Nyamu v Ministry of Water, Sanitation & Irrigation & 2 others (Petition E043 of 2022) [2022] KEELRC 3878 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 3878 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E043 OF 2022

K OCHARO, J

JULY 29, 2022

BETWEEN

ERIC MUTHUURI NYAMU ..... APPLICANT

AND

MINISTRY OF WATER, SANITATION & IRRIGATION ..... 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION ..... 2ND RESPONDENT

THE HON. ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

1. Before this court is the petitioner's Notice of Motion Application dated February 4, 2022 wherein, he has sought for the following orders:

   (i) That this application and petition be certified as urgent and apt for hearing on a priority basis and *ex-parte* in the first instance.

   (ii) That the 1st Respondent's letter dated February 11, 2022 terminating the Petitioners/ Applicant's contract be stayed pending the hearing and determination of this application.

   (iii) That the 1st Respondent's letter dated February 11, 2022 terminating the petitioner's/ Applicant's contract be staying pending the hearing and determination of this suit.

   (iv) That pending the hearing and determination of this application, the Honorable court be and is hereby pleased to issue a conservatory order restraining the 1st Respondent from altering the repayment terms of the Applicant's salary.

   (v) That pending the hearing and determination of this petition the Honorable court be and is hereby pleased to issue a conservatory order restraining the 1st Respondent from at altering the repayment terms of the Applicant's salary.

(vi) That pending the heard are determination of the application a conservatory order does issue restraining the Respondent either by themselves or its servants from advertising shortlisted, interviewing, recruiting or in any other way filling the Petitioner's/Applicant's position.

2. The application is anchored on those grounds obtaining on the face of the application and the affidavit in support thereof sworn by the Petitioner/Applicant. In opposition to the application, the 1st and 3rd Respondents filed grounds of opposition dated March 21, 2022 and a replying affidavit that was sworn on March 22, 2022 by Caroline Wanjiku Munywe, the 1st Respondent's Director Human Resource Department. The 2nd Respondent's opposition to the application is enveloped in a replying affidavit sworn by Dr Simon K Rotich CBS.

The Petitioner's /Applicant's application

3. Outstanding for court's determination are limbs 3, 5 and 7 of the Applicant's application.

4. It was the Petitioner's case that through a letter of offer dated February 11, 2021, and a written contract of the even date, he was appointed as a Technical Officer, Strategic Communication, Advocacy and Public Relations in the Ministry of water, Sanitation and Irrigation.

5. He stated that his contract of employment was to run from February 12, 2021 to February 11, 2023, therefore a fixed term of two years.

6. The Petitioner/Applicant contended that without any notice or reason given to him, his salary for February 2022, was reduced, this prompted him to write a letter dated February 25, 2022 to the Principal Secretary of the 1st Respondent seeking to know what informed the reduction.

7. Surprisingly, on March 1, 2022 the 1st Respondent issued him with a termination letter dated February 11, 2022.

8. The petitioner contended that on the termination letter the 1st Respondent put forth the reason for the termination, his contract of service was tied to the tenure of the office of the former Cabinet Secretary which lapsed on February 7, 2022 when she resigned to venture into politics.

9. The Petitioner/Applicant asserted that the above stated reason was not in accord with the terms and conditions of the letter of appointment and the contract of employment. He was appointed to serve the Cabinet Secretary's office and not a specific Cabinet Secretary-Sicily Kariuki.

10. The contract of employment was terminable by a one month's notice, which he was not issued with.

11. The Petitioner/Applicant contends what the termination of his contract was arbitrary capricious , whimsical and unilateral. His rights to fair administrative action as when as the right to fair labour practices are under the threat of infringement, rendering the courts intervention necessary by issuance of the orders sought in the application. The intended termination of his contract of service is both substantively and procedurally unfair it, affronts the provisions of the *Constitution* and those of the *Employment Act*.

