



**Kenya Medical Practitioners, Pharmacists and Dentists Union v Nairobi City
County Government & 2 others; Nairobi Metropolitan Services (Defunct)
& 130 others (Interested Parties) (Employment and Labour Relations Cause
E904 of 2023) [2024] KEELRC 403 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 403 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E904 OF 2023**

**BOM MANANI, J
FEBRUARY 29, 2024**

BETWEEN

**KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS
UNION CLAIMANT**

AND

**NAIROBI CITY COUNTY GOVERNMENT 1ST RESPONDENT
NAIROBI CITY COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT
PUBLIC SERVICE COMMISSION 3RD RESPONDENT**

AND

**NAIROBI METROPOLITAN SERVICES (DEFUNCT) INTERESTED PARTY
HONOURABLE ATTORNEY GENERAL INTERESTED PARTY
DR KIRONJI MARGARET WANJIKU INTERESTED PARTY
DR SUMBA IRENE NAOMI INTERESTED PARTY
DR NJOGU SIMON MUTHEE INTERESTED PARTY
DR TAJBHAI MUFADDAL SHABIBIR INTERESTED PARTY
DR LUMIRE ELIZABETH NYAGOTHIE INTERESTED PARTY
DR ADEGU JACOB WILLIAM INTERESTED PARTY
DR HOLLYWOOD EDISON OKOTH INTERESTED PARTY
DR DAWOOD MARIAM ALI AHMED INTERESTED PARTY
DR KAMANDA ANN NDU'TA INTERESTED PARTY**



DR MWANGI GRACE WANJIKU INTERESTED PARTY
DR CHEMUTAI DOROTHY INTERESTED PARTY
DR HASSAN RAMLA NAFULA INTERESTED PARTY
DR GATAMA GEORGE WANYOIKE INTERESTED PARTY
DR WAFULA TIMOTHY JUMA INTERESTED PARTY
DR WAFULA MARGRET CYNTHIA INTERESTED PARTY
DR ODHIAMBO PAMELA AMATTA INTERESTED PARTY
DR MUTIO TIMOTHY KALELI INTERESTED PARTY
DR ALKAMA IBRAHIM HUSSEIN INTERESTED PARTY
DR MUSIDIA KEVIN MUKONJERO INTERESTED PARTY
DR MUTUNGA ELIZABETH VAATI INTERESTED PARTY
DR OTIENO VICTOR ACHACHA INTERESTED PARTY
DR MAKANA COLLINS OTENG'O INTERESTED PARTY
DR AMBANI GERALD INYANGALA INTERESTED PARTY
DR CHESIRE ALBERT KABUTIEI INTERESTED PARTY
DR ABDI UMULKHEIR MOHAMED INTERESTED PARTY
DR GITHURA ROSE NJOKI INTERESTED PARTY
DR ABDI SAADIA FARAH INTERESTED PARTY
DR OSUMBA JOYCE AOKO INTERESTED PARTY
DR MAUNDU BETTY MBENGE INTERESTED PARTY
DR SHOBE GUYO SWALEH INTERESTED PARTY
DR NYAGA DEBORAH KANINI INTERESTED PARTY
DR MBOGHO ETHEL WAMACHI INTERESTED PARTY
DR NYAMWEYA NINA KERUBO INTERESTED PARTY
DR KIPTOO ALLAN INTERESTED PARTY
DR MOKAYA RYAN MWAMBA INTERESTED PARTY
DR ISSACK BARKE MOHAMED INTERESTED PARTY
DR KADZOMBA HARRIET DAMA INTERESTED PARTY
DR SHARIFF HASSAN MOHAMMED INTERESTED PARTY
DR OYOO CARL OWUOR INTERESTED PARTY
DR KIPROP ALICEN JERUTO INTERESTED PARTY
DR GITONGA ALEX INTERESTED PARTY
DR MATURI MARVIN INTERESTED PARTY
DR THIRIMA JACINTA WAMBUI INTERESTED PARTY



