



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION E024 OF 2021

NEHEMIAH KIPKORIR TERER.....1ST PETITIONER

WYCLIFF MABWA.....2ND PETITIONER

KARIUKI N. GATHONI.....3RD PETITIONER

WILFRED ANYONA MISENTE.....4TH PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSION.....1ST RESPONDENT

INSPECTOR GENERAL,

NATIONAL POLICE SERVICE.....2ND RESPONDENT

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

RULING

1. The Petitioners filed a Notice of Motion application dated 18th February 2021 seeking to be heard for Orders that pending the hearing and determination of this application and of the Petition, the 1st and 2nd Respondents, their agents, employees, nominees, assigns, agents or any other persons or authority connected therewith be restrained by a temporary injunction order from advertising, interviewing and or in any way recruiting any applicants as Cadet Inspectors into the National Police Service. They also seek for costs of this application to be provided. The Application is supported by the affidavit sworn by the 1st Petitioner with authority of his Co-Petitioners and on their behalf. The 1st Petitioner avers that the Petitioners are Graduate Police Constables (GPC) working with the Kenya Police Service Wing (KPS) of the National Police Service (NPS) and that they all have attained various university degree certificates. He further avers that under the National Police Service Commission (Promotion) Regulations, 2015 (hereinafter, Promotion Regulations) Police Constables who attain university degree certificates are eligible for promotion whether actual promotion or non-promotion reward scheme (horizontal career development) where a member is offered, *inter alia*, higher financial incentives irrespective of whether the member is promoted or not. They averred that the said promotion is determined by various factors being availability of appropriate vacancy and the officer satisfying the criteria for promotion or an officer successfully undergoing a promotional course or training. The Petitioners averred that the concept of horizontal career development has been recognized in the NPS since 1st January 1969 where upon presenting degree certificates, GPC were immediately upgraded to and paid a salary under Job Group J pending actual promotion. The Petitioners assert that this Court has indeed confirmed in a pronouncement in **Evans Muriuki & 4 Others v National Police Service Commission & 2 Others Milimani ELRC Petition No. 122 of 2018** that non promotion rewards in the NPS are legal. The 1st Petitioner further avers that following various complaints by GPC on delayed and or non-promotion, the 1st and 2nd Respondents undertook a nationwide exercise between 2nd and 5th May 2018 for verification and authentication of degree certificates attained by various Police Constables. That the said exercise was for purposes of auditing, rationalization and placement to determine the vacancies that exist vis-à-vis the qualified personnel and that after the exercise, the 1st and 2nd Respondents reported there was a total of 3,739 GPC holding various university degree certificates and which constituted “*a pool of graduates from which they can easily pick officers to be redesignated as cadets*”. That however no promotions have been awarded by the 1st and 2nd Respondents to any of the said GPC since the May 2018 exercise was conducted. He avers that on 1st September 2020 the Deputy Inspector General of Police issued a circular (signal) to all regional/formations commanders and all directorates on the recruitment of professionals into the NPS, wherein the 1st Respondent was looking to create a database of professional skills held by personnel in the NPS for placement in fields that match their professional qualifications. That the Petitioners and other qualified GPC subsequently submitted their details supported by credentials to their respective commanders and directorates but have never received any response or acknowledgment from the 1st and 2nd Respondent. That they are now surprised that the 1st and 2nd Respondents have proceeded to advertise

to the general public, to the exclusion of the Petitioners and that of current members of the NPS, 300 vacancies in the NPS for the position of Cadet Inspectors with the only major qualification being an undergraduate degree from a recognised institution. The 1st Petitioner avers that the 1st and 2nd Respondent's actions are discriminatory to the Petitioners and other GPC who hold the same qualification with proven track record, skills and experience and are available and ready for promotion into the said positions but are locked out of the exercise. Further, that the 1st and 2nd Respondents actions have negatively affected the morale of officers and contravened their right to fair labour practices under Article 41(1) of the Constitution.

2. The 2nd and 3rd Respondent filed a Replying Affidavit sworn on 15th March 2021 by Mr. George Kirigwi who is a Commissioner of Police working at the National Police Service Headquarters as a Staffing Officer, Human Capital Development. He avers that on 2nd February 2021, the 2nd Respondent, acting on delegated authority, advertised recruitment of Police Constables and Cadet Inspectors of Police into the NPS through local dailies of national circulation and through its official websites. He asserts that recruitment of Police Constables took place on 22nd February 2021 and successful candidates have since reported and are continuing training in the relevant police colleges. He averred that the advertisement for Cadet Inspectors of Police posts prioritised interests in the fields of medicine, engineering, forensic science, ballistics, education and law and invited online submission of applications between 2nd February and 15th February 2021 and that contrary to the Petitioners' allegations, interested serving officers were free to apply for the advertised positions and that a total of 776 police officers applied to be considered for the vacant posts and that the Petitioners' applications are being processed alongside others. He further averred that the National Police Service Commission Regulations (Recruitment and Appointment) (hereinafter, Recruitment Regulations) at Regulation 21 provide for a complaint management system to address complaints against any step of the recruitment process and vests upon the 1st Respondent with unlimited powers to take corrective measures. He averred that the Petitioners have however not raised any complaint concerning the recruitment process to any of the Respondents for redress and are further misleading the Court by connecting the ongoing recruitment exercise to an unrelated matter of promotions in the Service, which is subject to an entirely different internal process. He averred that contrary to the Petitioners' allegations, education level is only but one of the criterion to consider in determining merit for promotion and that eligible officers are required to apply for promotions, attend interviews and thereafter recommendations made for determination by the 1st Respondent. He avers that indeed promotional vacancies were advertised in the Police Service in September and October 2020 inviting eligible police officers to apply. He averred that the 1st and 4th Petitioners attended the last promotional boards in September/October 2020 but did not qualify for promotion while the 2nd and 3rd Petitioners abstained altogether. Further, that the 4th Petitioner has not been confirmed in appointment to be eligible for promotion while the 2nd Petitioner lacks requisite police law examination to attend police promotional interviews. He further averred that succession management is a continuous process in the Police Service and that police officers with degrees have cadres i.e. Graduate NCO's to Station/Platoon Commanders and Special Station/Platoon Commanders slots reserved specifically for them. He averred that he is aware that many serving officers who are degree holders are promoted subject to available vacancies and the latest batch of successful promotion candidates (2020) has degree holders attending courses in the various training institutions pending promotion. He averred that while Regulation 14 of the Promotion Regulations provides for an internal appeal process against a promotion delay, failure to promote or demotion of an officer to the 1st Respondent, none of the Petitioners have submitted an appeal towards the same. He averred that the Service gathering data on degree holders in the Service did not amount to a promotion process as mistakenly construed by the Petitioners and that recruitment is a public interest matter guided by the Constitution, all enabling laws and based on principles of transparency, objectivity, impartiality and fairness and the Petitioners should thus not be allowed to stop or arm-twist the process in their favour through court process. Mr. George Kirigwi further averred that it is in public interest that the injunction sought by the Petitioners is not granted noting that the recruitment process is at an advanced level, has many participants at risk of disqualification on age criteria if pushed forward, affects service delivery of the Respondents and may occasion unnecessary loss of public funds. He averred that the Petitioners have not met the threshold for grant of an injunction and shall suffer no prejudice if the orders sought are not granted and that they have also not established an arguable *prima facie* case with any likelihood of success. Further, that the Petitioners failed to disclose their participation in the disputed recruitment and or promotional interviews and have also not demonstrated any legal or equitable right which requires protection by an injunction. He averred that the balance of convenience should tilt in favour of the Respondents who have followed the law to the later and a higher risk of injustice lies with awarding the injunctive relief. He averred that a perusal of the Judgment delivered in **Evans Muriuki Muthuri & 4 others** (*supra*) relied upon by the Petitioners, reveals that the parties and prayers sought are substantially different from those in the instant Application and the Court had been moved to determine matters of graduate police constable's pay scale. Further, that the said judgment is a subject of appeal in **Nairobi Court of Appeal Civil Appeal No. 352 of 2019** and as such, does not meet the threshold that would qualify it as a reference in the instant suit. He urges this Court to dismiss the Application with costs.

3. In response to the Respondents' Replying Affidavits, the Petitioners filed two Further Affidavits sworn by the 1st Petitioner. He avers that Recruitment Regulations specifically provide for recruitment of specific specialists and that under Regulation 19(2) of the Recruitment Regulations, recruitment from outside the NPS can only be done after the positions have been filled internally only for those functions where it is not necessary to have a police service background. He averred that however, the 1st and 2nd Respondents disregarded the requirement to first recruit from within the NPS before advertising to the general public and that the posts so advertised require a background in police service. He further avers that even though the advertisement for recruitment of cadet inspectors was open to Graduate Police Constables, the entry requirements unfairly discriminate against the Petitioners and other serving GPC by restricting the age limit for applicants to 30 years. That the said age limit is unreasonable given that only 776 out of 3,739 GPC applied for the said positions and considering that the age requirement for recruitment into the NPS is ordinarily between 18 and 28 years and the Petitioners and other Police Constables had already been enlisted into the NPS. He denies that all the Petitioners were shortlisted in the recruitment exercise of 2nd to 15th February 2021 averring that only the 2nd Petitioner was shortlisted and no reasons were advanced why neither of the Petitioners qualified for recruitment. He avers that their exhausting of the internal remedy of appeal to the 2nd Respondent is not tenable as such appeal to the same body undertaking the recruitment exercise would not be effective and adequate and that the Commission would sit as judge in its own case against the rules of natural justice. He averred that it is only fair and in the interest of justice for the whole recruitment exercise undertaken by the 1st and 2nd Respondents between 2nd and 15th February 2021 and all subsequent decisions thereof be nullified, and the 1st and 2nd Respondent be ordered to comply with the recruitment and promotion laws applicable in the NPS. He averred that if the interim orders they seek are not granted and the recruitment and appointment exercise stayed, the Petitioners will continue to suffer unfair discrimination at the hands of the Respondents with no chance for career development. The 1st Petitioner also avers that there is no evidence that a total of 902 GPC candidates were successful in the board interviews conducted in September and October 2020 as the Petitioners and other candidates did not receive any response on the outcome of the said interviews conducted by the 2nd Respondent. He contends that a recruitment exercise carried out in disregard of the constitutional and legal underpinnings of such an exercise cannot be justified on grounds of public interest.

4. The Application was dispensed of by way of Written Submissions. The Applicants/Petitioners submitted that this Honourable Court has the constitutional authority under Article 23 (3) of the Constitution of Kenya, to grant appropriate reliefs including an injunction, in order to uphold and enforce the Bill of Rights. They submitted that the court in **Kilimambogo Estates Limited v National Youth Service & 5 Others; National Land Commission (Interested Party) [2019] eKLR** set out the conditions to be fulfilled before a court can issue conservatory orders Constitutional Petitions i.e. whether the Applicant has an arguable case; whether the injury or the threatened loss is irreparable; whether the Petition, if successful, would be rendered nugatory; and whether the grant or denial of the conservatory relief will enhance constitutional values and objects of a specific right or freedom in the Bill of Rights. The Applicants submitted that they have demonstrated that the 1st and 2nd Respondents failed to adhere to Articles 27 and 41(1) of the Constitution and Regulation 19(2) of the Recruitment Regulations 2015. That under Regulation 20 of the Recruitment Regulations, the interdependence of the Recruitment Regulations and the Promotion Regulations is illustrated, that in recruiting civilians as specialists, such recruits must be limited to a small number as not to negatively affect the career development of rank and file officers which only happens through promotions. The Petitioners submitted that the Respondents' allegations that the two regulations are independent of each other is therefore unfounded and that it is clear they have been condemned to stagnant in one rank without hope for career development due to the Respondents disregarding this provision of law. Further, that the issue of age limit imposed on internal staff when applying for positions advertised to the general public has been held to be unlawful and unconstitutional. They cited the case of **Jared Juma v Kenya Broadcasting Corporation & 3 Others [2014] eKLR** where the Court declared the age limit of 45 years imposed on applicants for the position of Managing Director as unconstitutional. The Petitioners submitted that the 2nd Respondent shortlisting successful candidates subjected them to extraneous and additional qualification criteria including past performance at board interviews, status of confirmation of appointment in the Service and performance in police law examination while other applicants were not subjected to the same. They submitted that with the foregoing, they have clearly established an arguable case for breach of their rights under the Constitution, specifically freedom from discrimination and the right to fair labour practices. The Petitioners/Applicants submitted that an "irreparable injury" is that which cannot be adequately compensated in damages as held in the case of **Firmbridge Limited v County Government of Mombasa [2015] eKLR**. The Petitioners submitted that if the orders sought herein are not granted, they will continue to suffer unfair discrimination at the hands of the Respondents with no chance for career development. The Petitioners submitted that the Respondents have already shortlisted successful candidates for the advertised positions and therefore if the stay orders are not granted and they are successful in their Petition, the orders so granted will be in vain and will not be capable of execution, except at the expense of taxpayers. Further, that if conservatory orders are not granted, they will continue to suffer discrimination at the hands of the Respondents. They submitted that their case meets the conditions for grant of interim orders and they pray that the Honourable Court grants them the Orders prayed for in the application dated 18th February 2021 with costs to the Respondents.

