



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 117 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 13th February 2017)

KENYA COUNTY GOVERNMENT WORKERS UNION.....PETITIONER

VERSUS

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

NAIROBI CITY COUNTY REPUBLIC SERVICE BOARD.....2ND RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 26th August 2016 where the Applicant seeks orders for:

- 1. That this application be certified as urgent, admitted to hearing during the court vacation and heard ex-parte in the first instance.***
- 2. That the petition herein be heard on a priority basis.***
- 3. That pending the hearing and determination of the petition there do issue a temporary order of injunction against the Respondents, their agents, officers or interviews, recruitment or employment of any new employees to the Nairobi County Public Service without undertaking staff audit, qualification, assessments, promotions and right job placements.***
- 4. The costs of this application be provided.***

2. The Application is based on the annexed affidavit of Johnstone Byrum Muyuka and on the following grounds:

- a. Advertisement were published in the Daily Nation Newspapers on the 16th August 2016 and 25th August 2016 inviting applications for the position inter alia; Directors, Deputy Directors, Principal Counsels, Senior Counsels, Counsels and Human Resource Officers in the Nairobi County Public Service.***
- b. Since the establishment of the 2nd Respondents there have been previous similar advertisement for various position in the Nairobi County Public Service.***

c. That those advertisements to fill these positions have been discriminatory and in violation of Constitutional Rights and legitimate expectations of the Applicant's members.

d. That the current advertisement if only meant to perpetuate the aforesaid discrimination, violations of the Applicant's members' constitutional rights and a breach of their legitimate expectation.

e. That some of the advertised positions have substantive holders and others in acting capacity.

f. Some of the current staff within the Applicant membership have not been promoted despite being qualified and having worked diligently with the respondents since March 2013 having been inherited from the defunct County Council of Nairobi.

g. The Applicant's members have had the requisite qualifications for a long time and have not been redeployed and/or promoted in order to determine the vacancies that cannot be filled by them.

h. The Respondents lack the legal basis to act as they are purported to do until and unless they undertake staff audit, rationalization and right placement to determine the vacancies that exist.

i. The affected staff within the Applicant's membership stand to suffer irreparable damage if orders sought are not granted as they will be rendered redundant when these advertised positions are filled.

j. The Applicant's members are likely to lose their employment without due process of the law or following their terms and conditions of employment hence they are likely to face extreme hardship and legal injustice by the actions of the Respondent and unless the Respondents are restrained, the Applicants' members legal and constitutional rights shall continue to be infringed upon.

3. In response, the Respondents have filed a Replying Affidavit deposed to by Dr. Robert Ayisi the acting County Secretary of the Nairobi County Government.

4. Therein they aver that the Claimant who seeks to stop the advertisement, interviewing and subsequent recruitment of any employees until the audit of current staff, have failed to establish a prima facie case as to warrant such orders. They aver that that the parameters of granting a temporary injunction as set out in **Giella vs Cassman Brown** have not been met.

5. They aver that the Claimant has not suffered irreparable damages that cannot be compensated through damages. The advertisements were done in a proper manner through their Human Resources department and further, all officers were encouraged to apply with preference given to those under probation, interns, and volunteers in case there was need for absorption of new employees by the Nairobi City County Public Service Board.

6. They aver that the court should not interfere with the Human Resource functions of an employer and cite **Constitutional Petition 4 of 2015 Geoffery Mworira v Water Resources Management Authority & 2 Others [2015] eKLR** where it was held that to interfere with the Human Resource functions of an employer, the Applicant must show that the employer is proceeding in a manner that is in contravention of the provisions of the Constitution or legislation; or in breach of an agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case.

7. They aver that they are not going to violate the constitutional rights of the employee and the court need not interfere with the recruitment process, the suggestion that the Applicant members will be declared redundant are just mere speculations, and a waste of the courts time.

8. They aver that the advertisement dated 26th August 2016, was precipitated by the need to restructure

the legal department which in turn was going to affect the respective positions held by the Applicant members. The Applicants should apply for the positions as they have not been affected negatively by the advertisement.

9. They aver that the Applicants are asking the court to dispose of the matter without fully canvassing the issues at full hearing, and that the same issues have been raised in the petition, therefore they can be sorted out at hearing. They cite **Cause No. 2262 of 2015 Rajab Barasa & 4 Others vs. Kenya Meat Commission [2016] eKLR** where it was stated:

“The Claimants have also raised another serious subject, discrimination against them by the Respondent. Such are matters where pleaded, this Court must stop and address. However, such cannot be conclusively addressed at the interlocutory level. Such require the call of evidence and upon hearing both parties, the court must direct and address as appropriate. Such will not be gone into at interim....”

10. They ask that the Court to strike out the application with costs.

11. The Applicants have filed a further affidavit deposed to by Johnstone Byrum Muyuka where they aver that in a press release dated 24th of December 2013, the Transition Authority advised all levels of government to suspend recruitment of new staff from outside the public service until the rationalization exercise was finalized and the existing public officers were deployed accordingly. The authority recommended the carrying out of a skills and capacity assessment to determine areas of deficit and surplus as well as a review of structures, system process, staffing levels and determining those that should be retained, transferred, merged, abolished, contracted out or privatised.

12. They aver that the Respondent does then not have a legal basis for the new recruitment before they conduct an audit.

13. They aver that they are likely to be prejudiced should the recruitment go on without taking into account the current skills within the existing staff. They further aver that the Respondents should also be fair and recruit just for the positions that need filling and not those already held by competent staff. Replacement of the Applicant members would be detrimental to them.

14. They aver that the human resource manual being used by the Respondent is one that is yet to be approved, and that some of the offices that it has advertised for are yet to be established, such as the Office of the County Attorney.

15. They aver that they have a prima facie case that the court should preserve and grant the injunction sought.

16. In their submissions, the Applicants relied on their pleadings and the supporting affidavit of Johnstone Byrum Muyuka and also submit that they had legitimate expectation of continuing employment. Further, they submit that for a position to be opened to members of the public, there must be staff rationalization to establish any vacancies.

17. Further, they submit that public workers are protected under Article 236 of the Constitution. They submit that they should be treated well and that the Respondents have not adhered to this provision, as well as the County Government Act of 2012.

18. In response the Respondents have also relied on their replying affidavit and emphasise that the advertisements were not in place to tell them to vacate their offices, but to encourage them to also apply for the positions. They submit that the applicants have not shown how they would be negatively affected and that the application ought to be dismissed.

19. I have considered the submissions of both parties. The issue for determination is whether the Applicants have established a prima facie case with a probability of success. The criteria for grant of an

injunction has been set out in the celebrated case of **Giella vs. Cassman Brown Company Limited (1973) EA** which show a prima facie case with probability of success, demonstrate that unless it is granted, the Applicant might suffer irreparable injury which cannot be compensated in damages and that in case of doubt, the Court would decide the matter on a balance of convenience.

20. In seeking to unravel the parameters as set out above, I find that jobs advertised herein for which the Applicants are opposed to their filing are for Directors and Department Director in the Legal Departments; Department Directors in HR Department, other officers in the same HR Department and Department Directors in Finance Department and in IT Department. The adverts were made in the Daily Nation of 16th August 2016.

21. The Applicants have averred that the decision to fill out the vacant position without carrying out a staff audit qualifications assessment, promotions and right job placement places its members in a disadvantaged position.

22. The deponent of the Applicant's affidavit avers that he has been placed in an Ag. Position for a long time and there is no guarantee that he will be considered in filing the position of Counsel as advertisement is open to all members of the public. He wants the position filled with qualified members of the Applicant through promotions.

23. He wants a staff audit qualification assessment, promotion and right job placement undertaken for the entire current employees of the Respondents before any recruitments and employment of any new employees is carried out.

24. For this Court to proceed and stop the entire recruitment process, this Court must be satisfied that the employer is proceeding in an unconstitutional or illegal manner. The Court would normally not interfere with HR functions of an employer unless this is proved.

25. The deponent herein Johnstone Byrum Muyuka stated that he has been performing duties of a Counsel within the Legal Department of the Respondent and previously within the Defunct City Council of Nairobi. He however never annexed his appointment letter or documents that allowed him to perform the said duties which would enable the Court to protect him. It is on the basis of the relationship he currently occupies with the Respondent that this Court can be of assistance. He annexed his academic certificates but the position he currently occupies with the Respondent remains unclear.

26. Indeed under Article 6.14 of the Guidebook for Governors, the County Government cannot terminate services of staff of former local authorities who are employees of the Public Service Commission; without following the laid down laws and regulations. This procedure would entail absorbing those needed in their employment and then releasing the surplus through redundancy.

27. It is my position that transparency and full disclosure is the starting point in establishing a prima facie case. In the case of the Applicants however, there is material non-disclosure of what the members of the Applicants will suffer. Indeed the list of members to be effected and their current status is unknown.

28. This Court would be reluctant to stop an entire recruitment process without full material disclosure. In case of any wrong doing, I believe the Applicants can be compensated in damages. This is so because the Applicants have not demonstrated the irreparable damage they stand to suffer if the application is not allowed.

29. I do not find the application warranted and I decline to allow it. The main Petition may be set down for hearing.

Read in open Court this 13th day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Petitioner

No appearance for Respondent