



**Aura v The Cabinet Secretary Ministry of Environment And Forestry & 2 others
(Petition 1064 of 2021) [2022] KEELRC 4021 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4021 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 1064 OF 2021**

M MBARŪ, J

MAY 12, 2022

BETWEEN

STELLA MARRIS ODERO AURA PETITIONER

AND

**THE CABINET SECRETARY MINISTRY OF ENVIRONMENT AND
FORESTRY 1ST RESPONDENT**

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The petitioner filed application dated 22nd December, 2021 and seeking for orders pending the hearing and determination of the petition herein the court do suspend the 1st respondent's letter dated 8th December, 2021 on mandatory retirement of the petitioner taking effect on 24th December, 2021 and the letter dated 20th December, 2021 requiring the petitioner to hand over her duties and to be allowed to continue acting in her duties without termination of employment of Director of the Metrological Services.
2. The application is supported on the grounds on its face and on the affidavit of the petitioner who avers that she was employed as the Director of Metrological Services at the 1st respondent but on 8th December, 2021 she received letter of retirement taking effect on 24th December, 2021 and also directed to hand over her duties upon attaining 60 years but as a person living with disability her retirement age is 65 years since the Council for Persons with Disabilities has already certified her as such and issued certificate and informed the 1st and 2nd respondents. Upon the letter of retirement the petitioner wrote to the 2nd respondent letter dated 9th December, 2021 that she is a person living with disability and duly registered as such. There has been no response.



3. The 1st respondent has resulted in harassment of the petitioner to hand over her duties to Dr David Irungu Gikungu and who is a person with disability whose age of retirement fell on 28th July, 2020 but his services were extended to the mandatory retirement age of 65 years to July, 2025.
4. The 2nd respondent's Human Resource and Procedures Manual for Public Service issued in May, 2016 at Section D.21 indicate that officers shall retire from the public service at 60 years and 65 year for persons with disabilities or as may be prescribed by the government. The refusal by the respondents to extend the petitioner's retirement age to 65 years similar to Dr David Irungu Gikungu is discriminatory and direct violation of Article 27 of the Constitution and contrary to fair administration action and fair labour practices pursuant to Articles 47 and 41 of the Constitution and the orders sought should issue.
5. In reply, the 1st respondent filed the Replying Affidavit of Rosemary W Wamoto the Director, Human Resource and Development and who avers that the petitioner was issued with retirement notice on 12th February, 2021 and did not respond to the same or raise any objections. The 1st respondent in letter dated 7th June, 2021 reminded the petitioner and 8 other officers from her department to submit their documents so as to enable the Ministry forward their claims to the Director of Pensions for processing but the petitioner refused to forward her documents without any explanation.
6. In a letter dated 8th December, 2021 the Principal Secretary directed the petitioner to prepare and hand over her duties to the authorised officer and she had an undertaking to do so on 15th December, 2021 but failed to do so.
7. The mandatory retirement age is 60 years and 65 years for persons with disabilities and registered with the National Council for Persons with Disabilities (NCPWD) and has a tax exemption certificate from the Kenya Revenue Authority and as per the respondents' records the petitioner did not submit the medical reports, the exemption certificate or the registration with the NCPWD which lists original letter from the employer as one of the requirements to be presented to the Council stating the nature of disability and how it affects the employee's productivity at place of work for submission to the KRA for consideration and exemption. The 1st respondent has never written to KRA in this regard.
8. The petitioner has failed to comply with Regulation 70 of the Public Service Commission Regulations (2020) which requires that an officer's services be extended to 65 years on grounds of disability. The officers should be registered with NCPWD and the public body human resource data base as a person with disability at least 3 years before retirement; which the petitioner has failed to do.
9. The petitioner ought to have had a certificate of exemption from KRA stating the nature of disability and the 1st respondent as the employer has no such document submitted or presented by the petitioner. The petitioner was promoted through the ranks but not on the basis of disability but on merit and vacancy following the retirement of Director on 1st July, 2018. On 10th June, 2019 the petitioner was appointed as permanent representative of Kenya to the World Metrological Organisation (WMO) and as Vice-President of WMO regional association, Arica in April 2021. The appointment and election had nothing to do with the petitioner's alleged disability but on merit.
10. The petitioner has claimed that she was issued with NCPWD card on 3rd September, 2021 and therefore the appointment as WMO representative had nothing to do with her disability.
11. Ms Wamoto also avers that it is only the PSC which has mandate to review the application and either extends the retirement age or otherwise and since the petitioner never complied with the requirements of the law and did not submit the requisite documents she cannot be exempted from the applicable law governing persons with disability.



12. In this petition, the petitioner has violated Dr David Irungu Gikungu's right to confidential documents in that she has failed to explain how she came into possession and access of his confidential documents without his permission and has produced them herein. Such documents relates to Dr Gikungu's health status and reliance on them is in violation of Article 50(4) of the *Constitution* for being illegally obtained and in abuse of office and right to privacy to have such documents left personal pursuant to Article 31 of the *Constitution*.
13. Ms Wamoto also avers that with the authority of Dr Gikungu he has confirmed that he is registered with NCPWD and also with KRA for tax exemption since the year 2011. The petitioner concealed these details in bad faith and the interim orders granted should be vacated and application dismissed with costs.
14. The petitioner has failed to meet the threshold of a constitutional petition, no rights violations have been demonstrated contrary to *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR and *Amrita Karma Nero case* [1979] KLR. This is not a proper petition and should be dismissed with costs.
15. The 2nd respondent in response filed the Replying Affidavit of Simon K. Rotich the Secretary/Chief Executive Officer and avers that under Section 80 of the *Public Service Commission Act* a public officer who has attained the age of majority should retire from service with effect from the date prescribed under the regulations the *Public Service Commission Regulations, 2020* in elaborating the mandatory retirement age in public service provides under Regulation 70(1) that the mandatory retirement age is 60 years and 65 for persons with disability.
16. Whereas The petitioner is registered with NCPWD but does not meet the requirements of Regulation 70(2) (b) of the Public Service Commission Regulations, 2020 which states that for a public officer to retire as a person with disability they need to have registered in the human resource data base as a person with disability for a least 3 years before retirement. It was incumbent on the petitioner to comply.
17. Persons with disability enjoy tax exemption under the *Income Tax Act* and there is no evidence that the petitioner had applied for the same before receiving the retirement letter. The petitioner only reported on her disability by letter dated 25th October, 2021 and does not qualify for extension of retirement age under Regulation 70 and the instant application has no merit and should be dismissed with costs.
18. The petitioner filed her Supplementary Affidavit and avers that in the year 2009 she slipped and got injured to the right bimolecular fracture which is fixed with screws and plate and in the year 2019 she twisted her ankle, slipped and fell and sustained left bimocular fracture which was fixed with screws. She attended hospital and was treated and has since been in and out of hospital with back and feet pains using a walking stick.
19. In January, 2021 the petitioner was assessed as a person with disability by medical board Mbagathi Hospital which submitted a report to the NCPWD and was issued with a card as a person with disability. The process of registration under the *Persons with Disability Act* is elaborate and she has been awaiting issuance of the card for the next steps and upon which she submitted application for Income Tax exemption on 21st September, 2021 and attached all the required details together with letter of the 1st respondent signed by Christine Mahinga dated 23rd September, 2021 and has therefore complied with Regulation 70, the *Income Tax Act* and the *Persons with Disabilities Act* and should be allowed to retire at 65 years.

The parties addressed the application by way of written submissions.



20. The petitioner submitted that the court has jurisdiction to hear the petition pursuant to Article 162(2) of the Constitution read together with Article 22(2) and 258(2) of the Constitution which allow an aggrieved party and whose constitutional rights have been violated to file a petition as held in Abdikadir Suleiman v County Government of Isiolo & another [2015] eKLR.
21. Application herein should be allowed and conservatory orders issued under the principles outlined in Gatirau Peter Munya v Diskson Mwenda Kitihinji & 2 others [2014] eKLR and the principles that there is a *prima facie* case and unless the orders sought are granted there shall be prejudice suffered as a violation of constitutional rights, the petition shall be rendered nugatory and the order is in the public interest. In Giella v Cassman Brown & Co limited [1973] EA the court outlined the ingredients for the grant of an injunction which threshold is met by the petitioner who had an accident in the year 2009 has suffered injury and was assessed and registered as a person with disability and issued with a card by NCPWD. Subsequently, the petitioner made application to KRA for Income Tax exemption on 21st September, 2021 which was confirmed by the employer, 1st respondent and is awaiting decision by the Commissioner of Tax Revenue and has notified the respondent as held in Margaret Martha Byama v Alice A Otwala & 3 others [2016] and unless the application is granted the petitioner shall suffer loss and damage and should be allowed.
22. The 1st and 3rd respondents submitted that the court lacks jurisdiction to hear this petition as the same is purely a contractual relationship between an employer and employee and ought to be addressed as a claim. Where legislation has provided for a remedy, such should be followed before invoking constitutional provisions as held in Communications commission of Kenya & others v Royal Media Services Limited & 5 others [2014] eKLR. This is not a proper petition and the court lacks jurisdiction.
23. The principles which ought to apply in the grant of a conservatory order were outlined in the case of Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education, Science and Technology & 5 others [2015] eKLR that there must be a *prima facie* case with a likelihood of success and the applicant is likely to suffer prejudice as a result of the violations. In Kevin Mwititi & others v Kenya School of Law & 2 others [2015] eKLR the court held that the principle of proportionality plays a role in the exercise of discretion on whether or not to grant a conservatory order.
24. The petitioner's case is that she slipped and got injured in the year 2009 and in 2019. She went for assessment on 10th March, 2021 after letter of retirement issued on 12th February, 2021. The petition is an afterthought.
25. The petitioner cannot claim discrimination against her with regard to Dr Gikungu who was registered as a person with disability in the year 2011 and submitted all required documents the use of his confidential details is in breach of his right to privacy and confidentiality.
26. The petitioner has not complied with the provisions of the Persons with Disabilities Act, Regulation 70 of the Public Service Commission Regulations and the orders sought should not issue.
27. The 2nd respondent submitted that the principles for the grant of a conservatory order has not been met by the petitioner as outlined in Judicial Service Commission v Speaker of the National Assembly & another [2013] eKLR; National Gender and Equality Commission v Cabinet Secretary, Ministry of Interior and Coordination of National Government & 2 others [2016] eKLR that an applicant must demonstrate a *prima facie* case, public interest, denial of constitutional freedoms and rights and that the petition shall not be rendered nugatory if the orders sought shall not issue.
28. The petition has not met the requirements outlined above. A notice of retirement issued on 12th February, 2021 and upon which the petitioner commenced the process of registration as a person



with disability contrary to the Public Service Commission Regulation 70 which requires an employee to within 3 years before retirement to submit data as a registered person with disability which the petitioner failed to do to justify the grant of the orders sought.

Determination

29. The issue of court jurisdiction is raised by the 1st and 3rd respondents. The basis is that this is not a proper petition as there is no breach of the Bill of rights or any violations that the petitioner has alleged.
30. The petition is anchored under the various provisions of the Constitution including article 3, 10, 19, 20, 22, 23, 27, 28, 41, 47, 50, 159, 162, 165, 232, 236, 258 and 260.
31. In the petition, the petitioner is seeking various orders and declarations that she was discriminated against, her right under Article 28 and 47 violated and that the respondents have refused to extend her retirement age from 60 to 65 years in disregard of the Human Resource Policy and Procedures manual for the Public Service. The petitioner should be allowed to continue with her employment together with the positions appointed under WMO and the respondent restrained from terminating her employment until 65 years.
32. On whether to file a petition or not is now a matter that has reached notoriety and the Court of Appeal in addressing the same held in the case of Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR held that where an Act of Parliament has prescribed the process of litigation and access to various remedies a litigant should apply such provisions. Unless there is a claim that an Act of Parliament with regard to employment and labour relations is unconstitutional, a party ought not to invoke constitutional petition procedures. The court held that;

The Article 41 rights are enacted in the Employment Act and Labour Relations Act. The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st respondent filed a petition directly relying on the provisions of the Constitution for enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution.

We adopt and uphold the general principle in the persuasive authority in *Barbara De Klerk* (supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in Communications Commission case

33. These findings are buttressed in the case of Jane Angila Obando v Teachers Service Commission & 2 others [2020] eKLR that as a matter of practice, under the Memorandum of Claim, a party is allowed under the Court rules to urge any constitutional claims without invoking the procedures of a Constitutional petition. The court held that;

As a matter of practice and procedure, the constitutional questions advanced by the Petitioner, if any, could have been raised in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The Rule envisages a party raising disputes regarding the enforcement of any constitutional rights and freedoms or any constitutional provision through a Statement of Claim.



However, on what should be the legal implication of needlessly invoking the constitutional petition route, the Court is of the view that a denial of costs and/or an order directing that the Petition be converted in a Statement of Claim would be sufficient to deter this practice which is spreading at an alarming rate.

34. Equally in this case, there is nothing novel to warrant the invocation of a constitutional petition that cannot be resolved through a Memorandum of Claim. The core issue in dispute is the employment relationship between the parties and the challenged retirement of the petitioner. Nothing arises as to a challenge of any Act of Parliament as being unconstitutional and cannot be resolved under the application of Rule 7 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#).

This is not a proper petition.

35. The petitioner is at liberty to covert the petition herein into a Memorandum of Claim under the applicable Rules.
36. On the findings above, it would be fair to address the substantive issue at hand. Whether the orders sought seeking to restrain the respondent from retiring the petitioner until age 65 should be allowed and whether she should be allowed to continue serving under WMO as elected/appointed.
37. As correctly submitted, whether to grant or not grant interlocutory orders is now the subject of many legal authorities. At the core of such an application is whether an applicant has a *prima facie* case.
38. In *Kenya Commercial Finance Company Limited v Afraba Education Society* [2001] E.A. 86. The court held that;

The sequence of granting an interlocutory injunction is firstly, that an Applicant must show a *prima facie* case with a probability of success if this discretionary remedy will endure(sic) in his favour; secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly, when the court is in doubt, it will decide the application on the balance of convenience – see *Giella v Cassman Brown and Co. Ltd* [1973] EA 358 at 360 letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed

39. The petitioner in her Supplementary Affidavit has outlined crucial and important matters particularly the fact that she got injured in the year 2009 and 2019, she is registered with the NCPWD as a person with disability and was issued with the card on 3rd September, 2021. On 21st September, 2021 she lodged her application under the [Income Tax Act](#) for tax exemption and which matter is still pending determination with the Commissioner for Income Tax.

There is no Certificate of Tax Exemption issued.

40. The petitioner has attached to her Supporting Affidavit dated 22nd December, 2021 annexures “SMOA-1” and page 13, 14, and 15 thereof are payment statements for December, 2021; October, 2021; and November, 2021 respectively.
41. In all these “SMOA-1” the retirement date (RoD) is noted as 24th December, 2021.
42. The petitioner was therefore notified every month end of the date of retirement. As a senior officer of the 1st respondent, I take it she understood these particulars in no uncertain terms.



43. The petitioner does not contest that she was issued with notice of retirement on 12th February, 2021 and a reminder on 7th June, 2021. She did not raise any matter/objection with the respondent until her letter dated 21st September, 2021.
44. The petitioner as a public servant is regulated under her employment under the Public Service Act and the Regulations thereto. The 2nd respondent under its constitutional mandate in regulating the entire public service has the Public Service Commission Regulations, 2020 and under Regulation 70 has elaborate provisions on the mandatory retirement age in the public service at 60 years and 65 years for persons with disability.
45. The court reading of these Regulations is that for every public officer to benefit from the Regulations and allow the PSC to manage the entirety of public service, the Regulations issued in the year 2020 have applied equally and to all to ensure that all officers retire at 60 years and those with disability retire at 65 years subject to the provisions that individual officer must bring such matter to the attention of the employer at least 3 years in advance and before the date of retirement. Such is to enable the employer and or PSC to put the details on the data base and as a result automatically change the date of retirement from 60 years to 65 years.
46. Such practice and requirement is based on best practice and within the mandate of the 2nd respondent pursuant to Article 234 of the Constitution.
47. With the confirmation that the petitioner registration as a person with disability and process of employer notification and inclusion in the database is incomplete, such is now overtaken in time as her retirement date of 24th December, 2021 has come and passed. Time cannot be borrowed backwards.
48. The facts as given, to proceed and allow interim orders sought will not meet the ends of justice. A *prima facie* case is not apparent at this stage.
49. Above put into account, the balance of convenience favours the respondents in that where the petitioner's case is found with merit, the petitioner can be compensated in monetary terms save if the same is found without merit, she will have continued to earn salaries at the expense of the tax payer upon attaining majority retirement date at 60 years on 24th December, 2021.
50. The petitioner is seeking to retain the positions appointed with WMO on the basis that such accrued with the position. As outlined above, without a *prima facie* case apparent, the petition/claim shall be heard on the merits and in the interim the petitioner shall hand over her duties as directed by the employer.
51. Before conclusion, the confidential documents of Dr Gikungu are produced herein by the petitioner on the reasons that she was discriminated against and treated separately from him when he was allowed to work until age 65 as a person with disability. Ms Wamoto for the 1st respondent averred in her affidavit that the documents produced are in breach of the right to privacy with regard to Dr Gakungu and the petitioner is in abuse of office.
52. The right to privacy is sacrosanct and if breach is allowed without safeguards, all else shall be lost. The right to privacy is as dear as the right to life. Without it one has no confidence that his dignity is secured. That there is no exposure that is unwelcome and personal records deposited with the employer will not be open and free for access to all else without consent, approval and permission of the subject employee.
53. Where the petitioner seeks to prove any aspect of discrimination against her, such cannot gain high currency due to breach of the rights of other persons unrelated to her case.



54. The records herein produced and relating to personal records/data of Dr Gikungu shall be expunged and physically removed from the records. The Registrar of the Court shall secure these records and return them to the 1st respondent for safekeeping.
55. The ruling herein shall be brought to the attention of the 1st respondent with regard to exposure of employees' personal details/data in its possession by virtue of employment. The PSC has an equal duty to ensure there is no further breach.
56. The petitioner has enjoyed interim orders to allow the court hear the application on the merits. The salaries paid are legitimate and the respondents shall pay up and until the date of this ruling. The petitioner shall proceed and hand over her duties as directed.
57. Accordingly, as analysed above, this is not a proper petition. The petitioner is at liberty to move the court under a Memorandum of Claim pursuant to the applicable rules. No orders on costs.
58. The records herein relating to Dr David Irungu Gikungu shall be expunged.

DELIVERED IN COURT AT NAIROBI THIS 12TH DAY OF MAY, 2022.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and

