



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRCPET/E017/2021

CITATION: ALEX MREFU VS RURAL ELECTRIFICATION & RENEWABLE ENERGY

CORPORATION AND THE CABINET SECRETARY, MINISTRY OF ENERGY AND 1 OTHERS

JUDGMENT

ON 2022-02-04 BEFORE HON. JUSTICE J. N. ABUODHA

1. The Petitioner herein brought a Petition dated 29th November, 2021 and concurrently therewith a Motion under certificate of urgency.
2. The court initially entertained the Motion ex parte and granted interim orders on 29th November, 2021 and directed that the Motion be served for inter parties hearing on 15th December, 2021.
3. However, when the matter came up on 15th December, 2021 both parties agreed that since the orders sought in the Motion were more or less similar to orders sought in the main Petition, in order to save time, both the Petition and the Motion be collapsed as one and heard together.
4. The Petitioner herein seeks in the main orders that:
 - a) A declaration that the 1st Respondent's action of failing to conclude the recruitment process and issue the Petitioner and other 231 candidates that were successfully recruited with letters of appointment and employment contracts not later than September, 2021 is violation of their legitimate expectation and therefore unconstitutional.
 - b) A declaration that the Chairperson of the 1st Respondent's Board of Directors and its Chief Executive Officer have violated the Constitution by failing to conclude the recruitment process and or responding to the Petitioner's letter dated 28th October, 2021 and arrogantly received on 1st November, 2021.
 - c) A declaration that the 1st respondent's action of failing to issue the petitioner and the other 231 candidates that were successfully recruited and duly notified as much wide written notification, with letters of appointment and employment contracts is a violation of the legitimate expectation of the said Petitioner and the other 231 candidates that were successfully recruited and therefore null and void.
 - d) A declaration that in failing to issue the Petitioner and other 231 candidates that were successfully recruited with letters of appointment and employment contracts, the 1st respondent has violated their right to fair administrative action under Article 47 of the Constitution.
 - e) A mandatory injunction compelling the Chief Executive Officer of the 1st Respondent to issue the petitioner and other 231 candidates that were successfully recruited with letters of appointment and employment contracts within 7 days of the judgment herein.
 - f) A declaration be and is hereby issued that the petitioner and the other 231 candidates that were successfully recruited by the 1st respondent and duly notified as much wide notifications dated 11th October, 2021 or thereabouts are entitled to their full and prescribed remuneration, allowances, contractual and statutory benefits effective the said 11th October, 2021 or such other date when they were notified of their successful recruitment.
5. The facts on which the petition was based were among other that:

a) Through a notice appearing in the Daily Nation Newspaper edition of 1st December, 2020 the 1st respondent advertised for 232 vacant positions to members of the Kenyan public.

b) The Respondents job advertising notice that appeared in the Daily Nation Newspaper edition of 1st December, 2020 invited prospective applicants to visit its website namely www.rerec.co.ke for the full details of the job specifications, minimum requirements and requisite work experience. c) One of the positions which the 1st respondent invited applications from qualified applicants included that of Technician Construction – REREC 8. All the 232 vacant positions that were advertised were to be filled competitively.

d) By an application dated 28th December, 2020 the Petitioner applied for the position of Technician Construction – REREC8. The petitioner submitted his application electronically and physically.

e) On 17th June, 2021 the Petitioner received a notice dated 14th June, 2021 informing him that he had been shortlisted for an interview. The notice of 14th June, 2021 which the petitioner received via email read in part as follows:

“Following your application for the above post, I am pleased to inform you that you have been shortlisted for interview. This letter invites you for an interview on Thursday 24th June, 2021 at our offices. The interview will take place at the Auditorium, Kawi House, South C starting at 2.00pm.

f) The petitioner attended the 1st Respondents interview of 24th June, 2021 subsequent to which he was among others subjected to a robust written interview and availed original copies of his academic and identification credentials. This first interview was conducted by a panel that had been established by the 1st respondent’s Board of Directors.

g) On 4th August, 2021 the petitioner received an email from the 1st respondent. This email forwarded a notice dated 29th July, 2021 which informed the Petitioner that following his application for employment and subsequent written interview on 24th June, 2021, he was successful and had been shortlisted for a second interview on 12th August, 2021 at 2 pm.

h) The Petitioner attended the second interview on 24th June, 2021 at 2 pm as directed by the 1st respondent. At the conclusion of the interview, the petitioner inquired on how soon all the 232 will be expected to report to work in the event that they were successful. The 1st respondent informed the petitioner that information on when successful candidates would be expected to report had been made clear to all candidates during their respective plenary session. This notwithstanding, the 1st respondents panel informed the petitioner that successful candidates would report to duty not later than September, 2021 after signing their contracts.

i) Given the 1st respondents clear and unequivocal communication, the petitioner and other candidates had a legitimate expectation that they would receive notifications of their successful recruitment or otherwise not later than September, 2021. The petitioner and the other candidates further had a legitimate expectation that letter of appointment and contracts of employment would be issued by the 1st respondent not later than September, 2021.

j) The petitioner is equally apprehensive that all other candidates that applied for the 232 positions and eventually qualified for their second interview similarly relied on the 1st respondent’s representation that they would receive notification of their successful recruitment or otherwise and be issued with letters of appointment and employment contracts not later than September, 2021.

k) Notwithstanding the inordinate delay in issuing the petitioner and other candidates that applied for the other 232 positions with communication on whether or not they were successful, which delay occasioned them direct financial loss, anxiety, psychological suffering and violation of their right to fair work, the 1st respondent nevertheless issued the petitioner and other 231 successful candidates with notifications of successful recruitment dated 11th October, 2021.

l) By the said notification of successful recruitment, the 1st respondent informed successful candidates that applied for the 232 positions including the petitioner that following their applications and subsequent interviews, they had been successfully recruited.

m) The notification of successful recruitment of the petitioner who applied for the position of Technician Construction, Grade REREC 8 read in part as follows: -

“Following your application and subsequent interviews assessment, we are pleased to notify you that you were successful for the above mentioned position. A letter of offer will be sent to you for your consideration and acceptance.”

n) Despite being informed that they would be expected to report to work effective September, 2021 and receiving notifications of successful recruitment dated 11th October, 2021 after an inordinate and unexplained delay, the 1st respondent has to date neither issued the petitioner nor the other 231 candidates that were successfully recruited to various positions with letters of appointment and employment contracts.

6. The petitioner further filed a supplementary affidavit to the Petition in which he deposed among others that.

a) The 1st respondent advertised for 232 positions that were to be filled competitively pursuant to a notice that was placed in the Daily Nation Newspaper Edition of 1st December, 2020.

b) I am one of the candidates that applied for one of the 232 positions that were advertised by the 1st respondent. I was subsequently interviewed by the 1st respondent and duly notified of my successful recruitment as was the case with the other 229 candidates.

c) The 232 positions in respect to which the 1st respondent invited applications from qualified members of the public included two positions of the General Manager, Information, Education & Communications and Manager, System & Forensic Audit.

d) Subsequent to the filing of this petition, I established that while successful candidates that applied for the other 230 positions have not been issued with contracts of employment, the two that applied for the positions of General Manager, Information, Education & Communications and manager, System & Forensic Audit have been issued with letters of appointment as well as their employment contracts and are actually enjoying benefits attendant to their employment positions. e) I have further established that the two candidates that have been issued with contracts of employment for the positions of General manager, Information, Education & Communications and Manager, System & Forensic Audit are Dr. Rose Mkalama and Mr. Erick Jaoko respectively.

f) The selective issuance of letters of appointment and employment contracts to only two candidates and the decision to exclude the other 230 successful candidates that were subjected to a competitive recruitment process is discriminatory, amounts to preferential treatment and is a violation of Article 27 of the Constitution which provides that everyone has a right to equal treatment and protection of the law.

g) The 1st respondents' decision to issue only two candidates out of a pool of 232 candidates violates our legitimate expectation is unconstitutional and points to outright nepotism in violation of Article 10 of the Constitution.

7. The 1st respondent filed a Replying Affidavit through one CPA Peter Mbugua who deponed in the main that:

a) That I am the Chief Executive Officer of the 1st respondent herein fully conversant with the facts of this case and I am competent and duly authorized to swear this affidavit on behalf of the respondents herein.

b) That the petitioner herein was prematurely instituted, raises no legal or constitution foundation, is moot and this court has no jurisdiction to hear, entertain or grant the relief sought as the alleged dispute falls outside the scope of the court.

c) That to better contextualize the dispute, a detailed background information will be critical. That the Energy Act, 2019 that commenced on 28th March, 2019 established the Rural Electrification and Renewable Energy Corporation (hereinafter Corporation) as the successor to the Rural Electrification Authority with an expanded mandate of not only implementing the rural electrification programme but also spearheading the development of renewable energy technologies. d) That the enhancement of the mandate of the Corporation, there was need to align the Human Resource Instruments with the expanded mandate. This entailed a detailed review of the Organizations structure, Human Resource Policy and Procedural Manual. The staff Establishment, the Grading structure and the Career Guidelines.

e) That the Human Resource instruments were subsequently reviewed and approved by the Corporations' Board during the 33rd special board meeting on 31st July, 2019 during which time the Board specifically resolved and approve.

