



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIRIOBI

(MILIMANI LAW COURTS)

MISC. CIVIL APPLICATION NO. 93 OF 2013 (JR)

**IN THE MATTER OF: AN APPLICATION BY PC MORRIS SAGALA AND 29
OTHERS FOR LEAVE TO APPLY 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

REPUBLICAPPLICANT

=VERSUS=

THE DEPUTY INSPECTOR GENERAL OF NATIONAL POLICE SERVICE

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE

K.S. KITOORESPONDENTS

EX-PARTE:

1. PC. MORRIS SAGALA
2. CPL. SOLOMON RUTO NGEMNI (TRAFFIC)
3. CPL. ALI KUPI
4. CPL MILICENT KAMURI
5. CPL BENARD NJERU
6. PC. MOHAMED ADAN
7. PC. NATHAN MOTARI
8. PC (W). JANE MANYARA
9. PC. WILLIAM CHIRCHIR
10. PC. REUBEN ROTICH
11. PC(W) PRISCA ASOKON
12. PC. GIBSON MWATELA
13. PC. FRANCIS SANG

14. **PC (W). PAULINE NDERITU**
15. **PC. CRISPUS MAINGI**
16. **P.C. RICHARD NJENGA**
17. **PC. ANNALICE KABURU**
18. **PC(W). CAREEN MIHESO**
19. **PC(W). SALOME NZILANI**
20. **PC(R). LUKAS KIARIE**
21. **PC. WILLIAM OMOLLO**
22. **PC(W) RISPA WAMBUI**
23. **PC. PETER NGARUIYA**
24. **PC(W) JOYCE WANJA**
25. **PC. JOTHAM NYAROCHE**
26. **PC. MOPEL NKETUYA**
27. **PC. JIMMY KEMBOI**
28. **PC. JONAH SANG**
29. **PC. ALEX CHEMIRMIR**
30. **PC. PHILIP OTIENO FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION AND CERTIORARI**

JUDGEMENT

INTRODUCTION

1. By their Notice of Motion dated 15th March, 2013, the *ex parte* applicants herein seek 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's decision and order of the Respondents purporting to change the Applicants job from one station to another without authorities from Inspector General or Deputy General of National Police Service.**
2. **THAT an order of prohibition be issued to restrain the Respondents from further making orders, directives and decisions with regard to the Applicants employment, transfer and stationing.**
3. **THAT costs of this application be borne by the Respondents.**

EX PARTE APPLICANT'S CASE

2. The application is grounded on the Statutory Statement and Verifying Affidavit filed on 13th March, 2013 and sworn by **Morris Sagala**, the 1st applicant herein on the same day.
3. According to the deponent, he is a Police Officer of the rank of Corporal working at Athi River Weighbridge Police Station and in terms of the Constitution employed by the National Police Service Commission. According to him, transfer of a Police Officer from one station to another is one of the duties and they are ready to serve any part of this country as long as the transfer is procedural. He, however received a copy of a signal dated 6th March 2013 indicating that himself together with other 29 officers been transferred to different stations which transfer had been communicated by a fellow junior officer in the rank of Senior Assistant commissioner of Police who claimed to be acting for and on behalf of the 1st Respondent.
4. To the deponent, the 1st and the 3rd Respondents have no authority to act in the manner they have acted whatsoever and that the Applicants are ready to serve and carry on with our duties at our new station if such transfer is carried out towards the end of the year. The Respondents have therefore without reference to the applicants purported to transfer and remove all of them from the department of their jobs without following the laid down procedure on force standing order without authority since the only body Constitutionally mandated to transfer Police Officers is the Commission and that no reasons were been given to the applicant and no single explanation offered even by the signal as to why such a haste action has been taken without due cause and

procedure or information hence they have been have been condemned unheard which is in breach of the rules of natural justice despite the fact that they had just been recently posted to their stations and were yet to familiarize themselves with the said stations and have children in schools within Machakos County. Since it was in the beginning of the year, any change would adversely affect the applicants and their children hence the decision was unbearable and was meant to disrupt/disorient them completely.

RESPONDENTS' CASE

5. In opposition to the application, the respondents filed replying affidavits sworn by **Kapchanga Kitoo**, the third Respondent who is also the Deputy Director of Personnel of the National Police Service, the third Respondent herein. According to him the ex parte applicants are members of the National Police Service by virtue of Article 243 of the Constitution of Kenya and that the Inspector General's office created under of Article 245(1) of the Constitution is mandated to exercise independent command over the National Police Service and to perform any other functions prescribed by national legislation while section 10(g) of the **National Police Act** (hereinafter referred to as the Act) spells out that the office of the Inspector General shall have the function of determining the distribution and deployment of officers in the service.
6. It is deposed that due to reports and complaints of malpractices and corruption by the Kenya Highway Authority, the Authority managing the weigh bridges across the country, in an effort to eliminate corruption in accordance with the provisions of Article 244(b) it became necessary to deploy the ex parte applicants elsewhere. According to the deponents, the ex parte applicants on being enlisted accepted to be posted in any Station within Kenya hence the ex parte applicants are in breach of their contract of service by refusing to comply with the directives issued. To him the terms regarding transfers couched in the force standing orders are not mandatory and the office of the Inspector General may step in from time to time to address any issues which may arise with regard to the provision of police services as happened in this case where there were claims of rampant corruption at the weighbridges necessitating the said deployment.
7. It is further averred that the Inspector General may by virtue of Section 8(2) of the Act delegate his powers to a subordinate officer and that he had the delegated authority to issue the directives requiring deployment of the applicants hence the said deployment was legal and in accordance with statute and was not meant to condemn the applicants or disorient them as alleged but was meant to ensure that the provisions of Article 244 of the Constitution are met. According to the deponent, there were 174 officers who were being deployed hence the ex parte applicants' deployment was not actuated by malice or bad faith.

DETERMINATIONS

8. Having considered the foregoing, this is the view I form of the matter.
9. Article 245 of the Constitution provides as follows:

(1) There is established the office of the Inspector-General of the National Police Service.

(2) The Inspector-General—

(a) is appointed by the President with the approval of Parliament; and

(b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.

(3) The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission.

(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no

person may give a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

10. Whereas it is correct that the Inspector General of Police is empowered to exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation, Article 2(2) provides that:

Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

11. Accordingly any law which prescribes the powers of the Inspector General under Article 245 of the Constitution must itself comply with the provisions of the Constitution. Article 246 of the Constitution sets out 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.

12. It is therefore clear that 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.

13. It is however submitted that under Article 245 of the Constitution no person may give directions to the Inspector General with respect to “the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.” In **Kigula and Others vs. Attorney-General [2005] 1 EA 132** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation include *inter alia* that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other and further that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument. This is the principle of harmonization.

14. A reading of Article 245 of the Constitution, it is clear that the drafters of the Constitution deliberately left out transfer as one of the powers which the Inspector General exercises without directions from any one. Therefore the powers of transfer of members of the Service were reserved to the Commission. It is noteworthy that whereas the Inspector General was vested with the powers of appointment of any **members** of the police service, the powers to appoint a person to hold **offices** in the Service was reserved for the Commission. It would appear that there is a difference between members of the Service and Offices of the Service and their source of

- appointments are also separate.
15. It follows that there was no power given to the Respondents to transfer the applicants hence the transfer of the applicants whether termed as deployment or otherwise was not supported by the Supreme law of the land. The only powers which the Inspector General could exercise were the powers to assign the members of the Service particular duties.
 16. In **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** it was held that judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. Judicial review plays an important role in our society which is to check excesses, omnipotence, arbitrariness abuse of power and also accountability and maintenance of constitutionalism and the rule of law. As **Chief Justice Marshall** powerfully argued in the Case of **Marbury vs. Madison 5 us 137 (1803)**, judicial review provides the best means of enforcing the peoples will as declared in the written Constitution, without resort to the drastic remedy of revolution. He warned that, without judicial review, the legislative branch would enjoy a practical and real omnipotence and would reduce to nothing what is deemed the greatest improvement on political institutions - a written constitution. The concerns raised in the **Marbury** case are still relevant and applicable in our jurisdiction. It should be observed that Constitutional Judicial review is the cornerstone of the doctrine of separation of powers and the principle of the rule of law. On the clear provisions of the Constitution, the High Court is the principal interpreter and guardian of the Constitution. See **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728.**
 17. It is therefore clear that the unilateral decision by Respondents to transfer the applicants was not in accordance with the law. The action was *ultra vires* their powers and hence was null and void.
 18. In the Court's view the alleged reports and complaints of malpractices and corruption by the Kenya Highway Authority cannot be resolved by transfer and deployment. To transfer police officers who are suspected of corruption in my view only amounts to devolving corruption and malpractices and cannot be said to amount to an effort to eliminate corruption. This country has adequate machinery to deal with such malpractices and corruption and transfer and deployment do not form part of them. Where there is evidence of malpractice or corruption appropriate legal action ought to be taken against the culprits other than transferring them to other areas.

ORDER

19. In the result I find no merit in the Notice of Motion dated 15th March, 2013 and issue an order of certiorari calling into this Court for the purposes of being quashed the directive's decision and order of the Respondents purporting to change the Applicants job from one station to another which decision is hereby quashed. With respect to the prayer for prohibition, there is no evidence before me that the Respondent intend to issue any such further directives. In **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 eKLR** the Court of Appeal held *inter alia* that order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law.
20. The applicants will have the costs of these proceedings.
21. Before concluding this judgement it is important that both the Inspector General of Police and the Commissioners of the National Police Service Commission, work together for the well being of this nation. They must remember that under Article 129(2) of the Constitution executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit. If the two offices do not exercise their authority in a manner compatible with the principle of service to the people of Kenya and for their well-being and benefit they would be going contrary to the principles of the Constitution. It is therefore hoped that sobriety will prevail between the said authorities and they will avoid political expediency, popularity gimmicks, chest-thumping or competitive streaks that this country has been treated to in recent past.

G V ODUNGA

JUDGE

Dated at Nairobi this day 19th of December 2013

Delivered in the presence of:

Mr Staussi for the applicant