



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 13 OF 2015

STEPHEN KEMEI KIPTUM1ST PETITIONER

EMMANUEL KENGA KARISA2ND PETITIONER

PETER MWAU MUINDE.....3RD PETITIONER

VERSUS

NATIONAL POLICE SERVICE COMMISSIONRESPONDENT

Mr Ishmael for the Petitioners/Applicants

Mr Ojwang for the Respondent

RULING

1. The Notice of Motion Application dated 28th Jan, 2015 is serving before court. The Petitioners/Applicants seek prayers 1 – 8 set out in the Notice of Motion and on grounds set out as (a) – (t) thereof.
2. The matter was initially filed at the High Court and Lenaola J certified the suit urgent and granted prayer 4 of the Notice of Motion. The Judge then transferred the matter to this court having determined that the High Court lacked jurisdiction to deal with the same it being an Employment and Labour relations dispute.
3. On 5th February 2015, upon application by the petitioners, I granted further interim orders in terms of prayer 2 of the Notice of Motion.
4. The Petitioners/Applicants now seek grant of prayers 3, 5 and 6 of the Notice of Motion. The application is supported by respective affidavits of the Petitioners/Applicants.
5. The Application is opposed vide replying affidavit deposed to by the Chairman of the National Police Service Commission Mr Johnstone Kavuludi on 13th March 2014, and grounds of opposition filed by litigation counsel Mr. P. Ojwang dated 13th March 2015.
6. Attached to the replying affidavit is the record of review proceedings in respect of the three Petitioners/Applicants conducted on 7th July 2014 in respect of the 1st and 2nd Petitioner/Applicants and on 31 July 2015 in respect of the 3rd Petitioner/Applicant.

7. The Applications for review of the decision to remove the 1st and 2nd Petitioners/Applicants from service by the National Police Service Commission pursuant to a vetting exercise was dismissed. Whereas in respect of the 3rd Petitioner/Applicant, the application for review was allowed and the commission recommended a re-vetting of the 3rd Petitioners/Applicants. However, the 3rd Petitioner received a letter indicating that his application for review was also dismissed contrary to what the record shows.

Determination

8. The Petitioners/Applicants now seek prayers 3, 5 and 6 of the Notice of Motion being an order to confirm the conservatory orders granted ex-parte by the court staying the implementation of the Respondent's decision dated 22nd May 2014 and 7th January 2015 removing the Petitioners/Applicants from office in the national Police Service and that their monthly salaries and other allowances payable under their terms of service continue to be paid pending the hearing and determination of the petition and in respect of 1st Petitioner/Applicant, the court prohibits the Respondent from evicting or ejecting the 1st Petitioner from house No.2 West park estate, Lang'ata being a police housing pending the hearing and determination of the petition.

9. With regard to prayer 6, the Petitioners/Applicants seek provision of certified copies of the Hansard record of the review proceedings and a certified copy of the review panel's report to the commission in respect of the review of each of the Petitioners, a certified copy of the record if any of the Commission's deliberations in respect of each of the Petitioners' review applications and a certified copy of the commission's signed decision in respect of each of the petitioners review applications.

10. The Court will first deal with the latter prayer for provision of the aforesaid documentation. Article 35 of the Constitution of Kenya 2010 provides;

11. "35 (1) Every citizen has the right of access to :-

- a. *Information held by the state; and*
- b. *Information held by another person and required for the exercise or protection of any right or fundamental freedom".*

12. The Petitioners/Applicants require;

- a. Certified copy of the hansard record of the review proceedings in respect of each of the petitioners
- b. Certified copy of the review panels' reports to the commission in respect of the application for review of each of the Petitioners/Applicants
- c. A certified copy of the record if any, of the commission's deliberations in respect of the petitioners' review application and;
- d. A certified copy of the commission's signed decision in respect of each of the petitioners review application.

13. The court has examined carefully the attachments "JKI 4" being communication to the Petitioners/applicants dated 7th January 2015 from Chief Executive Officer of the National Police Service Commission, Mr Ojango Omumu and Letters dated 7th January 2015 addressed to each of the petitioners from the same Chief Executive Officer and noted that these documentation contain the decisions and the reasons for the dismissal of the applications for review of the decisions by the vetting panels constituted by the Commission

14. "JKI 5" are the minutes of the Board meeting of the National Police Service Commission held on 18th December 2014 in which the Commission deliberated the decision by the review panels that considered the applications for review of the decisions of the vetting panels that interviewed, vetted and removed the Petitioners/Applicants from service.

15. The verbatim record of the vetting interviews by the panels in respect of all the Petitioners/Applicants are attached to the application and therefore have not been requested for.

16. The Respondent filed a further replying affidavit deposed to by Johnstone Kavuludi on 15th June 2015 on the same date and attached to the affidavit verbatim records of the vetting review panels held on diverse dates in respect of the Petitioners/Applicants.

17. To this extent it is the court's considered view that the Respondent has already provided sufficient documentation required by the Petitioners/Applicants to enable them prosecute the petition except the verbatim record of the deliberations by the Commission in confirming the decisions of the review panels. To the extent that prayer 6 of the Notice of Motion is limited to the request of the Hansard record of the review proceedings in respect of the Petitioners/Applicants, the record of the commission's deliberations in respect of the review applications and certified copy of the commissions signed decisions in respect of the petitioners' review applications, the court finds that the Petitioners/Applicants will not be unduly hindered in prosecuting the petitions on the basis alone that the verbatim deliberations of the commission on the decisions by the review panels are not available. In any event this is a matter for consideration during the substantive hearing of the petition and if found necessary the court will make appropriate inferences on the matter.

Issue iii

18. As to the issue whether or not the court should confirm the interim conservatory orders already granted ex-parte pending the hearing and determination of the petition, the court relies on the case of **Giella Vs Cassam Brown & Co Ltd [1973] EA 358** in which the three conditions for the grant of interlocutory injunction were set out and are now well settled in East Africa as follows:-

- a. An applicant must show a prima facie case with a probability of success
- b. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages;
- c. If the court is in doubt it will decide an application on the balance of convenience.

19. On the facts of the present case, having regard to what stands out clearly from the Petitioners'/Applicants' affidavits in support of the application, the replying affidavits of the Respondent and oral submissions by counsel for the parties, I find that the totality of the facts disclose bonafide serious issues to be investigated by the court. In other words there is an arguable case as explained in the case of **American Cyanamid Co Vs Ethicon Ltd [1975] AllER 504**.

20. As was stated by the East African Court of Justice in **Mary Aliviza & Okotch Mandoh Vs A. G. of Kenya & Secretary General of the East African Community; Application No 3 of 2010, EALS Law Digest 2005 – 2011 p.4;**

“At this stage we must of course refrain from making any determination on the merits of the application or any defence of it. A decision on merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the reference”,

21. On the issue whether or not the Petitioners/Applicants might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, the court notes that in matters such as this one, public interest is a relevant consideration. A balance must be made between the public interest against keeping officers who may be unsuitable in service and on public payroll and the private interest of the Petitioners/Applicants who may be unlikely to be reinstated back to service once the decision to remove them is implemented and suffer non-payment of salaries for the unpredictable period of pendency of this case.

22. The court will also consider the statutory and common law limitation of damages that may be awarded to the Petitioners/Applicants in the event the case is successful and the Petitioners/Applicants have already been removed from service.

23. In resolving this delicate balance, the court has regard to the balance of convenience which is a third consideration in applications of this nature. The Court has noted the very long service given by the Petitioners/Applicants which is more than 20 years in respect of each one of them, the competing arguments by counsel for the Petitioners/Applicants and finds that it is in the interest of justice and fair play that the court grants the conservatory orders sought in terms of prayers 3 and 5 of the Notice of Motion.

24. The effect of this is that the Respondent is enjoined from implementing the decisions dated 22nd May 2014 and 7th January 2015 in respect of the Petitioners/Applicants until the hearing and determination of the petition and in respect of the 1st Petitioner, the Respondent is prohibited from evicting him for house No 2 West Park Estate Lang'ata being a police housing pending the hearing and determination of the petition.

25. The petition be fast track and it be set down for hearing before any judge of the court by the Registrar.

Dated and delivered at Nairobi this 18th day of March 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE