



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**CAUSE NO. 54 OF 2018**

1. PATRICK KOOME MUTIGA
2. PATRICK MUTABARI
3. KALATU STEPHEN KABERIA
4. PURITY KAREGI
5. MURITHI ENOCH KILEA
6. LUCY KANORIO
7. BEATRICE KAIRUTHI MUKARIA
8. GITONGA AMOS KINOTI
9. MERCY KAJUJU
10. DOROTHY KENDI THAMBURA
11. MURIIRA JOSPHAT
12. KATHURE LISPER MUCHENA
13. IRENE MWERU KAROKI
14. MERCY KATHURE
15. BENJAMIN KOBIA KILEMI
16. AMOS WAFULA WANYAMA
17. DENNIS MWIRIGI
18. NGIGI PATRICK KIRIMI
19. ANDREW WAMBUGU MWANGI
20. PATRICK NJERU KAMWARA
21. CAROLINE NJOKI WAMBUI
22. ANNAH MUMBI GACAMBA

23. EMILY KAYUYU KALARE.....CLAIMANTS

VERSUS

1. MERU COUNTY GOVERNMENT

2. MERU PUBLIC SERVICE BOARD.....RESPONDENTS

RULING

1. In the Notice of Motion application dated 19th June 2018, the Claimants/Applicants expressed to be brought under Section 3, 12(3) of the Employment and Labour Relations Court Act, Article 41 of the Constitution of Kenya and all other enabling provisions of the law, seeks orders:-

1. That this application be certified extremely urgent and the same be heard *ex parte*, service thereof being dispensed with.
2. That pending *inter partes* hearing hereof, this honourable court be pleased to issue interim orders of injunction against the Respondents, their servants or agents that the Claimants' position as appointed in their letters of appointment (sic) dated 26.7.2017 be preserved.
3. That at the *inter partes* hearing hereof and pending the hearing and determination of the claim herein, this honourable court be pleased to issue interim orders of injunction to issue as against the Respondents, their servants or agents that the Claimants' position pursuant to their respective appointment letters dated 26.7.2017 be preserved.
4. That pending the *inter partes* hearing hereof, the honourable court can be pleased to issue interim orders of injunction barring the respondents whether by themselves, their agents, servants or employees from recruiting new officers in the positions held by the Claimants.
5. That at the *inter partes* hearing hereof, and pending the hearing and determination of its claim, this honourable court be pleased to issue interim orders of injunction barring the Respondents from recruiting new officers in the positions held by the Claimants' as per their respective letters of appointments dated 26.7.2017.
6. That the costs of this application be provided for.

The motion was supported by grounds on the face of it and the affidavit of Patrick Koome Mutiga the 1st Claimant. They assert that the Claimants reported on 1st September 2017 for deployment and the chief officer of health Meru County Government one James Gitonga told them to go back home and wait to be deployed at a later date. They had resigned their previous positions to take up the appointments with the department of health in the 1st Respondent and the 2nd Respondent has embarked on recruitment of officers in the positions held by the Claimants. The Claimants have annexed the documents in respect of the appointments as well as the interview lists.

2. The Respondents are opposed to the motion and assert that to grant the orders sought will be akin to determining the suit at the interlocutory stage. In the replying affidavit sworn in opposition to the motion, the acting director of human resources of the 1st Respondent avers that the motion was replete with falsehood and that the appointments were made just before the August 2017 elections yet there was a directive that halted recruitment on 22nd May 2017. The Respondents assert that the appointments made contrary to the directive of the cabinet was null and void *ab initio* and the Claimants did not take up their positions on account of the illegality of the appointments. It was the Respondents position that the Claimants were to accept the offers dated 26th July 2017 within 14 days of the letter.

3. In their skeletal submissions, the Claimants argue that they were duly interviewed and appointed to positions in the department of health effective 1st September 2017. They assert that by refusing to deploy them as the Respondents have done, they are denied a means of livelihood and they have suffered irreparable loss and damage. They assert that they have established a *prima facie* case against the Respondents. It is submitted that the position taken that the positions be advertised is in bad faith and a blatant breach of the applicants constitutional right to fair labour practices under Article 41(1) and (2) of the Constitution of Kenya. The Claimants assert that the balance of convenience tilts in their favour as they already went through the due process whereupon they were recruited competitively and issued with appointment letters which they still hold. They urged the court to grant the orders sought.

4. In the submissions filed for the Respondents, they argue that the Claimants were guilty of forum shopping as they had petitioned the County Assembly of Meru seeking the same orders using the very same documents. The Respondents assert that there are two parallel proceedings going on relating to the issue which amounts to abuse of court process. They argue that the Claimants are guilty of material non-disclosure and they should not be allowed to benefit from their misdeeds. The Respondents assert that it would be impracticable to preserve the employment positions of the Claimants whose salaries and other allowances and packages have never been budgeted or factored for. The Respondents submit that the Claimants have not met the threshold for grant of the injunctive orders sought. The Court of Appeal decision in the case of **Wells Fargo Ltd v Cyrus Kioko & 48 Others [2015] eKLR** was cited as was the case of **Rajab Barasa & 4 Others v Kenya Meat Commission [2016] eKLR**, **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** and **Benedict Abonyo Omollo v Judicial Service Commission [2015] eKLR** which relate to the grant of injunctive orders and the managerial prerogatives at the workplace. The Respondents submitted the Claimants were not entitled to the orders sought.

5. The authorities cited have been considered in the determination herein. The Claimants seek interim relief. Being cognizant of the requirement that courts should not strangle management by interfering with the exercise of managerial prerogatives except in exceptional circumstances as held in the case of **Alfred Nyungu v Bomas of Kenya (supra)**, I would determine the matter with the injunctive remedy

sought being the central theme. The principles that govern the grant of injunctive relief are well stated. In the case of **East African Industries v Trufoods [1972] EA 420** cited with approval in the oft cited case of **Giella v Cassman Brown [1973] EA 358**, the 3 guiding principles were well set out. These are that an applicant who seeks a temporary injunction must show; firstly, a *prima facie* case with a probability of success; secondly, that failure to grant the temporary injunction sought would expose such an applicant to irreparable injury which injury would not be adequately compensated by an award of damages; and thirdly, that where a court is in doubt, it would decide the application on a balance of convenience. Put another way, the three-part test is that there must be an assessment of the merits of the case. I have to be satisfied that the claim is not frivolous and that there is at least a reasonable chance of success at trial. Secondly, the applicants must show that they would suffer irreparable harm in the context of the nature of the harm to be suffered not by the magnitude. Thirdly, if in doubt, I should use the balance of convenience, meaning that I have to assess who would suffer greater harm than the other and whoever would suffer greater harm would benefit as the scale would tilt in their favour.

6. In the motion, the Claimants who assert that they are employees of the 1st Respondent, recruited by the 2nd Respondent into various positions in the department of health. They did not take up their appointments ostensibly due to a directive by one James Gitonga an acting director of health. The Respondents argue that appointments were made contrary to the directive of the cabinet, and were therefore null and void *ab initio*. From documentation annexed to the replying affidavit it is apparent there is an internal memo that suggests that the cabinet froze appointments on 22nd May 2017 for reasons stated therein. Reflected against the letters of offer the Claimants have exhibited, there is clearly an issue to be resolved which dispenses the first ground. On the second limb, the Claimants assert that they have suffered loss of livelihood and there is irreparable harm. Having considered all factors, the contracts were to be performed effective September 2017. There is on the material before me reason to hold that the damage is not irreparable as the same can be compensated by an award of damages. The Claimants in their motion seek interim relief which would entail freezing the recruitment of officers to take their places. The Claimants were dispatched on 1st September 2017 and came to Court on 19th June 2018 some 9 months later. If they could wait for 9 months they can wait for the determination of the suit as the interests of justice tilt in favour of maintaining the *status quo*. In my view, the balance tilts in favour of the Respondents whose mandate of provision of health services may grind to a halt should the court freeze all recruitment pending hearing and determination of the cause. The application is therefore dismissed as the threshold for the grant of the injunctive remedy is not met. It is dismissed with no order as to costs. In view of the urgency espoused herein the court will give directions on the disposal of the suit in the next session at Meru.

It is so ordered.

**Dated and delivered at Meru this 4th day of October 2018**

**Nzioki wa Makau**

**JUDGE**