



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
PETITION NUMBER E130 OF 2021

BETWEEN

SHEILA MUNUBI.....PETITIONER

VERSUS

1. ADAH ONYANGO

2. NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD...RESPONDENTS

RULING

1. The Petitioner describes herself in her Petition, as a Nairobi voter.
2. She filed this Petition, and an Application for conservatory measures. The Application is dated 16th August 2021.
3. Her main grievance is that the Respondents advertised job vacancies, which substantially altered the organizational structure of the Nairobi City County Assembly Service. The structure was approved and adopted in April 2020. The advertisements have the effect of making certain offices redundant; will lead to duplication of roles, loss of public and tax payers' money; and is against the law and procedure as laid down under the County Governments Act, 2012, the Employment Act 2007 and County Assembly Services Act, 2017 and the directives of the Salaries and Remuneration Commission.
4. Her Application seeks among other conservatory measures, to have the Respondents prohibited from receiving job applications, recruiting and/ or filling the positions advertised in the Internal Advertisements by the Respondents, dated 11th August 2021.
5. The Application was placed before the Court on 18th August 2021, which ordered that the Respondents are at liberty to continue receiving job applications, but shall not fill the advertised positions. The Parties were directed to take a date for *inter parte* hearing at the end of 7 days from 18th August 2021.
6. They did not do so.
7. Instead, the Petitioner filed an Application dated 27th August 2021, asking the Court to find the 1st Respondent, and 2nd Respondent's Board Members Charles Thuo, Catherine Okoth, Dr. Fatuma Affey and Willis Okello, to be in contempt of the orders made on 18th August 2021.
8. The 2nd Respondent in turn filed an Application dated 30th August 2021, asking the Court to set aside the orders of 18th August 2021.
9. The 1st Respondent filed a Notice of Preliminary Objection dated 25th August 2021 challenging the jurisdiction of the Court to hear the Petition.
10. The Court directed that the Petitioner's Application for contempt, and the Preliminary Objection by the 1st Respondent, are heard first, and are heard by way of Written Submissions.
11. Submissions were confirmed to have been filed and exchanged at the last mention before the Court, on 21st October 2021. Ruling was scheduled for 17th December 2021, but is ready for delivery, on the date indicated below.

12. The Petitioner submits that the Respondents and Board Members named in the Application, have acted contemptuously and contumaciously of the orders made by the Court.

13. Based on her Affidavit sworn on 27th August 2021, the Petitioner states that she served the orders on the Respondents. Despite service, the Respondents went ahead to conduct the long-listing, short-listing and interviewing of candidates for the advertised job vacancies. This amounts to filling the vacancies, contrary to the orders of 18th August 2021.

14. The Respondents deny that they have acted in contempt of the orders. They have not filled any of the advertised positions. On the 1st Respondent's Preliminary Objection, the Respondents assert, the Petitioner is not in an employee- employer relationship with the Respondents. The dispute does not fall within the jurisdiction of the Court defined under Section 12 [1] of the Employment & Labour Relations Court Act No. 20 of 2011. The Petitioner affirms that the Court has jurisdiction under the Constitution of Kenya, and that as a voter in Nairobi and potential job applicant, she has the capacity to present the Petition.

The Court Finds: -

15. The Application by the Petitioner does not establish that the Respondents have acted in contempt of Court.

16. The Court allowed the Respondents to go ahead with the process of interviews and only barred the Respondent from employing the interviewees, pending hearing and determination of the Application *inter partes*.

17. There is no evidence that any of the interviewees, has been employed and placed in the payroll of the County Assembly of Nairobi.

18. At paragraph 8 of her Application dated 27th August 2021, the Petitioner discloses that her Application is based on her apprehension, that the Respondents shall proceed and appoint what are perceived as 'successful candidates.' This is the same apprehension she expressed on coming to Court, which was addressed in the orders of 18th August 2021. The continued apprehension cannot be the basis of mounting a successful Application for contempt. The Petitioner must provide clear and actionable evidence, showing that the Respondents have employed persons to fill the advertised vacancies, contrary to the orders of the Court.

19. This finding on contempt however, does not bar the Petitioner from presenting a fresh Application, should she obtain evidence that any persons have been employed by the Respondents pursuant to the Internal Advertisements, and are in the payroll of the 2nd Respondent, during the life of the orders made on 18th August 2021.

20. On jurisdiction, a Court must always be satisfied that it has the subject matter jurisdiction [jurisdiction *ratione materiae*], personal jurisdiction [jurisdiction *ratione personae*] and temporal jurisdiction [jurisdiction *ratione temporis*], to proceed with any Claim or Petition.

21. Temporal jurisdiction is not contested.

22. The subject matter of the Petition is restructuring of the employment organogram of the County Assembly of Nairobi. It is about restructuring of the Nairobi County Assembly Service. It is an employment matter, at the heart of the jurisdiction of the E&LRC.

23. The last consideration, and this appears to be the crux of the Preliminary Objection filed by the 1st Respondent, is on personal jurisdiction. It is argued that the Petitioner is not in an employee-employer relationship with the Respondents, and therefore does not have the capacity to petition the Court, and the Court does not have authority to take cognisance of her grievance. The 1st Respondent relies on Section 12 of the Employment and Labour Relations Court Act, which defines the nature of disputes, and persons who may bring those disputes before this Court. The persons include Employees, Employers and their Organizations, Trade Unions, the Cabinet Secretary or any office established under any written law for such purposes.

24. The 1st Respondent submits that a Party has to be in an employer-employee relationship to access the E&LRC jurisdiction.

25. The Court does not think that this is a correct interpretation of the jurisdiction of the E&LRC. Section 12 is not an exhaustive list of the disputes that may be presented before the E&LRC, and the persons named under Section 12 [2] do not have the exclusive right to appear before the E&LRC. The provision refers to '*employment and labour relations disputes, including...*' A dispute between an Employer and a potential Employee for instance is not included under Section 12 of the E&LRC Act; yet for purposes of discrimination claims under Section 5[8] [a] of the Employment Act, an 'Employee' includes a job applicant. In sexual harassment claims, harassment extends to that instigated by co-workers, but a dispute between an Employee and an Employee is not included in Section 12 [1] of the E&LRC Act.

26. In Constitutional Petitions, *personae jurisdiction* must be interpreted in the context of Article 22 [1] of the Constitution, which states that, "*every person has the right to institute court proceedings, claiming that a right of fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*" Article 22 [2] extends the right to bring Petitions to individuals acting on their own behalf; on behalf of other persons who cannot act in their own names; on behalf of a class of persons; or acting in the public interest. Article 258 of the Constitution similarly allows any person to initiate proceedings in enforcement of the Constitution. If it is established that the subject matter, relates to employment and labour relations, there is a Court created to deal with the subject matter and jurisdiction ought not to be problematic. Courts of equal status to the High Court, contemplated by the Constitution, are based on subject matter jurisdiction.

27. Section 12 of the Employment and Labour Relations Court Act, should not be read in a manner that takes away personal jurisdiction under Article 22 [1] of the Constitution.

28. A restrictive reading of personal jurisdiction would prevent potential Employees or Job Applicants, from challenging the decisions of potential Employers, from accessing the E&LRC jurisdiction, on grounds that there is no employer-employee relationship under Section 12 of the E&LRC Act. It would also restrict public interest litigants, who frequently bring Petitions challenging decisions on appointments to public bodies. The subject matter should be the overriding consideration, in determining constitutional jurisdiction.

29. The Petitioner describes herself as a Nairobi voter and taxpayer. She also states, she is a potential job applicant. The 2nd Respondent is an Employer in the public service. The change in its organizational structure has effect on current and potential Employees. The change cannot be simplified into an employee-employer dispute. The Court is of the view that the Petition is anchored on individual as well as public interest. She is perfectly entitled to bring the Petition, and this Court is entitled to hear her, under Article 22 read with Article 258, of the Constitution.

IT IS ORDERED: -

- a. The Application by the Petitioner dated 27th August 2021 is declined.*
- b. The Preliminary Objection by the 1st Respondent is declined.*
- c. No order on the costs.*
- d. The Petitioner and the 1st Respondent shall file and serve their respective responses to the 2nd Respondent's Application dated 30th August 2021 within 14 days of this Ruling.*
- e. Mention on 10th December 2021 for further orders.*

Dated, signed and released to the Parties electronically, at Nairobi, under Ministry of Health and Judiciary Covid-19 Guidelines, this 12th day of November 2021.

James Rika

Judge