended their dismissal for contravening Section 93(3) and (5) of the Public Finance Management Regulations, No. 18 of 2012, and Section 8 an 9 (1) of Public Officers Ethics Act, 2009.
 - d. The 2nd Respondent approved the Committee's Report(CGO4A) and dismissed the Applicants.
 - e. The Applicants then filed an appeal with the 2nd Respondent, but their dismissal was upheld prompting them to appeal to the Public Service Commission, which upheld the 2nd respondent's decision to dismiss the applicants and dismissed their appeal(CGO5).
 - f. The Applicants proceeded and filed for review with the Public Service Commission which was allowed and the appeal was heard afresh during which the 2nd respondent was required to file a response, and they did(CGO6).
 - g. The applicants' application is a ploy seeking reinstatement in an interlocutory stage and is thus untenable and should not be granted. The Advertisement annexed as HL-1 is an internal



advertisement for serving officers to fill vacant positions on a promotion basis and the same is not a recruitment but rather a promotion process.

- h. The Applicants were already dismissed from employment of the 1st Respondent and are thus not eligible to participate in an internal recruitment that is only available for serving employees of the 1st Respondent.
 - i. The grant of interlocutory orders is futile as it will unjustly affect a process that the applicants are not eligible for.
 - j. The respondents were dismissed on 1st December 2020, close to three years now and their positions were already filled up and not vacant and thus not available.
 - k. The current exercise is a promotion and not a fresh recruitment as purported by the Applicants and the same is not hurried to defeat the applicants' claim.
 - l. That there is already in place a lawful pronouncement of the 3rd Respondent which found the applicants were wrongly dismissed and awarded them 12 months' salary, but on the substantive issues found that as per the Ad hoc Committee's Report, the Applicants were culpable of the charges leveled against them and there was a valid reason for their termination(CGO7).
 - m. The Respondents adopted the PSC's decision to pay the Applicants and duly informed them(CGO8), and while implementing the said decision, the Applicants filed the instant claim challenging the Public Service Commission's decision.
 - n. That it would be improper to stay the impugned recruitment at the interlocutory stage basing the same on the intended reinstatement of the Applicants, which is a substantive issue to be determined at the hearing on the guidelines set out under Section 49 of the Employment Act.
- 4. The respondents are opposed to the reinstatement of the applicants and granting the prayers sought would be prejudicial to the 1st Respondent as it will deprive it of its powers to run the affairs of the Government and fulfill its mandate to the people of Kakamega and hinder its operations. The public interest overrides private individual rights and to grant the application would amount to limiting the 1st Respondent's managerial prerogative.
- 5. The Respondents argue that to grant the application would be to force a relationship between the 1st Respondent and the Applicants during the trial process yet there is no mutual trust and confidence among them after the latter's dismissal.
- 6. The further argue that the applicants have not met the conditions for the grant of an injunction as they have not demonstrated they have a prima facie case with high chances of success, or that irreparable harm will be occasioned if the injunction orders are not granted.

Written submissions

- 7. The court directed that the application be canvassed by way of written submissions. The parties complied. The Applicants' written submissions dated 10th November 2023 were filed by Geoffrey O. Yogo instructed by Otieno, Yogo, Ojuro & Company Advocates on 14th November 2023. The 1st and 2nd Respondents' written submissions dated 1st November 2023 were filed by the Tindi Munyasi & Company Advocates on the 3rd November 2023. The 3rd Respondent did not file submissions after leave was granted to it to file.



Determination

Issues for determination.

8. The Applicants addressed the following issues in their written submissions:-
 - a. Whether the applicant has presented a case with a probability of success.?
 - b. Whether if the injunction is not granted, the Applicant is likely to suffer immense damage that cannot be compensated by way of damages.
 - c. If none of the above has been proved, then the court is to be determine on a balance of probabilities
 - d. Whether bears costs of the Application.
9. The 1st and 2nd Respondents addressed the following issues in their written submissions:-
 - a. Advertisement is for a promotion exercise, not a recruitment
 - b. Conditions have not been metPrima facie caseIrreparable harm an injuryBalance of Convenience
 - c. Managerial Prerogative
 - d. The application is an abuse of court process.
10. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issue placed before the court by the parties for determination of the application is whether the Applicants have proved on a balance of probabilities that to allow the intended recruitment to continue will render their claim an academic exercise to warrant the grant of a stay sought.

