



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 170 OF 2014

**IN THE MATTER AN APPLICATION BY PC STEPHEN MATHENGE FOR ORDER OF
CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE POLICE SERVICE ACT AND THE KENYA CONSTITUTION 2010

AND

IN THE MATTER OF CIVIL PROCEDURE ACT CAP 21

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE DEPUTY INSPECTOR GENERAL OF NATIONAL

POLICE SERVICE.....1ST RESPONDENT

INSPECTOR GENERAL OF NATIONAL

POLICE SERVICE2ND RESPONDENT

JOSEPH ODIPO.....3RD RESPONDENT

***EX PARTE*: PC STEPHEN MATHENGE**

JUDGEMENT

Introduction

1. By their Notice of Motion dated 14th May, 2014, the *ex parte* applicant herein, **PC Stephen Mathenge**, seeks the following orders:
1. That an order of Certiorari be issued to remove to this honourable court and quash for purposes of being quashed the directive, decision and/or order of the Respondents purporting to change the Applicant from one Police Station to another without authority from the Commission.

2. That an order of prohibition be issued to restrain the Respondents from further making orders, directives and decision meant to intimidate the Applicant's employment, transfer and stationing.
3. That costs of this application be borne by the Respondents on the grounds stated in the statutory statement dated 8th May 2014.

Ex parte applicant's case

2. According to the applicant, as deposed in his affidavit sworn on 8th May, 2014, he is employed by the National Police Service Commission and since the transfer of a Police Officer from one station to another is one of the duties which is unquestionable, he was ready to serve any part of this Country as long as the transfer is carried out is procedural.
3. According to the applicant, all along he had been carrying on his duties as a Police Officer at Machakos County until 8th October 2013 when he received a signal transferring him to Athi River Traffic Base to which he moved to till 7th January 2014 when he received another signal purporting to transfer him from Athi River Traffic Base to Tana River. However, he deposed that as per the Force Standing Order a police officer is eligible for transfer from one station to another after serving at least three (3) years at one station.
4. He further deposed that the signal of 8th October 2013 was not signed but only bore the name of **Joseph Kimeli** who was too junior and further was an unauthorized officer to effect or even think effecting transfers.
5. It was therefore the applicant's position that the Respondents acted without authority as the only constitutional body mandated to carry out transfers of Police Officers is the commission. Further, no reasons were given as to why he was being transferred from one station to another in a haste move. This action, in his view made him and his children to change stations as well as schools like nomads yet the Respondents do not provide means of transport to cater for transport costs.
6. The applicant contended that the unilateral decision was unbearable and meant to disrupt/disorient him and his family noting that he had paid school fees for the 1st term at Machakos County and even getting a vacancy for his children would be a nightmare.

Respondents' case

7. In opposition to the application, the respondents filed a replying affidavit sworn by **Maurice Kiplagat**, SSP the Staff Officer 3 in the Kenya Police Service (hereinafter referred to as "the Service").
8. According to him, the application was overtaken by events following the tendering of a letter of early retirement on 12th March 2014 and disappeared before his application to retire could be considered and approved. He added that the Applicant had been sought severally to hand over but failed and/or neglected to do so and was considered a deserter and was being sought to be arrested and prosecuted for the offence of desertion as provided for in Section 94 of the **National Police Service Act, No. 11A of 2011** (hereinafter referred to as "the Act").
9. He added that the Applicant was trained and deployed as a police rider who would be required to deliver mails and or official dispatch to any part of the Country since deployment is a command function which is exercised by the Inspector General of the National Police Service. Consequently, the Applicant is bound by Clause 6 of the Letter of Appointment to which the Applicant appended his signature obliging him to serve in any part of the Country. This was fortified by paragraph 1 of Chapter 23 of the **Force Standing Orders**. Further, paragraph 5(ii) (a) of the **Force Standing Orders** would only apply in respect of the mutual agreements between the Provincial Commander which is not the case here.
10. It was deposed that officers No. 218721 **Mr. Joseph Kimeli, SSP** and No. 230754, **Mr. Joseph Odipo, SP** are gazette officers who are six and five ranks respectively senior to the Applicant and authorized to transmit the decision of the National Police Service Commission the office of the Inspector General or any other senior command to the Applicant. Further, communications in the National Police Service follow the chain of command.
11. According to the deponent, the Constitution gives dual function to both the National Police

Service Commission and the Office of the Inspector General. If the Applicant is adversely affected by his deployment, the Force Standing Orders enjoin him to request for reconsideration of the decision to the Inspector General and finally the National Police Service Commission. In this case, however, the Applicant has not appealed to the Inspector General or the National Police Service Commission to reconsider his case and has not otherwise proved that it is necessary to move with his children. Instead, the applicant disappeared and was declared a deserter and the Commandment Traffic requested the Applicant to be struck off pursuant to paragraph 37(ii) Chapter 20 of the Standing Orders hence rendering him ineligible to be reinstated back in to the service.

12. To the deponent, the Applicant has not provided evidence that he was not going to be paid disturbance as well as luggage allowance. Otherwise, the exigencies of police work could be disruptive due to its very nature and the Applicant signed for it hence could be heard to complain.

Determinations

13. Having considered the foregoing, this is the view I form of the matter.

14. Article 246 of the Constitution establishes the National Police Commission (hereinafter referred to as the Commission) and in Clause (3) the powers of the said Commission are set out as hereunder:

(a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;

(b) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and

(c) perform any other functions prescribed by national legislation.

15. As I held in High Court Misc. Application No. 93 of 2013 between **Republic vs. The Deputy Inspector General of National Police Service and 2 Others ex parte Morris Sagala & Others:**

“the powers to *inter alia* determine promotions and transfers within the National Police Service was given to the Commission and any legislation which purported to take away such powers and place them on any other body would have been inconsistent with the Constitution since to create two centres with the same powers was bound to cause confusion in the administration of the police service. Kenyans must have had a good reason for removing the powers of transfer of the members of the Service from the predecessor of the Inspector General, the Commissioner of Police, to the Commission. Since the Inspector General is a Member of the Commission, it is expected that where a need for transfer of the Members of the Police Service arises he would be able to explain this position and the Commission would be able to take appropriate steps.”

16. In this application it has not been contended by the Respondents that the decision to transfer the applicant was carried out by the Commission. There is no evidence at all that the communication which was transmitted to the applicant came from the Commission. Accordingly I have no hesitation in finding that the decision to transfer the applicant was ultra vires the powers of the Respondents.

17. It was further contended that the Respondent’s decision to transfer the applicant just three months after his transfer to his current station was bound to adversely affect him and his family. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The duty to exercise power in a fair manner has been recognised to be necessary in the exercise of administrative discretion. As was held in **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8,**

“...the Courts are not to abdicate jurisdiction merely because the proceedings are of administrative nature...It is to everyone’s advantage if the executive exercises its discretion

in a manner which is fair to both sides, and is seen to be fair.”

18. Wherever any person or body of persons has authority conferred by legislation to make decisions affecting the rights of the subjects, it is amenable to the remedy of an order to quash its decisions either for an error of law in reaching it, or for failure to act fairly towards the person who will be adversely affected if the decision maker fails to observe either one or other of the two fundamental rights accorded him of the rules of natural justice or fairness, viz: to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made. See **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194.**
19. It is trite law that persons charged with statutory powers and duty ought to exercise the same reasonably and fairly and that the discretion ought not to be used whimsically, unreasonably and arbitrarily. If the discretion is used arbitrarily and unreasonably, the court may step in to remedy the situation.
20. In the preamble to the Constitution, the people of Kenya committed themselves *inter alia* to nurturing and protecting the well-being of the individual, the family, communities and the nation. In **Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258,** it was held that although the national objectives and directive principles of State policy are not on their own justiciable, they and the preamble of the Constitution should be given effect wherever it is fairly possible to do so without violating the meaning of the words used. To emphasize the importance the Constitution attaches to the family Article 45(1) of the Constitution provides as follows:
- The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.***
21. Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. Therefore in exercising its statutory powers the executive ought to ensure that its action is geared towards the recognition and protection of the family unit as far as is practicable. To take actions which are meant to place the family unit in jeopardy would be clearly contrary to the spirit of the Constitution. To fail to take into account the need to recognise and protect the family therefore amounts in my view to failure to take into account a relevant factor. Where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. See **Council of Civil Service Union vs. Minister for the Civil Service (1985) AC 374; Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation (1948) 1 KB 223.**
22. To transfer a public officer without taking into account his family obligations not only affects the officer but his family as well such as the right to education as enshrined under Article 43 of the Constitution.
23. By failing to consider the foregoing I find that the Respondents' decision was irrational. Whereas the applicant could properly be transferred from one station to another such transfer ought to have taken into account all relevant factors including family obligations and its protection. It is my view that this was what meant to be achieved by the relevant force Standing Orders.

Order

24. Accordingly, I issue an order of certiorari removing into this Court and quashing the Respondents' impugned decision. As the Respondents are properly entitled to transfer the applicant if all the relevant factors are considered, I decline to grant an order of prohibition in the manner sought in the application.
25. As the applicant has not responded to the allegation that he resigned from the force, there will be no order as to costs.

Dated at Nairobi this 25th day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Sausi for the Applicant

Mr Munene for the Respondent

Cc Patricia