



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**PETITION NO. 9 OF 2016**

**IN THE MATTER OF ARTICLES 1, 2, 41 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS UNDER ARTICLES 41  
AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER BY THE DECISION AND PROCESS DECLARING THE PETITIONER TO  
BE A DESERTER FROM THE PRISON SERVICE**

**BETWEEN**

**RUTTO KAPTO HILLARY.....PETITIONER**

**AND**

**THE OFFICER IN CHARGE NAIVASHA MAIN PRISON.....1<sup>ST</sup>  
RESPONDENT**

**THE COMMISSIONER GENERAL OF PRISONS.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner was appointed as a prison warder through a letter dated 11 May 2010 and was confirmed through a letter dated 17 October 2011.
2. On 14 December 2015, the Officer-In-Charge Prisons, Naivasha Prison sent a signal to the

Commissioner General, Prisons informing him that the Petitioner had deserted/been declared a deserter (absent from duty from 23 November 2015 for a total of 21 days) and that his whereabouts were not known.

3. On 17 February 2016, the Petitioner moved Court through a Petition alleging violation of his rights to fair labour practices and fair administrative action by the Respondents by declaring him a deserter despite knowing of his ill health.

4. The Petitioner filed together with the Petition, a motion seeking

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2. THAT interim conservatory orders do issue against the respondents restraining them whether by themselves their servants and/or agents from implementing the decision declaring the petitioner to be a deserter from the prison service terminating his employment and circulating any false and malicious information pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of the petition.

3. THAT the costs of this application be provided for.

5. The Court directed that the motion be served for *inter partes* hearing.

6. The Attorney General entered appearance for the Respondents on 27 February 2016 and grounds of opposition to the motion on 5 April 2016.

7. The Petitioner filed a Supplementary Affidavit on 21 April 2016 and after several false starts, the motion was taken on 3 May 2016.

8. The Court has duly considered the motion, the supporting affidavit, grounds of opposition and oral submissions tendered in Court.

9. The test for grant of conservatory orders was outlined by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others* (2014) eKLR and the test has been explained in several decisions of the High Court and the Court of Appeal.

10. The Supreme Court laid the test thus

*'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 the case*, bearing in mind the *public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes*.

11. The Court is therefore enjoined to consider whether the case material placed before it by the Petitioner fall within the principles set out above to warrant grant of conservatory order(s) as sought.

12. That the relationship between the Petitioner and the Respondents is one of contract underpinned by statutory protections need not be belaboured.

13. In this respect, the Court wishes to note and observe that the Prisons Act and the applicable disciplinary regulations in respect of Prisons Officers as enacted under the Public Service Commission

Act (Service Commission Act) give the Petitioner channels of having his complaints addressed before moving Court.

14. The declaration of desertion was only the commencement of a process and the Petitioner ought to at the first instance have brought to the attention of his superiors the explanations for his absence at the material and or relevant periods.

15. The Petitioner, in the view of the Court is attempting to assert contractual rights in which no public interest has been demonstrated at this stage

16. On the factual anchor to the orders sought, the Petitioner's case is predicated on the contention that he was taken ill and the Respondents knew of the situation.

17. Some of the documents the Petitioner has exhibited are copies of medical documentation alluding to his admission in hospital from 20<sup>th</sup> to 31<sup>st</sup> July 2015, another attests to outpatient treatment in August and November 2015, while another grants 14 days off duty from 20 November 2015 to 4 December 2015.

18. Despite exhibiting the medical documents, there is nothing on record that the Petitioner informed his superiors or brought to their attention his ill health.

19. The off duty sick sheet is of more relevance but again, the Court notes that there is nothing to suggest that it was brought to the attention of the Petitioner's supervisors.

20. The upshot of the foregoing is that the Court finds no public interest or merit in the motion filed in Court on 17 February 2016 and orders that it be dismissed with costs to the Respondents.

21. The Court will give directions as to the determination of the Petition immediately hereafter.

**Delivered, dated and signed in Nakuru on this 19<sup>th</sup> day of September 2016.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner Mr. Mogambi instructed by Wambua Kigamwa & Co. Advocates

For Respondents Mr. Kirui, Litigation Counsel, Office of the Attorney General

Court Assistant Mwangi S