The 1st and 3rd Respondent's Response

12. In response to the application the 1st and 3rd Respondents contended that the 1ST Respondent Ministry does not have the position of Technical Officer Strategic Communication, Advocacy and Public Relation in its approved establishment.

13. They asserted that the position into which the Petitioner/Applicant was employed flowed from the Cabinet Secretary's request and was anchored on a "local arrangement terms." The sitting Cabinet Secretary would hand pick an advisor to support the office during her/his tenure.

14. According to the 1st and 2nd Respondent the actual length of the contract of service was dependent on the pleasure and tenure of the particular Cabinet Secretary.

15. Through its letter dated February 3, 2021, the 2nd Respondent conveyed its decision to appoint the Petitioner/Applicant as a Technical Officer Strategic Communication Advocacy and Public Relations in the office of the Cabinet Secretary, Mrs Sicily Kariuki. The appointment was for a period of 2 years, a term that was tied to her tenure.

16. The 1st Respondent proceeded to implement the above stated decision by the 2nd Respondent and issued a 2-year contract to the Petitioner. The contract clearly indicated that it was subject to the tenure of the serving Cabinet Secretary.

17. The Respondents asserted that thereafter the Petitioner/Applicant was appointed to the supernumerary position which was personal in the Cabinet Secretary, Mrs Sicily Kariuki's tenure. The petitioner /Applicant was well aware that his contract of service was to terminate upon the end of her tenure at the 1st Respondent ministry or at the lapse of the two years whichever came first.

18. Correspondingly at the exit of the Cabinet Secretary the services of all her advisors the petitioner inclusive came to determination.

The 2nd Respondent's Response.

19. The 2nd Respondent contends that the Petitioner's /Applicant's application is mis-anchored. It appreciates not that the employment of the petitioner flowed from a local agreement and was supernumerary in character tied to the tenure of the Cabinet Secretary who resigned from office.

20. That the application is in ignorance of the stipulations of Regulation (27) (i) of the Public Service Commission Regulations, 2020. Under the Regulations certain State Officers (The President, Deputy President and Cabinet Secretaries) may make written requests to the Public Service Commission for appointment of various advisors to their respective offices.

21. According to Regulation 27(8) of the Public Service Commission Regulations, 2020, such advisors shall be appointed on a contract for a period not exceeding three years and may be renewable only once for a period not exceeding three years and that the appointment of an advisor for a state officer shall not extend beyond the tenure of the Sate Officer.

22. The Respondent stated that through her letter dated 16th November, 2020 that was pursuant to Regulations 27(5) of the Public Services Regulations, the Cabinet Secretary in charge of the 1st Respondent requested the Public Service Commission for establishment of the supernumerary position of Strategic Communication, Advocacy and Public Relations Advisor in the Cabinet Secretary's office. In the same letter the Cabinet Secretary requested that the Petitioner be appointed to the said position.

23. The Commission considered the request but declined the recommendation for the establishment of the supernumerary position. It further declined to appoint the petitioner to the said position. The decision was communicated to the Cabinet Secretary through a letter dated December 18, 2020.

24. Not satisfied with the above stated decision, the Cabinet Secretary appealed against the same through her letter dated January 25, 2021. The Commission considered the appeal, its decision of December 18,

2020 was reconsidered. In the 2654 meeting held on January 3, 2021, the Commission appointed the Petitioner to the Supernumerary position of Technical Officer, strategic Communication, Advocacy and Public Relations to replace Mr. Daniel Cigua who did not take up his appointment. The decision was communicated vide a letter of the even date. The letter was express as regards the character of the appointment.

25. As a result of the aforegoing decision, the Petitioner/Applicant was engaged under Local Agreement Terms. Testament of this is the letter of offer and the subsequent employment contract.

26. It was contended that in his clearly informed letter of appointment, the petitioner /Applicant was clearly informed that his engagement was a Supernumerary one that was based on a Local Agreement Term which was tied to the tenure of the Cabinet Secretary. It was subject to the prevailing Public Service Regulation's.

27. The Cabinet Secretary in charge of the 1st Respondent Ministry resigned on the 7th February, 2020 to venture into politics. Consequently, pursuant to provisions of Regulation 27(8) of the Public Service Commission Regulations, 202 the petitioner's employment contract on Local Agreement Terms automatically became terminated w e f February 7, 2022.

28. The application has been brought contrary to the provisions of Rule 17(10) of the Rules of this Court.

The petitioner's /Applicant's Submissions

29. The petitioner/Applicant proposes a single issue for determination on the application, whether the Petitioner/Applicant has satisfied the legal and factual basis to warrant issuance of conservatory orders pending the hearing and determination of the petition.

30. Counsel for the petitioner, submits that Article 23(3) of the*Constitution* provides a flat form for a party to proceedings brought pursuant to Article 22, to move the court for any relief including temporary reliefs, a conservatory order inclusive.

31. It was further submitted that judicial attention has been given hugely to matters conservatory order(s) the principles governing a grant of the same are now trite. The decision in the case of *Board of Management Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR was cited as one of those decisions that have aptly set forth the principles, thus;

    (a) The need for the applicant to demonstrate an arguable prima facie case with a like hood of success and to show in the absence of the conservatory orders, he is likely to suffer prejudice.

    (b) Whether the grant or denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the bill of rights.

    (c) Whether the court should consider, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

    (d) Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

32. As to what amounts to a prima facie case, Counsel for the petitioner invited the court to consider the holding of Musinga J (As then was) in the case of *Centre for Rights Education and Awareness and 7 others v The Attorney General* (HCC No. 16 of 2011), thus;

> " (Arguments) in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will therefore not delve into a detailed

analysis of facts and law. At this stage a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a like hood 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*.

33. The petitioner argued that there is no clause in the contract of Employment between him and the 1st Respondent that tied the contract of service to the tenure of the Cabinet Secretary. It was therefore his legitimate expectation his contract would lapse at its appointed time. To elaborate the principle of legitimate expectation, reliance was placed on the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 others* [2007] eKLR.

34. Too the petitioner had a legitimate expectation that he was to continue earning his salary till the contractual for effluxion of the contract of service. However, the salary was stopped abruptly without any notice.

35. It was argued that by reason of the foregoing premises, the petitioner/Applicant has demonstrated that he has a prima facie case.

36. Counsel for the petitioner/Applicant submits that enhancement of constitutional values and more specifically Article 10 of the *Constitution* shall be well favoured by a grant of the conservatory order sought. The 1st and 2nd Respondent have violated the principle of integrity and transparency.

37. The petitioner/Applicant argues that a grant of the order sought will help preservation of the substratum of the petition herein. If the orders sought are not granted another person shall be employed to take up the position that was occupied by him. As regards the court's jurisdiction to grant conservatory orders for purposes of preservation of the substratum of a suit, reliance was placed on the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Kithingi and 2 others* [2014] eKLR(Application No.5 of 2014).

38. Reinstatement is a discretionary power and the same can be granted where the law has been violated. The Respondent here violated express provisions of the law and breached contractual terms, the court's intervention is justifiable under the circumstances.

1st and 3rd Respondent's Submissions

39. The 1st and 3rd Respondents identify the following issues as those that present themselves for determination by this court on the application, thus;

    I. Whether there is a decision capable of being stayed.

    II. Whether the Applicant has met the threshold for grant of the conservatory orders.

    III. Whether the Respondents are entitled to costs of the Application.

40. It was submitted that there is no contest that the petitioner's employment with the Respondents was terminated. Further, it is not in dispute that the relationship that existed between the Applicant and the Respondents was that of employer-employee which was governed by private law. Consequently, the applicant cannot benefit from public law remedies of stay and prohibition as sought in the application. To buttress this submission, reliance was placed on the Court of Appeal holding in *Republic v Professor Mwangi S. Kimenyi, Permanent Secretary, Ministry of Planning & Another* [2013] eKLR, thus;

> "Judicial review remedies are discretionary and the court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law, not private law. In normal circumstances, employment contracts are not the subject

of Judicial review. In the case of R -v- British Broadcasting Corporation - Ex Parte Lavelle (1983) 1 WLR 1302, it was emphasized that judicial review remedies are not available in a situation of employer-employee relationship."

41. Further, that the petitioner's contract with the 1st Respondent terminated on February 7, 2022 and therefore there was no decision capable of being stayed at the time of filing suit on March 4, 2022. In fortification of this submissions, the decision in *Obuya Bagaka v Kenya School of Government*, Nairobi ELRC Petition 135 of 2016, was cited, a decision that was upheld by the Court of Appeal in Obuya Bagaka v Kenya School of Government [2019] eKLR, where the Court held;

> "(25) From the record, we note that the decision to dismiss the appellant was made by the Respondent's Council on 14th October, 2016 and that the appellant filed the Petition and Notice of Motion on 8th November, 2016. Accordingly, the learned Judge did not err in finding as she did that by the time the appellant filed the Petition and the Notice of Motion, the decision to dismiss him had already been made by the Appellant's Council. There was therefore no decision to stay and any violations could be remedied pursuant to full hearing of the Petition".

42. The 1st and 3rd Respondents further submit that the court will be setting a negative precedent in reinstating the applicant pending the hearing of the suit. To bolster the submission, reliance was placed on the decision in *Anthony Omari Ongera v Teachers Service Commission* [2017] eKLR where the Court in pronouncing itself on the issue of reinstatement pending hearing of a suit stated:

> "The rationale is that the order for reinstatement is final in nature and should only issue in exceptional cases which warrant specific performance. In the case of Ahmed Aden Dire versus Natif Jama and County Government of Garissa, Petition No. 121 of 2016; the court in analyzing the provisions of Section 49 of the *Employment Act* and Rule 17(10) of the Court Rules with regard to the orders of reinstatement held that;
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> "The rationale [of not reinstating an employee at the interlocutory stage] is that the order for reinstatement is a specific performance order with finality. To issue such an order in the interim is essentially to deny the other party a chance to their defence unless there are exceptional circumstances that the court is appraised of to warrant the grant of the same in the interim".

43. On the second proposed issue, the Respondents submitted that the Applicant has not established the threshold for grant of conservatory orders. A grant or refusal to grant an interlocutory injunction, flows from an exercise of the Court's discretion. This principle was restated in the Court of Appeal case of *Abel Salim & Others v Okongo & Others* [1976] KLR 4.

44. It was further stated that conditions for the grant of an interlocutory injunction are now well settled and the principles as set out in *Giella v Cassman Brown and Co Ltd 1973 E A 360* have been restated by our courts severally and they are:

> (a) An applicant must show a *prima facie* case with a probability of success;
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> (b) In an interlocutory injunction the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages; and

(c) If in doubt in any of the above conditions the court will decide then on a balance of convenience.

These principles apply to the instant application.

45. The Applicant/Petitioner has not demonstrated to the Court that indeed he is entitled to reinstatement to his position noting that the position of Technical Advisor to the former Cabinet Secretary of the 1st Respondent was a supernumerary position that was tied to the tenure of the then Cabinet Secretary and which terminated automatically when the Cabinet Secretary resigned to venture into politics on February 7, 2022.

46. According to the 1st and 2nd Respondents mere establishment of *prima facie* case on the petitioner's side is not enough ground to grant the orders sought. The court is obligated to further interrogate whether the petitioner will suffer irreparable harm if the injunction is not granted. That the Petitioner/Applicant has not demonstrated that if the court refuses to grant this remedy, an irreparable injury, will be suffered. In fact, if the orders sought are granted and the Court declares that the Petitioner/Applicant is an employee of 1st Respondent and that the Petitioner/Applicant should continue to serve in the said supernumerary position, then the same would be illegal and detrimental to the Respondents and contrary to the basic principles of contract.

47. Lastly, it was submitted that the balance of convenience in this case tilts in favour of the Respondents since the injury to them that would be consequential to a grant of injunction would far exceed that to the Petitioner if the grant was refused.

2nd Respondent's Submissions.

48. The 2nd Respondent submitted that in numerous cases, judicial attention has been given to the meaning and nature of conservatory orders. In the case of *Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others* [2018] eKLR, Odunga, J while agreeing with the decision in the case of *Judicial Service Commission -vs- Speaker of the National Assembly & Another* [2013] eKLR stated the following with regards to conservatory orders:

> [50] "Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution* the supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

49. The foregoing description of conservatory orders received the approval of the Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR where the court stated;

> 86. "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 applicant'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.

87. The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory".

50. It was argued that looking at the material placed before this Court by the Petitioner/Applicant it is quite clear that the Application for conservatory/stay/interim orders has not met the judicially set criteria for the grant of the orders sought therein.

51. Further, a denial of the conservatory/interim reliefs sought by the Applicant will enhance Constitutional values and objects specific to the rights or fundamental freedoms in the Bill of Rights in that it will promote adherence to the rule of law and promotion of good governance as well as aid in the administration of justice.

52. The Applicant has not sufficiently demonstrated that if the conservatory orders sought are not granted, the main Petition alleging violation of, or threat of violation of rights will be rendered nugatory

53. The Application is bad in law for having been brought contrary to the express provisions of Rule 17(10) of the Rules of this Honourable Court which forbids interim reinstatement of an employee whose employment has been terminated.

54. The 2nd Respondent further submitted that the application is legally misconceived since the Petitioner's former position was a supernumerary one (tied to the tenure of then Cabinet Secretary who resigned) which got extinguished on February 7, 2022 when the tenure of the then Cabinet Secretary in charge of the Ministry of Water, Sanitation and Irrigation came to an end on account of resignation.

55. The Application offends the express provisions of Regulation 27(8) of the Public Service Commission Regulations, 2020. As such, it is bad in law.

56. The Applicant cannot be heard to state that he has any legitimate expectation in law to continue holding the terminated supernumerary position once the same is terminated pursuant to Regulation 27(8) of the Public Service Commission Regulations, 2020.

57. There cannot be any conclusion that the actions of the Respondents complained of by the Petitioner/Applicant constitute a breach of any of their rights and fundamental freedoms under the *Constitution* or any other law.

58. The instant Application is speculative and repulsive to the constitutional ideals of good governance, effective and efficient administration of justice as well as service delivery to the members of the public by the Respondents herein.

59. It was further submitted that even if the instant application never existed and/or is dismissed, the issues raised in the Petition will still be live and merit final determination by this court. The Petitioner's prayer seeking to be reinstated back to his former position may only be considered after a full hearing of the main Petition on its merits and only if this court finds in favour of the Applicant. In support of this submission, reliance was placed on the decision in Charles Kamande v Teachers Service Commission [2017] eKLR.

60. This Court was urged to be persuaded in determining the application herein, to apply the lens provided in the decision in of *John Harun Mwau -vs- Linus Gitahi & 13 others* [2016] eKLR regarding the purpose of granting interim orders and when they are grantable, thus;

> (26) This question can only be answered by applying legal principles applicable to interlocutory applications. The principles are trite and in the interest of space and time, I will only refer to three cases in the context of the application before me. In East African Portland Cement Company Limited vs Attorney General and Another 2013 eKLR the Court had this to say about interlocutory orders:
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> " Interim orders are granted where the Court, exercising its discretion is satisfied that they are necessary due to the urgency and nature of the circumstances. They are mostly injunctive in nature, putting on hold an action, maintaining the status quo, until the substantive dispute can be investigated and resolved. The applicant must establish genuine urgency. Interim orders are not suitable if by their grant, they finally determine the substantive dispute. The Courts must be wary of prejudgment of the substantive merits."
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> (29) What is discernible from the above statements is that in these kinds of applications an applicant must prove inter alia, urgency, irreparable harm and that a disposal of the application would not result in determination of the substantive issues.

61. It was submitted that the prayers sought in the applications for conservatory orders herein are a mirror image of those sought in the Petition, albeit with minor modifications.

62. Further, pursuant to Regulation 27(8) of the Public Service Commission Regulations, 2020, each advisor shall be appointed on contract for a period not exceeding three years and may be renewable only once for a period not exceeding three years and that the appointment of an advisor for a State officer shall not extend beyond the tenure of the State officer.

63. In letter of February 3, 2021, the 2nd Respondent indicated that the said position was supernumerary and was to be on Local Agreement Terms for a period of two (2) years from the date the Petitioner resumed duties and was tied to the tenure of the Cabinet Secretary for the Ministry of Water, Sanitation and Irrigation.

64. In his letter of appointment, the Petitioner was clearly informed that his engagement was a supernumerary one that was based on Local Agreement terms which was tied to the tenure of the then Cabinet Secretary in charge of the Ministry of Water, Sanitation and Irrigation. He was also informed that the same was subject to the prevailing Public Service Regulations.

65. The foregoing is in consonance with the provisions of Regulation 27(8) of the Public Service Commission Regulations, 2020, hence the Petitioner's contract of service was a supernumerary one that was based on Local Agreement terms that are tied to the tenure of the Cabinet Secretary in charge of the Ministry of Water, Sanitation and Irrigation.

66. The nature of the Petitioner/Applicant's employment contract was supernumerary and he was never interviewed for the said position and neither was the same advertised. Consequently, it is not arguable that there is any intention to advertise or fill the said vacancy as alleged by the Petitioner/Applicant until such a time that the new Cabinet Secretary will make a request to the Commission, if at all, in accordance with the Public Service Commission Regulations.

67. The 2nd Respondent submitted that the Applicant was required to demonstrate that the greater public interest would be served if the conservatory/interim orders sought are granted and further that in so doing, the constitutional values and objects will be greatly advanced and/or promoted.

68. From the material placed before this Court, the nature of the public interest that would be served by the grant of the conservatory/interim orders sought by the Applicant cannot be discerned. On the contrary, it is the public interest of upholding the rule of law that stand to suffer immeasurably.

Analysis and Determination

69. Appreciating that at this juncture the court is dealing with an interlocutory application, and considering the manner in which the petitioner has couched the prayers both in this instant application and the petition itself, I will be very measured in rendering myself on the application, to void the trap of appearing to have pre-judged the petition.

70. Interlocutory orders are granted for a purpose, and as to when they can properly be granted depends on the circumstances peculiar to each case as they are largely discretionary. However, it is imperative to appreciate that there are trite principles applicable to interlocutory applications that have been applied and present over time, flowing from judicial pronouncements. In the case of *John Harun Mwau =vs= Linus Githau & 13 Others* (2016 eKLR, Justice Lenaola (as he then was] aptly captures them, thus:

> 'This question can only be answered by applying legal principles applicable to interlocutory applications. The principles are trite and in the interest of space and time, I will only refer to the three cases in the context of the application before me. In East Africa Portland Cement Company ltd v Attorney General and Another 2013 eKLR the court had this to say about interlocutory orders:
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> > "Interim orders are granted where the court, exercising its discretion is satisfied that they are necessary due to the urgency and nature of the circumstances. They are merely injunctive in nature putting on hold an action, maintaining the status quo, until substantive dispute can be investigated and resolved. The applicant must establish genuine urgency. Interim orders are not suitable if by their grant, they finally determine the substantive dispute. The courts must be wary of prejudgment of the substantive merits.
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> 29. What is discernible from the above statements is that in this kind of applications an applicant must prove inter alia, urgency, irreparable harm and that the disposal of the application would not result in the determination of the substantive issues".

71. I will apply the lens hereinafter, keeping in view the fact that the Petitioner/Applicant has in his application sought for various interlocutory orders that will require consideration of other considerations and factors beyond these general principles.

72. The Petitioner/Applicant has sought in her application inter alia, that the 1st Respondent's letter dated February 11, 2022 terminating the Petitioner's /Applicant's contract be stayed pending the hearing and deamination of the suit. I am certain that it shall not be an off mark to state that the prayer is crafted in an ambiguous manner. A letter cannot be stayed, it is the decision that it conveys that can.

73. Assuming that the Petitioner/Applicant is seeking for a stay of the Respondent's decision to terminate the Applicant's contract of employment, I am still of the view that this court cannot grant the same,

as the termination has already occurred. I find comfort in the binding decision of *Obuga Bagaka –vs- Kenya School of Government* (2019) eKLR, where the court of Appeal held:

> "From the record, we note that the decision to dismiss the appellant was made by the respondent's council on 14th October, 2016 and that the appellant filed the Petition and Notice of motion on 8th November, 2016.Accordingly, the learned Judge did not err in finding as she did that by the time the appellant filed the Petition and Notice of motion, the decision to dismiss him had already been made by the appellant's Council. There was no decision to stay and any violations could be remedied pursuant to full hearing of the Petition."

74. The Petitioner/Applicant further sought for a conservatory order restraining the 1st Respondent from altering the payment terms of his salary. Having found as I have hereinabove that this court cannot in the circumstances of this matter stay the decision by the Respondents that brought the Petitioner's contract of employment into termination, it cannot be possible for this court to grant any order concerning the salary terms of the contract that has already been determined. To so do shall be tantamount to grant an order in a vacuum. I am not ready to so grant.

75. In any event this is an aspect of the Petitioner's case that shall be appropriately canvassed and considered in the substantive petitioner.

76. The Petitioner/Applicant also sought that by way of a conservatory order the Respondents either by themselves or their servants be restrained from advertising shortlisting, interviewing, recruiting or in other way filing the Petitioner's position.

77. This court has carefully considered the material placed before it by the combatants herein, and what strikes its mind is that clearly the Petitioner/Applicant deliberately or otherwise did not bring it forth how he was recruited. Put in another way, he did not explain the events pre- the contract of employment of February 11, 2021. Was the position he occupied advertised, was he shortlisted for any interviews, was he interviewed? are questions that he needed to answer so that the character and nature of his contract is understood to be different from the nature and character that the Respondents have accorded the same.

78. The Respondents contended that the Petitioner's position, the subject matter of the petition herein was supernumerary- one that was tied to the tenure of the then Cabinet Secretary who resigned. I have carefully considered the documents that the Respondents placed before this court, documents that predated the contract of employment and the contract of employment, coupled with the provisions of Regulations 27(8) of the Public Service Commission Regulations, 2020, and come to a conclusion that the petitioner has not prima facie demonstrated that his position was not tied to the tenure of the then Cabinet Secretary who had requested for his employment and caused him to be employed.

79. I agree with the 2nd Respondent's submissions that the Petitioner has not advertised for the positions that the Petitioner was holding, and infact considering the nature of the such position, there is no likelihood that there is going to be an advertisement. The Petitioner/Applicant wants this court to venture into the realm of speculation. It cannot.

80. The long and short of the foregoing premises, the court finds that the petitioner's /Applicant's application herein dated February 4, 2022 does not meet the threshold for the grant of a conservatory order(s) The application is dismissed consequently.

READ SIGNED AND DELIVERED THIS 29TH DAY OF JULY 2022

OCHARO KEBIRA

JUDGE

In presence of

Ms. Mungai for Mr. Omari for the Petitioner/Applicant

Ms. Kinyua for the 1st and 3rd Respondent

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 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 1B of the 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.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE