



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. E155 OF 2021

**IN THE MATTER OF: ARTICLES 10(2c), 22(1) & (2)(a)(c), 23(1), 41(1) &(2b), 48, 47(1)(2), 50(1),
165, 236, 179(6), 183, 236(a)(b) AND 258(1)&(2)(C) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE BILL OF RIGHTS

PARTICULARLY ARTICLES 27(1) & 41(1)&(2B) OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: THE CONSTITUTIONAL VALIDITY OF THE DECISION OF THE 1ST RESPONDENT OF
REMOVING THE PETITIONER FROM THE POSITION OF A TRANSPORT OFFICER AND DEMOTING HIM TO A JUNIOR
RANK OF AN AMBULANCE DRIVER WITHOUT WRITTEN REASONS FOR SUCH AN ADMINISTRATIVE ACTION
WHICH IS A VIOLATION OF ARTICLE 47(2) AND 236 (b) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: THE EMPLOYMENT ACT 2007, LAWS OF KENYA

AND

IN THE MATTER OF: THE COUNTY GOVERNMENT ACT NO 17 OF 2012

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015

AND

**IN THE MATTER OF: KITUI COUNTY HUMAN RESOURCE POLICES AND
PROCEDURES MANUAL FOR THE COUNTY PUBLIC SERVICE (2018)**

BETWEEN

KENNEDY MULWA WAMBUA.....PETITIONER

VERSUS

KITUI COUNTY CHIEF OFFICER, HEALTH & SANITATION.....1ST RESPONDENT

COUNTY GOVERNMENT OF KITUI.....2ND RESPONDENT

RULING

1. The Petitioner/Applicant vide his notice of motion application dated 4th October 2012 seeks the following orders:-

a. Spent

b. THAT pending hearing and determination of this application *inter partes* an order do issue restraining the Respondents or their agents, servants and any other persons acting on their direction or authority, from transferring or deploying, or taking any disciplinary action against the Applicant, arising from the duty roster issued by the Respondents on 1st October, 2021 or an investigation report issued on 9th August, 2021 in contravention of the Constitution and applicable Laws.

c. THAT pending hearing and determination of this application *inter partes* an order do issue directing the Applicant to continue discharging his duties as the Transport Officer- Kitui County Referral Hospital as per the appointment letter ref no. KTI/GEN.CORRES/VOL.VIII/029 of 15th October 2018 without any undue interference.

d. THAT pending hearing and determination of the Petition an order do issue restraining the Respondents or their agents, servants and any other persons acting on their directions or authority, from transferring or deploying, or taking any disciplinary action against the Petitioner arising from or connected to a duty roster issued by the Respondents on 1st October, 2021 or an investigation report dated 9th August, 2021 in contravention of the Constitution and applicable Laws.

e. THAT pending hearing and determination of the Petition an order do issue directing the Petitioner to continue discharging his duties as the Transport Officer- Kitui County Referral Hospital as per the appointment letter ref no. KTI/GEN.CORRES/VOL.VIII/029 of 15th October 2018 without any undue interference.

f. THAT the Honourable Court be pleased to make any other orders within its inherent jurisdiction.

g. THAT the costs of this Application be provided for.

The Application was supported by the affidavit of the Petitioner sworn in support of the motion and on the grounds on the face of the application.

2. The application herein seeks injunctive relief. The Court has declined delving into the factual matters as these are the substance of the Petition herein and the parties would be best advised to have the Petition heard and determined within the next one or two months as the issues in the application and the Petition are inextricably intertwined. The principles for grant of interim injunctive orders have been well laid out in the case of **Giella v Cassman Brown & Co. Ltd [1973] E.A 358** as follows: (i) The applicant must show a *prima facie* case with a probability of success; (ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; (iii) When the court is in doubt, it will decide the application on a balance of convenience.

3. The Court is to consider in sequence the principles to ascertain whether the Applicant is entitled to relief in respect of the motion. Would the Petition be considered to be one that shows a *prima facie* case with a probability of success? It would seem there is basis for the disgruntlement of the Petitioner and that if it can be shown the Petitioner has suffered indignity at the hands of the Respondent in respect of his employment there may be a *prima facie* case with a high probability of success. The second limb is that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. The irreparable injury is one that cannot be remedied by an award of damages. If indeed the Court will find in favour of the Petitioner, would there be adequate recompense by way of damages? Indeed, the Petitioner can be reinstated to the office at Kitui General Hospital while also simultaneously compensating him monetarily. That would take care of the second limb. On the third limb, where the Court is in doubt, it will decide the application on a balance of convenience. The balance of convenience herein tilts in favour of the employer who has the authority to exercise managerial prerogatives against the employee. The motion seeking a stop of the transfer to Zombe Dispensary is declined as the second principle under **Giella v Cassman Brown (supra)** which states that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury has not been met.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2021

NZIOKI WA MAKAU

JUDGE