a) The increase of the Corporation staff establishment from 481 to 1118;

b) The reviewed organizational structure for implementation by the Corporation and for onward submission to the state Corporations Advisory Committee (SCAC) through the Ministry of Energy;

c) That this resolution be executed by the Board Chairman and the Chief Executive Officer;

d) That this Resolution be released to the appropriate Authority.

f) That while the aforesaid Human Resource Instruments and the Corporations Board resolved to increase the Corporation's staff compliant from the current 481 to 1118, the actual in post staff members are 298. This therefore necessitated an urgent need to restructure the Corporation and full the staff deficit for optimum discharge of the expended mandate.

g) That on 1st August, 2019; the corporation through the ministry of Energy wrote to SCAC seeking for concurrence and approval of the Human Resource Instruments and the implementation of the same by the Corporation a copy of the letter dated 1st August, 2019 is marked 'PM2'

h) That on 14th August, 2019 SCAC responded to the Ministry of Energy stating that it had reviewed the Human Resource Policy documents and approved the implementation of the Human Resource Instruments including the Organizational structure, Staff Establishment, Career Guidelines and Human Resource Policy and Procedure Manuals, a copy of the letter dated 14th August, 2019 is Marked 'PM3'

i) That having secured the approval from SCAC, the Corporation initiated a restructuring program to align the organizational structure and other changes to be in tandem with the new Human Resource Instrument. From the new structure, the positions of the General Manager, Information, Education and Communications and Manger, System and Forensic Audit were created following review of the Corporations' Human Resource Instruments, Copies of the excerpts of the Human Resource Instruments are marked 'PM4'

j) That in its 33rd special board meeting (PM1), the board resolved to approve a re-evolution of all REREC employees to ascertain their suitability. The assessment was aimed at ensuring the placement of the right persons in the positions that match their academic qualifications, skills and work experience to steer the Corporation towards achieving its new mandate under the Energy Act, 2019. upon implementation of the Resolution, the three (3) directorates under the former structure ceased to exist hence it was resolved that

the Board approves the re-deployment of the 3 office holders in the acting capacity once the proposed organizational structure is approved by SCAC.

k) That following the aforesaid Resolutions, I am aware that the Corporation's Board conducted a suitability assessment to all heads of directorates, departments and sections of the Corporation. In its 35th Special Board Meeting which was held on 29th January, 2020 the Human Resource Committee of the Board reported that it had since conducted and concluded the suitability assessment for the senior management and requested the Board to deliberate and consider the recommendation of the suitably report or approval and implementation. In the said meeting, the Board resolved to approve staff re-designation of the entire senior management cadres, a copy of the excerpts of the Minutes of Special Board Meeting dated 29th January, 2020 is marked "PM5.

l) That I am aware that the Board Resolution of 29th January, 2020 was fully implemented whereby the entire senior management cadres in the Corporation were re-designated as per the new organizational structure. Noteworthy is that over 30 senior management positions were redesignated and it is surprising that the petitioner is only aggrieved with the re-designation of Dr. Rose Mkalama and Mr. Erick Jaoko.

m) That I confirm that although the positions of General Manager, Information, Education & Communications and Manager, System & Forensic Audit resulted from the re-structuring process, they were never advertised. Therefore, it is not true that the current holders (Dr. Mkalama and Mr. Jaoko) were recruited afresh.

n) That the correct position is that Dr. Mkalama and Mr. Jaoko, just like the 28 other senior managers of the Corporation, underwent an initial suitability process that found them suitable to hold these positions, given that the Board was keen to ensure proper placement of the management cadres in accordance with the newly approved Human Resource Instruments.

o) That I know that the terms of service in respect of Dr. Mkalama and Mr. Jaoko did not change with their placement. They neither signed new contracts with the Corporation, nor were their terms of service reviewed. I know that what changed was merely their titles and this was in accordance with the new Organizational structure.

p) That thereafter, we sought approvals to conclude the placement as well as competitively fill the remaining positions that the SCAC had approved. In that regard, on 6th July, 2020; the National Treasury granted a concurrence to recruit the additional staff and requested the ministry of Energy to seek the necessary approval from the Head of Public Service, a copy of the letter dated 6th August, 2020 is marked "PM12"

q) That on 1st October, 2020; the Head of Public Service granted the requested approval through the Ministry of Energy for the Corporation to recruit and fill the remaining positions, a copy of the letter is dated 1st October, 2020 is marked "PM 14".