Whether the Applicants have proved on a balance of probabilities that allowing the intended recruitment to continue will render their claim an academic exercise to warrant the grant of a stay sought.

11. The Applicants argue that the 2nd Respondent advertised for the positions they held before dismissal after the applicants had filed their present suit in court. That the 1st and 2nd respondents are in a rush to fill the said positions to circumvent the applicants' claim and any orders that the Court may issue.
12. The Applicants argue that if the recruitment process is not stopped their positions will be filled and that will render their claim nugatory as to main prayer in the claim is for reinstatement. They state that they challenge the 3rd Respondent's(PSC) decision that is being implemented by the 1st Respondent on the basis that the same did not comply with the Constitution based on their right to be heard.
13. The Applicants argue that they have a prima facie case which has a high probability of success as they were dismissed based on an Ad hoc Advisory and disciplinary report dated 17th November 2023 which was produced after the disciplinary hearing which they were not allowed to respond to and thus not granted a right to be heard and thus their court may set aside the 3rd Respondent's decision which upholds the 1st and 2nd respondent's decision to dismiss the Applicants.
14. The Applicants' prayers are for the grant to stay of the process of recruitment of new persons to fill their positions, which positions they wish to remain unfilled until their claim which seeks reinstatement is heard.



15. The Applicants argue that if the 1st and 2nd Respondents are allowed to recruit people to the positions they previously held, then any decision by the Court will be an academic exercise and the applicants will lose their employment and will never be absorbed again by the Respondents. They argue that if the Court is inclined to not find that they have a prima facie case or no irreparable damage, the Court cannot on a balance of probabilities grant the orders sought and the Respondents can wait a little longer before undertaking the recruitment as there are persons occupying the said offices in an acting capacity.
16. The 1st and 2nd Respondents argue that the Applicants were dismissed employees and the current process is an internal process of promoting serving officers which are not open to the applicants and that an order for compensation is already in place and the applicants cannot be reinstated due to lack of trust and that their dismissal met procedural fairness and they were dismissed based on the reasons that their employer believed existed at the time of their dismissal. To buttress this point they relied on the decision in *Joshua Rodney Marimbah v Kenya Revenue Authority*(2021)eKLR and *Kenya Power and Lighting Company Limited v Aggrey Wasike* (2017) eKLR.
17. The 1st and 2nd Respondents have urged that curtailing the recruitment process would be tying its hands in the performance of its managerial prerogative and public mandate to the public and rely on the decision in *Alfred Nyungu Kinungui V Bomas Of Kenya*(2013)eKLR.
18. The 1st and 2nd Respondents argue that the Applicants have not exhibited a prima facie case, as to whether the reason for their dismissal was false or whether the dismissal was unprocedural nor have they shown that they cannot be compensated by way of damages, which grant of damages is already in place by the decision of the 3rd Respondent. In any event, there are various remedies under section 49 of the *Employment Act*, and the same cannot be negated for reasons that a position previously held was not preserved pending the hearing. As the court makes the final award considering the evidence availed to issue the appropriate remedies. To buttress this they relied on *John Njeru V Intex Construction Ltd* (2017)EKLR & *Giella V Cassman Brown & Co.*(1973) EA 358; *Kenya Tea Growers Association Vs Unilever Tea Kenya Limited And Kenya Plantation And Agriculture Workers Union* (2018)eKLR;
19. They state that the Applicants’ prayer for stay of recruitment is in anticipation of reinstatement after the determination of their claim and the same is analogous to the grant of Reinstatement at an interlocutory stage, which the courts have held cannot be made at an interlocutory stage. They relied on various decisions namely *Kenya Airways Limited Aviation & Allied Workers Union & 3 Others* (2014)eKLR and *Kenya Shipping Clearing Freight Logistics And Warehouse Workers Union V May Freight Ltd* (2020)eKLR