DR. ODHIAMBO BRIAN OWUOR INTERESTED PARTY
DR SAID MUSTABSHIRA FOFEEK INTERESTED PARTY
DR KIBAYA EZRA MURIUNGI THAIMU INTERESTED PARTY
DR MULATYA PAUL MASEKI INTERESTED PARTY
DR DAHIR ABDIAZIZ MAHAMUD INTERESTED PARTY
DR FARAH ABDULKADIR MOHAMED INTERESTED PARTY
DR GITAHI EUNICE NJOKI INTERESTED PARTY
DR. ONJIRA JOHN ANYUL INTERESTED PARTY
DR. OGENYA BRIAN ODHIAMBO INTERESTED PARTY
DR. SIRONGA DIANA NYAMBURA INTERESTED PARTY
DR. NGUGI FLORENCE LUCY INTERESTED PARTY
DR. KYALE WINNIE MWIKALI INTERESTED PARTY
DR. NGILA DORIS NDUNGE INTERESTED PARTY
DR. OWALLA EILEEN ADHIAMBO INTERESTED PARTY
DR. MUTHEE FRIDAH KENDI INTERESTED PARTY
DR. AJWALA BONFACE WASONGA INTERESTED PARTY
DR. MELI FRANCIS KIMAIYO INTERESTED PARTY
DR. ONTIRIA CHRISTINE INTERESTED PARTY
DR. AUMA CYNTHIA ALUOCH PAULINE INTERESTED PARTY
DR. MOHAMED MOHAMUD ABDIKARIM INTERESTED PARTY
DR. KANGOR BOAZ INTERESTED PARTY
DR. KEDIE YUSSUF JIBRILTH INTERESTED PARTY
DR. OMBEO CORNELIUS NYAGWANGA INTERESTED PARTY
DR. MOROGA WILLIAM KOBOKO INTERESTED PARTY
DR. OMINDE FRANCIS ODUOR INTERESTED PARTY
DR. KILONZO PHILIP MWENDWA INTERESTED PARTY
DR. GICHOBI HELLEN NYAMBURA INTERESTED PARTY
DR. BUNDI ISAAC MWENDA INTERESTED PARTY
DR. NGAYAI GERALD MUSOMBA INTERESTED PARTY
DR. TIKOLO CHERYL ASAKANAIU INTERESTED PARTY
DR. CHUMBA LAURA BUSIEKA INTERESTED PARTY
DR. GICHEHA MAUREEN WANJIRU INTERESTED PARTY
DR. OCHIENG CYNTHIA AKINYI INTERESTED PARTY
DR. MALELE VICTOR OSCAH INTERESTED PARTY



DR. OMOLLO ANNE AKINYI INTERESTED PARTY
DR. KILONZO HELLEN MUENI INTERESTED PARTY
DR. ADEN ALI ABDI INTERESTED PARTY
DR. ALI SARA HASSAN INTERESTED PARTY
DR. ETIANG EVANS OMURIAI INTERESTED PARTY
DR. KIPKEU CHEMTAI INTERESTED PARTY
DR. NJERU WILSON NJAGI INTERESTED PARTY
DR. MUTALI HARON LUBISIA INTERESTED PARTY
DR NYABWA FREDRICK ODHIAMBO INTERESTED PARTY
DR KUNG'U JACKLINE WANJIRU INTERESTED PARTY
DR. LANGAT JOAN CHERONO INTERESTED PARTY
DR NJEHU CLARE WANJIRU INTERESTED PARTY
DR. MAINA MARGARET WANGUI INTERESTED PARTY
DR MOMANYI VINCENT INTERESTED PARTY
DR SHAH MITALI MAHESHKUMAR INTERESTED PARTY
DR MOHAMED MUHSIN ADOW INTERESTED PARTY
DR ZAKARIA FATUMA JAMAL SHARIFF INTERESTED PARTY
DR AMOGOLA MERLENE AOKO INTERESTED PARTY
DR WACHIRA JOHN RUTUNU INTERESTED PARTY
DR CHIRCHIR CHEBETT INTERESTED PARTY
DR ELMI IQRA ABDI INTERESTED PARTY
DR OMWENO DAVE GIKOBI OMWENO INTERESTED PARTY
DR KARANI RENFIN INTERESTED PARTY
DR ALI FATMA ADAN INTERESTED PARTY
DR MUNYI ERIK KINYANJUI INTERESTED PARTY
DR MOKANDU JUNE KEMUNTO INTERESTED PARTY
DR. BARBARA KASENGA INTERESTED PARTY
DR. CHEPCHIRCHIR DAISY BOR INTERESTED PARTY
DR. OMWENGA BRENDA NYABOKE INTERESTED PARTY
DR. NYAMU YVONNE MUKIRI INTERESTED PARTY
DR. MBURU PATRICIA WANJIKU INTERESTED PARTY
DR SHEIKH IMRAN ABDISHAKUR INTERESTED PARTY
DR OMOLLO HEZRON OMONDI INTERESTED PARTY
DR ADONGO MARGRET PHOEBE INTERESTED PARTY



DR ASGERALI SARAH	INTERESTED PARTY
DR KANG'ORI MERCY MURUGI	INTERESTED PARTY
DR AMIIN AHMED RASHID	INTERESTED PARTY
DR ARNOLD BUNYOLI BUGAH	INTERESTED PARTY
DR BERNARD KEVIN WAMBUGU	INTERESTED PARTY
DR BERYL ACHIENG KAUDIA	INTERESTED PARTY
DR DAVID OGECHI ATANDI	INTERESTED PARTY
DR DIANA KEMUNTO	INTERESTED PARTY
DR DORCAS NYANCHAMA OBARE	INTERESTED PARTY
DR IAN ARNOLD ORWA	INTERESTED PARTY
DR JEMIMAH KARINGI MUGO	INTERESTED PARTY
DR KINGI KEMUNTO MOCHACHE	INTERESTED PARTY
DR MARIAM ALI AHMED DAWOOD	INTERESTED PARTY
DR MARIANNE WAMAITHA GITAU	INTERESTED PARTY
DR MAUREEN ADUNDO OKANGO	INTERESTED PARTY
DR PHILIP NELSON OLIELO	INTERESTED PARTY
DR RASHID ISSA MUSA	INTERESTED PARTY
DR RASHIDA BHAIJI ZAVERY	INTERESTED PARTY

JUDGMENT

Introduction

1. The instant suit seeks to compel the Respondents to, inter alia, convert the contracts of service for the 3rd to 131st Interested Parties (also referred to as Claimant's members) from fixed term to permanent and pensionable. These Interested Parties are all members of the Claimant currently engaged in the service of the 1st Respondent.
2. The Claimant's case is anchored on the 3rd Respondent's circular dated 3rd August 2021. According to the Claimant, this circular required that the contracts for the 3rd to 131st Interested Parties be converted from fixed to indefinite term contracts.
3. The suit is opposed by the Respondents. The 1st and 2nd Respondents argue that the 3rd Respondent has no powers in law to direct them in the performance of their functions including those that relate to management of human resource that falls within their docket. On the other hand, the 3rd Respondent asserts that the Claimant's action is misconceived since its (the 3rd Respondent's) circular of 3rd August 2021 did not apply to the Claimant's members in the action.

Claimant's Case

4. The Claimant avers that it is a Trade Union for medical practitioners, pharmacists and dentists working in Kenya. It contends that the 3rd to 131st Interested Parties are its members.



5. The Claimant avers that on diverse dates in 2021 the 3rd Respondent employed the 3rd to 131st Interested Parties on behalf of Nairobi Metropolitan Services (NMS), the 1st Interested Party. According to the Claimant, the 3rd Respondent undertook this task pursuant to the authority that had been conferred on it from the 1st and 2nd Respondents under the Deed of Transfer of Functions between the 1st Respondent and the National Government dated 25th February 2020. The aforesaid Deed of Transfer of Functions was published under Gazette Notice No. 1609 of 2020.
6. The Claimant contends that although the 3rd to 131st Interested Parties were initially hired on fixed term contracts for three years, the 3rd Respondent issued a circular dated 3rd August 2021 directing its authorized officers to convert these contracts into indefinite term contracts. According to the Claimant, the 3rd Respondent's circular only excluded persons serving as personal staff and advisors of other public officers whose tenure of office was tied to those that they were attached to and persons engaged on short term special programmes.
7. The Claimant contends that despite the express directions in the aforesaid circular, the Respondents and NMS have jointly and severally failed to implement it in respect of the 3rd to 131st Interested Parties. The Claimant further contends that the 3rd to 131st Interested Parties are not engaged on contract terms as personal staff or advisors of other officers in government. And neither are they serving on special programmes. According to it (the Claimant), the 3rd to 131st Interested Parties are part of the mainstream civil service. Therefore, they are entitled to benefit from the directions by the 3rd Respondent in its circular dated 3rd August 2021.
8. The Claimant avers that despite every effort to have the Respondents implement the circular to benefit the 3rd to 131st Interested Parties, this has not yielded fruit. And hence the institution of this suit to compel the Respondents to give life and meaning to the instrument.

1st and 2nd Respondents' Case

9. On their part, the 1st and 2nd Respondents deny that they are under obligation to absorb the Claimant's members. These two Respondents deny that they are bound by the 3rd Respondent's circular of 3rd August 2021 to absorb the Claimant's members on indefinite terms.
10. The two Respondents contend that the process of hiring the Claimant's members was steeped in irregularities and hence the entire exercise smirks of illegality. Accordingly, they issued disclaimers stating that they were not going to absorb the staff hired by NMS after the latter's tour of duty came to an end.
11. The 1st and 2nd Respondents contend that the Deed of Transfer of Functions that was executed between the National Government and the 1st Respondent did not transfer the 2nd Respondent's functions to the National Government. Therefore, the unilateral recruitment of the Claimant's members by the 3rd Respondent without the concurrence of the 2nd Respondent was irregular and in contravention of the law.
12. The 1st and 2nd Respondents aver that the doctrine of separation of powers places a distinctive divide between them and the 3rd Respondent. Whilst the 3rd Respondent's mandate is largely confined to the National Government realm, the mandate of the two other Respondents focuses on devolved government.
13. The two Respondents aver that the Deed of Transfer of Functions gave National Government, acting through the NMS, a temporary mandate over some functions of the 1st Respondent. However, the NMS failed to work in consultation with the 2nd Respondent in raising the human resource to perform



these functions. Instead, it (the NMS) exclusively collaborated with the 3rd Respondent in this respect, an actor at national level.

14. The 1st and 2nd Respondents aver that they are constitutionally distinct from the 3rd Respondent in conducting their affairs at different levels of government. Therefore, they cannot be compelled to absorb staff recruited by the 3rd Respondent.
15. The two Respondents aver that after the NMS concluded its tour of duty, they took over the 3rd to 131st Interested Parties on the same terms that they had been serving under the NMS. They (the 1st and 2nd Respondents) aver that they are currently undertaking recruitment of staff to take up the positions of the 3rd to 131st Interested Parties once their contracts come to a close. These Respondents assert that the 3rd to 131st Interested Parties have, as a matter of fact, applied for the positions that they currently hold and should they be successful in the impending recruitment process, they will be absorbed on new terms subject to the budgetary limits of the 1st Respondent.

3rd Respondent's Case

16. The 3rd Respondent confirms that by a Deed of Transfer of Functions dated 25th February 2020, the 1st Respondent transferred some of its functions to the National Government. Some of the transferred functions included provision of healthcare services which the Claimant's members were recruited to perform.
17. The 3rd Respondent avers that the National Government set up the NMS as a special purpose vehicle to execute the transferred functions. According to this Respondent, the tenure of the NMS was tied to the Deed of Transfer of Functions aforesaid and was temporary in nature.
18. The 3rd Respondent contends that clause 5.6 of the Deed of Transfer of Functions provided for the manner in which the human resource element for the NMS was to be handled. According to it, personnel to execute the transferred functions were to be seconded from the 1st Respondent to the NMS. However, after undertaking the secondment process, it was realized that the 1st Respondent's staff that had been dedicated for this purpose were insufficient and hence the need to recruit additional individuals.
19. The 3rd Respondent contends that the Claimant's members were recruited to fill the gap that was left after the aforesaid secondment exercise. That they were recruited specifically to execute the transferred devolved functions of the 1st Respondent as had been delegated to the NMS.
20. The 3rd Respondent states that the Claimant's members were hired on fixed term contracts for three years. The contracts had a start and end date.
21. The 3rd Respondent contends that this arrangement was informed by the reality that the transferred functions were to be undertaken by the NMS on behalf of the National Government for a specified period of time. Eventually, they (the transferred functions) were to revert to the 1st Respondent as the body with the constitutional mandate to execute them.
22. The 3rd Respondent avers that the 1st Respondent's functions eventually reverted to it after the August 2022 elections. With the end of these elections, a new administration was installed at the 1st Respondent thus resuming execution of its (the 1st Respondent's) constitutional mandate.
23. The 3rd Respondent avers that the statutory mandate of hiring staff for the 1st Respondent vests in the 2nd Respondent. According to the 3rd Respondent, it hired the Claimant's members on contract in order to provide the 2nd Respondent with the window to exercise this statutory mandate once the new



- administration for the 1st Respondent came on board in order to determine whether to retain the said employees once their contracts lapsed.
24. The 3rd Respondent avers that by virtue of article 234(2)(i) of *the Constitution*, its mandate in respect of County Governments is confined to hearing and determining appeals from county public service. This mandate does not extend to hiring of staff for County Governments.
 25. The 3rd Respondent avers that its involvement in the hiring of the Claimant's members for the NMS must be understood in the context of the Deed of Transfer of Functions between the 1st Respondent and the National Government. It was simply discharging a delegated mandate on behalf of the parties to the Deed of Transfer of Functions to in order to address the human resource requirements under the arrangement.
 26. The 3rd Respondent avers that the Claimant's members were engaged for the duration of the transfer of functions under the Deed of Transfer of Functions. As such, their contracts could not graduate from fixed term to indefinite term contracts.
 27. The 3rd Respondent contends that the Deed of Handover of Transferred Functions from the National Government back to the 1st Respondent provided that at the close of the arrangement, officers who had been seconded from the 1st Respondent to the NMS were to resume their positions at the 1st Respondent establishment. All other persons who had been hired for the NMS on fixed term contracts were to continue serving the 1st Respondent for the balance of the terms of their contracts or as was to be decided by the 2nd Respondent.
 28. The 3rd Respondent contends that the Claimant has misconstrued its (the 3rd Respondent's) circular of 3rd August 2021. It contends that this circular was addressed to its (the 3rd Respondent's) authorized officers within the National Government structure and not the 1st and 2nd Respondents.

Issues for Determination

29. After analyzing the pleadings and evidence on record, I am of the considered view that the following are the questions for determination in the cause:-
 - a. Whether the 3rd Respondent's circular of 3rd August 2021 applied to the Claimant's members comprising the 3rd to 131st Interested Parties.
 - b. Whether the Claimant is entitled to the reliefs that it seeks through these proceedings.

