



REPUBLIC OF KENYA



KENYA LAW
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Muthengi v Chairperson, Kitui Public Service Board & 4 others; County Assembly of Kitui (Interested Party) (Cause E839 of 2021) [2022] KEELRC 1579 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 1579 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E839 OF 2021**

**MN NDUMA, J
MAY 26, 2022**

BETWEEN

JAPHETH MBITI MUTHENGI APPLICANT

AND

CHAIRPERSON, KITUI PUBLIC SERVICE BOARD 1ST RESPONDENT

KITUI COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

COUNTY GOVERNMENT OF KITUI 3RD RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER-TREASURY 4TH
RESPONDENT**

WILFRED NGESU MUTUA 5TH RESPONDENT

AND

COUNTY ASSEMBLY OF KITUI INTERESTED PARTY

RULING

1. Applications dated 8th October, 2021 and 19th October, 2021 have been considered together for determination.
2. Application dated 8th October, 2021 sought the following orders:-
 1. Spent
 2. Spent
 3. Spent
 4. Spent



5. Spent
6. Spent
7. Spent
8. That the honourable Court do issue orders restraining the 1st, 2nd, 3rd and 4th Respondents either by themselves, their agents, servants, or any other person acting under their instructions from preventing the Claimant from accessing his office and performing his public duties as the Secretary and Accounting Officer of Kitui County Public Service Board and a further order restraining the 1st and 2nd Respondents from suspending, or interdicting the claimant from office or subjecting the Claimant to any arbitrary disciplinary action pending hearing and final determination of the Claim.
9. That the Honourable Court do issue an order restraining the 5th respondent from assuming and/or taking over the office of the Claimant and performing the duties of the Board Secretary and Accounting Officer of the 2nd Respondent pending hearing and determination of the claim.
10. That pending hearing and determination of the Claim, the Honourable Court do issue an order compelling the 1st and 2nd Respondents to remove the locks or any other fittings fixed at the doors of the Claimant's office situated at Kitui town and further allow the Claimant to access his office and perform his public duties as the Secretary and Accounting Officer of Kitui County Public Service Board without any undue interference.
11. That the Honourable Court do issue an order staying the 4th Respondent's letter Ref. No. CGKKTII/CT/HRM/8/111/83 of 28th September, 2021 appointing the 5th Respondent as the Acting Accounting Officer of the 2nd Respondent and further staying the 1st Respondent's letter Ref. No. CGK/KCPSB/CON/VOL. 1 (2) of 27th September, 2021 directing the Claimant to hand over his office to the 5th Respondent pending hearing and determination of this Claim.
12. That pending hearing and determination of this Claim, the Honourable Court do issue an Order staying the 3rd Respondent's letter ref. No. 2002000590(41) of 8th July, 2021 deploying the 5th Respondent to work at the offices of the 2nd Respondent.
13. That the Honourable Court be pleased to make any other orders within its inherent jurisdiction.
14. That the costs of this Application be provided for.
3. The application is premised on grounds set out on the face of the application and the supporting affidavit of the applicant which may be summarized that the Applicant is the Secretary of Kitui County Public Service Board, the 2nd Respondent.
4. That the Applicant will serve up to 9th April, 2023 and had worked well with the previous Board members whose term expired in July, 2019.
5. That the new Board members sworn in on 30th April, 2021 started fighting the Applicant immediately upon assuming office and have schemed to remove him from office.
6. That on 29th September, 2021, the 1st and 2nd Respondents went to the office of the Applicant and demanded that he hand over the office to the Acting Accounting Officer, but the applicant declined



- prompting the respondents to evict the Applicant from his Office and changed the office locks without any lawful Court order.
7. That the Applicant has not been interdicted or suspended from office yet he has completely been denied by the 1st and 2nd respondents access to his office to perform his official duties as the Secretary as well as the Accounting Officer of the 2nd Respondent.
 8. That the 1st and 2nd respondents are planning to install the 5th respondent as the Acting Board Secretary of the 2nd respondent and interdict the Applicant from office. That the application be granted.
 9. The applicant filed also application dated 19th October, 2021 seeking to enjoin the Governor Hon. Charity Kaluki Ngilu as an interested party and also a contemnor for the purposes of the application.
 10. That upon joining the interested party, herself, Dr. Florence and Makindi, Ben Katungi be summoned by the Court to show cause why they should not be committed to Civil jail for a period not exceeding six months and/or be fined Kshs one million shillings for disobeying the orders of the Court issued on 12th October, 2021.
 11. That pending the determination of the suit, the Court do stay implementation of the letter by the interested party Ref. No. CGKTI/OoG/HRM/VOL. 2/4/ (21) dated 8th October, 2021 recalling the applicant from his office and letter Ref. No. CGKTI/OoG/HRM/VOL. 2/4/(21) of 15th October, 2021 interdicting the Applicant from his position of the Secretary/Chief Executive Officer Kitui Public Service Board and allow the applicant to continue performing his duties.

Replying Affidavit

12. The respondents filed replying affidavit of Dr. Florence Munanie Makindi, the Chairperson of the 2nd respondent, the Board.
13. She deposes that at the first sitting of the new Board, the applicant ambushed it as its first order of business with a list of over 500 staff demanding that the 2nd respondent either confirms, re-designates, deploys or renews their contracts. That there was no notice preparation and or explanation where the list had come from and it was apparent that the Applicant had single handedly engaged in recruitment of staff before the new board was reconstituted.
14. That 40 staff who were supposed to be re-designated were not in the list presented by the Applicant except 4 only. That the 400 were eventually re-designated but the claimant has to date not explained why he had omitted their names from the initial list.
15. This conduct led to hue and cry from omitted staff leading to downing of tools and the County Secretary summoned the 2nd Respondent to explain its conduct.
16. Other issues were raised against the Applicant indicative of corrupt practices by the Applicant. As a result, the 2nd Respondent resolved to undertake an appraisal of the Applicant to make sure that he understood his mandate. This was done on 11th August, 2021 and a report was shared with him with a view to improve his performance.
17. The Applicant however, continued to exude defiance, insubordination and arrogance in his interaction with members of the 2nd Respondent. The Applicant had prior to the appraisal declined picking Board members' calls. The Applicant even at some point declined to pick the call from the Chairman.
18. The Applicant also had unlawfully shared interview tools with his preferred candidates prior to conduct of planned recruitment interviews.



19. The 2nd Respondent decided to serve the Applicant with a Show Cause letter dated 21st September, 2021. It was imperative that the Applicant stayed out of the office to avoid sabotage of operations of the 2nd Respondent pending his response and also protect the integrity of the process.
20. That the Applicant in a show of defiance threatened the chairperson and the Applicant refused to vacate the office, screaming that he could not leave the office as he was not subject of any form of discipline. That the Chairperson requested the local police to provide security at the 2nd Respondent's premises.
21. The Applicant eventually responded to the show cause letter by making a 'Disclaimer' dated 6th October, 2021.
22. That the matter was referred to the 2nd Respondent's Discipline and Performance Management Committee for deliberation and recommendation on the way forward.
23. The Committee deliberated the matter and prepared a Board paper on 8th October, 2021 recommending that the Board refers the case to H.E. the Governor in terms of Section 58(5) of the County Governments' Act, 2012, the Governor being the appointing authority for further necessary action. The report was forwarded to the Governor on 8th October, 2021.
24. The Governor wrote to the Applicant on the same date. The Applicant responded to the letter through his advocate dated 14th October, 2021 which letter depicted a lot of arrogance. That the orders of the Court dated 12th October, 2021 were introduced through the said letter.
25. That the conduct by the Applicant was untenable and was inimical to the smooth running of the 2nd and 3rd Respondents. In the circumstances, the Applicant was interdicted pending formal processing for his contemplated possible removal/dismissal. That the said decision of the Governor was communicated *vide* the letter dated 15th October, 2021.
26. That the Applicant failed to hand over the 2nd Respondent's property and his duties despite being instructed to do so by the appointing authority, the Governor. This incapacitated the operations of the Board. To-date, the Board is unable to discharge certain responsibilities because the Applicant has either hidden or ran away with the 2nd Respondent's file.
27. That the Applicant did not make material disclosure in his application dated 8th October, 2021, thereby misleading the Court to grant him interim orders. The Applicant in particular failed to disclose the events leading to the need to have him remain out of office pending disciplinary action. That the Applicant has not been dismissed and or replaced but has simply been asked to step aside as the Respondents commence the disciplinary process that may lead to his removal.
28. That the application is premature since the disciplinary process contemplated is underway.
30. That the application be dismissed for lack of merit.
31. The Applicant did not file a further affidavit to join issue with the Respondents on matters raised in the replying affidavit by the 1st Respondent on behalf of the Respondents.
32. The parties filed written submissions which the court has duly considered.



Determination

33. The issue for determination is whether the Applicant has satisfied the requirements for grant of Conservatory orders as set out in the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR in which the Supreme Court held:
- “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.”
34. The statement of claim before us, filed on 8th October, 2021 contain prayers that seek to preempt the processing of a disciplinary action against the Applicant. These are the same orders sought in the two applications dated the 8th October, 2021 and the 29th October, 2021.
35. The supporting affidavit by the Applicant does not disclose material facts comprising the history of the dispute. The facts set out in the replying affidavit depict conduct by the Applicant which if eventually found to be true contributed greatly to the decision to have the Applicant stay out of office pending conduct of a disciplinary action by the Governor of the County in terms of Section 58(5) of the *County Government Act*, 2012.
36. Section 58(5) reads:-
- “The members of the Board may only be removed from office:-
- (a) on grounds set out for the removal of members of the Constitutional Commission under Article 252(1) of the *Constitution*; and
 - (b) b) by a vote of not less than seventy five percent of all members of the County Assembly.
37. The secretary of the Board, is in terms of Section 58(1) (c) appointed by the Governor, with the approval of the County Assembly.
38. The process of removal of a Secretary of the Board may therefore be commenced by the Board through the process contemplated under Section 58(5).
39. It is evident that the Respondents had contemplated and commenced the process of removal of the Secretary which process was injuncted by the Court on 8th October, 2021.
40. It is the Court’s finding that the applicant has failed to satisfy the requirements set out in Gatirau Munya Case (*supra*) to warrant the Court to confirm the conservatory orders issued pending the hearing and determination of this application.
- 41 The conservatory orders if issued would not serve public interest and orderly governance of the County Public Service Board of Kitui considering the facts placed before Court.
42. It is important that the Applicant go through the lawful process contemplated by the Respondents on the allegations made against him.



43. Accordingly, the Applications dated 8th October, 2021 and one dated 19th October, 2021 lack merit and are dismissed with costs in the cause.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2022.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances:-

M/s Njeri Ngunjiri for Claimant/Applicant

Mr. Musyoki for the 1st to 5th Respondents

Ekale: Court Assistant.