r) That having obtained the requisite approvals and vide the Board resolution of 6th November, 2020 (PM8), the redesignation of Dr. Mkalama and Mr. Jaoko were sanctioned by the Board. Moreover, the Board resolved to approve the commencement of the recruitment of the remaining positions. The Board further approved to constitute an Ad Hoc Committee of the Board to oversee the recruitment process.

s) That subsequently on 1st December, 2020; the Corporation placed an advertisement in the local dailies inviting applications from interested applicants for various positions a copy of the advertisement dated 1st December, 2020 is marked 'PM15'.

t) That I am aware that the Ad Hoc Committee of the Board on Recruitment conducted interviews of the shortlisted candidates but before concluding the exercise under clause 2.19 of the Human Resource Policy and Procedures Manual, the process was frozen by the 2nd Respondent's letter dated 26th, October, 2021; a copy of the letter is marked 'PM17'

u) That further to this letter, the Corporation also received a letter dated 28th October, 2021 from the Ministry of Energy addressed to all energy sector entities freezing any kind of recruitment due to the ongoing reforms in the energy sector which involved review of human capital in the sector, a copy of letter dated 28th October, 2020 is marked 'PM 21'

v) That in view of the aforesaid justifications coupled with the process not having been finalized and or concluded, it was deemed necessary that the recruitment process be frozen pending further directions from the 2nd Respondent who is desirous to ensure that the reforms in the energy sector are realized.

8. In the submissions support of the Petition, counsel for the Petitioner Mr. Mathai submitted inter alia that the petition was brought on behalf of the petitioner and in the interest of 229 persons who successfully applied for vacant positions which were advertised by the 1st Respondent between 1st and 4th December, 2020. The Petitioner also brought the petition in public interest claiming the respondent had violated the constitution of Kenya.

9. According to counsel, it was not contested that all candidates who applied for the advertised positions attended their respective interviews and were informed by the 1st respondent that successful candidates would be notified and expected to report to duty not later than September, 2021. The letters or notifications of successful recruitment issued to the 230 candidates made it clear that contracts of employment would be issued to them without delay.

10. According to counsel, the 1st respondent in their replying affidavit sworn by CPA Mbugua did not contest those 230 candidates including the petitioner received the 1st respondent's notification of successful recruitment on 11th October, 2021, informing them that they would be issued with letters of offer and employment contracts.

11. Counsel submitted that despite being informed that successful candidates would receive notifications and expected to report to work not later than September, 2021 and subsequently receiving their notification on 11th October, 2021, the 1st respondent had refused, declined or neglected to issue the petitioner and the other 229 candidates that were successful with contracts of employment in violation of the law.

12. Mr. Mathai further submitted that the 1st respondent in its replying affidavit admitted that prior to the creation of the positions the petitioner and 229 others applied for as well as those of General Manager Information, Education and Communication and Manager System & Forensic Audit, it sought and obtained the approval of SCAC. In granting the approval SCAC stated that the filing of the vacancies created by the expanded REREC, the position be filled through competitive process.

Counsel further submitted that even assuming the 1st respondent filled the positions of General Manager Information, Education and Communication and Manager System & Forensic Audit through redeployment as alleged, its actions would be illegal, null and void given these were newly created positions that were to be filled completely according to SCA.

13. Mr. Mathai thus submitted that the actions of the 1st respondent in sorting out only Dr. Rose Kalama and Mr. Erick Jaoko out of 232 persons that successfully applied for the newly created positions constitute unjust and unequal treatment of people in the same category and is discriminatory. Counsel further submitted that if the two positions taken up by Dr. Rose Mkalama and Erick Jaoko were to be through redeployment as suggested, nothing could have been easier than for SCAC to expressly state in its letter of 14th August, 2019.

14. On the question of legitimate expectation, counsel submitted that the 1st respondent is a public institution established under the energy Act, 2019. It invited application from qualified candidates for 232 positions vide a notice published in the Daily Nation of 1st December, 2020. Further, the job advertisement fell within the mandate of the 1st respondent hence a lawful process that was undertaken competitively within the confines of the Constitution the Energy Act and other enabling legislation. The 1st respondent therefore made representation to the petitioner and the 229 others and the representation was clear, unambiguous and devoid of any qualification.

15. Counsel thus submitted that the 1st respondent created a legitimate expectation that the petitioner and the 229 others were successfully recruited, would be notified and required to report to work not later than September, 2021. Failure to issue the petitioner and his colleagues with appointment letters and ensuring they reported to work not later than September, 2021 violated their right to legitimate expectation. Further that the subsequent notification on 11th October, 2021 that a letter of offer would be sent to the applicants for consideration and acceptance in due course indicated they were successful in the interview and therefore created an expectation that they would be issued with contracts of employment.

16. In support of submission on legitimate expectations counsel relied on the cases of Communication Commission of Kenya & 5 others -v- Royal Media Services & 5 other [2014] eKLR and Sirikwa Squatters Group -v- Commissioner of Lands & 9 others [2017] eKLR among others. 17. Mr. Mathai further submitted that the petitioner and his 229 colleagues were successfully recruited and duly notified on 11th October, 2021. They have a right to work which included their right to the opportunity to earn their living by working for the 1st Respondent in positions they freely chose and were successfully recruited to. Failing to issue the Petitioner and the 229 others with their letters of appointment denied them an opportunity to work and earn a living contrary to article 6(1) of the International Covenant on Economic, Social and Cultural Rights.

18. Counsel further submitted that the recruitment of the petitioner and his colleagues by the respondent which is a public body constitute an administrative action that was bound by the dictates of Article 47 of the constitution and provisions of Fair Administrative Action Act. The respondent was enjoined to undertake and conclude the recruitment process in a manner that was expeditious, efficient, lawful, reasonable and procedurally fair.

19. In conclusion counsel submitted that colossal public funds had been expended in the lawful recruitment of the petitioner and the 229 other who have been successful hence public interest and the need to ensure proper and prudent use of public funds enjoin the court to issue an order compelling immediate issuance of contracts of employment as envisaged in the notifications dated 11th October, 2021.

20. Counsel for the respondent Mr. Odongo on the other hand submitted that this court's jurisdiction flows from article 162(2)(a) of the Constitution. That is to determine disputes flaring from employment and labour relations however article 162 does not elaborate on jurisdiction of the Court but provides that Parliament shall enact Employment and Labour Relations Court Act whose section 12 demarcates the boundaries of the jurisdiction of the court. According to counsel, the Petitioner did not fall into any of the categories specified under section 12 of the ELRC Act since there was not yet in existence employer – employee relationship between the 1st respondent and the petitioner. In fact, it was not even safe to conclude that the petitioner was a prospective employee as he had not demonstrated with credible justification that he was successful in the interviews. According to counsel, the petitioner remained a candidate in an ongoing recruitment process who must be patient to await the outcome of the process he subjected himself to.

21. Mr. Odongo further submitted that the petitioner seemed to unduly rely on the notification of 11th October, 2021 to imply he should be recognized as a prospective employee. According counsel however, the notification was a foreign concept under REREC HR policy and Procedures Manual. The manual only recognized three stages in recruitment which were declaration of vacancy, shortlisting of suitably qualified candidates and interviews. Hence assuming the Petitioner was issued with a notification as alleged, this alone did not qualify him to be prospective employee unless a letter of offer had been issued. According to counsel only those issued with offers letters under clauses 219 and 230 of the Human Resource Policy and Procedure Manual became prospective employees since an offer letter has promises which may be accepted or rejected. It signifies intention to create a legally binding relationship. In this particular case the 1st respondent had not yet signified intention to create a legally binding relationship with the petitioner. On the issue of jurisdiction and the status of the petitioner, counsel relied on the case of Ladopharma Company Ltd v- NHIF [2005] ECLR AND The Owners of The Motor Vessel Lillian "S" -v- Caltex Oil [1989]KLRL 22. On whether the Petition is a public interest litigation, Counsel submitted articles 22(2)(c) and 258(2) (c) allow any person acting in the public interest to institute Court proceedings to protect, defend and uphold public interest. It was therefore incumbent on the petitioner to show that the matter being litigated is of public interest. To succeed the as a public interest litigant, the petitioner must first disclose the interest being pursued is that of majority in society and one whose interest it is being brought. Thirdly that a broader and purposeful approach should be given to locus standi. 23. In this particular case counsel submitted that the interest being pursued is particular to the petitioner. The petitioner therefore does not ventilate public interest.

24. In support of the submission counsel relied on the case of Mumo Matemu -v- Trusted Society of Human Rights Alliance & 5 others [2003]eKLR

25. Counsel further submitted that the action was not a class action because the petitioner did not identify who the 213 other candidates were. In this regard counsel relied on the case Kipsiwo Community Self Help Group -v- AG & 6 others [2013]eKLR

26. On the issue whether the redesignation of Dr. Rose Mkalama and Eric Jaoko was discrimination against the Petitioners, Mr. Odongo submitted that the petitioner was confusing the process that was undertaken to fill the positions occupied by Dr. Rose Mkalama and Erick Jaoko. According to counsel though the two positions and 28 other Senior management positions created after the reorganization of REREC staff structure were to be filled competitively, the Board of Directors exempted them from competitive recruitment. The Board instead approved that a suitability exercise be carried out in respect of all senior management staff to establish whether they meet the criteria for holding the new positions. The respondent maintained that it was the outcome of the suitability test that allowed Dr. Rose Mkalama and Mr. Erick Jaoko to be redesignated to their positions. Following from the above, counsel submitted that the process through which the positions of General Manager Information, Education and communication and Manager – System & Forensic Audit were filled was totally different from the ongoing recruitment process.

27. Mr. Oduor further submitted that REREC Human Resource Manual under clause 2.16 recognizes that any vacancy may be filled first internally (from staff already in service) and then externally through usual process. It therefore could not amount to discrimination for the 1st respondent to conduct a lawful exercise of staff redesignation.

28. On the issue of legitimate expectation counsel submitted that the allegation by the petitioner that legitimate expectation arose when the 1st respondent represented to the 232 candidates during the plenary session and first and second phases of the interview that all successful candidates would receive notifications of success and would report on duty not later than September, 2021 was a mere plain statement. Under Sections 107,108,110 and 112 of the Evidence Act, the burden of proving these allegations rested upon the petitioner to present corroborative material to support them.

29. Counsel further submitted that the petitioner did not explain the legal basis of the notification dated 11th October, 2021 which he relied on to show he was informed he was successful in the recruitment and that he would be issued an offer letter and employment contract.

30. Mr. Oduor further submitted that the doctrine of legitimate expectation is a principle of administrative law which requires that a public authority or administrative body should not renege on legitimate promises which have been made and relied upon to a person's detriment. Further, in order to successfully invoke the doctrine, it must be shown that the act or decision complained of affected such person either:

(a) by altering rights or obligations of that person which are enforceable or against him in private law or;

(b) by depriving him of some benefits or advantage which he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do. For any expectation to be legitimate, it must flow from the law. To support these submissions, counsel relied on the cases of Council of Civil Service Unions & Others -v- Minister for Civil Service

[1984] 3 all ER 935 and Jitendra Kumer & other -v- State of Haryana & Another, Supreme Court of India Civil Appeal No. 5803 of 2007

31. Counsel further submitted that in the unlikely event that the court finds that legitimate expectation existed, public interest considerations of institutionalizing reforms in the energy sector militated against and or extinguished the accrued legitimate expectation. In this regard counsel relied on Republic -v- Kenya Revenue Authority & 4 others. New Flamingo Hardware & Paints Ltd & 22 others (Ex parte) [2020] eKLR

On the question whether the respondents' action was procedurally improper or unreasonable, counsel submitted that there were no precise particulars of the violations that had been demonstrated to warrant the court's adverse finding under this head. In this regard counsel relied on the case of Anarita Karimi Njeru -v- R [1976-1980] KLR 1272 as restated in Mumo Matemu -v- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.

32. Counsel conceded that under article 6(1) of the International Covenant on Economic, Social and Cultural Right, the right to work was protected in Kenya pursuant to article 2(6) of the Constitution. However, counsel submitted that under article 24 of the constitution this right was not absolute and was specifically limited by section 2 of the Employment Act to the extent that it can only be enjoyed by a bona fide employee.

33. The Court has endeavored to summarise the factual issues in the petition, the responses and submissions by Counsel for both parties and the main issue is whether the 1st respondent is justified in withholding the release of offer letters and contracts of employment to the petitioner and his 229 colleagues and if not, is the respondent guilty of discrimination and breach of legitimate expectation of the petitioner and his 229 other colleagues? Second what would be the appropriate order to make in the circumstance.

34. The uncontested facts and which I summarized above but worth recapping are that through print media advertisement the 1st respondent sought to recruit 232 people for various positions that became vacant after the 1st respondent underwent restructuring. The petitioner applied for the position of Technician Construction – REREC 8. All the 232 vacant positions were advertised and were to be filled competitively.

35. It is further undisputed that the petitioner and his 229 colleagues applied for, were shortlisted and interviewed. Although not seriously contested, the petitioner alleged that upon conclusion of the interviews he inquired on how soon all the 232 would be expected to report to work in the event they were successful and were told that if successful the candidates would report to duty not later than September, 2021 after signing their respective contracts.

36. It was further undisputed that through a notification dated 11th October, 2021 the 1st respondent informed the petitioner and his 229 colleagues that following their applications and subsequent interviews and assessment, they were successful for the respective positions they applied for and that a letter of offer would be sent to them for their consideration and acceptance.

This however did not come to pass hence this petition.

37. The 1st respondent's justification for not releasing the letters represented by the notification issued on 11th October, 2021 was because by letter dated 26th October, 2021, the 2nd Respondent wrote to the 1st stopping the recruitment process because a circular dated 28th June, 2021 had been issued by the National Treasury freezing employment in public service except for security agencies, health workers and education sector.

38. The freezing according to the 1st respondent was further because on 29th March, 2021, the President of Kenya H.E. Uhuru Kenyatta gazetted the appointment of a Taskforce on Review of Power Purchase Agreements whose terms of reference was to inter alia recommend legislative, regulatory, policy or administrative interventions and for the implementation of the recommendations and strategies of the Taskforce. Further that on 29th September, 2021, the taskforce presented to the President their report. The said report recommended among others that pursuant to its mandate for rural electrification as set out under section 44 of the Energy Act, REREC was to continue to perform its mandate of rural electrification by identifying areas of need. However, to mitigate cost and assure quality REREC should contract out the implementation of rural electricity programme to KPLC which had a better capacity. To avoid REREC's overexpansion on its mandate and duplicating management costs, REREC should not be involved in power generation projects for sale to KPLC but should focus on Rural electrification through mini grid generation functions.

39. From the foregoing, Mr. CPA Peter Mbugua in his replying affidavit stated that the justifications above coupled with the fact that the recruitment process had not been finalized or concluded, it was deemed necessary that the recruitment process be frozen pending further directions from the 2nd respondent.

40. From the affidavit filed by CPA Peter Mbugua the background to the recruitment process was sequenced as follows:

a) By a letter dated 1st August, 2019 written by the 1st respondent to the PS Energy, the 1st respondent sought approval of Human Resource Instrument for implementation by the 1st respondent. No response to this letter was attached but the fact that the recruitment process took place, it is presumed it was approved.

b) By a letter dated 14th August, 2019 attached to CPA Mbugua's affidavit and marked "PM3", The State Corporations Advisory Committee (hereinafter referred to as "SCAC") granted their approval subject to the recruitment being done through a competitive process and receiving the concurrence of the National Treasury.

c) By a letter dated 6th July, 2020 (marked "PM12") in CPA Mbugua's affidavit, the National Treasury granted its approval to the recruitment exercise.

d) By a letter dated 1st October, 2000 (PM 14) the Head of Public Service also gave his concurrence to the recruitment exercise.

41. It was on the basis of these approvals that the 1st respondent issued out the advertisements on 1st December, 2020, shortlisted qualified candidates, interviewed them, and particularly the petitioner on 24th June, 2021. The petitioner and the rest of his colleagues were subsequently notified on 11th October, 2021 that they were successful after the interviews and should await offer letters and contracts of employment for their concurrence and signature.

42. It is instructive to note that the letter from CS-Energy upon which CPA Mbugua alleged the 1st respondent relied on to delay and or withhold the offer letters and contracts of employments to the petitioner and his 229 colleagues was issued on 26th October, 2021 while the interviews the subject of this petition were concluded on or about 24th June, 2021 and petitioner and his colleagues indicatively told that if they were successful they would receive their letters in due course in any event they were expected to report to duty not later than September, 2021 after signing their contracts. Although this did not materialize, by a notification dated 11th October, 2021 the 1st respondent informed the petitioner and his colleagues that they were successful and should expect their offer letters for consideration and acceptance. The notification read in material part as follows: "Following your application and subsequent interviews assessment, we are pleased to notify you that you were successful for the above mention position. A letter of offer will be sent to you for your consideration and acceptance."

The 1st respondent has submitted that the notification of 11th October, 2021 was not known to the respondents Human Resource and Policy Manual. However, who if not the 1st respondent was responsible for issuing the same? The 1st respondent neither alleged it was a forgery nor that the person who issued it was not authorized to do so. In fact, the 1st respondent never denied the authorship of the notification dated 11th October, 2021. All it argued was that it was unknown to its Human Resource and Policy Manual.

43. The Court had framed as an issue for determination, whether the 1st respondent was justified in withholding the offer letters to the petitioner and if the answer be in the negative, whether it ought to be found guilty of unfairly denying the petitioner and his colleagues their legitimate expectation. 44. The Supreme Court of Kenya in the case of Communication Commission of Kenya & 4 others -v-Royal Media Services Ltd & 4 other [2014] eKLR observed as follows concerning legitimate expectation

"Legitimate expectation applies the principles of fairness and reasonableness to the situation in which a person has an expectation, or interest in a public body retaining a long standing practice, or keeping a promise. An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil..."

45. In the case before me the 1st respondent by its communication dated 11th October, 2021 made a representation to the petitioner and his

colleagues that they were successful in the interviews conducted and all they should await were offer letters for their concurrence and signature. This expectation was and is still within the power of the 1st respondent to fulfil save for a curious and albeit attempted late injunction by the 2nd respondent through the letter dated 26th October, 2021. 46. The Court observes so because first the 1st respondent sought and lawfully obtained the requisite approvals prior to embarking on the recruitment process.

