



**Mutuma v Chief Officer Health Services County Government of Meru & another  
(Judicial Review E003 of 2023) [2024] KEELRC 54 (KLR) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 54 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
JUDICIAL REVIEW E003 OF 2023  
ON MAKAU, J  
JANUARY 26, 2024**

**BETWEEN**

**BAIYENIA MOSES MUTUMA ..... APPLICANT**

**AND**

**CHIEF OFFICER HEALTH SERVICES COUNTY GOVERNMENT OF  
MERU ..... 1<sup>ST</sup> RESPONDENT**

**MERU COUNTY PUBLIC SERVICE BOARD COUNTY GOVERNMENT OF  
MERU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. On 12<sup>th</sup> October 2023, I granted the applicant leave to apply for order of certiorari to quash the 1<sup>st</sup> respondent's decision contained in the transfer letter dated 12<sup>th</sup> September 2023. I further directed that the leave granted shall operate as stay of the impugned decision until 7<sup>th</sup> November 2023.
2. The applicant, then filed the instant motion dated 26<sup>th</sup> October 2023 seeking the following orders:-
  - i. That an Order of Certiorari do issue to remove into this court and quash the decision of the 1<sup>st</sup> Respondent herein transferring the Applicant from Kanayakine Sub-County Hospital to Theera Health Centre conveyed via letter Ref:20150106540/TY/(21) dated 12<sup>th</sup> September 2023.
  - ii. That an Order of Prohibition do issue directed to the Respondents prohibiting them, their agents, servants, and/or officers from transferring the Applicant from Kanyakine Sub-County Hospital to Theera Health Centre conveyed via letter Ref:20150106540/TY/(21) dated 12<sup>th</sup> September 2023.
  - iii. That the costs of this application be provided for on full indemnity basis.



3. The respondents were served with the motion, leave order and mention notices but failed to file any response. Consequently, the motion proceeded as unopposed.

### **Factual background**

4. The applicant is a clinical officer personal number 20150106540 employed by County Government of Meru. In February 2023 he was transferred from Muthara Sub-county Hospital to Kanyakine sub-county Hospital. On 16<sup>th</sup> July 2023 he saw a posting order dated 13<sup>th</sup> July 2023 transferring him from Kanyakine to Ndumuru Health Centre with immediate effect. He appealed against the transfer on 17<sup>th</sup> July 2023 but on 27<sup>th</sup> July 2023, Kanyakine Sub-county Hospital notified him to collect his release letter even before the appeal was heard.
5. He wrote to the Medical Superintendent Kanyakine Hospital on 30<sup>th</sup> July 2023 protesting the release before his appeal was determined. He further wrote to the 1<sup>st</sup> respondent the same day for update of the appeal, and also for clarification about Ndumuru Health Centre which upon research he had confirmed to be non-existent. The only facility in Ndumuru was a Dispensary under construction without basic amenities such as water, electricity and toilet.
6. Ndumuru is also at the Meru-Isiolo boarder, that has been experiencing armed conflict, generally unsafe and lacking proper access to roads and cellular network. Besides the area lacks Government housing units and rental houses which means he would be commuting over 60kms every day. Further, the respondents have made no arrangements pertaining to the applicant's security or accommodation prior to posting.
7. The applicant was not pleased with the second transfer in less than six months. He had previously been transferred in 2017, 2020, 2021 and 2022 to different corners of the County of Meru. He attributed his frequent transfer to his union activities including a letter he signed together with other Health worker unions in Meru on 5<sup>th</sup> July 2023 raising several grievances.
8. When his appeal was ignored, he filed Judicial Review suit Meru JR No.E002 of 2023 and obtained leave which stayed the transfer. Upon service of the court process, the respondents revoked the transfer to Ndumuru Health Centre in order to circumvent court process, and transferred him to Theera Health Centre vide the impugned letter dated 12<sup>th</sup> September, 2023. Hence the instance suit.

### **Submissions**

9. The applicant submitted that the transfer to Theera Health Centre was tainted with illegality and irrationality, and it violated his legitimate expectation. As regards illegality, the claimant relied on the definition given by the Ugandan case of *Pastoli v Kabale District Local Government Council & others* (2008) 2 EA 300 where the court defined illegality as error of law in the decision-making process. In the instant case, it was submitted that the respondents decision to transfer the applicant was made without following mandatory and material procedure, or condition of giving sufficient notice. Instead the transfer was to take effect immediately even before the appeal against the rescinded transfer was determined.
10. He urged the court to be guided by definition of illegality in the English case of *Council of Civil Service Union v minister for the Civil Service* (1984) 3 ALL ER 935 where the court held that illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.
11. The applicant maintained that the decision to transfer the applicant was without sufficient notice and without necessary tools and facilitation in terms of transfer allowances, is disregard of his



Constitutional rights. Further the transfer violated his right to fair administration action under Article 47 of *the Constitution* and Article 1, 2, 3 and 4 of the *ILO C135* (Workers' Representatives' Convention of 1971 No.135).

12. The Applicant further relied on *Pastoli v Kabale* case, supra where irrationality was defined as gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it would have made such a decision. He further cited the *Council of Civil Service Union case, supra* where irrational decision was described as outrageous in defiance to logical or acceptable moral standards that no reasonable person would arrive at the same decision.
13. The applicant submitted that the rescinding of the earlier transfer and giving the impugned transfer was irrational because it was made in bad faith after the court order of stay was issued in JR No.E002 of 2023.
14. As regards legitimate expectation, it was submitted that his frequent transfers are not only unfair but also contravenes his rights and principles of human dignity, social justice and non-discrimination. His right to have his appeal considered before his second transfer could take effect.

### **Issues for determination**

15. As earlier observed, the motion herein was not opposed and therefore the facts set out by the applicant have not been rebutted. However, I would state from the onset that the prayer for prohibition order is incompetent for want of leave of the court to apply. The applicant only sought and obtained leave to apply for order of certiorari. Therefore, the only issue for determination is whether the applicant has laid a basis for granting the order of certiorari.
16. In the Ugandan case of *Pastoli v Kabale District Local Government Council & others* (2008) 2 EA 300, the court held that: -

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.”
17. In this case the applicant submitted that his transfer to Theera was tainted with illegality. In the *Pastoli* case above, illegality was defined as:-

“...when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.”
18. In this case, the applicant has been transferred from one hospital to another frequently between 2017 and 2023. It is not denied that in March 2021 he was transferred from Kanyakine Sub-county Hospital to Timau Sub-county Hospital. In January 2022, he was transferred from Timau to Muthara sub-county Hospital. In January 2023 he was transferred from Muthara back to Kanyakine and in July 2023 he was again transferred to Ndumuru Health Centre. The reason for the transfers was cited as service need.
19. He appealed against the transfer to Ndumuru vide the letter dated 16<sup>th</sup> July 2023 raising the following issues:-
  - a. The frequent transfers were not justified by valid reason.
  - b. No transfer allowances were paid to him.



- c. The frequent transfers were unsettling his family including minor children and causing much psychological torture contrary to Article 45 of *the Constitution*.
  - d. Within three years he was transferred four times from one corner of the country to the other.
  - e. Ndumuru is a highly security volatile area and no security measure was availed to him.
  - f. The frequent transfers are a violation of his right to fair labour practices contrary to Article 41 of *the Constitution*.
  - g. The frequent transfers are violation of his right to fair administrative action contrary to Article 47 of *the Constitution*.
  - h. The transfers are affecting his performance as the National Trustee of the Kenya Union of Clinical Officers, and as its Branch Secretary in Meru County.
20. When the applicant was released from Kanyakine on 24<sup>th</sup> July 2023, before his appeal was addressed, he moved to court for judicial review and stay orders were granted. Upon service with the court orders, the respondents rescinded the transfer to Ndumuru and transferred him to Theera Health Centre. Hence the instant case where the applicant contends that there is no valid reason for the transfer and the same is tainted with illegality.
21. In my view, transfers are generally matters of managerial prerogatives which, this court would rather leave to the employer to determine where the services of his employees are required. However, when it comes to public service the court has a role to review administrative decisions including transfers and deployment through the lenses of Article 41 and 47 of *the Constitution*. In such instances the court ought to consider whether the national values and principles of governance under chapter six of *the Constitution* have been observed and, whether a right in the Bill of right is infringed or threatened with violation, or whether the principles of public service under Article 232 and 236 of *the Constitution* have been infringed, or even whether any law or a principle of law has been infringed during the process of making the decision.
22. In this case it has not been denied that the frequent transfers have taken place. It has also not been denied that the applicant has a family including minor children who have been unsettled by the frequent transfers. It has further not been denied that the applicant was not facilitated in all these speedy transfers.
23. In my view, transferring a public officer 4 times in three years, and two times within six months is something this court must review. It smacks of abuse of office and serious violation of the national values and principles of governance set out in Article 73 (2) of *the Constitution* , which provides that: -

- “(2) The guiding principles of leadership and integrity include—
- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
  - (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;
  - (c) selfless service based solely on the public interest, demonstrated by—
    - (i) honesty in the execution of public duties; and



- (ii) the declaration of any personal interest that may conflict with public duties;
  - (d) accountability to the public for decisions and actions; and
  - (e) discipline and commitment in service to the people.”
24. In this case the speed transfers of the applicant violated his rights to fair labour practices and the right of his minor children. Employers in the public service both national and counties must appreciate that the office they hold is public trust and their decisions or actions must meet high standards of professionalism, and be aligned with the law so as to bring dignity to the office and promote public confidence in the integrity of the office.
25. Such confidence is eroded by tyranny and impunity of some public officers who are increasingly exposing their juniors to untold suffering through transfers and deployments in breach of their contract of service. Such contracts in most cases, are contained in a galaxy of statutes, Regulations, Policy Manuals, Memos and appointment letters. This court will readily review and intervene where decision to transfer public officers is contrary to the employees’ contract, or if done in a manner that is inconsistent with the purposes and objects of *the constitution* like in this case. In this case I am satisfied that the impugned transfer is tainted with illegality for the aforesaid reasons.

### **Irrationality**

26. Irrationality was also defined by the Ugandan Court in Pastoli case, *supra* thus:-
- “Irrationality is when there is such gross unreasonableness in the decision-making process in the decision taken or act done, that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision.”
27. In the case of *Council of Civil Service Union, supra* the court stated that:-
- “By irrationality I mean what can now be succinctly referred to as Wednesbury unreasonableness... it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”
28. In this matter the facts have not been disputed. The applicant has been transferred from his work stations quite frequently. In 2023 he was transferred twice between January and July. The reason cited was service needs.
29. However, it must always be appreciated that supervisors or “bosses” in the public service have a duty to act fairly and reasonably towards their juniors. Decisions to transfer a public officer ought to consider that the junior officers do not belong to the “bosses”. They are public servants who are also human being with family needs and obligations. Frequent transfers without any disciplinary issue not only compromises service delivery but also amounts to unfair labour practices.
30. Besides, the applicant is a trade union official and attributes his woes to his union activities. That allegation has not been rebutted as the respondent has not appeared to confirm that there was indeed a need to transfer the applicant. It has also not justified the frequency of the transfers. Finally, it has not justified the reason of transferring the applicant with immediate effect. In the circumstances I find and hold that the decision to transfer the applicant frequently and especially the impugned transfer to Theera Health Centre with immediate effect is unreasonable.



## **Conclusion**

31. I have found that the frequent transfers of the applicant from one station to another is tainted with illegality and irrationality. It violates the applicant's right to fair labour practices and it is also unreasonable considering the effects it has on his family. In the circumstances, I find that the application has met the legal threshold for granting the order of certiorari sought. Consequently, I issue an order of certiorari bringing into this court and quashing the decision of the respondents contained in the 12<sup>th</sup> September, 2023 purporting to transfer the applicant from Kanyakine Sub-county Hospital to Theera Health Centre with immediate effect. The applicant will also have costs of the suit.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF JANUARY, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

### **Order**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

