



**Cheruiyot v Board of Trustees, Commodities Fund. & 2 others;
Ndungu (Interested Party) (Employment and Labour Relations Claim
E050 of 2022) [2022] KEELRC 1425 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1425 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CLAIM E050 OF 2022**

SC RUTTO, J

JUNE 23, 2022

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL
RIGHTS AND FREEDOMS AND ARTICLE 2, 3, 22, 23, 27, 41,
47, 48, 73 & 74 OF THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF CONTRAVENTION AND VIOLATION OF ARTICLES,
2, 3, 22, 23, 27, 41, 47, 48, 73 & 74 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF VIOLATION OF THE CONSTITUTIONAL
RIGHTS OF NANCY CHELANGAT CHERUIYOT**

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF THE COMMODITIES FUND AS ESTABLISHED
BY THE CROPS ACT, NO. 16 OF 2013, LAWS OF KENYA**

AND

**IN THE MATTER OF THE CODE OF GOVERNANCE
FOR STATE CORPORATIONS (MWONGOZO)**

AND

IN THE FAIR ADMINISTRATIVE ACTIONS ACT 2015.

BETWEEN

NANCY CHELANGAT CHERUIYOT PETITIONER

AND



BOARD OF TRUSTEES, COMMODITIES FUND. 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK
FISHERIES & COOPERATIVES 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

AND

JANE NDUNGU INTERESTED PARTY

RULING

1. The instant Motion Application which is dated 14th March, 2022, is expressed to be brought under articles 10, 27, 22, 23, 27, 38, 47, 140, 159, 165 (3) (d) and 232 of *the Constitution* of Kenya (2010) and all enabling provisions of the law.
2. The applicant seeks the following orders through the said motion: -
 - a) Spent.
 - b) That pending the hearing and determination of this application and the main Petition, this honourable court be pleased to issue conservatory orders in the nature of a temporary Injunction restraining the respondents by themselves, their agents, servants, employees or anyone acting on their behalf from receiving and considering applications from members of the public or in any other manner proceeding with the recruitment process for the position of the Managing Trustee of the Commodities Fund.
 - c) That pending the hearing and determination of this Application and the main petition herein, this honourable court be pleased to issue Conservatory orders in the nature of an order of temporary Injunction restraining the Interested Party herein from performing any duties/ function of the Managing Trustee of The Commodities Fund in an acting capacity or in any other capacity.
 - d) That pending the hearing and determination of this application and the main petition, this honourable court be pleased to order that the applicant be reinstated back into her position as the Managing Trustee of the Commodities Fund.
 - e) That costs and such other orders as this Honourable court shall deem fit to grant.
3. The application is supported by the lengthy grounds on its body and an affidavit sworn by Ms. Nancy Chelangat Cheruiyot, the applicant herein. Briefly that: -
 - a. The applicant was employed as the Managing Trustee of the 1st respondent from January 1, 2018 for a renewable term of four years ending on January 28, 2022.
 - b. The applicant served her four year term from January 29, 2018, until 2January 8, 2022, when the 2nd respondent, without any legal mandate/authority and or while acting ultra vires and guided by malice, ill-will and ulterior motives, terminated her contract of employment by failing to renew the same contrary to the recommendation of the 1st respondent.



- c. The applicant's request for renewal of her contract was positively considered by the 1st respondent on September 6, 2021 who recommended the renewal of her term vide a letter to the petitioner dated 2 November 2, 2021.
- d. On February 3, 2022, the applicant received a letter dated January 28, 2022 from the 2nd respondent which purportedly declined to renew her contract of employment and consequently terminated the said contract.
- e. The said letter required the applicant to clear and handover to the 1st respondent by February 4, 2022 and that the same was not addressed or copied to the 1st respondent who is her employer.
- f. The 2nd respondent then proceeded to exercise power which he does not possess by appointing the Interested Party in an Acting capacity as the Managing Trustee of the Commodities Fund namely one Ms. Jane Ndungu vide a letter dated 28th January 2022 for an initial period of 3 months.
- g. The Crops Act No. 16 of 2013, Laws of Kenya has not donated, to the 2nd Respondent, the authority/power to appoint or remove the Managing Trustee of the Commodities Fund to or from office hence the 2nd respondent cannot exercise powers reserved for the appointing authority.
- h. The Power of appointment/removal of the Managing Trustee of The Commodities Fund vests with the 1st respondent as the same is governed by the Code of Governance for State corporations (Mwongozo) issued as an executive order in the year 2015.
- i. Upon receiving the termination letter of the 2nd respondent, through a letter dated February 4, 2022, the Applicant wrote to the 3rd respondent vide an appeal requesting for the reconsideration of the said termination. That the 3rd Respondent has willingly and intentionally failed to respond and/or address her grievance thus allowing the advertisement of the subject position of a Managing Trustee.
- j. The 1st respondent proceeded to advertise for the position of the Managing Trustee on March 2, 2022 in the dailies, without addressing the Applicant's grievances and it is highly likely to recruit a candidate to fill up the subject instant position if conservatory orders are not issued expeditiously.
- k. That pursuant to the said advertisement, interested persons have already begun to submit their applications before the deadline set for March 15, 2022, upon which the 1st Respondent shall proceed to conduct interviews and appoint someone to fill in the position.
- l. That the matter herein will be rendered nugatory to the detriment of the applicant if conservatory orders are not issued considering that as per the said newspaper advertisement, the last day to submit the applications is on March 15, 2022.

Responses

4. The application was opposed by all the respondents and the interested party. The 1st respondent averred through the affidavit sworn on March 24, 2022 by Hon. Dr. Julius Kones that: -
 - a. The power to appoint the Trustees of the Commodities Fund is vested with the Cabinet Secretary under section 9(3) of the Crops Act.



- b. The decision not to renew the Applicant’s contract was made within the powers of the Cabinet Secretary as the appointing authority in accordance with the Crops Act.
 - c. The Commodities Fund is not a corporate body and has no legal capacity to be sued as it is unincorporated entity established under section 9 of the Crops Act.
 - d. The appointment or removal of the Managing Trustee does not vest with the Board.
 - e. The Code of Governance for State Corporations (Mwongozo) does not apply to the instant case.
 - f. Further, the said Mwongozo is a guideline and cannot supersede the law which states that the appointment of the trustee of the Board is the mandate of the Cabinet Secretary.
 - g. The applicant handed over to the interested party on February 8, 2022 and was paid all her dues totaling Kshs 3,409,154.50 which she accepted and received.
 - h. The decision to sue the Board of Trustees of the Commodities Fund is an afterthought having voluntarily handed over, cleared and received her final dues.
 - i. The applicant has not demonstrated with precision of the law how her fundamental rights and freedom under the Constitution have been violated or threatened and has not provided any evidence to prove the alleged violations.
5. The 2nd respondent opposed the application through the replying affidavit of Mr. Peter Gatirau Munya, sworn on March 21, 2022 and through which he avers that: -
- a. Section 9 of the Crops Act assigns the mandate and power of appointing the trustees of the Commodities Fund to the Cabinet Secretary.
 - b. The applicant’s four year term as the managing trustee, ended on January 28, 2022.
 - c. The applicant’s letter of appointment did not provide or guarantee automatic renewal of the contract.
 - d. The decision not to renew the applicant’s contract was made within the powers of the Cabinet Secretary, as the appointing authority in accordance with the Crops Act.
 - e. Neither the Commodities Fund nor the Board of Trustees is a body corporate hence the power of appointment or removal of the Managing Trustee does not vest with the 1st respondent as alleged by the applicant.
 - f. The Code of Governance for State Corporations (Mwongozo) does not apply in the instant case and cannot supersede the law.
 - g. The position of the Managing Trustee has already been advertised and applications from members of the public were to be received on or before March 15, 2022 hence prayer 2 is overtaken by events.
 - h. Following expiry of her contract, the applicant voluntarily cleared from office and was paid all her dues, which she accepted and received hence prayer 3 and 4 of the motion are not tenable.
6. The interested party responded to the application through the replying affidavit sworn on 24th March, by Ms. Jane Ndungu, through which she states that: -



- a. On January 28, 2022, she was appointed as the Managing Trustee of the 1st respondent, in an acting capacity.
 - a. The position of the Managing Trustee fell vacant on January 28, 2022 after the former Managing Trustee's term expired and the same was not renewed.
 - b. The applicant handed over to her on February 8, 2022 and since then, she has been performing the functions of the Managing Trustee.
 - c. On March 2, 2022, an advertisement was placed in the Daily Nation for the recruitment of the Commodities Fund Managing Trustee with the deadline for the applications being March 15, 2022.
 - d. The decision by the applicant to sue the Board of Trustees Commodities Fund was an afterthought having voluntarily handed over, cleared and received her final dues.
7. In response to the responses by the respondents and the interested party, the applicant put in a supplementary affidavit through which she states that: -
- a. The 1st respondent has the powers to appoint a managing Trustee just as it did during her appointment dated May 21, 2018.
 - b. The 2nd Respondent is not vested with powers to appoint a Managing Trustee and that she did not hand over voluntarily since she wanted her term renewed.
 - c. She was entitled to her dues after the expiry of her first contract.
 - d. Prayer 2 of the Application is not overtaken by events as the recruitment process is at the stage of receiving applications.
 - e. Whereas her contract did not provide for automatic renewal, she made an application for renewal of her contract to the 1st Respondent and the same was approved.
 - f. The Code of Governance for State Corporations (Mwongozo) is a presidential directive which ought to be followed by state officers in governance.

Applicant's Submissions

8. The Application was canvassed by written submissions which I have considered. The Applicant submitted that her rights have been infringed by the fact that the 1st Respondent already recommended for the renewal of her contract and she was informed about it, hence she legitimately expected that the contract would be renewed for one further term. That as such, she had established a prima facie case with a high chance of success. She buttressed this position on several authorities including *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) eKLR, *Panari Enterprises Limited vs Lijoodi & 2 others* (2014) eKLR, *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* (2014) eKLR and *Board of Management of Uhuru Secondary School vs City County Director of Education & 2 others* (2015) eKLR.
9. The Applicant further submitted that there is a real danger if the recruitment process is carried on to fullness, in that the position of the Managing Trustee will be filled up and the petition will be overtaken by events. The cases of *Martin Wambora vs Speaker of the county Assembly of Embu & 3 others* (2014) eKLR and *Centre for Rights Education and Awareness (CREW) & another vs Speaker of the National Assembly & 2 others* (2017) eKLR, were cited in support.



Respondents' and Interested Party's Submissions

10. The respondents and the interested party filed joint submissions. It was submitted that the role of the 2nd respondent in the appointment of the Managing Trustee was not merely ceremonial as the office is integral to the effective operations of the ministry. That the 2nd Respondent's powers under the *Crops Act* is implied. In further submission, the respondent and the interested party submitted that the applicant had not established a prima facie case and no irreparable harm will be occasioned if the position of the Managing Trustee is filled. That the application is private in nature hence does not satisfy the public interest requirement expounded in the case of *Gatirau Peter Munya vs Dickson Mwenda Kitbinji & 2 others* (2014) eKLR.

Analysis and determination

11. Having critically considered the application and the responses thereto together with the opposing submissions presented by the parties, I find that the sole issue for determination is whether the application is merited.
12. The orders sought by the applicant at this interim stage are in the nature of conservatory orders against the respondents and the interested party.
13. The principles to be satisfied in granting of a conservatory order were well articulated in the case of *Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others* [2015] eKLR as follows:-

“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

14. Further in *Centre For Rights Education and Awareness (CREAW) & 7 others vs Attorney General* [2011] eKLR, it was held that: -

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.”

