



Union of Kenya Servants v Kenya Utalii Collage (Employment and Labour Relations Cause E287 of 2022) [2022] KEELRC 12743 (KLR) (3 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 12743 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E287 OF 2022**

**K OCHARO, J
OCTOBER 3, 2022**

BETWEEN

UNION OF KENYA SERVANTS CLAIMANT

AND

KENYA UTALII COLLAGE RESPONDENT

RULING

The Claimant's/Applicant's Application.

1. Through a Notice of Motion Application dated May 6, 2021, the Claimant / Applicant seeks the following orders:
 1. That this Application be certified urgent and be heard ex-parte in the first instance.
 2. That prayer no 3 be granted ex-parte in the first instance
 3. That pending the hearing and determination of the application inter-parte this Honourable Court be pleased to grant an injunction restraining the Respondent, its servants its agents, and/ or employees from implementing the Human Resource Manual and Resolutions arrived at, following the meeting held at Lake Naivasha Resort between April 4, 2022 to April 13, 2022.
 4. That pending the hearing and determination of this Application the Honourable Court be pleased to grant an injunction restraining the Respondent, its servants its agents and/ or employees from implementing the Human Resource Manual and resolutions arrived at following the meeting held at Lake Naivasha Resort between April 4, 2022 to April 13, 2022.
 5. That the cost of this application be in the cause.
2. The Application is anchored on the grounds on the face of it and supporting Affidavit sworn by Hon Tom M Odege, MP on the May 6, 2022.



3. The Application is opposed by way of a replying affidavit that was sworn by Teclan N Kigen the acting Human Resource Manager of the Respondent on the July 7, 2021.
4. The Claimant/Applicant states that the Respondent commenced a process of review of its grading structure. After a series of meetings, discussions and consultations with stakeholders, the process was completed in April 2018. The Human Resource instruments that were the subject of review were the, Human Resource policy and Procedure Manual, staff establishment, organizational structure, and grading and career guidelines.
5. The Applicant states that the committee that was responsible for the review had representatives from the Claimant union, the Respondent management, state corporation advisory committee and the Respondent Human Resource department.
6. The Applicant contended that the documents were forwarded to the State Corporation Advisory Committee and thereafter to the ministry of Tourism for approvals. The documents were eventually approved in November 2021. Consequently, the documents were ripe for implementation.
7. The Applicant states notwithstanding the approval, the Respondent failed to implement the instruments and make the instruments public to the members of the Claimant.
8. The Applicant states that one of the changes that came in with the review was the introduction of 11 tier grading structure, and in October 2019 a committee was formed whose mandate was to convert Patterson grading structure of 20 tiers to the approved 11-tier.
9. The Applicant states that during the committee's meeting held for purposes of executing the above stated mandate, representatives from the Public Service Commission proposed the expansion of the structure 11- tier to 14- tier, contrary to the mandate.
10. The proposal became contentious, there was no common cause over it. The Respondent's management was in support of the proposal. The Applicant took the position that the 11-tier grading structure should be implemented first and if there were to be any challenges in the implementation, the deliberations would be held on how the same would be expanded.
11. The Applicant states that while the issue was still under deliberations the Claimant's members were informed that the discussion was completed and the final document submitted to the Respondent's management and the public service commission.
12. As the deliberations were going on, the Applicant's members [employees of the Respondent] were informed that that discussions had been completed and a final document submitted to the Respondent's Management and subsequently to the Public Service Commission for approval.
13. Further the Applicant states that on the August 26, 2021 the Principal and Chief Executive Officer advised all staff by way of a memo that the approved 14-tire grading structure recommended by PSC had been approved and it had reviewed the current 20-tire grading structure to 14 -tire grading in line with the SRC provisions for implementation. The Memo indicated that the management was to hold forums with staff and collect their views.
14. On or about the March 28, 2022, the Respondent's Human Resource and Administration Manager, sought for approval and funds for a retreat in Naivasha, retreat whose purpose was to discuss re-alignment of the Human Resource Instruments to the proposed 14-tier grading structure. This didn't sit well with the Applicant as apparently it had been excluded from the least of those who were to attend the retreat. One Mr Richard Lelemusi who was indicated as to attend as a representative of the Applicant, didn't have its authority.



