



**Nubian Rights Forum v National Hospital Insurance Fund & another; Ethics and Anti-Corruption Commission & 3 others (Interested Parties) (Petition E024 of 2022) [2022] KEELRC 13111 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13111 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION E024 OF 2022**

**JK GAKERI, J**

**NOVEMBER 2, 2022**

**IN THE MATTER OF: THREATENED INFRINGEMENT AND CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 10 (1), 10(2), 19, 22, 41, 47, 48 73(2) & 201 OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

**IN THE MATTER OF: ALLEGED VIOLATION OF RIGHTS AND FREEDOMS UNDER ARTICLES 1(1), 2(1) & (2), 3(1), 10(1) & (2), 27, 73(2) & 201 OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**NUBIAN RIGHTS FORUM ..... PETITIONER**

**AND**

**NATIONAL HOSPITAL INSURANCE FUND ..... 1<sup>ST</sup> RESPONDENT**

**PETER KAMUNYO ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**

**CABINET SECRETARY, MINISTRY OF HEALTH ..... INTERESTED PARTY**

**PRINCIPAL SECRETARY, MINISTRY OF HEALTH ..... INTERESTED PARTY**

**ATTORNEY GENERAL ..... INTERESTED PARTY**



## RULING

1. Before me for determination is an Application dated February 9, 2022. The Applicant seeks orders that:
  - a. Spent;
  - b. That pending, the hearing and determination of this application, this Honourable Court be pleased to issue orders compelling the 1<sup>st</sup> Respondent to provide the records and minutes of the interviews that led to the promotion of the 1<sup>st</sup> Respondent's members of staff in April, 2021;
  - c. That pending, the hearing and determination of this Application, this Honourable Court be pleased to issue orders compelling the 1<sup>st</sup> Respondent to provide a list of the promotions that have been made to members of staff since the 2<sup>nd</sup> Respondent's assumption of office in the year 2020 and the date the said promotions took effect;
  - d. That pending, the hearing and determination of this Application, this Honourable Court be pleased to issue orders staying the appointments of members of staff and promotions made by the 2<sup>nd</sup> Respondent without following due procedure;
  - e. That pending, the hearing and determination of the Petition filed herewith, this Honourable Court be pleased to issue orders compelling the 1<sup>st</sup> Respondent to provide the records and minutes of the interviews that led to the promotion of the 1<sup>st</sup> Respondent's members of staff in April, 2021;
  - f. That pending, the hearing and determination of this Application, this Honourable Court be pleased to issue orders compelling the 1<sup>st</sup> Respondent to provide a list of the promotions that have been made to members of staff since the 2<sup>nd</sup> Respondent's assumption of office in the year 2020 and the date the said promotions took effect;
  - g. That pending, the hearing and determination of the Petition filed herewith this Honourable Court be pleased to issue orders staying the appointments of members of staff and appointments made by the 2<sup>nd</sup> Respondent without following due procedure;
  - h. That consequent to the grant of the prayers above, this Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders; and
  - i. That the costs of this application be in the cause.
2. The application is based on the grounds set out on the face of the Notice of Motion Application and the Supporting Affidavit of Shafi Ali Hussein, the General Secretary of the 3<sup>rd</sup> Respondent sworn on the February 9, 2022.
3. The Respondents filed a replying Affidavit sworn by Jane Boit on the September 19, 2022, the 1<sup>st</sup> interested party filed a Replying Affidavit sworn by Jackson Mwai on February 21, 2022 while the 2<sup>nd</sup> to 4<sup>th</sup> interested parties filed grounds of opposition dated February 21, 2022 in response to the application.

### **Petitioners Case**

4. The petitioner is a Human Rights Organization that started in 1997.
5. The 1<sup>st</sup> Respondent is a state parastatal whose core mandate is to provide medical cover to all its members and their declared dependants.



6. The 2<sup>nd</sup> Respondent is the Chief Executive Officer of the 1<sup>st</sup> Respondent who has been sued for proliferating irregularities at the 1<sup>st</sup> Respondent through corruption, embezzlement of funds, unjustified backdating of salaries and making irregular appointments and transfers.
7. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties have been joined as parties as having a stake and legal interest.
8. The petitioner avers that the 2<sup>nd</sup> respondent who is a public officer and director of the 1<sup>st</sup> Respondent is on a rampage of proliferating irregularities at the 1<sup>st</sup> Respondent by abusing and misusing his power by directly discriminating against well deserving and hardworking members of the 1<sup>st</sup> Respondent.
9. The petitioner avers that the 2<sup>nd</sup> Respondent contravened the 1<sup>st</sup> Respondents right to information as to how promotions were done and no interviews were conducted which contravenes the principles under chapter 10 of the *Constitution of Kenya, 2010*.
10. The petitioner avers that the 2<sup>nd</sup> Respondent used tax payer's money for unjust enrichment of a few individuals in contravention of the guiding principles of integrity and public finance and unless the court intervenes there will be an inevitable crisis bound to affect tax payers.
11. The petitioner observes that unless the 2<sup>nd</sup> respondent is restrained he will continue to infringe on national values, principles of governance and values and principles of public service.

### **Respondents Case**

12. In opposition of the application the Respondents filed a Preliminary Objection dated February 21, 2022 and later filed a Replying Affidavit sworn by Jane Boit on the September 19, 2022.
13. The affiant who is the Acting Corporation Secretary of the 1<sup>st</sup> Respondent states that the 1<sup>st</sup> Respondent being a state corporation and in fulfilment of its mandate of delivering Universal Health coverage was in the process of implementing 2018-2022 Strategic Plan.
14. She states that in line to the fulfilment of the mandate, there was a re-organization and restructuring of the fund acting in accordance with recommendation of a World Bank Consultant. That the Board of Management had revoked the appointment of three members of staff in the 2020.
15. The affiant states that vide a letter dated March 16, 2021 the Board of Management of the Respondent sought advice from the State Corporations Advisory Committee (SCAC) on the issue of staff appointment and specifically on reversal of the appointments of three officers.
16. The affiant states that the Board of Management Acting on the advice of SCAC reinstated the officers, Mr Joseph K Tanui, Mr Stanely Wambugu and M/s Rosemary Gachemi.
17. Further the affiant states that an internal job advertisement was published but the same was later deferred by an internal memo dated March 11, 2021 and members of staff were advised to continue discharging their duties in the offices they held prior to the advertisement.
18. The affiant states that the appointment and recruitment of senior management had not been advertised and the allegations that the 2<sup>nd</sup> Respondent made appointments without following the laid procedure were misguided as the only action taken was to reinstate the three officers.
19. The affiant contends that the Petitioners allegations that that the 2<sup>nd</sup> Respondent proliferated irregularities through corruption and embezzlement of funds was untrue, and that there was no discrimination against anyone as no interviews or recruitments had been conducted.



20. The affiant states that the respondents had not violated, infringed or threatened the Petitioners constitutional rights.
21. The affiant states that the Application and Petition are misconceived, incompetent, unfounded and an abuse of the courts process and urges the court to dismiss the same with costs.

### **1<sup>st</sup> Interested Party's Case**

22. In opposition to the Application, the 1<sup>st</sup> interested party filed a Replying Affidavit sworn by Jackson Mwai an Ethics Officer with the 1<sup>st</sup> interested party stating that on the July 21, 2021, the Commission received a complaint and entered it into the investigations of the claim under Inquiry File number EACC/EL/INQ/025/2021.
23. The affiant states that the complaint related to irregular promotions, transfers and irregular backdating of salaries of staff at the National Hospital Insurance Fund.
24. The affiant states that the inclusion of the Commission as a party into the Petition was not warranted since the Commission had already taken up the complaint and the same was being investigated and once concluded the Commission will make recommendations and take any action in accordance to the law.
25. The affiant states that the Commission was not in violation of any law and no acts or commissions have been attributed to it and has no clear or identifiable stake in this matter and prays that its participation in the matter be dispensed with.

### **2<sup>nd</sup> to 4<sup>th</sup> Interested Parties' Case**

26. The 2<sup>nd</sup> to 4<sup>th</sup> interested parties filed grounds of opposition in dated February 9, 2022 and raised the ground that the application has not met the threshold for grant of interlocutory injunctions as established under *Giella vs Cassman Brown & Co Ltd* (973) EA 358.
27. They urge that this being a public interest matter, it outweighs personal interest and that the petitioner stands to suffer no irreparable injury or prejudice if the court orders are not granted.
28. They state that conservatory orders are discretionary and their scope and purpose is limited to most deserving circumstances and the present Petition is not, therefore it is in the interest of justice that the orders sought be denied.
29. The 2<sup>nd</sup> to 4<sup>th</sup> Interested Parties State that the Petitioner is an unknown entity and has no interest or stake on the issues touching on the 1<sup>st</sup> Respondent and has not demonstrated how its interests are affected by promotion of constitutional principles.
30. Further the interested parties contend that the Petitioner is using public documents obtained contrary to the provisions of Article 35 of the [Constitution](#) and section 80 of the [Evidence Act](#) and urges the court to expunge the same from the court record.
31. The interested parties further states that the petitioner lacks locus standi to commence these proceedings and in that regard the court lacks jurisdiction to hear and determine the issue herein.
32. The interested parties have further contended that the petitioner has not demonstrated why he joined the 2<sup>nd</sup> to 4<sup>th</sup> interested parties.
33. The interested parties urge the court to dismiss the application as it is frivolous, vexatious and an abuse of the court process.



## **Applicant's Submissions**

34. Counsel for the Petitioner identifies two issues for determination;
- a. Whether the Application/Petition before this court is merited.
  - b. Who should bear the cost of the Application/Petition?
35. On the first issue, the Petitioner submitted that on the February 26, 2021, the 1<sup>st</sup> Respondent published an internal advertisement for vacant positions open to its members of staff. On the March 11, 2021 the said advertisement was rescinded and employees were advised to proceed with their current roles. In April, 2021, the 2<sup>nd</sup> Respondent proceeded to make internal appointments despite the earlier notice rescinding the vacancies.
36. The petitioner submits that the said appointments were made in a discriminatory manner and without following due procedure. It is urged that Section 2.13 of the NHIF Human Resource Policy and Procedure Manual, May 2019 provides
- “The powers to appoint employees is vested in the board, however the board may delegate some of those powers in writing for a specific cadre of employees to the Chief Executive Officer. The CEO shall therefore report such appointments not later than the next board meeting for noting and approval”
37. The Petitioner submits that the actions of the 2<sup>nd</sup> Respondent had caused demoralisation, frustration and general apathy among employees.
38. The Petitioner further submitted that by declining to be guided by the *Constitution* and the laid down internal procedures, the 2<sup>nd</sup> Respondent infringed on the rights of employees of the 1<sup>st</sup> Respondent guaranteed under Article 27 of the *Constitution of Kenya, 2010* and their legitimate expectations.
39. The Petitioner relied on the holding in *Trusted Society of Human Rights Alliance vs Nakuru Water & Sanitation Services Company & Another* (2013) eKLR where the court considered appointments made without following due process and held that a recruitment undertaken outside established policy guidelines was unlawful.
40. The Petitioner further submitted that the respondent's actions breached the National Values and principles of governance prescribed in Article 10, 73 and 232 of the *Constitution of Kenya, 2010*.
41. The Petitioner further submitted that the 2<sup>nd</sup> Respondent failed to adhere to the responsibilities of leadership as provided under Article 73(1) of the *Constitution* and Section 52 of the *Leadership and Integrity Act* by failing to exercise authority in a manner that is consistent with the purpose and objects of the *Constitution*.
42. The Petitioner submitted that the actions of the 2<sup>nd</sup> Respondent were not only illegal but also undermined members of the public through misappropriation of public funds.
43. The Petitioner further submitted that there was eminent danger that the 2<sup>nd</sup> Respondent would continue to infringe on national values, principles of governance and principles of public service and prays that the orders sought in the Petition be granted.
44. On the 2<sup>nd</sup> issue, the Petitioner urges the court to find that costs should follow the event and the successful party should be awarded costs.



## 1<sup>st</sup> and 2<sup>nd</sup> Respondents Submissions

45. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents identified four issues for determination namely;
- i. Whether the Respondents acted in a discriminatory manner against any person contrary to and in breach of Article 27 of the [Constitution of Kenya, 2010](#);
  - ii. Whether the Respondents violated any Constitutional rights, values and principles in exercising their mandate with respect to recruitment, appointment, promotion and reinstatement of any person/members of its staff; and if not, whether the instant Petition is frivolous, vexatious and/or actuated by malice;
  - iii. Whether the Petition is merited; and
  - iv. Whether costs should issue in the instant Petition.
46. The Respondent submitted that it initiated various reforms and restructuring that necessitated realignment of the human resource and organizational structure. This necessitated the appointment of three officers to fill critical positions of the Fund.
47. The reorganization led to the publishing of an internal advertisement seeking individuals to fill various positions in different departments, process different from the appointment of the three officers.
48. The Respondents submitted that the petitioner misconstrued the above facts and alleges discrimination by assuming that the appointments of the three officers was as a result of the internal job advertisement published by the Fund in February, 2021.
49. The Respondents further submitted that the interviews and the promotions the Petitioner is alleging are yet to take place as the process was deferred by the Cabinet Secretary for the Ministry of Health for further consultations.
50. Further, the Respondents submitted that the three members of staff the Petitioner is alleging were promoted were in fact reinstated as they had initially been appointed on the 2<sup>nd</sup> September 2020 as their appointment had been un procedurally revoked.
51. The respondents submitted that they had not violated any constitutional provisions, values and principles as alleged and no evidence has been provided in support of the Applicant/Petitioner's case.
52. It is further submitted that the allegations on embezzlement and loss of public funds is unsubstantiated as no evidence has been adduced and the accusations were malicious and amounted to witch-hunt, mud sliding and in bad faith on the part of the Petitioner.
53. The Respondents submitted that the Application/Petition herein is frivolous, vexatious and actuated by malice and urges the court to find that it is not merited as the Petitioner had not proved its case to warrant the issuance of the orders sought.
54. The Respondent urges the court to dismiss the Application/Petition with costs to the Respondents.

## 2<sup>nd</sup> – 4<sup>th</sup> Interested Parties Submissions

55. Counsel for the interested parties identified four issues for determination as hereunder,
- i. Whether the petitioner has *locus standi* in this case?
  - ii. Whether the court has jurisdiction in this matter?



- iii. Whether the petitioner’s evidence is admissible in court?
  - iv. Whether the petitioner has demonstrated why the 2<sup>nd</sup>- 4<sup>th</sup> interested parties were joined in this suit.
56. On the first issue, the interested parties counsel submitted that the Petitioner had no locus standi or capacity to institute this suit. Reliance was made on the holding in *Law Society of Kenya Vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No 464 of 2000, where the Court held that:-
- “Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”.
57. The interested parties submitted that the Petitioner’s suit is operating under the oblique considerations and intended to abuse the judicial process as the petitioner had not demonstrated any cause of action that would create any concrete injury.
58. The interested parties further submitted that the basis of the Petition of embezzlement of tax payers money and wrongful appointments of staff had not been substantiated.
59. On the 2<sup>nd</sup> issue for determination, the interested parties submitted that the court had no jurisdiction in the matters raised in the Petition. Reliance was made on the holding in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, where this Court emphasized that:-
- “. . . In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....” In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.”
60. It is submitted that challenging the appointment of staff through a constitutional petition is misguided and further the issue of corruption and embezzlement of funds was not incidental to the matters that are set out in Section 12 of the *Employment and Labour Relations Court Act, 2011* and as such submitted that the court had no jurisdiction to hear the matter.
61. On the third issue, the interested parties submitted that the public documents annexed to the Application/Petition were not compliant with section 80 of the *Evidence Act* and being public documents, they had not been certified by a public officer as provided under section 81 of the *Evidence Act* and urges the court to have them expunged from the record.
62. On the 4<sup>th</sup> issue, the interested parties submitted that the Petitioner had not demonstrated why they were joined in the suit and submitted that the Supreme Court had delineated the grounds for joining an interested party in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) where court stated that:
- “. . . Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:



- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

63. The interested parties submitted that the Petitioner had not proved any of the grounds and urged the court to strike them out of the proceedings.
64. The interested parties urged the court to find that the Petitioner lacked locus standi to institute the suit and that the court lacked jurisdiction on the issues raised and the Petitioner had not met the criteria for grant of conservatory orders. The court was urged to dismiss the Application and the Petition with costs.

### **Analysis and Determination**

65. The singular issue for determination is whether the Application dated February 9, 2022 is merited.
66. The Application seeks interim reliefs relating to avilment by the 1<sup>st</sup> Respondent of records and minutes of interviews that led to the promotion of staff in April 2021, list of promotions made since 2020, stay of the appointment and promotions by the 2<sup>nd</sup> Respondent in April 2021 without due process and costs of the application.
67. The affidavit by Mr Shafi Ali Hussein dated February 9, 2022 states that he had learnt that the 2<sup>nd</sup> Respondent was proliferating irregularities at the 1<sup>st</sup> Respondent through corruption, embezzlement of funds, unjustified back dating of salaries and making of irregular appointments and transfers of members of staff without due procedure as evidenced by an internal advertisement dated early 2021 which was rescinded in March 2021 but appointments were made in April 2021 despite the rescission of the advertisements and the same was secretly done without board approval and involved 12 names.
68. That individuals had been appointed on Permanent and Pensionable terms that are contractual under the 1<sup>st</sup> Respondent’s policies and attempts to settle the matter internally failed.
69. That the 2<sup>nd</sup> Respondent’s acts were illegal.
70. To buttress the application, the Applicant attaches an undated internal advertisement within the 1<sup>st</sup> Respondent. Applications were expected by March 3, 2021. Also attached is the 2<sup>nd</sup> Respondent’s letter to staff dated March 11, 2021 intimating that the process had been deferred pending further consultation and a promise to keep staff posted on the issue.
71. Also attached are faded copies of letters to Mr Joseph Tonui and Rosemary Wairimu Gachemi dated April 30, 2021 who had been appointed to offices by letter Ref HF/HR 1285/160 and HF/HR 2137/99 respectively dated September 2, 2020 and their appeals and reinstatement to the positions of Head, Administrative Services and Manager, Human Capital Management with immediate effect.



72. The last attachment is an email from the 2<sup>nd</sup> Respondent to Joseph Tonui under the subject rescinded appointments.
73. The foregoing is the foundation of the Application before the court.
74. In their Replying Affidavit, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents deponed that the 1<sup>st</sup> Respondent was a statutory corporation with a statutorily defined mandate.
75. It is deponed that in its 2018 – 2022 Strategic Plan, the 1<sup>st</sup> Respondent initiated reforms and restructuring to realign its Human Resource and organizational structure and developed all its Human Resource Instruments which were approved by the State Corporations Advisory Committee (SCAC) on August 31, 2020 and a Human Resource suitability assessment was conducted and recommendations were made to the 1<sup>st</sup> Respondent’s Board of Directors and as a consequences, the following were appointed by the Board of Management to various offices, namely; Rosemary Wairimu Gachemi, Joseph Tonui and Mr S Wambugu Kariuki but as the restructuring continued, the Board of Management revoked the appointments of the three owing to their qualification and experience.
76. The Respondents subsequently, sought advice from the SCAC and were advised of the risks inherent in the revocation of appointments and the appointees were reinstated by letters dated April 30, 2021 and an internal advertisement was published on March 3, 2021.
77. In the meantime, the Respondents sought SCAC’s advice on the revision of the Human Resource Instruments which the latter declined. They were advised that if revision was necessary, the same had to be recommended by the Board to the Parent Ministry. A letter dated March 1, 2021 was dispatched to the Cabinet Secretary National Treasury, Head of Civil Service and Cabinet Secretary, Ministry of Health for approval of recruitment of officers to various positions created by the re-organization.
78. Finally, by letter dated March 8, 2021, the Cabinet Secretary, Ministry of Health advised the Respondents to halt the exercise of recruitment until further notice for further consultations and employees were informed of the same by an internal memo dated March 11, 2021.
79. The Respondents state that the issue of the appointment of Senior Management Staff as advertised remains as directed by the Cabinet Secretary for Health.
80. From the foregoing, it is evident that contrary to the Applicant’s submissions that the 2<sup>nd</sup> Respondent made 12 internal appointments in April 2021, these were only reinstatements to positions previously appointed on September 2, 2020. The Applicant furnished no evidence of who the other eight (8) officers were and when they were appointed.
81. Instructively, the reinstatements were made on the basis of the advice given by SCAC which cited the risk of exposure to litigation.
82. The related submission that the appointments were discriminatory is unsubstantiated.
83. In *Andrews V Law Society of British Columbia* (1989) 1 SCR 321, discrimination was defined as  
“ . . . is a distinction which whether intentional or not but based on the grounds relating to personal characteristics of individual or group which has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.”
84. Discrimination or acting in a discriminatory manner as alleged by the applicant would be a violation of Article 27 of the *Constitution of Kenya, 2010*.



85. Similarly and as submitted by the Respondents, discrimination as explained in [\*Peter K Waweru V Republic\*](#) (2006) KCR entails;
- “The effect of a stature or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found . . .”
86. As correctly submitted by the Applicant, the power to appoint employees is vested on the Board of the 1<sup>st</sup> Respondent but may delegate the same in writing for specific cadres of employees in which case the 2<sup>nd</sup> Respondent would report to the Board.
87. In the instant case, these were appointments of internal staff to positions created on account of the re-organization as expressed in the Human Resource Policy and Procedures Manual, 2019.
88. The Applicant provided no evidence of who was discriminated in this instance as only the three officers appointments had been revoked after appointment on September 2, 2020 and reinstatement affected the three after their appeal and advisory by SCAC. The Applicant did not furnish an affidavit of any person who was in the same category and was not appointed.
89. Relatedly, the Applicant led no evidence that the reinstatements were made in contravention of the 2<sup>nd</sup> Respondent’s Human Resource Instruments which are board documents approved by SCAC for implementation by the Board.
90. It is not in dispute that the 2<sup>nd</sup> Respondent had not advertised positions to persons other than internal employees. These were not recruitments, properly so called but upgrades depending on an employee satisfying a prescribed criterion.
91. The Applicant has not demonstrated that the prescribed criterion was violated. (See [\*Aggrey Lukorito Wasike V Kenya Power & Lighting Co Ltd\*](#) (2016) eKLR.
92. In the premises, the court is satisfied that the Applicant has on a balance of probability failed to demonstrate that the re-appointment of the three officers to the positions they had been appointed to on September 2, 2020 was discriminating or conducted in a discriminatory manner.
93. This position finds support in the words of the three (3) Judge bench decision in [\*EG & 7 others V Attorney General: DKM & 9 others\*](#) (2019) eKLR as follows;
- “The law as we understand, it is that a party pleading violation of constitutional rights is at the very least expected to give credible evidence of the said violation and that it is not enough to merely plead and particularize a violation. That is one of the rules enunciated in the Anarita Karimi Njeru V Republic and Mumo Matemu V Trusted Society of Human Rights Alliance and 5 others. Even where a party cites Articles of the Constitution alleging that they have been violated, he/she is duty bound to adduce convincing evidence to prove the alleged violations. In the instant case, save for the allegations made in the petition and the affidavits, no tangible evidence was given in support of the allegations. No iota of evidence was tendered to establish any of the cited acts of discrimination. It is our finding that there is no basis at all upon which the court can uphold any of the alleged violations. In the end, we find that the Petitioners have failed to establish that the impugned provisions are discriminatory.”
94. These sentiments apply to the facts of the instant case on all fours.



95. Neither copies of the three letters relied upon nor the undated internal advertisement or the email dated October 22, 2020 demonstrate that the Respondents acted in a discriminatory manner or acted irregularly or corruptly or embezzled public funds or transferred employees irregularly.
96. A closely related and important parameter raised by the 2<sup>nd</sup> – 4<sup>th</sup> Interested Parties is whether the Application had met the threshold for the grant of interlocutory injunction as established in *Giella V Cassman Brown & Co Ltd* (1973) EA 358.
97. The 2<sup>nd</sup> – 4<sup>th</sup> Interested Parties were persuaded that the Application had not met the threshold.
98. In *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (2014) eKLR, the court stated as follows;
- “In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
- a. establish his case only at a prima facie level,
  - b. demonstrate irreparable injury if a temporary injunction is not granted, and
  - c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.
- These are the three pillars on which rests the foundation of any injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate distinct legal hurdles which the applicant is expected to surmount sequentially.”
99. In *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, the court explained the requirement of a prima facie case as follows;
- “A prima facie case is more than an arguable. 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. That is clearly a standard, which is higher than an arguable case.”
100. From the evidence on record and the submissions, the court is not satisfied that the Applicant has established a prima facie case for purposes of the 1<sup>st</sup> pillar.
101. As regards irreparable injury, in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (supra), the court stated;
- “. . . As 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 adequately remedy.”
102. The Applicant has not placed any material before the court to demonstrate that it stands to suffer any injury analogous to irreparable injury.
103. Having failed to establish any of the pillars, the last pillar is of no moment.
104. In sum, the court is in agreement with the submissions of the 2<sup>nd</sup> – 4<sup>th</sup> Interested Parties that the Applicant/Petitioner has not met the threshold for the grant of an interlocutory injunction.
105. Although it is unclear as to why the appointments dated September 2, 2020 were revoked, the 1<sup>st</sup> Respondent sought advice of the State Corporations Advisory Committee (SCAC), was advised and acted accordingly.



106. Finally and most significantly, the Replying Affidavit of the 1<sup>st</sup> Interested Party is explicit that it received a complaint on July 21, 2021 and the same was entered into the Investigation and Complaints Register and an Inquiry File No EACC/EL/INQ/025/2021 opened and the allegations related to irregular promotions, transfers and backdating of staff salaries at the 1<sup>st</sup> Respondent, the subject matter of this suit and the issue is being investigated and the Ethics and Anti-Corruption Commission (EACC) should not have been joined as a party to the Petition.
107. It was deponed that upon conclusion of the investigations, the commission would make recommendations for further necessary action in accordance with the law. That the EACC had no identifiable stake in the suit before the court.
108. Needless to emphasize, since the matter was reported to the EACC and an inquiry is underway, it would be premature for the court to make any substantive orders before the inquiry is concluded and recommendations made.
109. Instructively, the complaint was made in July 2021 and the action was filed in February 2022 and the Applicant makes no reference to the inquiry which predates the suit.
110. Puzzlingly, some of the prayers sought by the Applicant are intended to bolster the Petition through provision of documentation by the Respondents which the applicant hopes could strengthen the Petition.
111. Neither the Notice of Motion Application dated February 9, 2022 nor the Supporting Affidavit explain or provide a preview of what the records, minutes and lists of promotions made in 2020 and 2021 are intended to demonstrate or reveal.
112. To that extent, the interim orders sought appear to be fishing expedition by the Applicant to buttress the Petition.
113. In the absence of particulars of the specific records or minutes required, the court is not persuaded that the interim reliefs are merited.
114. As regards the order of stay of the promotions made by the 2<sup>nd</sup> Respondent in April 2021, the court is not satisfied that the Applicant has made a sustainable case for their issuance.
115. Granted that the appointments were first made on September 2, 2020 and the reinstatement took place on April 30, 2021 and the Applicant filed the instant Application on February 9, 2022 almost 10 months later which is unreasonably long, the court is unpersuaded that the prayer is deserving and is accordingly declined.
116. For the above stated reasons, the court is satisfied that the Application dated February 9, 2022 is unmerited and is accordingly dismissed with no orders as to costs.
117. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF NOVEMBER 2022**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup>



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 **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.

**DR. JACOB GAKERI**

**JUDGE**