47. Second, the 1st respondent made a clear and unambiguous representation to the petitioner and his colleagues over their success at the interview such as to lead to reasonable expectation that they should shortly receive their offer letters for concurrence and signature and eventually report to work.

48. The notification of 11th October, 2021 was succinct and left no doubt in the minds of the recipients as to what was being communicated. It in fact amounted to an offer letter itself and all the recipients needed was a formal rendition thereof for their concurrence and signature. The court says so because it is alive to how emotive the issue of employment is in this country. Such that the mere communication that one is successful in an interview and should await formal communication is a source of celebration and anticipation. One can imagine the nature and extent of anxiety the petitioner and his 229 colleagues are going through while the communication represented by the 1st respondent on 11th October, 2021 remain unfulfilled.

49. To this extent the Court is persuaded that the 1st respondent has no lawful or reasonable cause to continue withholding the release of the offer letters to the petitioner and his 229 colleagues and by continuing to so withhold the 1st respondent is in breach of the legitimate expectation of the petitioner and his 229 colleagues.

50. This brings me to the second question framed which is whether by partially releasing offer letters to Dr. Rose Mkalama and Erick Jaoko, the 1st respondent is guilty of discrimination.

51. On this issue the 1st respondent has stated that Dr. Mkalama and Mr. Jaoko were not freshly recruited but were redesignated following the review of the 1st respondent's Human Resource Instruments yielding a new organogram. The respondent further stated that thirty other senior management positions were redesignated hence it was surprising that the petitioner only picked Dr. Mkalama and Erik Jaoko.

52. It is noteworthy that the review of the 1st respondent's Human Resource Instruments and eventual recruitment of new staff was one process over which concurrence of SCAC and other relevant authorities was sought. The process should have been completed save for the intervention of the 2nd respondent. It cannot therefore be said that the 1st respondent by redesignating Dr. Mkalama and Mr. Erick Jaoko who were already serving staff amounted to discrimination. The Court however appreciates the contention by Counsel for the Petitioner that the recruitment process being in the same context as the redesignation of Dr. Mkalama and Erick Jaoko, it smacked of discrimination to halt the recruitment process while allowing the redesignation. To this extent the allegation over discrimination has not been proved against the 1st respondent.

53. Counsel for the respondent raised an important issue of jurisdiction by arguing that since there was not yet in existence employer-employee relationship between the 1st respondent and petitioner the court lacked jurisdiction to entertain the suit. Whereas the issue of jurisdiction is everything and the court ought to have dealt with it first, I chose to deal with at this stage because the issue was novel and did not strictly go on to the issue of jurisdiction of the Court.

54. This Court derives its jurisdiction from article 162(2)(a) of the Constitution as read together with Section 12 of the Employment and Labour Relations Court Act. Section 12 of the Act provides in material part that the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the constitution and provisions of the Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including (a) disputes relating to or arising out of employment between an employer and an employee. Section 5(1)(a) of the Employment Act provides. 5(1)(a) it shall be the duty of the Minister, Labour Officer and the court to promote equality of opportunity in employment in order to eliminate discrimination in employment.

Subsection 7 of the said section provides(7) for purposes of this section,

a) employee includes an applicant for employment.

55. From the foregoing provisions it would seem that in carrying out its statutory duty conferred by Section 5 (1)(a) this court has jurisdiction to entertain a claim by a prospective employee. This in a sense is the issue in this petition. The court is therefore of the opinion that it has jurisdiction.

56. In conclusion the court finds and holds that the petitioner was justified in bringing the present petition and issues the following orders:

a) A declaration hereby issues that the continuance by the 1st respondent in withholding the release of offer letters communicated to the petitioners and his 229 other colleagues through the 1st respondent's letter dated 11th October, 2021 is in breach of their legitimate expectation.

b) A declaration that the 1st respondent sought and obtained all the necessary approvals prior to embarking on the recruitment process hence the letter dated 26th October, 2021 issued by the 2nd respondent purporting to stop the recruitment process had no lawful justification and in any event issued late and after the recruitment process had been completed.

c) An order hereby issues that the 1st respondent shall within fourteen (14) days of this judgment release to the petitioner and other successful applicants the offer letters as communicated by the 1st respondent in its letter dated 11th October, 2021.

d) This being a public interest litigation, each party shall bear their own costs) It is so ordered.

Dated at Eldoret this 2nd day of February, 2022

GIVEN under my hand and Seal of this Court on 2022-02-02 11:42:35

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT DATE: 2022-02-02 11:42:35