

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER E029 OF 2023

AMOS MUTHAMA MUTUA.....

CLAIMANT

-VERSUS

CABINET SECRETARY, MINISTRY OF ENVIRONMENT & FORESTRY.....

.....RESPONDENT

CORAM

Before Lady Justice J. W. Keli

C/A Otieno

JUDGMENT

1. Vide a memorandum of claim dated the 19th of January 2023, the Claimant sued the Respondent and sought the following Orders:-
 - a) **A declaration that the decision to transfer the Claimant is unfair and did not follow due process.**
 - b) **An order compelling the Respondents to rescind their decision to transfer the Claimant from Jomo Kenyatta International Airport Meteorological Station to Voi Meteorological Station.**

- c) **Compensation for procedural unfairness and victimization.**
- d) **Costs of the suit.**

2. The Claimant in support of the claim filed his list of witnesses dated 19th January 2023; witness statement of even date; and list of documents of even date with the bundle of documents attached.
3. The Respondent entered appearance through the Honourable Attorney General on 9th February 2023 and filed a reply dated 10th August 2023; and grounds of opposition dated 13th February 2023. In support of the said reply, the Respondent filed a list of witnesses dated 15th February 2024; witness statement of DAVID GIKUNGU dated 24th April 2023; and a list of documents dated 15th February 2024 with the bundle of documents attached.
4. In response to the Respondent's reply to claim, the Claimant filed a reply dated 12th October 2023.

Hearing and evidence

5. The claimant's case was heard on the 10th June 2025, where he testified on oath, adopted his witness statement dated 19th January 2023 as his evidence in chief, together with documents listed in the documents dated 20th January 2023, produced as c-exhibits 1-3. He was cross-examined by counsel for the respondent Ms Karbolo and was re-examined by own counsel.
6. The respondent's case was heard on the 10th June 2025 where the witness of facts was Dr. David Gikungu. He adopted his witness statement dated 24th April 2023 as evidence in

chief and produced the respondent's documents under list dated 15th February 2024 as R-exhibit 1-3. He was cross-examined by counsel for the claimant, Mino Kimeu, and re-examined by his own counsel.

The Claimant's case in summary

7. The Claimant's case is that he is an employee of the Respondent in the position of Principal Meteorological Technologist in the Kenya Meteorological Department under the Ministry of Environment, Climate Change and Forestry and is stationed at Jomo Kenyatta International Airport (JKIA) Meteorological Station. The Claimant states that on 2nd November 2022, the Claimant along with other meteorological officers participated in a countrywide strike seeking the reimbursement of allowances from the Respondent which strike ended on 4th November 2022. A month later, specifically on 15th December 2022, the Claimant, along with several of his colleagues who were proactive in the go-slow strike, received a letter informing him that he was being transferred to the Voi station from 1st February 2023. In response to the transfer letter, the Claimant wrote to the officer in charge of the JKIA Meteorological station on 18th December 2022 asking them to reconsider his transfer due to its financial implications, since a transfer would result in a drastic decrease in his allowances. Vide a letter dated 21st December 2022, the Respondent informed the Claimant that his request to remain at the JKIA station was declined, with the Respondent instead reiterating that he was expected to report to Voi, as earlier communicated. No good reason was given by the Respondent for refusal to reconsider the Claimant's transfer.

8. The Claimant explains that he has loan facilities with Gulf African Bank and Wanaanga Sacco, which are secured by his current allowances as collateral. Further, the repayment

amounts, which are significant (a repayment of Kshs. 104,000/- per month to the Bank, and an undisclosed amount to the Sacco) are deducted automatically from his gross salary and remitted to the bank and Sacco. If his allowances decrease, he will struggle to pay back his loans and will ultimately default on repayments. Gulf African Bank approved eth loan to the Claimant based on his current allowances after confirmation and assurance from the Respondent that the allowances received by the claimant were permanent and recurring.

9. The Claimant's position is that the decision to transfer him abruptly, without sufficient and reasonable notice and without considering the adverse financial consequences to the Claimant of such a transfer violate his Article 41 right to fair labour practices and Article 47(1) right to fair administrative action. The decision to transfer the Claimant did not follow due process, with the names of the people transferred failing to be published and put on the notice board after a meeting of the transfer board within the department, as is usual. The Claimant has also not been granted a fair hearing to explain why he ought not to be transferred; or given reasons for the Respondent's refusal to reconsider and withdraw his transfer/re-deployment letter.
10. The Claimant is adamant that his transfer was discriminatory and used as a punitive tool to victimise the Claimant for participating in the go-slow strike, as his colleagues who were also proactive in the go-slow strike are also facing transfers.

Respondent's case in brief

11. The Respondent challenges the present suit on the premise that the same is premature since the Claimant has not lodged an appeal against his transfer to the Voi station to the Public

Service Commission. They argue that the suit offends the doctrine of ripeness and is filed contrary to section 9(2)(3) of the Fair Administrative Action Act on the principle of exhaustion of alternative dispute resolution and/or utilization of internal mechanisms of appeal or review.

12. The Respondent concedes that the Claimant is an employee of the Kenya Meteorological Department and that it issued him with a transfer letter dated 15th December 2022 Ref: MET/1990148319/34. However, they insist that the transfer was a normal administrative action, hence he was not unreasonably deployed/transferred in bad faith as alleged. The Claimant was administratively deployed from Jomo Kenyatta International Airport Meteorological Station to Voi Meteorological Station due to exigencies of work.
13. The Respondent acknowledges that on 19th December 2022, the Kenya Meteorological Department received a letter from the Claimant stating that he was not ready to report to Voi Meteorological Station since he had undertaken a loan from Gulf African Bank and he is subject to monthly deductions of Kshs. 104,000. The Claimant stated that the transfer would affect his airport allowance and house allowance. Further, vide a letter dated 20th December 2022, the Claimant requested the Director, Kenya Meteorological Department to cancel his transfer to Voi Meteorological Station, again reiterating that the transfer would affect him and his family financially. In response to the Claimant's letters, the Director, Kenya Meteorological Department vide letter Ref: MET/199014319(136) dated 21st December 2022 informed the Claimant that his request had been carefully considered but not approved and he was thus instructed to report to Voi Meteorological Station as earlier instructed.

14. The Respondent accuses the Claimant of being motivated solely by the allowances he enjoys at his current station, and of not being focused on rendering services to the public. They state that the decision to deploy/transfer the Claimant is a normal administrative action undertaken to enhance efficiency in service delivery, and point out that deployments in the public service are normal and meant to improve service delivery, with deployment/transfer of officers being made to where they are needed the most. The Respondent denies that it violated any of the Claimant's Constitutional rights as alleged or at all.

DETERMINATION

ISSUES FOR DETERMINATION

15. The claimant outlined the following as the issues for determination in the suit-
16. Conversely, the respondent outlined the following as the issues for determination in the suit-
- a. Whether this claim is ripe for determination.
 - Whether the transfer was punitive and tainted with malice.
 - iii. Whether due process was followed in issuing the transfer.
17. The Court was of the considered opinion that the issues for determination in the claim were-
- a. Whether the claim was ripe for determination.

- b. Whether the transfer was an act of victimization for union activities in contravention of Article 41 of the Constitution and section 5 of the Employment Act.
- c. Whether the transfer process was proper.
- d. Whether the process was fair.

Whether the claim was ripe for determination.

The respondent's submissions

18. Whether this claim is ripe for determination. -It is the submission of the Honourable Attorney General that the Claimant has approached this Honourable Court prematurely as he has failed to exhaust the internal mechanisms available to a dissatisfied employee, prior to approaching this court. The Fair Administrative Action Act in section 9 provides to wit: ' (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1)." In addition to the aforementioned, Article 234 of the Constitution of Kenya provides that; "... (2) The Commission shall— (c) promote the values and principles referred to in Articles 10 and 232 throughout the public service; (e) ensure that the public service is efficient and effective;..." Manifestly, from a reading of section 33 of the Public Service Commission Act that the Commission is empowered to designate authorized officers to be responsible for the proper management of

its delegated functions in ministries or state departments. It therefore follows that any disgruntled employee should approach the Public Service Commission first before moving the Court we would like to echo the sentiments of the Court of Appeal in *Nyaoga v Chairman Kisii County Assembly & 3 others* 120231 KECA 1540 (KLR) on the doctrine of exhaustion. The Court held that: "The doctrine of exhaustion of remedies was created by courts in order to promote an efficient justice system and autonomous administrative state. It is a principle that requires parties to exhaust all available local administrative remedies before seeking redress in a court of law on a constitutional issue. An aggrieved party must first pursue all avenues of relief found within the administrative agency responsible for the issue at hand. The reason for this is to allow administrative agencies to address, and to potentially resolve the issue before escalating the same to the courts." [para 20] (Emphasis ours). The Court expressed similar sentiments in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] KECA 304 (KLR), where the Honourable Court noted that courts ought not to be the first port of call when disputes arise, but a fora of last resort. That notwithstanding, we are cognizant that Courts retain the residual jurisdiction to intervene in exceptional circumstances despite the existence of an alternative remedy. The Court of Appeal, succinctly explained section 9(4) of the Fair Administrative Action Act in *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] KECA 341 (KLR) and opined that: "Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and

disrespect of the Rules of natural justice are manifest." [para 23]. It is worth noting that the Claimant has never appealed against the transfer decision by the Respondent to the Public Service Commission (PSC) hence offending the doctrine of ripeness. Moreover, the Claimant has not established malice nor unreasonableness to exempt him from exhausting internal mechanisms. In the circumstances we pray that the Claimant's case be dismissed with costs to the Respondent.

The claimant's submissions on jurisdiction

19. Whether this Honourable Court is seized with jurisdiction to hear and determine the dispute and/or offends the doctrine of exhaustion of local remedies? The Respondent avows that the claim offends the statutory provisions of section 9(2) & (3) of the Fair Administrative Action Act on the principle of exhaustion of alternative dispute resolution/internal mechanisms for appeal or review. We humbly submit that it is trite law that where the Constitution or a Statute provide for an alternative procedure of settling disputes, the court should give way to allow the alternative process to run its full course. In the *National Assembly v Njenga Karume* (2008) 1 KLR the Court of Appeal held that: -In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

20. In the instant case, the Respondent relies on section 74 of the PSC Act which provides that: "Any person who is dissatisfied or affected by a decision made by an authorised officer or other authority in exercise or purported exercise of disciplinary control against any public

officer under this Act may appeal to the Commission." The Claimant submits that the dispute herein arises or relate to employment and this court has jurisdiction to determine the dispute by dint of Article 162 (2) (a) of the Constitution and section 12 (1) (a) of the Employment and Relations Court (ELRC) We further submit that the exhaustion doctrine does not apply to this case since the PSC does not have jurisdiction to remedy violations of human rights. In the instant case, the Claimant alleges violation of his constitutionally ordained rights particularly article 41 and 47 of the Constitution. In the circumstances, only this court can entertain the question of violation of the said rights.¹⁸ Be that as it may, there was urgency in the matter and Public Service Commission could not grant conservatory orders sought. Consequently, the local remedy under section 74 of the Public Service Commission Act was not viable in the circumstances of the case. We fortify the above submission by citing the case of Mustafa Abdulrahman Khogali v Gulf African Bank Limited (2020) eKLR and Mohamed Ali Baadi and others v Attorney General & 11 others (2018) eKLR where the Court held that section 74 of the PSC Act cannot limit the right of the petitioner to approach the court seeking redress of his human rights. The Claimant contends that the Respondent violated his constitutionally ordained rights contrary to the constitution. He further avers that the Respondent acted ultra-vires by transferring him without the due process. The said transfer was also done without any good cause and an attempt to punish the Claimant. Consequently, we submit that the doctrine of exhaustion of local remedies does not apply in the circumstance of this case due to the urgency involved and also the fact that the Public Service Commission cannot remedy violation of fundamental rights under the Constitution.

Decision

21. On perusal of the claim, the court found that claims of constitutional violations were raised and thus the claim could not be limited by the existence of an alternative dispute resolution mechanism under Public Service Commission Act. This court retains original jurisdiction to handle employment disputes, and while it respects the doctrine of exhaustion, it can't deny access to a party who claims constitutional violations like in the instance case. The Public Service Commission has no jurisdiction to redress constitutional violations. The court issued interim orders in the matter and the said interim orders were never challenged by appeal or otherwise and are in force. The respondent by failing to raise objection based doctrine of exhaustion at the initial stages cannot be heard to raise the same at the level of determination of the suit. The court rejects the objection based on doctrine of exhaustion and holds the suit is ripe for determination.

Whether the transfer was an act of victimization for union activities in contravention of Article 41 of the Constitution and Section 5 of the Employment Act.

22. He who alleges proves. The claimant had the burden to prove victimization and discrimination as the basis to challenge the decision of transfer. The claim was to effect that the transfer was malicious and retaliation against the claimant for participation in leading a go-slow strike based on a grievance on allowances, which, if true, would be a violation of the right to fair labour practices under Article 41 of the Constitution. The claimant stated that on the 2nd November 2022 along with other meteorological officers participated in a countrywide go slow strike seeking the reimbursement of allowances from the respondent which strike ended 4th November. That a month later along with other colleagues who were

proactive in the go-slow received a deployment letter dated 15th December 2022 informing him that he was on transfer to Voi effective 1st February 2023. He challenged the deployment vide letter dated 18th December 2022, based on financial constraints arising from a bank loan, on the ground that the employer's letter guaranteeing the allowances received at JKIA as permanent was the basis on which he took the bank loan. The letter was produced and dated 6th November 2019, addressed to Gulf Bank, which issued the claimant with the loan.

23. At the hearing, the claimant told the court that after the strike, 5 of them were transferred, but he had no evidence. He admitted that the reason for the challenge of the transfer was financial constraints and not discrimination. The claimant confirmed that as a civil servant, he was aware that a transfer was normal to improve service delivery through reorganization. He told the court he had not appealed to Public Service Commission as the notice was short. The claimant confirmed the transfer reason was stated as exigencies of duty, but queried the reason's validity. The claimant confirmed that JKIA was not his first working station and told the court he had worked in Makindu and Voi. At re-examination, he clarified the transfer was punitive as it appeared 5 of them who appeared as leaders of the strike were targeted, and further it affected him negatively financially. On cross-examination of RW1, he confirmed the transfer by coincidence was immediately after the strike. He denied the process was flawed and said there was a process-like experience of the claimant when he was deployed to JKIA. RW1 had no evidence that the procedure was not flawed. The witness was aware that the claimant took the loan on the basis of a letter by the respondent stating that the allowances were permanent, but contended that the loans were personal. The witness admitted there were no reason given for failure to reconsider the transfer. He confirmed the

claimant was entitled to fair administrative action, but denied there was action unconstitutional.

24. It is true the transfer was immediately after the strike. The claimant believed it was retaliatory. The transfer of staff is a management prerogative. The claimant confirmed the challenge of the transfer was based on his potential financial challenges on transfer to Voi, which he attributed to the employer for having guaranteed the payment allowances were permanent. The claimant confirmed there was no discrimination but a case of financial.

25. I find that the claimant did not prove on a balance of probabilities that the transfer was a retaliatory action by the respondent. The claimant had served in two other 2 stations, Makindu and Voi. The court finds that the actual reason the claimant challenged the transfer was the imminent financial constraints if he were not to earn the allowances at JKIA and not the issue of victimization.

Whether the transfer process was proper

26. The court takes the position that transfer of employees is a management prerogative, and the claimant confirmed he was aware it is necessary for government re-organisation. The claimant did not prove the flaws in the transfer process. The letter of transfer gave sufficient notice. The claimant said that the appeal did not elicit a reason for rejection of the transfer appeal. The letter was dated 21st December 2022, said his appeal was carefully considered and not approved. I find that, applying the concept of a reasonable employer, the response ought to have considered the financial issues raised, taking into account the employer's letter stating that the allowances were permanent. The court was persuaded by the decision in

Nthuci & 6 others v Ministry of Education & PSC(2025), relied on by the claimant, that the employer ought to consider family and financial circumstances. The claimant suggested to the employer to be transferred to a station with an airport in Nairobi or Laikipia so as to continue earning the allowances in view of the loan taken on basis of the guaranteed allowance payment by the employer. The employer ought to have given a response as to why the request was not accommodated. The court perused the payslip by the claimant, and it was evident that the huge loan by Gulf bank was supported by the allowances guaranteed by the employer and not by basic salary. Consequently, the court, while it appreciates transfer decision as a management prerogative, the same should be accompanied by administrative fairness, which was breached by failure to give actual reasons for rejection of the appeal to the transfer. It was apparent to the court that the transfer of the claimant to Voi which station had no airport would cause acute financial burden to the employee, and while financial status of employee is personal, the financial burden of the Gulf Bank loan could be objectively attributed to the respondent's letter to the bank guaranteeing the allowance paid to the claimant at the station with airport were permanent.

CONCLUSION

27. In the upshot the claim is held as merited. The claim is allowed as follows-
- a. A declaration that the decision of transfer of the claimant from JKIA to Voi which has no airport was unfair.
 - b. An order is issued compelling the respondents to rescind their decisions to transfer the claimant from Jomo Kenyatta International Airport Meteorological station to Voi meteorological station. The respondents are free to exercise their

management prerogative and transfer the claimant to any station where the extra allowances in the letter dated 6th November 2019 are payable.

c. The claim for victimization and discrimination fails.

d. The claimant is awarded costs of the suit.

28. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 10TH DAY
OF DECEMBER, 2025.**

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Claimant: Mino Kimeu

Respondent: absnet