



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

PETITION NO. 30 2015

LILIAN NDEGWA 1ST PETITIONER/APPLICANT

STEPHEN OSIRO 2ND PETITIONER/APPLICANT

LUKE GATIMU 3RD PETITIONER/APPLICANT

NANCY KARURI 4TH PETITIONER/APPLICANT

JIMMY KIAMBA 5TH PETITIONER/APPLICANT

Versus

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

NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

Mr Kago for the petitioners

M/S Matunda for 1st respondent

Mr. Mulomi for 2nd respondent

RULING

1. ELRC Petition no. 30 of 2015 and ELRC petition no. 32 of 2015 have been consolidated.
2. The petitions were filed together with chamber summons applications on a certificate of urgency on 27th March 2015 and 31st March 2015 respectively seeking for an order in the following terms;
 2. That pending the *interpartes* hearing and determination of this application, a conservatory order be and is hereby issued prohibiting the respondents whether by themselves or through their agents, officers, servants, employees and / or whosoever, from sacking, terminating from employment and / or in any way implementing the impugned recommendation / order of the 2nd respondent's report of the Auditor-General on the City Council of Nairobi for the period ending 28th February 2013.
3. The applications are based on the grounds set out in the respective chamber summons and in the

supporting affidavits of Lilian Wanjiru Ndegwa, the Nairobi City County Secretary and head of Public Service and Stephen Osiron Head of Treasury.

4. The other petitioners are Mr. Jimmy Kiamba Chief Finance Officer, Luke Gatimu Head of County Revenue and Nancy Karuri Head of Budgeting.

5. The application is opposed through a replying affidavit of Karisa Iha the Legal Affairs Director of the County Government of Nairobi, the 1st respondent.

Facts of the case

6. The Kenya National Audit office conducted an Audit of, and made a report of the Auditor General on Financial statement of The City Council of Nairobi for the eight months period ended 28th February 2013. The report is dated 28th October 2011, and signed by Mr. Edward R. O. Ouko, the Auditor General.

7. On page two (2) of the report, clause 1 titled ‘Accuracy of the Financial Statements’, the Auditor General observed;

“The Council’s Management did not produce a general Ledger and trial balance for audit verification. Further, accounting records including the cashbooks, bank reconciliation statements, bank certificates for some of the bank accounts maintained by the Council among other relevant records were not made available for audit. Consequently, the validity of the financial statements for the period ended 28th February, 2013 could not be confirmed.”

8. The chairman of the Public Accounts Committee (PAC) of the Nairobi City County Assembly, the 2nd respondent tabled a public accounts committee report on the report of the Auditor General aforesaid before the 2nd respondent on 21st March 2015 in which the PAC recommended the sacking of the petitioners for violating *inter alia* section 164 of the Public Finance Management (PFM) Act, 2012 which mandates the accounting officer for a county government entity, to prepare financial statements in respect of the entity. The PAC found that the accounting officer for Nairobi City County Government had consistently failed to produce crucial accounts records to the office of the Auditor General as indicated in the Auditor General’s reports for the financial year 2010/2011, 2011/2012 and 2012/2013. The PAC in particular recommended that the Accounting Officer, who is the County Secretary M/S Lilian Ndegwa, be sacked for her incompetence and dereliction of her duties and gross violation of the constitution and the PFM Act 2012 and Section 40(1)(a) and (f) of the County Government Act, 2012.

9. The petitioners / applicants seek that the respondents be enjoined from implementing the aforesaid report of the PAC.

10. The petitioners allege *inter alia*, that;

(1) They were never accorded a fair hearing before the said recommendation was made nor was any due process followed which include proper notice of any indictments against them and / or the fact that the said report would be tabled before the County Assembly as stipulated in the standing orders, the County Government Act, and the Constitution of Kenya.

11. The petitioners state that they were all employed by the respondents after March 2013. That they cannot be held accountable for the failings of their predecessors. The report refers to a period prior to the petitioners employment by the respondents. The petitioners are not the subject of the report and the report could not properly recommend their sacking after acknowledging that it was referring to the financial years 2010/2011, 2011/2014 and 2012/2013.

12. On 26th March 2015, the 2nd respondent adopted the report of the select committee on public accounts on the report of the Auditor General on the City Council of Nairobi for the eight months period ended 8th

February 2013.

13. The PAC derives its mandate from standing order 18(2)(a) which states that the committee shall be responsible for the examination of accounts to ensure public funds are prudently and efficiently utilized.

14. The petitioners except the 3rd petitioner were adversely mentioned in the Ethics and Anti-corruption Commission (EACC) Report of 20th May 2015 which was submitted to the President and all the mentioned persons were ordered to step aside pending investigations. For this reason the 1st, 2nd, 4th and 5th petitioners / applicants are not in office since they have stepped aside.

15. No action has been taken yet by the 1st respondent pursuant to the adoption of the PAC report by the 2nd respondent.

Determination

16. The issue for determination is whether the petitioners / applicants have satisfied the requirements for grant of interim injunction pending the hearing and determination of the petition.

17. The court relies on the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358** in which the prerequisites for granting interlocutory injunction were set out and are well settled in East Africa as follows:-

1. an applicant must show a *prima facie* case with a probability of success;
2. 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;
3. if the court is in doubt it will decide an application on the balance of convenience.

18. On the facts of the present case, the 2nd respondent has already adopted the impugned report to have the petitioners / applicants dismissed from service. The horse has already bolted before the closure of the stable as far as the 2nd respondent is concerned.

19. With regard to the 1st respondent, it has yet to take any action pending investigations of the matter.

The anticipated investigations before initiating any disciplinary action by the 1st respondent is within the statutory mandate of the 1st respondent. So far, the 1st respondent has not been shown to have taken any action adverse to the petitioners / applicants which is in violation of the enabling statute and the constitution of Kenya 2010.

In any event, the petitioners / applicants are no longer at work, having stepped aside awaiting investigations by EACC.

20. It is the court's considered view that the petitioners / applicants have not established a *prima facie* case with a probability of success at the interlocutory stage.

21. The court will consider the merits of the petition after the hearing of the substantive petition in line with the decision of the East African Court of Justice in **Mary Aliviza & Okotch Mondoh –vs- A.G. of Kenya & Secretary General of the East African Community Application no. 3 of 2010, EALS Law Digest 2005 – 2011 at P.4** where the Judges stated;

“at this stage we must of course refrain from making any determination on the merits of the application (read petition) 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 (read petition).”

22. In view of the finding on the first preliquisite, it is not necessary to consider the other two preliquisites of granting an interim injunction. The court will only say that, in matters such as this one, involving public finances, public interest is also a consideration in weighing the balance of convenience. This is however unnecessary in this case.

23. The consolidated application lacks merit and is dismissed with costs in the cause.

Dated and delivered at Nairobi this 31st day of May, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE