



**Karugu v Public Service Board of Nakuru & another (Petition
E008 of 2022) [2022] KEELRC 13462 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13462 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E008 OF 2022
HS WASILWA, J
DECEMBER 8, 2022**

BETWEEN

ANN WAMBUI KARUGU PETITIONER

AND

PUBLIC SERVICE NAKURU COUNTY 1ST RESPONDENT

PUBLIC SERVICE BOARD OF NAKURU 2ND RESPONDENT

RULING

1. Before this Court for determination is the petitioner/ applicants notice of motion dated August 29, 2022, brought pursuant to articles 1,2,3,10,11,19(2), 159(2)(a), (b) &(d) and 50 of the Constitution, rule 13, 19, 23(1)&(2) and 24 of the Constitution of Kenya (Protection of rights and Fundamental Freedoms practice and Procedure Rules, 2013), seeking for the following orders ;
 - a. Spent.
 - b. That this honourable court be pleased to issue conservatory orders restraining the 1st and 2nd respondents, their officers, staff, agents, servants and or any other person acting under the instruction from implementing or enforcing the 1st and 2nd respondents letter of retirement referenced NCG/ HRM/ STAFF/PF/ 1986070732 dated March 25, 2021 which gives the applicant/ petitioner instructions to retire on the June 30, 2022 pending hearing and determination of this application.
 - c. That this honorable court be pleased to issue orders pending the hearing and determination of this suit , the respondent sot be compelled to issue the petitioner with a letter recognizing County Secretary and Head of Public Service Ministry of Health letter dated March 25, 2021 referenced number 1986070731.
 - d. That the costs of this application be provided for.



2. The application is supported by the ground on the face of the application and the supporting affidavit of Anne Wambui Karugu, the petitioner, sworn on August 29, 2022 and based on the following grounds; -
 - a. That the petitioner/applicant was employed and has been an employee of the respondent from July 1, 1986 working as nursing officer 1 in job group K in the ministry of Medical services.
 - b. The petitioner has worked for 32 years and due to retire on December 30, 2022 when she attains the age of 60 as she was born on December 31, 1962.
 - c. That the respondents have unilaterally reduced her retirement age by 6 months to June 30, 2022 and forced an early retirement for her, an issue that has confused the petitioner and cannot properly plan her retirement.
 - d. Despite several appeals to the 2nd respondent to rectify the retirement age to December 31, 2022 instead of June 30, 2022 as reflected in the letter of March 25, 2021 reference number. NCG/HRM/STAFF/PF/1986070731, the respondents have been adamant in making the said rectification.
 - e. That the move by the respondents is against the law and offends the rules of natural justice and amount to a nullity abinitio.
 - f. That unless the orders in the application are allowed as prayed, she will be prejudiced by the actions of the respondent to her detriment.
 - g. In the further affidavit filed on September 26, 2022, the applicant maintained that her birth certificate was placed on her file as such the respondent were well aware of her date of Birth and in effect the date of retirement. Furthermore, that the issue of rectification of date of birther was raised severally with the respondents in the letters of March 11, 2020 and December 2, 2020.
3. The application is opposed by the respondent's through, Francis Kihoro, their County Attorney, who filed grounds of opposition dated September 15, 2022 and a replying affidavit deposed upon by Moses Bii, the acting director, Human Resource, deposed upon on 1September 5, 2022.
4. The grounds of opposition came out as follows; -
 1. That the provisions of article 23(3) of the Constitution provides that it is in proceedings brought under article 22 that a court may grant appropriate reliefs, including a conservatory order, therefore, to the extent that the present application is premised on any allegation of denial, violation or threatened violation of the bill of rights there is no basis for issuance of the conservatory orders sought.
 2. That the petitioner has not demonstrated any prejudice that it will suffer if the orders sought are not granted.
 3. That the petitioner has not demonstrated a prima facie case with any likelihood of success.
 4. That the substratum of the petition will not be rendered nugatory if the conservatory orders sought are not granted.
 5. That there is no evidence that the grant of the conservatory orders sought would enhance constitutional values and objects specific to the rights and freedoms in the bill of rights.



5. In the replying affidavit filed contemporaneously with the grounds of opposition, Moses Bii, avers that indeed the applicant was employed as Kenya Enrolled Community Nurse(KECN) under job group F with effect from July 1, 1986. Together with the invitation letter was FORM PSC 2 which the applicant filled declaring her age, the date, month and year of birth, which declared it as 1962 without any specific date or month as such the assumed dated was July 1, 1962 as per the government regulations, which date of birth appear in her records.
6. He states that as per the records, the applicant was to retire on June 30, 2022 as such, he, on behalf of the 2nd respondent, wrote the letter of March 25, 2021, notifying the applicant of her upcoming retirement. In addition that the respondent received a circular reference no. DPM-PA/5/7 VOL LII(170) dated September 25, 2008 which reiterated that the date of retirement is the one that had initially been declared by any employee without any amendments.
7. It is the affiant's averments that the applicant ought to have made the proper date when filling in Form PSC 2 and therefore that she is the author of her own misfortune and therefore should not be allowed to benefit from her own negligence, dishonest and casual attitude towards her employment.
8. He states that the applicant has been using a national Identity card which shows her date of birth as 1962 and not the one which was issued on the November 27, 2019. He added that the variance in retirement age appearing in the applicant's pay slip of January, 2022 and February, 2022 was due to an honestly mistake which occurred due to the reading of circular reference number PSC/ADM/13(9) which has since been determined to be flawed.
9. He stated further that the orders sought are not capable of being granted because the action the applicant is seeking to restrain has already occurred as such has been overtaken by events.
10. It is the respondent's case that the applicant will not suffer any prejudice if orders sought are not granted and in any case that incase the main suit succeeds; the applicant will be compensated by way of damages.
11. The application was disposed of by way of written submissions with the applicant filling on the September 26, 2022 and the respondents filling theirs on the October 3, 2022.

applicant's Submissions.

12. The applicant submitted from the onset that conservatory orders are judicial remedy granted by court to preserve the subject matter until the motion and suit is heard, put differently that it is an order of preservation of status quo. This was expounded in the case of *Centre for Rights Educational and Awareness (CREAW) & 7 Others v Attorney General [2011] eKLR*.
13. It was submitted that for conservatory orders to be granted there are requirements that an applicant has to satisfy, which were well illustrated in the case of *Management of Uburu Secondary School v City County Director of Education & 2 Others [2015] eKLR* where the court listed the said principles as follows; -
 - i. The need for the applicant to demonstrate an arguable prima facie case with likelihood of success and to show that in the absence of he conservatory orders, he is likely to suffer prejudice.
 - ii. The second principle is 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.
 - iii. Thirdly, the court should consider whether, if an interim conservatory order is granted, the petition or he substratum will be rendered nugatory."



14. Similarly, it was submitted that the applicant has an arguable case in that her retirement age was reduced by six months contrary to the law on retirement age of civil servants. He added that a prima facie case does not need to necessarily be the one that succeeds eventual but one that has issues to be considered in hearing of the main suit as was held in *Mrao v First American Bank of Kenya Limited & 2 Others [2003] KLR 125*.
15. It is further submitted for the applicant that this court is granted powers to issue conservatory orders in a constitutional petition under article 23(3)(c) of the *Constitution* as read with rule 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*. To support this argument they relied on the case of *Simeon Kioko Kitheka & 18 others v County Government of Machokos and 2 others [2018] eKLR* where Odunga J(as he then was) held that;

“ Article 23 of the *Constitution* does not expressly bar the court from granting conservatory orders where a challenge is taken on the constitutionality of the legislation. The only rider is that the case must be one which falls under article 22 of the *Constitution*.”
16. Similarly, that the applicant’s rights have been infringed when her terms of employment are changed unilaterally by the respondents, as such that she deserves conservatory orders sought.
17. It was also argued that the applicant’s petition will be rendered nugatory if the orders sought are not granted at this stage. He therefore argued that it has satisfied the threshold pre-requisite for granting of conservatory orders and urged this court to allow the application as prayed.

respondent’s submissions.

18. The respondent on the other hand submitted that the conservatory orders sought by the applicant is one pending determination of the application and none is sought pending suit and the grant of the prayers therein will be merely an academic exercise.
19. Nevertheless, that the conditions for granting of conservatory orders according to the respondent were aptly captured in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR* where the court insisted on the applicant demonstrating, first prima facie case with probability of success, secondly, that the applicant and the broader public will suffer irreparable loss and thirdly on the balance of convenience.
20. On prima facie case, the respondent submitted that the action of going for retirement which the applicant is seeking to restrain and conserve status quo has already happened as such the orders sought are incapable of being enforced if allowed. Therefore, that there is no prima facie case that is likely to succeed on that facet.
21. On whether the broader public will suffer prejudice, the respondents submitted that the issue of alleged forced early retirement affect only the applicant to the exclusion of all others as such that the claim has nothing to do with the broader public.
22. On balance of convenience, the respondent submitted that that the same does not tilt in favour of the applicant as the claim is on personal interest that can be agitated without seeking conservatory orders.
23. With regard prayer (c) of the application, the respondents argued that there is no such letter and the only letters issued on March 25, 2021 is the one referenced. NCG/HRM/ STAFF/ PF/ 1986070732, therefore that the orders is untenable for lacking clarity and specificity as was held in *Ernest Odhiambo v Peter Gabriel Onyango [2016] eKLR*. Moreover, that the said letter by Mr PK Ronoh was retracted



and the original is in custody of the respondents. They therefore urged this court to strike out the application of August 29, 2022 with costs.

24. I have examined the averments of the parties herein. This petition was filed on August 30, 2022 where the petitioner/applicant sought orders to stay her retirement on June 30, 2022.
25. It is apparent that the applicant sought court's intervention when the retirement had already been effected on June 30, 2022 and so there was nothing to be stayed.
26. The same position is prevailing today and this court cannot issue orders staying a retirement that has already been effected.
27. I find the application lacks merit and I dismiss it accordingly.
28. The applicant petitioner is free to proceed with the main petition.
29. Costs in the petition.

RULING DELIVERED VIRTUALLY THIS 8TH DAY OF DECEMBER, 2022.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kihoro for respondents – present

Awuor for petitioner – present

Court assistant – Fred