15. And further, the Supreme Court of Kenya in the Case of *Gatirau Peter Munya vs Dickson Mwenda Kitbinji & 2 others* eKLR, expanded the principles applicable as follows: -

“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 applicants 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”

16. Flowing from the foregoing judicial authorities, the principles required to be satisfied before granting conservatory orders can be condensed as follows: -
 - a. An applicant must demonstrate that he or she has a prima facie case with a likelihood of success, and that in the absence of the conservatory orders, he or she is likely to suffer prejudice.
 - b. The court should consider whether, if an interim conservatory order is not granted, the substratum of the matter will be rendered nugatory.
 - c. A consideration should be made whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
17. Hence, has the applicant established a prima facie case? The Court of Appeal in *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.”
18. Accordingly, the main consideration ought to be whether the applicant has established that it has an arguable case that is not frivolous and pointed out to a right that has apparently been infringed.
19. It bears to note that a prima facie case is not a case which must succeed at the hearing of the main case. Put differently, an Applicant has to show that he or she has a case which discloses serious and arguable constitutional issues to be tried or a case alleging violation of rights. This was well put in the case of *Kevin K. Mwiti & others v Kenya School of Law & others* [2015] eKLR, where it was held that: -

“The first issue for determination is whether the petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which discloses arguable issues and in this case arguable constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the Court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”
20. I am also mindful that at this stage, that this is not mini trial hence I will not examine the evidence presented vis a vis the applicable law, microscopically.
21. The crux of the application and the petition herein, is the 2nd respondent’s powers in the appointment of the managing trustee to the 1st respondent’s Board.
22. It is not in dispute that the applicant was appointed as the managing trustee of the 1st respondent on a renewable contract of employment, and that she was to apply in writing for renewal of the same, at least six months before the expiry.
23. It is common ground that the applicant applied to the chairman of the 1st respondent for renewal of her contract vide her letter dated July 13, 2021 and the same was approved by the 1st respondent. upon transmission of the board’s resolution to the parent ministry, the 2nd respondent was not in occurrence



- with the renewal of the applicant's contract as the 1st respondent's Managing Trustee, hence declined the contract renewal and asked her to handover to the interested party.
24. It is that refusal by the 2nd respondent to approve renewal of the applicant's contract, that is now the subject of the instant dispute. At the heart of this application is the powers of the 2nd respondent in the appointment of the managing trustee of the 1st respondent under the Crops Act, No. 16 of 2013 Laws of Kenya.
 25. Further, the applicability of the Code of Governance for State Corporations (Mwongozo) in the appointment of the Managing Trustee to the 1st Respondent is also in contest.
 26. In light of the foregoing, and having noted the evidence presented by all parties in support of their respective positions at this interim stage, I find that the Applicant has satisfied that she has an arguable prima facie case.
 27. Establishing a prima facie case is not an end in itself and cannot form sufficient basis to grant a conservatory order. Consequently, the court must undertake a further enquiry in order to determine whether the injury to be suffered by the applicant in the event the conservatory order is not granted, will be irreparable.
 28. The concept of irreparable injury was espoused by the Court of Appeal in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others [2014] eKLR, as follows: "An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."
 29. As was held in Centre for Rights Education and Awareness (CREAW) & 7 others (supra) a party seeking a conservatory order only requires to demonstrate that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
 30. Essentially, an applicant must demonstrate that if the application is not allowed, the substratum of the Petition will be lost and as such, the main claim will be rendered nugatory.
 31. Therefore, the Applicant bears the burden of establishing that there is danger which is imminent, evident, and actual and which danger deserves immediate remedial attention or redress by the court. The danger must be more probable than possible.
 32. The subject matter of the dispute in this case is the office of the Managing Trustee of the 1st Respondent. This is the position the Applicant seeks to conserve pending the hearing and determination of the main Petition.
 33. The applicant has posited that if the recruitment process of the Managing Trustee of the 1st respondent is carried on to its fullness, then the Petition will be overtaken by events.
 34. From the record before me, the process of recruiting the Managing Trustee to the 1st respondent, kicked off on 1st March, 2022, with an advertisement being placed in the newspapers. As admitted by the respondents and the interested party, the applications in response to the advertisement were received from interested applicants on or before March 15, 2022.
 35. What this means is that in absence of any conservatory order, the 1st respondent may proceed with the recruitment process and appoint a substantive holder to the office of the Managing Trustee. Subsequently, the substratum of the main suit will be lost.



36. There is therefore a real likelihood that the substratum of the main suit which is the office of the Managing Trustee, will be eroded and the applicant will suffer prejudice.
37. The final issue for consideration is whether the public interest lies in granting the orders sought by the Applicant. According to Black's Law Dictionary, "public interest" is defined as:-
- "The general welfare of the public that warrants recognition and protection; or something in which the public as a whole has a stake especially an interest that justifies governmental regulation."
38. It is also evident from the *Gatirau Peter Munya* case (supra), that: "Conservatory orders bear a more decided public law connotation: for these are orders to facilitate the ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest."
39. As stated herein, the crux of the application and the petition, is the 2nd respondent's role in the appointment of the managing trustee to the 1st respondent's Board.
40. There is also a dispute as to the applicability of the Code of Governance for State Corporations (Mwongozo) in the appointment of the said Managing Trustee.
41. It is not in dispute that the 1st respondent is a state agency established under the *Crops Act*. As per the submissions of the respondents and the interested party, the 1st respondent fund consists of monies paid as license, fees, commissions, export or import agency fee and funds that may accrue or vest in the authority or such other funds appropriated by Parliament. In a nutshell, its funding is drawn from the public coffers.
42. Further, the office of the 2nd respondent is a state office hence the authority and power exercised in such capacity, is a public trust. In addition, it is apparent that the position of Managing Trustee of the 1st respondent is an office in the public service.
43. It therefore follows that the appointment of the Managing Trustee to the 1st respondent is appointment to a public office hence the same is a subject of public interest.
44. It is also not in doubt that the recruitment process will be undertaken by funds from the public coffers. Further, any money payable as damages to the petitioner, in the event the recruitment process is left to continue and the Petition ultimately succeeds, will be drawn from the public coffers. This will definitely impact the public.
45. I have further considered the fact that there is an officer acting in the office of the Managing Trustee of the 1st respondent. as such, there is no vacuum in the said office and the affairs of the 1st respondent will not stall should the conservatory orders be granted. There is therefore no prejudice to be suffered by the respondents and the interested party in the event the conservatory orders are issued.
46. In light of the foregoing and in order to preserve the substratum of the petition, I am persuaded that the lesser injustice would be to suspend the recruitment process of the Managing Trustee to the 1st respondent pending the hearing and determination of the petition.
47. Against this background, the following orders hereby issue: -
- a. Pending the hearing and determination of the petition, the respondents are restrained from further proceeding with the recruitment process for the position of the Managing Trustee of The Commodities Fund.



- b. For the avoidance of doubt, the interested party shall continue to perform the duties of the Managing Trustee of The Commodities Fund in an acting capacity pending the hearing and determination of the Petition.
48. Further, given the nature of the petition herein, there is need for its expeditious disposition hence the court directs that: -
- a. The petition shall be canvassed by written submissions.
 - b. In the event the Respondent or the interested party is desirous of filing any further response and supplementary documents, they are granted leave to do so within 7 days hereof.
 - c. The Petitioner shall thereafter file and serve any supplementary responses, if need be, together with written submissions within 7 days from service of (b) above.
 - d. The respondents and the interested party shall file and serve their respective written submissions within 7 days of service of (c) above.
 - e. A convenient mention date shall issue to confirm compliance and take a Judgment date.
49. Costs shall be in the Cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Kyalo appearing with Mr. Mutuma for the Petitioner/Applicant

Ms. Oyugi for the Respondents and Interested Party

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 15th March 2020 and subsequent directions of 21st 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