15. The Applicant contends that it believes that the purpose of the retreat was to legitimize the illegal actions of the Respondent where it sought to implement documents which had not been approved by the relevant authorities.
16. The Applicant states that following the meeting that was held between 4th and April 13, 2022 at Lake Naivasha Resort, a document – Human Resource Policy and Procedures of April 2022 was to be forwarded to the Public Service Commission for approval.
17. It was further contended that the Respondent’s actions were in breach of the Recognition Agreement between the Respondent and the Applicant, and against the spirit of the Labour Relations Act.
18. The Applicant states that the implementation of the document commenced in October 2021 and the document was materially different from the document of April 2018 and the salary gap between the highest paid and the lowest paid greatly increased
19. The Applicant stated that the Respondent did not inform the Applicant’s members of the changes as required under section 13 of the *Employment Act* and the members did not receive re-designation letters and only knew of the changes through their payslips.

The Respondent’s case.

20. True, on or about the July 23, 2017 the Respondent commenced a process to review its salary and grading structure. After series of meetings, discussions and consultations with stakeholders, the process was completed in the August 2018. The State Corporations Advisory Committee [SCAC] approved the, HR Policy & Procedures Manual; Staff Establishment; Career Guidelines, and Organizational Structure, documents.
21. The Respondent states that once the HR instruments were approved it did not implement the changes or make them public for the following reasons;
 - a. Lack of college expertise to convert 20-tier grading system to 11- tier as approved.
 - b. The college sought technical expertise from PSC to convert the grading structure
 - c. PSC advised that 11- tier was impossible to be implemented hence recommended 14 tire grading system as the 11- tier was too short for staff career progression.
22. According to the Respondent, the new salary grading structure was effective July 1, 2021. following the approval of the 14-tier grading structure by the Public Service Commission, through their letter dated June 9, 2021, the 11-tier structure which was established in 2018 was abolished. The Respondent implemented the report by the Public Service Commission report without alteration.
23. The Respondent further states that the Respondent college organized for staff forums to discuss the changes in structure as had been communicated in the principal’s and CEO’s memo of August 26, 2021.
24. A team comprising representatives from SCAC, the college and the union retreated at Naivasha for 10 days and the team reviewed and aligned the HR instrument tools from 11 tire to 14 tier grading structure.
25. The Respondent states that the Claimant union was always represented by, Mr Richard Lelemusi, Ms Jane Kawira, Ms Zamzam Shikanga, & Ms Joyce Biwott.
26. In the retreat, out of 15 [fifteen] members who were in attendance 5 [five] were from the Applicant union. Mr Lelemusi together with Mr Kiganda had all through represented the Applicant in the



process of development of the Human Resource instruments. With the absence of Mr Kiganda [branch secretary] who was absent as he was under interdiction, it was prudent to have Mr Lelemusi in the retreat because of his understanding and contribution. In the past Mr Lelemusi had represented the Applicant union, without any complaints.

27. The Claimant/Applicant further states that the development of the instruments was done by relevant government agencies SAAC and PSC who are mandated under Article 232(2) of the Constitution. Consequently, there is nothing illegal about the process. Further, the implementation of the 14-tier structure was approved by the College Council. No illegality has been demonstrated of the process.
28. The affiant further states that the Claimant union has failed to plead with precision and provide particulars of how its members will be affected by the reviewed Manual.
29. The affiant further states that the Claimant has relied on confidential documents that were obtained illegally and the Applicant's reliance on them is in violation of Article 50(4) of the Constitution.
30. It is further stated that the Claimant/Applicant has rushed to Court prematurely as the instruments have just been forwarded to the cabinet secretary for his concurrence and onward transmission to SCAC for approval.
31. The affiant contends that the Applicant wants this Court to micro-manage Human Resource functions undertaken by other public bodies for the benefit of the entire staff at the Respondent's establishment, to satisfy the union's narrow and self-interests.
32. Further the Respondent states that the allegations that the Claimant members were not consulted and their views not taken into account cannot be taken to vitiate a process undertaken with public bodies with the necessary expertise in Human Resources matters.
33. The Respondent urges the Court to dismiss the application with costs

Rejoinder

34. In rejoinder the Applicant avers that one Richard Lelemusi was not authorised by the union to represent it.
35. The Claimant avers that the Respondent admits that they have implemented the 14-tire structure and at the same time states that the process is ongoing, and argues that it is illegal to implement a structure that has not been approved.

The Claimant's/ Applicant's Submissions

36. The Applicant heavily recited the factual matters raised both in its affidavits and the replying affidavit by the Respondent. Having set out the respective cases by the parties as I have hereinabove, it will be quite unnecessary for this Court to recapture that part of the Applicant's submissions here.
37. Having said this, it is imperative to state that the Applicant suggests three issues for determination in this application thus:
 - a) Whether the Applicant has established a prima facie case.
 - b) Whether the Applicant stands to suffer irreparable loss which could not be compensated by an award of damages.
 - c) Balance of convenience.



38. The Claimant seeks for orders restraining the Respondent from implementing the HR instruments dated 2022 and relies in the holding in the celebrated case of *Giella vs Cassman Brown Co Ltd (1973) EA 358*, where the Court stated that for the grant of the orders of injunction, a Court has to be satisfied that the following conditions have been met:
- i. The Applicant has established a prima facie case with a probability of success;
 - ii. The Applicants stand to suffer irreparable loss which could not be compensated by an award of damages; and
 - iii. If the Court was in doubt, the application would be determined on a balance of convenience.
39. On the 1st proposed issue, the Applicant submits that what constitutes a prima facie case was defined in *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*, thus:
- ' In civil cases a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial.'
40. In the current case the Applicant submits that the Respondent failed to follow due Procedure in conducting the review of the HR instruments and did not consult its members, therefore their views and opinions were never taken into consideration. Which amounts to violation of an important constitutional step of public participation.
41. The Applicant submits that one Richard Lelemusi who purportedly represented the union did not have the authority to represent it.
42. The Claimant submits that the implementation of the Human Resource policy and Procedures dated April 2022 will affect the Claimant's members therefore it was very imperative that the Claimant be heard therefore praying that an injunction is issue to restrain the Respondent from implementing it. Reliance was placed on the case of *Wilfred Mantbi Musyoka vs The County Assembly of Machakos & Others [2018] eKLR*.
43. On the 2nd issue the Applicants submit that the Applicant's members who are employees of the Respondents will suffer an irreparable loss that cannot be compensated by any award of damages.
44. On the third issue the Applicants submit that they have proved that it is a prima facie case with a probability of success and will stand to suffer irreparable injury which cannot be compensated by way of damages therefore urges the Court to find the balance of convenience lies in favour of granting the orders.
45. The Applicants submit that so long as the process used to arrive at the HR instruments was flawed the instruments themselves were flawed as they failed to make the process open and transparent by implementing a structure that had not been approved and side-lining the Claimant's involvement in the process.

The Respondent's Submissions.

46. The Respondent highlighted the following issues for determination:
- d) Whether the Applicant has satisfied the threshold for grant of conservatory orders



- e) Whether the Applicant was represented in the Naivasha retreat.
 - f) Whether the application offends the mandatory provisions of Order 53 Rule 1 and 2 of the *Civil Procedure Rules*.
 - g) Whether the Applicant is entitled to the reliefs sought.
47. On the first issue the Respondents submit that the principles which ought to guide the Court when dealing with an application for conservatory order were established in the case of *Kenya Small Scale Farmers Forum -v- Cabinet Secretary Ministry of Education, Science and Technology & 5 Others HCCP No 39 of 2015 [2015] eKLR* the Court summarized the principles as follows:
- ' I would state the principles which govern a Court considering an application for interim or conservatory relief to be the following:
- 'The Applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see *Centre for Rights Education and Awareness & 7 Others -v- The Attorney General HCCP No 16 of 2011*'.
48. On the threshold to be met by an Applicant seeking the conservatory order, it was further submitted that such a party must go beyond showing that the prima facie case is potentially arguable, he or she must demonstrate that there is a likelihood of success.
49. On the principles governing the grant of conservatory orders further reliance is placed on the decision in *Mary Arviza & Another v AG of Kenya & another, Application No 3 of 2010*.
50. The Respondent argues that the Applicant's case is not clear. The application seeks for orders restraining the Respondent from implementing the Human Resource Manual, and the resolutions arrived at following the meeting held at Naivasha. It is contended that from the affidavit in support of the application it is not discernible how the Human Resource Manual of 2018 which is currently in operation, prejudices the Applicant's members.
51. On the 2nd issue the Respondents submit the Applicant has not demonstrated that irreparable loss will be suffered if the orders sought are not granted.
52. The Respondents rely in the holding in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR* where the Court of Appeal held that:
- ' If the Applicant establishes a prima facie case that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the Applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant' claim may appear at that stage the existence of a prima facie case does not permit 'leap-frogging' by the Applicant to injunction directly without crossing the other hurdles in between.'
53. On the 2nd issue the Respondents submit that the Applicant's allegation on non- participation in the process and the subject meeting is unfounded. The Applicant's representatives participated all through. The assertion that in the meeting it was not represented by its three preferred members doesn't in any manner aid its application herein.



54. The Respondent relies in the holding in *Republic vs County Government of Kiambu Ex Parte Robert Gakuru & Another [2016]* in which the High Court held of public participation as hereunder; -

' 51. Therefore, the mere fact that particular views have not been incorporated in the enactment does not justify the Court in invalidating the enactment in question. As was appreciated by Lenaola, J in *Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others* Petition No 486 of 2013, public participation is not the same as saying that public views must prevail.'

55. The Respondent submitted that the Claimant was fully represented in the retreat in Naivasha by one Richard Lelemusi and the Applicant's wish for other members should not be a reason to nullify a process guided by Human Resource experts.

56. On the third issue the Respondent submitted that the Claimant rushed to Court prematurely noting that the instruments in question have been forwarded to the cabinet secretary concurrence and onward transmission to SCAC for approval.

57. The Respondent submits that Order 53 Rule 1 and 2 of the civil Procedure Rules states that an application to challenge a constitutional body's decision can only be done within 6 months from the date of the decision and in this case the Human Resource policy and Procedures has not been approved therefore the Court cannot grant the orders sought.

58. In *Cyril J Haroo & Another v Uchumi Services Limited & 3 Others (2014) eKLR* where the Court held that:

42 A suit filed contra-statute cannot be saved by the Oxygen principle or the provisions of Article 159 of the *Constitution*, in the case of *Siasa Pasua & 2 Others v Mbaruk Khamis Mohammed and Another (2012) eKLR* OJwang J (as he then was) had this to say about the provisions of Article 159 (2) (d) of the *Constitution*. 'The obligation placed upon the Courts by the *Constitution*' requirement (article 159 (2), that they render Justice without undue regard to procedural technicalities, does not in my opinion, negate the orderly scheme of litigation provided by the Civil Procedure Rules; and the law in respect of Originating Summons is by no means nullified'.

59. The Respondent submits that that there is no Human Resource Manual capable of being barred from implementation as the same is yet to be approved.

Analysis and Determination

60. At the onset, I consider it imperative to render myself on a specific issue that has been raised by the Respondent in its submission, applicability of the provisions of Order 53 of the Civil Procedure Rules in this matter, before I delve into the merits or otherwise of the instant application. The Respondent submits that under Order 53 Rules 1 and 2 of the Civil Procedure Rules, an application to challenge a constitutional body's decision can only be done within 6 months from the date of the decision. That in this case the approval of the Human Resource Policies and Procedure Manual has not been made, the application is therefore premature.

61. With respect to Counsel for the Respondent this argument is as a result of a deliberate or otherwise ignorance of the clear provisions of Order 53 of the Civil Procedure Rules, regarding the nature



of proceedings it relates to, and the remedies contemplated thereunder. The provisions under the Order relate to Judicial review proceedings, and the prerogative orders of mandamus, certiorari and prohibition. The limitation of time prescribed therein only relates to the pursuit for those specific remedies contemplated thereunder. The last issue proposed by the Respondent, the submissions thereon and the authority cited - Cyril J Haroo v Uchumi Services Limited & other [2014] eKLR, are not relevant as an attack on the instant application.

62. The Applicant herein has not at all sought for any remedy pursuant to the provisions of Order 53 of the Civil Procedure Rules. Further, the submissions are not in appreciation of the fact that in the current constitutional dispensation, even where a violation of a right or breach of the law is threatened, such a threat is justiciable.
63. In its notice of motion application before this Court the Applicant seeks for the relief of temporary injunction. There is now firm jurisprudence on how and when a Court confronted with an application for a temporary injunction can exercise its discretion. A grant of a temporary injunction is an exercise of judicial discretion which must be exercised judiciously, with the aim, to preserve the status quo where circumstances of the matter allow.
64. In the case of *Mary Arviza & Another v AG of Kenya* [supra], on the conditions for grant of an interlocutory injunction the Court stated that, an Applicant must show a prima facie case with a probability of success; an application for interlocutory injunction will not normally be granted unless the Applicant might suffer an irreparable injury, which would not be adequately compensated by an award of damages; and if the Court is in doubt, it will decide an application on the balance of convenience.
65. It is through the above lens that I will consider the Applicant's application, herein. However, considering the manner the Applicant's statement of claim, the application and the supporting affidavit has been couched, I will make a determination on the application in a measured manner, to avoid the risk of the determination being seen as a pre-judgment on the substantive suit.
66. The Applicant seeks that the Respondent be restrained from implementing the Human Resource Manual and resolutions arrived at following the meeting held at Lake Naivasha Resort between April 4, 2022 to April 13, 2022. The Respondent argued in its submissions that the Applicant is not clear on, Manual for which year. The importance of clarity of any application seeking for orders from a Court of law is a must, for clarity or otherwise of the same will always have an impact on the order to be granted and its enforceability.
67. An application by a party cannot be read in isolation from an affidavit in support thereof. Carefully considering the instant application and the affidavit in support, one can without difficulty conclude that the Manual the subject matter of the application is not the 2018 one, but that of April 2022, which was to be and was, deliberated on in the retreat. Therefore, this Court does not agree with the Respondent's submission that the application is unclear on the specific Manual, the subject matter of the application.
68. The retreat was to deliberate on the April 2022 Manual to align it with the 14-tier structure that had been approved. The Applicant doesn't dispute this. The Manual was forwarded to the Public Service Commission for necessary approval. The Applicant acknowledges this at paragraph 29 of the supporting affidavit. The Applicant does not contend that the approval has been done. In fact, the Respondent states that the same has not been approved.
69. It is not automatic that once a document has been forwarded to a constitutional body charged with the responsibility to consider its approval, shall be approved as a matter of course. Cognizant of this fact,



this Court isn't convinced that it can issue a restraining order of implementation of a document that has not been approved, for if the approval is not done eventually, this Court shall have acted in vain.

70. From the material placed before me, I am convinced that the Applicant was represented at the retreat. That in most occasions during the deliberations and discussions regarding the review, Mr Lelemusi was among those who represented the Applicant. The Applicant's letter dated April 4, 2022 that was written to the Respondent concerning the reservations that the Applicant had over the retreat, did not specifically or in any express manner indicate that it was not agreeable to Mr Lelemusi representing it at the retreat. It is not difficult to hold that the assertion that Mr Lelemusi was without authority to represent the Applicant was an afterthought.
71. The Human Resource policy and Procedure Manual that was the subject of the deliberations in the retreat was one that flowed from the review of the grading structure, from 11-tier to 14-tier, as per the advice of a body with a constitutional mandate to, the Public Service Commission. Looking at the provisions of the Article 234 of the Constitution of Kenya, 2010, no doubt, one of its functions is to advise on matters like that it advised on here.
72. The advice, and the resultant conversion of the grading structure has not been assailed in this matter or in any other legally recognized forum.
73. The Court has agonized over this matter, how does the 14- tier structure which according to the Public Service Commission, is better than the 11-tier grading structure, prejudice the Applicant's members? What prejudice would a HR policy and Procedure Manual, a product of the approved grading system visit on the members of the Applicant? The Applicant is not clear on this.
74. In the upshot this Court concludes that the Applicant has not demonstrated that it has a prima facie case with a chance of success, and that if the orders sought are not granted, its members will suffer an irreparable damage that cannot be compensated by way of damages. Consequently, the Applicant's application is hereby dismissed as it lacks merit.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF OCTOBER, 2022.

OCHARO KEBIRA

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 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.

OCHARO KEBIRA

JUDGE

