



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 23 OF 2019

(Before Hon. Justice Mathews N. Nduma)

ANDREW OCHENGO OSUMO.....1ST PETITIONER

BOAZ MOMANYI NYAUMA.....2ND PETITIONER

HERBERT NYAMWANGE.....3RD PETITIONER

EVERLYNE MANGAA.....4TH PETITIONER

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....1ST RESPONDENT

GOVERNOR NYAMIRA COUNTY.....2ND RESPONDENT

DEPUTY COUNTY GOVERNOR COUNTY GOVERNMENT OF NYAMIRA.....3RD RESPONDENT

COUNTY EXECUTIVE COMMITTEE MEMBER,

PUBLIC SERVICE MANAGEMENT NYAMIRA COUNTY.....4TH RESPONDENT

COUNTY SECRETARY, COUNTY GOVERNMENT OF NYAMIRA.....5TH RESPONDENT

CHAIRPERSON, NYAMIRA COUNTY PUBLIC SERVICE BOARD.....6TH RESPONDENT

SECRETARY, NYAMIRA COUNTY PUBLIC SERVICE BOARD.....7TH RESPONDENT

RULING

1. Serving before court is a notice of motion application dated 12th August 2019 seeking an order in the following terms, inter alia:

pending the hearing and determination of the instant petition, the honourable court be pleased to grant an interim conservatory order to protect, preserve and/or conserve the status of the 634 petitioners/Applicants as Senior Support Staff and Enforcement Officers, County Government of Nyamira and in particular barring the respondents jointly and severally from commencing and or undertaking any disciplinary action against the petitioners/Applicants without due process of the law and
2. A further conservatory order be issued restraining the respondents from removing the subject 634 Employees from the payroll of the County Government of Nyamira and cause them to make payments to the said employees on account of Remuneration Allowances and/or salaries and
3. The court do order the respondents to provide the petitioners and file in court certified copies of all the advertisements for the posts of support staff and related cadres, evaluation report of the interviews conducted, letters of regret to unsuccessful candidates, evidence of the final results and outcome of the interviews, advertised resolutions on the creation of the posts, appointment letters and any other document

and memoranda relied upon in the decision to remove the aforesaid staff from the County Payroll, pending the hearing and determination of the Petition.

4. The Application is based on grounds set out on the face of the notice of motion in paragraphs (A) to (U) thereof and in the supporting affidavits of Andrew Ochengo Osumo the 1st Petitioner/Applicant. That the four petitioners represent the named others in a list filed before court and as supported by the authority in the further Affidavit filed by the 1st Petitioner/Applicant on 19th December 2019 and sworn on 16th December 2019.

5. The 1st petitioner/Applicant deposes in the further Affidavit that as at the date of filing the Notice of Motion dated 12th August 2019, 874 employees or there about had been affected by the impugned conduct of the 1st respondent but as at the date of filing the further affidavit on 19th December 2019, only about 150 employees are yet to be reinstated back to the payroll. The first petitioner attached a list of the employees whose salaries were withheld by the respondents and have not yet been returned back to the payroll.

6. The applicants pray that the remaining employees not yet on the payroll but who continue to report to work daily have been subjected to extreme economic hardship and to huge debt arrears. That the conduct by the respondents is discriminatory of the remaining applicants, and is unlawful and unfair labour practice. That since the applicants are working, no prejudice will be suffered by the respondents by reinstating the salaries of the remaining applicants. The application be granted as prayed.

7. The respondents filed a replying affidavit sworn on 20th December 2019 by Mr. Bernard M. Osumo, the County Executive Member of the Public Service Management of Nyamira County. He deposes that on diverse dates the public service management department conducted various audit processes in the County with a view of confirming compliance with the law in recruitment and placement of certain cadre of County Staff. That the County Government on 15th March 2018 contracted Institute of Human Resource Management a consultancy service firm to carryout skills audit.

8. That the exercise commenced in April 2019, affected 874 employees and adhoc committees were set up to interrogate the 874 County Workers. That all employees were notified and relevant summonses issued to them.

9. That so far 406 officers who have presented themselves for vetting have been cleared and reinstated to the payroll. That 313 are still being vetted and the process shall be concluded in February 2020. That of the four (4) petitioners, two have been cleared and reinstated being 2nd and 3rd petitioners.

10. That the remaining two petitioners are due to be vetted on 19th December 2019. That the process is lawful and fair. That if any applicant is adversely affected, they are obliged to lodge an appeal to the Public Service Board. That the Application is misconceived and it be dismissed for lack of merit. The petitioner filed written submissions and both parties made oral submissions before court.

Determination

11. The issue for determination is whether the applicants have met the threshold for issuance of conservatory orders in public service.

12. During the oral submissions by Counsel Ochoki for the Petitioners/Applicants and Counsel Ndege for the respondents, it was common cause that all but 162 petitioners/applicants had been reinstated to the payroll and payments made thereof. Counsel for the applicants emphasized that there was no tangible reason by the respondents why the remaining 162 should not be reinstated on the payroll forthwith. It was not disputed that the 162 employees continued to be in employment and continued to report to work daily but had not received salaries for the past 36 months since the month of March 2019. It was also not in dispute that between the month of March 2016 to March 2019, the applicants were in permanent and pensionable employment and had received salaries and allowances for work done for the respondents on a monthly basis.

13. The period from March 2019 to month of February 2020, when Counsel for the respondents submitted that the vetting exercise would be completed, was in the court's considered view and finding so inordinately long to keep an employee in employment without any salaries.

14. The issuance of conservatory orders in public service is governed by the principles set out in the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 others (2014) eKLR Supreme Court Application No. 5 of 2014** as follows:

“[80] Conservatory orders” bear a more decided public law connotation, for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders therefore, are not unlike interlocutory injunctions linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”

15. It is the finding of this court that the inherent merit of this case is augmented by the inordinate delay in keeping public servants in employment without any pay for a period of about a year; failure to conclude the vetting process during the period despite the glaring prejudice the applicants continue to suffer; the recognition of Articles 41 and 48 of the constitution of Kenya which prohibit unfair labour practice by an employer and promise persons fair and expedient administrative action respectively. The conduct by the respondent apparently militate against public interest it being oppressive to public servants.

16. Accordingly, the Applicants have made out a case to warrant grant of conservatory orders in terms set out under prayers 7, 8 and 10 of the Notice of Motion.

17. Consequently, the court grants a conservatory order to the Applicant/Petitioners as against the respondents in terms of prayers 7, 8 and 10 of the Notice of Motion dated 12th August 2019. The said orders relate to the 160 employees who have not yet been reinstated to the payroll of the 1st respondent. The consequence of the said Order is to have all the remaining 160 employees reinstated to the payroll with effect from March 2019 and the whole arrear remuneration paid to them forth with.

18. Costs in the cause.

Judgment Dated, Signed and delivered at Nairobi this 30th day of April 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Ochoki for Petitioners/Applicants

Mr. Ndege for the Respondents.

Chrispo – Court Clerk