



Kerongo & another v Kisii County Public Service Board & another (Employment and Labour Relations Petition E014 of 2022) [2022] KEELRC 12873 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12873 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS PETITION E014 OF 2022

CN BAARI, J

OCTOBER 6, 2022

IN THE MATTER OF: ARTICLES

**1, 2, 3, 10, 19, 20, 22, 24, 25, 27, 28, 33, 35, 48, 50, 52,
165 & 232 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: VIOLATION AND/OR INFRINGEMENT
ON THE FUNDAMENTAL RIGHTS OF THE PETITIONER**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT
2012 SECTION 64, 65, 66, 67, 68, 70, 76, 77, 88, 95 & 96**

IN THE MATTER OF: THE EMPLOYMENT ACT 2007

**IN THE MATTER OF: THE EMPLOYMENT AND
LABOUR RELATIONS COURT ACT NO. 29 OF 2011**

IN THE MATTER OF: ACCESS TO INFORMATION ACT, NO.31 OF 2016

IN THE MATTER OF: KISII COUNTY GOVERNMENT

**IN THE MATTER OF: ARBITRARY & UNCONSTITUTIONAL APPOINTMENT IN
THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
& FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

THOMSON KERONGO 1ST PETITIONER

RIGENA HUMAN RIGHTS WATCHDOG ORGANISATION . 2ND PETITIONER

AND

KISII COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

KISII COUNTY GOVERNMENT 2ND RESPONDENT



RULING

1. Before court is the Petitioners' application dated 10th March, 2022, seeking orders THAT:
 - i. Spent
 - ii. The Respondents, their agents, workers, employees and any other authorized person working under the head of public service to the 2nd Respondent be restrained by way of injunction from employing, recruiting, issuing letters of appointment and advertising any position for employment
 - iii. Spent
 - iv. Spent
 - v. Spent
 - vi. Spent
 - vii. spent
 - viii. The Honourable court be pleased to grant an order of temporary injunction under Article 23(3)(b) of *the Constitution*, 2010 prohibiting and/or restraining the Respondents either by themselves, agents, servants and/or employees from placing them in the payroll, further advertising, recruiting and/or enlisting employees without complying with the due process of the law and in particular, provisions of Article 10(1) of *the Constitution* of Kenya, 2010 pending the hearing and determination of this application.
 - ix. The Honourable Court be pleased to grant conservatory Order as envisaged under Article 23(3)(c) of *the Constitution* of Kenya, 2010 to protect, preserve and/or conserve the funds and/or resources of the 2nd Respondent from being paid out to irregularly and/or illegally employed personnel, on account of salaries, remunerations and allowances, pending the hearing and determination of this petition.
 - x. Costs of the application.
2. The application is supported by the grounds on the face thereof and the affidavit of Thomson Kerongo, the 1st Petitioner herein. The basis of the application is that the Respondents have carried out an employment exercise without adhering with the necessary policy guidelines.
3. The Petitioners further aver that the Respondents have proceeded to employ personnel without sending out advertisements, shortlisting or conducting interviews, and are sneaking names for appointments without following employment policies whatsoever.
4. The Petitioners further state that the recruitment was conducted without the approval of the Kisii County Public Service Board wherein those enlisted or given appointments did not follow the laid down employment procedure and appointments as provided by law and *the constitution*.
5. They aver that the letters of appointments issued at the time of electioneering and in the last term in office by the Governor will prejudice his successor.
6. The Petitioners state that the Respondents' acts of omissions or commission offends the mandatory provisions of *the Constitution* of Kenya, 2010.



7. The Respondents did not respond to the application despite being allowed leave to do so.
8. The application was urged orally on the 19th July, 2022.

Determination

9. I have considered the application, the grounds, affidavit and the oral submission by the parties. The issue that fall for determination is whether the Petitioners' application meets the threshold for grant of injunctive reliefs pending hearing of their petition.
10. The conditions for grant of temporary injunctions was clearly spelt out in the famous case of *Giella versus Cassman Brown* (1973) EA 358. The position was further buttressed in *Nguruman Limited versus Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the court opined thus: -

“In an interlocutory injunction application the Applicant has to satisfy the triple requirements to -

- a, establishes his case only at a prima facie level,
- b, demonstrates irreparable injury if a temporary injunction is not granted and
- c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”.

11. The first question that comes to mind is whether the Petitioners have established a prima facie case to warrant the grant of the injunctive reliefs.
12. The Petitioners' prayers before this court are for an order restraining the 2nd Respondent from employing, recruiting, issuing letters of appointment and advertising any position for employment, placing the persons recruited in the 2nd Respondent's payroll and paying the person recruited from the funds or resources held by the Respondents.
13. The documents produced in support of the instant application include a corrigendum of an advertisement for various positions in the service of the 2nd Respondent, which indicate the last day for submission of applications to be 18th January, 2019. Further, the list of shortlisted candidates produced before court is also dated 15th February, 2019 and yet another of 27th June, 2019.
14. This application was filed in March, 2022. The Petitioners have not provided any evidence indicating that a recruitment process was underway around the time of filing this application and petition.
15. It is thus clear that the Petitioners are, to borrow the now famous phrase from our apex court, only on a wild goose chase.
16. In *Mrao Ltd Versus First American Bank of Kenya Ltd* (2003) eKLR the Court of Appeal stated:

“... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



17. In my view, and for the reasons foregone, I find that the Petitioners/Applicants have not established a prima facie case to warrant the grant of the orders sought.
18. Further without a prima facie case, it goes without saying that one cannot demonstrate that they would suffer irreparable injury if the orders sought are not granted.
19. The upshot is that the Petitioners' application dated 10th March, 2022, is dismissed.
20. Parties shall bear their own costs.
21. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF OCTOBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Thomson Kerongo Applicant present in person

Mr. Mokaya present for the Respondents

Ms. Christine Omollo- Court Assistant.