5. The 1st Respondent submitted that apart from the Recruitment Regulations 2015 and Promotion Regulations 2015, the Commission has also developed the **National Police Service Career Progression Guidelines for the Uniformed Personnel - 2016** with clear entry levels and progression from one rank to another and which guidelines were operationalized in 2018 and the officers in the NPS duly sensitized on the same. It submitted that Regulation 4 of the Recruitment Regulations 2015 provides that a person may enter the Police Service as a Police Constable, on higher ranks through a Cadet Entry scheme, as specialists or as civilian staff and that Regulation 7 of the Promotion Regulations 2015 provides that promotions shall be determined by the existence of a vacancy, when an officer satisfies the criteria for promotion and when an officer successfully undergoes a promotional course or training. It submitted that Regulation 11 (2) further provides that a member of the Service may apply for a position in the NPS that entails a promotion from his or her current position. It submitted that the Petitioners' assertion of breach of legitimate expectation (for direct and instant promotion because of holding educational certificates) even though denied, is legally untenable due to the fact that there are clear laws and regulations guiding the recruitment and promotion of officers within the Service. Further, that any adjustments in the Petitioners' remunerations can only be effected with advice of the Salaries and Remunerations Commission. It submitted that any alleged legitimate expectation should not be contrary to the prevailing laws and for the promise to hold it must be made within the confines of the law as was observed in **Republic v Kenya Revenue Authority Ex parte Shake Distributors Ltd [2012] eKLR** and reaffirmed by the Court of Appeal in **Kalpna H. Rawal v Judicial Service Commission & 4 Others [2015] eKLR**. The 1st Respondent further submitted that the listed alleged violations in the application are baseless and offend the principles as enunciated in the case of **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272**. Further, that it is unreasonable for the Petitioners to state that they were all not considered for promotions yet some of them have never applied for promotions nor attended interviews for promotions and that based on the foregoing, it is clear the Petitioners were not discriminated against as they would want this Court to believe. It further submitted that the Petitioners have not exhausted the available internal mechanisms of appeal and dispute resolution as pleaded by the Respondents and as a Constitutional mandate under Article 159. It cited the case of **Benard Murage v FinServe Africa Limited & 3 Others [2015] eKLR** where the Court stated that not each and every violation of the law must be raised before the High Court as a constitutional issue and that where there exists an alternative remedy through statutory law, it is desirable that such a statutory remedy be pursued first. The 1st Respondent prays that the Petitioners' case as against it for the alleged and unproven violation of rights be dismissed with costs.

6. The 2nd and 3rd Respondents submitted that the jurisdiction and power to issue injunction orders must follow well-trodden principles which the court must examine before granting any orders and they rely on the *locus classicus* case of **Giella v Cassman Brown & Company Ltd (1973) EA 358** which was restated by the Court in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, on the requirements for an interlocutory injunction. They submitted that even where a *prima facie* case is established, the question of damages comes in and that the Court in **Nguruman Limited (supra)** stated that:

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An 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 be adequate remedy.”

7. The 2nd and 3rd Respondents submitted that the Applicants' application does not meet the basic tenets to grant the orders of injunction and the Applicants' Petition has no chance of success considering the recruitment of Cadets was conducted fairly and procedurally, pursuant to Article 244(a) of the Constitution and Regulation 6 of the Recruitment Regulations 2015. Further, that promotion in the police service is

governed by Articles 10, 232 and 246(3) of the Constitution, Section 10(2) and 28 of the National Police Service Commission Act, Regulation 3 of the Promotion Regulations 2015 and the Career Progression Guidelines for the National Police Service Uniformed Personnel of 2016. They submitted that they should not be punished for performing their statutory functions and obligation in a fair and just manner. The 2nd and 3rd Respondents submitted that the application before Court has since been overtaken by events since successful candidates are currently undertaking training and that the same should thus be dismissed forthwith.

8. The principles governing the grant or denial of injunctive orders were laid down in the case of **Giella v Cassman Brown (1973) E.A 358** where the court held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately compensated by damages. Thirdly, if the court is in doubt on the above two requirements, then it will decide the application on the balance of convenience.”

9. While considering what constitutes a prima facie case in civil cases Bosire JA held in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** as follows:

“So what is prima facie case? I would say that 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 right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

...It is not sufficient to raise issues. 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.”

10. Further, in the case **Eric V.J. Makokha & 4 Others v Lawrence Sagini & 2 Others [1994] eKLR** the Court of Appeal at Nairobi held that it is trite law that a court cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. Also in **Nicholas Mahimu v Ndima Tea Factory Ltd & Another [2009] eKLR** the Court held that the orders sought in that case if so granted would have no effect as the action had already been done. In closing it is clear that the Court does not, and ought not to be seen to make orders in vain otherwise the Court would be exposed to ridicule, odium and contempt. No agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the declaration enforcement rights of all people. It is my considered opinion that I should proceed to hear the suit on the merits so as to make a full determination on the issues raised as was similarly held in the case of **Samson Rosana Ondigi v Council of Masinde Muliro University of Science and Technology [2019] eKLR**. I therefore dismiss the Petitioner’s notice of motion application and order that costs shall abide the outcome of this Petition directions wherefore shall issue immediately upon reading of this Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JUNE 2021

Nzioki wa Makau

JUDGE