



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

ELRC PETITION NO.23 OF 2020

(Before D.K.N.Marete)

WAQO KOMBA GUYO.....1ST PETITIONER

SHUNU FATUMA GURA.....2ND PETITIONER

VERSUS

COUNTY COMMISSIONER MARSABIT.....1ST RESPONDENT

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

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

RULING

This is an application dated 27th July, 2020 and seeks the following orders of court;

1. *THAT, this honourable court be pleased to certify this application as urgent and order that the same be heard EXPARTE in the first instance.*
2. *THAT, this Honourable Court do issue interim preservative orders barring the 1st and 2nd respondents from proceedings with the recruitment of the position of assistant chief sagante sublocation till this application is heard interparties.*
3. *THAT, this honorable Court do issue permanent preservative orders barring the 1st and 2nd respondents from proceeding with the recruitment of the position of assistant chief sagante sublocation till this petition is heard and determined.*
4. *THAT cost of this petition be provided for.*

It is grounded as follows;

- a) *The 1st and 2nd respondents have changed the goal posts at the midst of the recruitment exercise.*
- b) *The 1st and 2nd respondents actions have raised eyebrows as they seem determined to favour particular candidates.*
- c) *The petitioners stand prejudiced by sudden waiver of qualifications to a lower cadre the exercise will not be free and fair.*

The Respondents have not filed a reply to this application. Instead, they seek to rely on their Respondents' submission to the Notice of Motion dated 27th July, 2020. The submissions are dated 8th March, 2021.

The Applicant's case is that this application and Petition comes in to seek a protection of their fundamental rights and freedoms ensured under Article 47 and 48 of the Constitution of Kenya, 2010. It comes out as follows;

In a nutshell, the two applicants petitioners applied to be appointed as assistant chiefs in their respective places i.e. SAGANTE SUB-LOCATIONS Marsabit.

The process commenced. They were shortlisted for interviews. They were interviewed. Before the results were out the office of the County Commissioner re-advertised and changed qualifications at the midst of the process of interview this was done specifically to accommodate particular candidate's from particular communities.

It's on this basis that the applicant moved to court citing Article 47 and 48 of constitution.

The legal basis of the application is Article 23 (1) of the Constitution of Kenya, 2010 which provides thus;

“23” The High court has jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation of infringement of or in treat to a right or fundamental freedom in the bill of rights.”

It is the applicants submission that the facts as contained in the affidavit in support of the application have not been denied or controverted by a counter replying affidavit.

The Respondents seek to rely on the Grounds of Opposition dated 17th September, 2020 which comes out as follows;

- 1. This Honourable Court lacks jurisdiction to hear and determine the Petition and by extension the notice of motion herein.*
- 2. The Petitioners have concealed and/or suppressed material facts before the Honourable Court.*
- 3. The Petitioners are guilty of misapprehension of facts and/or giving misleading facts to the Honourable Court.*
- 4. The Petitioners have not approached this Honourable Court with clean hands as they have acted in bad faith.*
- 5. The said Notice of Motion application lacks merit and does not meet the threshold for grant of a temporary injunction.*
- 6. The said Notice of Motion application does not meet the threshold for the grant of a mandatory injunction and/or an order to injuncting the Respondents from proceeding with the exercise.*
- 7. In the premises, it is in the interest of justice that the orders made herein on 24th August, 2020 to be vacated.*
- 8. Such other rounds and reasons as shall be contained and verified in the Replying Affidavit of the County Commissioner to be filed herewith.*

The Applicants in their written submissions dated 16th December, 2020 reiterates their case and submits that this court has jurisdiction to hear and determine this application in compliance with Article 50 (1) of the Constitution of Kenya, 2010.

It is their further submissions that the Respondent, by not filing a replying affidavit has not denied or controverted the issues raised thus maintaining the veracity of their case.

The Respondents in answer and rebuttal seek to rely on the Grounds of Opposition dated 7th September, 2020 and written submissions of 8th March, 2021.

It is their case and submission that the advertisement dated 21st August, 2019 had raised requirements which were not met by the original ten (10) applicants, these two included. This therefore forced a re-advertisement with a lower pass mark or academic waiver to attract candidature. This was not intended to favour any person or category of candidate.

It is the Respondents further case that the applicants did not disclose to court that they had not met requirements as per the advertisement or that the 1st Petitioner had not met the age and certificate of good conduct requirement. The 2nd Respondent did not have a computer certificate or one of good conduct. They neither re-applied on re-advertisement.

The Respondents submit that the petitioner/applicants have not come to equity with clean hands. On this they seek to rely on the authority of **John Njue Nyaga v Nicholas Njiru Nyaga & Another (2013)eKLR** where the Court of Appeal observed as follows;

“It is out considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealing.” The applicant has not done so and is underserving of the orders he seeks.”

The Respondents further submit that the interim orders of court issued on 25th August, 2020 vacated when this matter was transferred from the High Court at Marsabit to this court. The Petitioners did not apply for extension of the orders and as a consequence, the 1st and 2nd Respondents appointed, one, Wako Abdub Boru, to this position on 29th January, 2021. It is now filled.

It is the Respondents penultimate case that the petitioner/applicant have not set out substantial evidence for the grant of an injunction. Here, they seek to rely on the authority of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others (2016) eKLR** where the

court held that;

“An injunction, being a discretionary remedy is granted on the basis of evidence and sound legal principles.”

This couples with the celebrated authority of **Giella vs Cassman Brown and Co.Ltd (1973) EA 358** where the court set out the principles for interlocutory injunction as follows;

- i) The plaintiff must establish that he has a prima facie case with high chances of success.*
- ii) That the plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.*
- iii) If the court is in doubt, it will decide on a balance of convenience.*

Again, the above principles were authoritatively captured in the famous Canadian case of **R.J.R.Macdonald vs.Canada (Attorney General) (3)** where the three part test of granting an injunction were established as follows;

- a) Is there a serious issue to be tried?*
- b) Will the applicant suffer irreparable harm if the injunction is not granted?*
- c) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called “balance of convenience”).*

This application is perilous and disabled. The applicants have not in any way rebutted the case of non disclosure and other mischief on their part. They have not either established a prima facie case with a possibility of success, or at all.

Overall, the applicants have failed the test of *Giella vs Cassman Brown and Co.Ltd (1973) EA 358* and therefore the application fails *in toto*.

I am therefore inclined to dismiss the application with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF JUNE, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Ndegwa holding brief for Mr.Ondari instructed by Leonard K.Ondari & Company Advocate for the Petitioner /Applicant
2. Miss.Mbaikata holding brief for Miss Kungu instructed by State Law Office for the Respondents