



REPUBLIC OF KENYA



**Muganda v Waweru & another (Constitutional Petition  
E075 of 2022) [2022] KEELRC 1205 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1205 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CONSTITUTIONAL PETITION E075 OF 2022**

**SC RUTTO, J**

**MAY 31, 2022**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE  
159 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165 (3) (A), (B), (4)**

**AND**

**IN THE MATTER OF CONTRAVENTION & THREATENED  
CONTRAVENTION OF ARTICLES 2, 3, 10(2) (A), (C), 27, 28,**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLE 22, 23, 47, 48, 50, 165, 176, 177, 178, 232, 258**

**AND 259 OF THE CONSTITUTION OF KENYA AND THE  
ENFORCEMENT OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE WILDLIFE CONSERVATION AND MANAGEMENT ACT**

**BETWEEN**

**LYNETTE WASHIALI MUGANDA ..... PETITIONER**

**AND**

**JM WAWERU ..... 1<sup>ST</sup> RESPONDENT**

**KENYA WILDLIFE SERVICE ..... 2<sup>ND</sup> RESPONDENT**



## RULING

1. The Applicant has moved this Court vide a Chamber Summons Application dated 17<sup>th</sup> May, 2022, brought under a Certificate of Urgency and expressed to be brought under Articles 22, 23, 28, 47, 48, 50, 165, 258 and 259 of *the Constitution* of Kenya and Under Rule (11), (12), (13), (14), (15), (20) and (21) of *the Constitution* of Kenya (Supervisory Jurisdiction and Protection of fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006, (Practice and procedure Rules.
2. The Application which is supported by the Affidavit of Lynnette Washiali, the Applicant herein, seeks the following orders: -
  - 1) Spent.
  - 2) That pending the hearing of this application interpartes, there be conservatory orders prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from implementing and proceeding with disciplinary process (sic) against the Petitioner on 19<sup>th</sup> May, 2022 pursuant to the letter dated 13<sup>th</sup> May, 2022.
  3. That pending the hearing of this petition, there be conservatory orders prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from implementing and proceeding with disciplinary process (sic) against the Petitioner pursuant to the letter dated 13<sup>th</sup> May, 2022.
  4. That costs of this application be costs in the Petition.
3. The main grounds upon which the Application is premised, is that:
  - a) The 1<sup>st</sup> and 2<sup>nd</sup> Respondent have by their own actions violated various constitutional provisions;
  - b) the 1<sup>st</sup> Respondent assumed that office of the Director General on 13<sup>th</sup> March, 2019 for a period of 3 years as stipulated in Section 11 of the Wildlife Conservation and Management Act, 2013;
  - c) the 1<sup>st</sup> Respondent's contract has expired and has not been renewed;
  - d) the 1<sup>st</sup> Respondent's contract has not been renewed and gazetted as is required by procedure;
  - e) the 1<sup>st</sup> Respondent has not undergone any interview for selection as a Director General;
  - f) due process was not followed in selecting the 1<sup>st</sup> Respondent;
  - g) the 1<sup>st</sup> Respondent has further attained a mandatory age 60 for retirement;
  - h) upon selection and reappointment to the office of the Director General, the name of the 1<sup>st</sup> Respondent ought to have been gazetted before assuming the functions of the office of the Director General;
  - i) the 1<sup>st</sup> Respondent has illegally directed the Petitioner to appear before the Human Resource Committee for disciplinary purposes;
  - j) the 1<sup>st</sup> Respondent has not undergone any interview for selection as a Director General;
  - k) the 1<sup>st</sup> Respondent has further attained a mandatory age 60 for retirement; and



- i. the 1<sup>st</sup> Respondent's actions are therefore null and void as he is in office illegally.
4. The Respondents opposed the Application through Grounds of Opposition dated 24<sup>th</sup> May, 2022 and a Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 25<sup>th</sup> May, 2022. Briefly that: -
  - i. the Application and Petition as framed and pleaded are fatally defective;
  - ii. it is against public interest to grant the orders sought by the Petitioner;
  - iii. the orders sought if granted will amount to the court managing the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's internal affairs and processes;
  - iv. the orders sought in the Petitioner's application if granted will amount to the court issuing final orders at the interlocutory stage without according the Respondents a right to be heard;
  - v. the 2<sup>nd</sup> Respondent is entitled to perform any internal Human Resource functions such as recruitment, transfer, disciplinary action in line with the Human Resource documents and the *Employment Act*;
  - vi. the Petitioner has not satisfied the conditions for granting conservatory orders and/or temporary injunction;
  - vii. the 1<sup>st</sup> Respondent is legally in office pursuant to Section 11 (1) and (4) of the Wildlife Conservation and Management Act, 2013 and Section 6 of the State Corporations Act, 1986;
  - viii. there is no requirement for the gazette of the appointment of the 1<sup>st</sup> Respondent and reappointment for a one further term of three (3) years;
  - ix. the Petitioner violated clauses 13.7.1 (iii) of the 2<sup>nd</sup> Respondent's Human Resource Policy Manual by sending insulting, offensive, unwarranted and abusive text messages to the 1<sup>st</sup> Respondent who is her superior in service, hence was issued with a notice to show cause;
  - x. the Petitioner has not demonstrated that no other remedy is available to her in law;
  - xi. there is no contravention of the Petitioner's Constitutional rights; and
  - xii. The Petitioner's application and Petition is premature, frivolous, vexatious and an abuse of the process of the Court.
5. The Application was disposed of by way of written submissions and brief highlights before the Court.
6. The Applicant argued the Application through Mr. Onindo who placed reliance on the Application, the Supporting Affidavit, Supplementary Affidavit and submissions filed on behalf of the Applicant. Mr. Onindo submitted on behalf of the Applicant, that the Application is properly before the Court as Article 159 (d) of *the Constitution* states that justice should be administered without undue regard to technicalities. That the disciplinary committee constituted by the 1<sup>st</sup> Respondent is illegal as he is not legally in office hence ought not to be rendering service for the 2<sup>nd</sup> Respondent. That the orders sought in the Application are not final. That further, the orders sought will not bar the 2<sup>nd</sup> Respondent from performing its internal affairs such as recruitment, transfer etc in respect of other persons. Mr. Onindo further urged that there was no evidence that the 1<sup>st</sup> Respondent had been gazetted to the position of the Director General as was done in March, 2019.
7. On the other hand, the Respondents through their Counsel Ms. Feksi, sought to rely on the Grounds of Opposition, the Replying Affidavit sworn by the 1<sup>st</sup> Respondent, submissions on record and the list of authorities accompanying the submissions. Counsel submitted that the 1<sup>st</sup> Respondent's initial



gazettement was sufficient and did not require further reappointment. The case of *Dr. Wilfrida Arnondah Itolondo vs the Attorney General & 5 others* (2019) eKLR, was cited in support of this position. That the 1<sup>st</sup> Respondent is not subject to the 2<sup>nd</sup> Respondent's Human Resource Policy Manual and that he was on a fixed term contract. It was Counsel's further submission that section 80(2) of the *Public Service Commission Act* permits for the reappointment of a public officer beyond the age of retirement. To buttress this submission, the Court was invited to consider the determination in the case of *Okiya Omtata vs Kenya Revenue Authority Board of Directors & 2 others* (2018) eKLR.

8. Ms. Feksi further submitted that the Applicant had not demonstrated that she had a prima facie case or will suffer irreparable harm if the orders are not granted and that she deserved the orders on a balance of convenience. That on the contrary, the 2<sup>nd</sup> Respondent will suffer prejudice if the Application is allowed. That the Application and Petition have not been filed in good faith and in furtherance of a genuine public interest but of a personal interest with the aim of scuttling the pending disciplinary hearing against her.

### **Analysis and Determination**

9. Arising from the Application, the Affidavit in support thereof, the response thereto and the rival submissions, the sole question for determination before the Court is whether the Application is merited.
10. Evidently, the orders sought by the Applicant at this interim stage are injunctive in nature and whose issuance is guided by the principles set out in the celebrated case of *Giella vs Cassman Brown* [1973] EA 358 at page 360 where Spry VP held that:

“.... First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420.)”

11. In brief, the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the orders, she is likely to suffer irreparable injury. Further, if the Court is in doubt, it should decide the matter on a balance of convenience.

### **Prima facie case\***

12. The Court of Appeal in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* [2003] eKLR defined a prima facie case in the following terms;

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

13. Accordingly, at this juncture the main consideration by the Court ought to be whether the Applicant has pointed out to a right that has been apparently infringed. I am also mindful that that this is not mini trial hence the Court will not examine the evidence presented microscopically.
14. The grounds in support of the Application have extensively covered the legality of the 1<sup>st</sup> Respondent's occupation of the office of the Director General in the 2<sup>nd</sup> Respondent organisation. Basically, what the Applicant has attempted to do, is invite the Court to determine the 1<sup>st</sup> Respondent's legality



- or otherwise, in office. I refuse that invitation and this is the reason why? The 1<sup>st</sup> Respondent's appointment and reappointment is not the main issue here. That is a peripheral issue that is not for determination at this juncture.
15. The question that is rightly before me is the continuance of the disciplinary proceedings against the Applicant and specifically, her appearance before the 2<sup>nd</sup> Respondent's Human Resource Advisory Committee.
  16. It is also notable that the disciplinary process was commenced against the Applicant on 19<sup>th</sup> January, 2022, when she was issued with a show cause letter. As such, the Applicant has been undergoing a disciplinary process since then. It is also notable that she has never raised any substantive issue as regards the disciplinary process commenced against her until when she was invited to appear before the 2<sup>nd</sup> Respondent's Human Resource Advisory Committee.
  17. It is also instructive to note that the Applicant has not singled out or presented before this Court any procedure in the 2<sup>nd</sup> Respondent's Human Resource Policy and Procedures Manual that has been flouted by the Respondents. Coupled with this, she has not challenged the composition of the Human Resource Advisory Committee.
  18. Her only contention appears to be the fact that she was invited to appear before the Human Resource Advisory Committee by the 1<sup>st</sup> Respondent, whom she deems to be illegally in office. To my mind, and at this point in time, that issue is neither here nor there. Regardless of whether the invitation to appear was made by the 1<sup>st</sup> Respondent or any other person within the 2<sup>nd</sup> Respondent, the fact remains that the Applicant is still under a disciplinary process, which evidently, she has not challenged in substance. Therefore, I do not see any reason why this Court should interfere with that process.
  19. As it was held in the case of *Rebecca Ann Maina & 2 others vs Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR, the Court should not take over and exercise managerial prerogative at the working place unless the process was marred with irregularities and the Court should not stop the process, but only put things right.
  20. As such, and as determined in the South African case of *Booyesen vs The Minister of Safety and Security & Or* (2011) 1 BLLR 83 (LAC), the Court's intervention to interdict a disciplinary action before it is concluded should only be undertaken in exceptional cases, and I must say that this is not one such case.
  21. In light of the foregoing and applying the principle set out in the Mrao case (supra), I am not persuaded that the Applicant has justified that she has an arguable prima facie case at this juncture.
  22. Having found that the Applicant has not established a prima facie case, it will be superfluous to consider the element of irreparable injury and balance of convenience.
  23. In the premises, the Court declines to grant the orders sought in the Application dated 17<sup>th</sup> May, 2022 and consequently, the same is dismissed.
  24. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY, 2022.**

**STELLA RUTTO**

**JUDGE**

**Appearance:**

Mr. Onindo for the Applicant



Ms. Feksi for the Respondents

Court Assistant Barille Sora

## **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**