Analysis and findings

20. The applicants’ prayer, in essence, is that of a conservatory order: to the effect that during the pendency of their claim, the current occupancy of their previous positions be maintained (in acting capacity); and the recruitment into the substantive positions towards their previously held positions be held in abeyance.
21. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR (*Ojwang & Wanjala, SCJJ.* held that:-“[85] These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light. ’[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to



facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...”

22. The Applicants in their statement of claim have contested the termination of their employment saying the same was unlawful, and unconstitutional, that they were dismissed based on an Ad hoc Advisory and disciplinary report dated 17th November 2023 which was produced after the disciplinary hearing which they were not allowed to respond to and thus not granted a right to be heard and that their disciplinary cases were not finalised within 6 months as per the human resource manual. The Applicants have consequently sought for an order of reinstatement, payment of withheld salaries and/ or terminal dues and other dues from their suspension and or termination and damages for unlawful termination, costs of the claim, and interest.
23. The Applicants’ application is to stay recruitment for filing the position they previously held before dismissal as advertised by the 2nd respondent (HL-1) in anticipation that the court will order their reinstatement after determination of the claim dated 13th September 2023.
24. In considering the prayer to prevent the recruitment of person’s to occupy the various positions advertised by the 2nd respondent being Senior Assistant Accountant General, Assistant Accountant general, principal Accountant, Chief Accountant, senior Accountant, Accountant I and Accountant II, the Court takes judicial notice that the 1st and 2nd respondents are public bodies run on public funds hence there is greater public interest in the smooth and continued running of their operations.
25. For the court to order the suspension of recruitment of eligible persons to fill vacant offices in the public service would be an act of serving the applicants’ private interest more than the public interest in having the affairs of the 1st and 2nd respondents continue as the Claimant pursues his private interest through the Court process.
26. The Applicants have acknowledged that the offices they occupied and those that have been advertised are held by other persons in an acting capacity, which is a temporary measure. The offices as a public entity that cannot be held in an acting capacity indefinitely awaiting for the court’s determination in the suit; and in any event, the Claimant/Applicants have in their claim sought for damages for unlawful, wrongful and unfair termination. the claim would not be nugatory as the claimant/Applicants would be awarded compensation damages for any violation of rights the court may find.
27. On a prima facie case, the 2nd Respondent has a statutory mandate to ensure that it Appoints persons to hold or act in office of the Public and it would be against the law for the 2nd Respondent to violate the law by engaging persons on an acting capacity beyond the statutory timelines without having a substantive holder of the said offices pending the hearing and determination of the Claimants’ claim, where the timelines are not definite.
28. To consider the Claimants’ prayer for reinstatement, the same can only be considered at the conclusion of a full trial on merit and after taking into account the parameters set out under section 49(4) of the [*Employment Act*](#).
29. Consequently the Court holds that it is not in public interest to grant the conservatory orders and that the Claimants having sought compensation in final claim the Court finds no prejudice will be suffered if orders sought in the application are not granted. They are not granted.



30. The Application dated 11th October 2023 is dismissed. Costs in the cause.

31. It so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF DECEMBER 2023.

JEMIMAH KELI

JUDGE

IN THE PRESENCE OF:-

Court Assistant:- Emmanuel

Applicant:- Odhiambo- I apply for leave to appeal

1st and 2nd Respondent: Tindi

3rd Respondent:- Koome h/b Iseme

COURT ORDER

Leave to appeal in 30 days granted.

In the meantime parties to comply.

Pretrial directions on 24.1. 2023 if no appeal filed as per the leave.

It is so Ordered.

JEMIMAH KELI

JUDGE

7/12/2023