Analysis

30. *The Constitution* of Kenya 2010 establishes a devolved system of government with two levels of government. These are the National and County Governments.
31. *The Constitution* goes further to allocate functions to the two levels of government. Under the 4th Schedule thereto, the function of provision of healthcare services is devolved to County Governments. The National Government only handles the aspect of health policy. It is in this context that the 1st Respondent undertakes the function of provision of healthcare services within its geographical reach.
32. Although *the Constitution* has allocated specific functions to either of the two levels of government, it provides a window for the transfer of these functions from one level to the other. In this regard, article 187(1) thereof provides as follows:-

‘A function or power of government at one level may be transferred to a government at the other level by agreement between the governments if:-



- a. the function or power would be more effectively performed or exercised by the receiving government; and
 - b. the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.”
33. When there is transfer of a function as contemplated under article 187 (1) of *the Constitution*, the level of government to which the function is transferred only acts as a delegate of the level that is constitutionally mandated to execute the function. Thus, the function does not constitutionally divest from the level of government that has been constitutionally mandated to execute it.
34. Therefore, the level of government to which the function is transferred only acts on behalf of the level which is constitutionally mandated to execute the function. Otherwise, the function constitutionally remains with the level of government which is constitutionally mandated to execute it.
35. Article 187 (2) (b) of *the Constitution* renders this reality apparent. It provides as follows:-

“Constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule.”
36. Thus, when the 1st Respondent transferred the function of provision of healthcare services to the National Government under the Deed of Transfer of Functions dated 25th February 2020, it did not relinquish its constitutional mandate over this function. Constitutionally, the function still vested in the 1st Respondent notwithstanding that it was to be performed by the National Government for the duration of the transfer. Put differently, the National Government was only acting as a delegate of the 1st Respondent in executing this task.
37. As such personnel who were hired by the 3rd Respondent to perform the function on behalf of the NMS were engaged to perform a function that is constitutionally devolved to the 1st Respondent, a County Government. They were not performing a function that falls within the constitutional purview of the National Government as provision of healthcare services is devolved to County level.
38. This reality means that the Claimant’s members were hired as officers at county government level performing a devolved function that had temporarily been delegated to the National Government under the Deed of Transfer of Functions. They were not engaged as employees of the National Government because constitutionally, this level of Government does not deal with provision of healthcare services and cannot therefore hire staff for this purpose at national level.
39. The 3rd Respondent contends that it hired members of the Claimant on behalf of the NMS to perform the transferred healthcare services under the Deed of Transfer of Functions dated 25th February 2020. It avers that these officers were hired specifically for this purpose which was in the nature of a special programme since the transfer of functions was time bound. Eventually, the transferred functions were to revert to the 1st Respondent as indeed happened after the elections of August 2022.
40. The 3rd Respondent contends that it made the appointments in question on the authority of the parties to the Deed of Transfer of Functions dated 25th February 2020. As such, the appointments ought to be construed in the context of this arrangement.
41. The 3rd Respondent avers that beyond the aforesaid arrangement, it has no constitutional or statutory mandate to appoint or assign personnel to the 1st Respondent. Its (the 3rd Respondent’s) powers with respect to County Governments are limited to hearing and determining appeals from the county public service.



42. Article 5.6 of the Deed of Transfer of Functions provides as follows:-

“The relevant human resources for the implementation of this agreement shall be seconded from the County Government to the National Government;”

43. From the foregoing, it is clear that the parties to the Deed intended that personnel to perform the transferred functions were to be sourced from the 1st Respondent and seconded to the NMS. Secondment of staff is in the nature of a lease of an employee from one employer to another for a particular purpose and for a limited duration. Black’s Law dictionary describes the term “secondment” as follows:-

“A period of time that a worker spends away from his or her usual job either doing another job or studying.”

44. Where there is secondment of an employee, the legal employer for the seconded employee remains the initial/primary employer; not the individual to whom the employee has been seconded. Once the secondment contract lapses, the seconded employee resumes his role with the primary employer.

45. The Deed of Transfer of Functions contemplated that the individuals who were to perform the transferred functions would be employees of the 1st Respondent who would have been leased or seconded to the National Government for the duration of the arrangement. Upon the lapse of the arrangement, these employees were to return to their stations within the rank and file of the 1st Respondent.

46. However, as the 3rd Respondent stated in evidence, personnel from the 1st Respondent to perform the transferred functions were not sufficient. As a result, it (the 3rd Respondent) was forced to undertake temporary recruitment of additional individuals to execute these functions. It is in this context that the 3rd Respondent hired the Claimant’s members to serve in the NMS on fixed term contracts.

47. It is noteworthy that the Deed of Transfer of Functions did not provide for recruitment of additional staff to perform the transferred functions. However, the 3rd Respondent avers that this was necessitated by the insufficiency of human resource within the rank and file of the 1st Respondent to be seconded to the NMS for this purpose.

48. It is further noteworthy that when the 3rd Respondent undertook recruitment of the additional staff, neither the 1st Respondent nor the NMS on behalf of the National Government (the principal actors under the Deed of Transfer of Functions) objected to the process. On the contrary and by their conduct, the 1st Respondent and NMS sanctioned the actions of the 3rd Respondent by taking on board the 3rd to 131st Interested Parties. In effect, the two (the 1st Respondent and NMS) granted the 3rd Respondent ostensible authority to make the appointments on their behalf.

49. The aforesaid appointments by the 3rd Respondent were done to complement the human resource requirements for NMS under clause 5.6 of the Deed of Transfer of Functions. In executing this task, the 3rd Respondent was acting as an ostensible delegate of the 1st Respondent and the NMS on behalf of the National Government pursuant to the agreement between the 1st Respondent and the National Government under the said Deed. It (the 3rd Respondent) was resolving the issue of staffing on behalf of the two within the context of the Deed of Transfer of Functions.

50. Having regard to the foregoing, it is apparent that when the 3rd Respondent hired the Claimant’s members on behalf of the NMS, it did so pursuant to the ostensible mandate donated to it by the 1st Respondent and NMS to fill the gap in the number of staff that were required to be seconded from the



- 1st Respondent to the NMS to execute the devolved healthcare function that had been delegated by the 1st Respondent to the National Government by virtue of article 187 of *the Constitution*. As such, the 3rd Respondent was not recruiting for the National Government at national level but for the NMS to enable it to discharge the specific mandate of implementing the transferred devolved functions during the transfer window.
51. If the 1st Respondent had sufficient personnel to be seconded to the NMS, the need to hire the 3rd to 131st Interested Parties would not have arisen. Thus, their recruitment was purely to fill the gap that was left during the secondment exercise from the 1st Respondent to the NMS to raise sufficient manpower to execute the transferred functions during the transfer window.
 52. As indicated earlier, despite the aforesaid arrangement between the 1st Respondent and the National Government, the function of provision of healthcare services still constitutionally inhered in the 1st Respondent, a County Government. Therefore, the individuals whom the 3rd Respondent engaged under the arrangement were engaged as employees in the county public service. They were not hired as officers in the service of the National Government.
 53. The reality that the 3rd Respondent only has constitutional mandate to hire at national level is self-evident in article 234 of *the Constitution*. Therefore, the recruitments it undertook on behalf of the principal actors under the Deed of Transfer of Functions of 25th February 2020 to perform the transferred devolved functions were done outside its constitutional mandate as set out under article 234 of *the Constitution*. These recruitments were undertaken purely in exercise of the 3rd Respondent's delegated authority under the aforesaid Deed.
 54. Because the transfer of functions under the aforesaid arrangement was time bound (see article 9 of the Deed of Transfer of Functions), the 3rd to 131st Interested Parties were engaged in the county public service on temporary contracts. This reality is informed by the fact that by virtue of section 59 of the *County Governments Act*, the function of staffing County Governments vests in County Public Service Boards. Therefore, the individuals who were engaged to execute the transferred devolved functions during the transfer window had to exit at the tail end of the arrangement unless the 2nd Respondent was able to absorb them for an extended duration to satisfy the human resource needs of the 1st Respondent. It is in this context that the 3rd Respondent refers to the arrangement as a special programme.
 55. Counsel for the Claimant has suggested in his closing submissions that the 3rd to 131st Interested Parties are employees of the 3rd Respondent (or the National Government) because the Claimant's witness affirmed this fact during his testimony. This argument is flawed for a number of reasons.
 56. First, the 1st and 2nd Respondents' witness confirmed that although the 3rd to 131st Interested Parties were hired by the 3rd Respondent, this was for purposes of the said Interested Parties offering services to the 1st Respondent under the arrangement between the National Government (through the NMS) and the 1st Respondent that had been put in place through the Deed of Transfer of Functions dated 25th February 2020. Second, this witness stated that after the lapse of the aforesaid arrangement between the 1st Respondent and the National Government, the 1st Respondent retained the services of the 3rd to 131st Interested Parties for the balance of their tenure under the fixed term contracts with the NMS. Third, at paragraph twelve (12) of the witness statement of Dr. Davji Atellah for the Claimant, he asserts that the 1st and 2nd Respondents have refused to yield to demands by the Claimant to convert the contracts of service for the 3rd to 131st Interested Parties from fixed to indefinite term notwithstanding that the said contracts are due to lapse on diverse dates in March 2024, a clear admission by the Claimant that the 3rd to 131st Interested Parties are in the employment of the 1st Respondent on fixed



- term contracts. Thus, the contention by Counsel for the Claimant that the 3rd to 131st Interested Parties are employees of the 3rd Respondent or the National Government is founded on quicksand.
57. In any event, the Claimant's case is that the 3rd to 131st Interested Parties should be confirmed as permanent and pensionable employees in the positions that they currently hold. As noted earlier, these positions fall within the constitutional purview of the 1st Respondent. It is therefore absurd for the Claimant to contend that the 3rd to 131st Interested Parties are employees of the National Government whilst at the same time pushing for their confirmation as permanent and pensionable in positions that constitutionally fall within the purview of the 1st Respondent.
58. The Claimant has asserted that the 3rd Respondent's circular of 3rd August 2021 required that the contracts of the 3rd to 131st Interested Parties be converted from fixed to indefinite term. However, a perusal of the circular shows that it was addressing the operationalization of the superannuation scheme that was established under the Public Service Superannuation Scheme Act. The circular required contracts for employees serving in public service on fixed term basis to be converted into indefinite term in order for them to be eligible to join the new superannuation scheme that is established under the Act.
59. As was observed in *Kenya National Union of Nutritionists and Dieticians v Nairobi City County Government & 2 others* (Employment and Labour Relations Cause E972 of 2023) [2024] KEELRC 188 (KLR) (9 February 2024) (Judgment), the superannuation scheme established under the Public Service Superannuation Scheme Act only applies to public officers serving in the National Government as defined under section 2 of the Act. It (the scheme) does not apply to persons serving in the county public service where the Claimant's members in the instant action were and are still offering their services. This latter group is catered for under the County Governments Retirement Scheme Act.
60. The fact that the Claimant's members are on the payroll of the 1st Respondent, a County Government was confirmed by the 1st and 2nd Respondents' witness both in his witness statement and testimony in chief. At paragraph seven (7) of his witness statement, this witness stated that although the Claimant's members were hired by the 3rd Respondent, they were posted to work for the 1st Respondent under the NMS. During his oral testimony, he confirmed that the 3rd to 131st Interested Parties are currently on the 1st Respondent's payroll.
61. Therefore, the 3rd Respondent's circular of 3rd August 2021 which was issued to address the operationalization of the superannuation scheme under the Public Service Superannuation Scheme Act did not and does not apply to them (3rd to 131st Interested Parties). The circular only affects those public officers serving in National Government as contemplated under section 2 of the Public Service Superannuation Scheme Act. It does not apply to individuals in other spheres in the public realm including those serving under special programmes and those in the county public service. As such, the 3rd to 131st Interested Parties cannot invoke it (the circular) to push for conversion of their contracts from fixed to indefinite term contracts.
62. Importantly and as was pointed out by the 1st and 2nd Respondents' witness during his oral testimony, the legal mandate for hiring staff for the 1st Respondent vests in the 2nd Respondent. The 3rd Respondent has no constitutional or statutory powers to impose staff on the 1st and 2nd Respondents. The 3rd Respondent's powers in respect of devolved governance units is limited to hearing and determining county public service appeals in terms of article 234(2)(i) of *the Constitution*.
63. As was pointed out in *Kenya National Union of Nutritionists and Dieticians v Nairobi City County Government & 2 others* (supra), the 3rd Respondent's involvement in the recruitment of the Claimant's members in the instant case must be construed strictly in the context of the Deed of Transfer of



- Functions that was executed between the 1st Respondent and the National Government. The 3rd Respondent was merely executing a delegated function on behalf of the parties to the aforesaid Deed.
64. The Deed does not suggest that the 3rd Respondent was entitled to unilaterally impose staff on the 1st and 2nd Respondents. On the contrary, clause 5.7 thereof required it (the 3rd Respondent) to make decisions on human resource for NMS in consultation with the 2nd Respondent. Thus, to suggest that the 3rd Respondent was entitled to issue unilateral circulars to require the 1st and 2nd Respondents and the NMS to convert the contracts for the Claimant's members from fixed term to long-term is to ignore this reality.
65. In any event, if the intention of the circular was to direct the 1st and 2nd Respondents to absorb the Claimant's members on permanent terms as is suggested by the Claimant, such intention would be contrary to the express provisions of section 59 of the *County Governments Act* which vests the power to manage human resource at county level in the County Public Service Boards. The circular would also have been issued in excess of the 3rd Respondent's powers under article 234 of *the Constitution*. As such, it (the circular) would, in the circumstances, be null and void.
66. As I draw to the end of the decision, it is perhaps necessary to address a matter that the 2nd Respondent has raised. This Respondent contends that the Deed of Transfer of Functions that was executed between the 1st Respondent and the National Government did not transfer the human resource functions that vest in it (the 2nd Respondent) to the 3rd Respondent or the National Government. This Respondent denies that it was party to the said Deed of Transfer of Functions. Consequently, it argues that it is not bound by it.
67. The 2nd Respondent also avers that the 3rd Respondent unilaterally hired the 3rd to 131st Interested Parties without consulting it as was required under article 5.6 as read with article 5.7 of the Deed of Transfer of Functions. Thus, it (the 2nd Respondent) is not bound to absorb these staff.
68. I agree with the 2nd Respondent's position that the Deed of Transfer of Functions did not transfer statutory responsibility for its (the 2nd Respondent's) human resource functions to the 3rd Respondent. As article 187 (2) (b) of *the Constitution* provides, despite the temporary transfer of any function from one level of government to another, constitutional responsibility for the performance of the function or exercise of the power remains with the government to which the function is assigned by the Fourth Schedule.
69. Article 5.7 of the Deed of Transfer of Functions provides as follows:-
- "The County Public Service Board shall, in consultation with the Public Service Commission, formulate the necessary instruments to facilitate the secondment and/or deployment of the necessary human resources."
70. The aforesaid provision in the Deed of Transfer of Functions, by implication, recognized the fact that the function under consideration constitutionally vests in the 1st Respondent with the attendant result that the 2nd Respondent had to be consulted on human resource issues in respect of it (the function) including during the transfer of functions window between the 1st Respondent and the National Government. It is in this context that the Deed specifically obligated the 2nd and 3rd Respondents to work in consultation with each other whilst handling the human resource issues for the NMS during the transfer window.
71. Although the 2nd Respondent argues that the above requirement was not honoured, it (the 2nd Respondent) confirms that it continued to utilize the services of the 3rd to 131st Interested Parties after



- the window of transfer of functions to the NMS was closed albeit for the balance of their contractual tenures with the latter. As a matter of fact, the 2nd Respondent confirmed that the said Interested Parties are presently on its payroll.
72. In my view, although the 2nd Respondent was not directly involved in the recruitment of the 3rd to 131st Interested Parties by the 3rd Respondent, it ratified the process when it agreed to retain the services of the 3rd to 131st Interested Parties for the balance of their tenure under their respective contracts with the NMS. Therefore, it is no longer open to it (the 2nd Respondent) to disown the arrangement.
73. However and for the avoidance of doubt, it is emphasized that the 2nd Respondent assumed responsibility for the Claimant's members only for the balance of their contractual terms. Whether the contracts are to be renewed upon reaching their sunset date or whether they are to be converted into indefinite term is a matter that only the 2nd Respondent, in consultation with the 1st Respondent, is entitled to determine pursuant to the powers donated to it (the 2nd Respondent) under section 59 of the *County Governments Act*.
74. Indeed, the foregoing is what is contemplated under the Framework for the Handover of Transferred Functions back to the 1st Respondent that was executed between this Respondent and the National Government on 30th September 2022. This framework was mentioned by the Respondents in their evidence in court and during cross-examination of the Claimant's witness. As was noted in *Kenya National Union of Nutritionists and Dieticians v Nairobi City County Government & 2 others* (supra), this framework provides that individuals who had been recruited for the NMS during the transfer of functions window were to be absorbed by the 1st Respondent subject to availability of vacancies and based on the human resource needs of the 1st Respondent.
75. It is noteworthy that article 3.3(a) of the aforesaid Handover Framework provided that employees who had been seconded to NMS from the 1st Respondent and the National Government during the currency of the transfer of functions arrangement were to revert to their respective employers at the close of the arrangement. However those who had been recruited under the arrangement (including the 3rd to 131st Interested Parties) were, by virtue of article 3.3(b) of the latter instrument, to be retained by the 1st Respondent subject to availability of vacancies for them and if there was need for their services.
76. This provision fortifies the position expressed earlier in this decision that contrary to what the Claimant asserts, the 3rd to 131st Interested Parties were not employed by the 3rd Respondent to serve in the National Government and thereafter seconded to the NMS. Had this been the case, their services would have reverted to the National Government at the close of the transfer of functions window in terms of article 3.3(a) of the Handover Framework of 30th September 2022.
77. As the record shows, this is not what happened to these Interested Parties. On the contrary, their services were retained by the 1st Respondent for the balance of their tenure with NMS underscoring the fact that they were not in the service of the National Government.
78. In any event and as was pointed out earlier, article 5.6 of the Deed of Transfer of Functions of 25th February 2020 which addresses provision of manpower for the NMS to perform the transferred functions was specific that personnel to serve under the programme were to be seconded from the 1st Respondent to the NMS. The Deed did not contemplate that these personnel would be seconded from the National Government to the NMS. Therefore, to argue that the 3rd to 131st Interested Parties were seconded from the National Government to the NMS is to suggest a position that is contra the intention of the aforesaid Deed under which the programme was run.



Determination

- 79. Having regard to the foregoing, it is apparent that the 3rd to 131st Interested Parties were not employed to serve in the National Government. And neither are they presently serving in the National Government.
- 80. They were recruited to perform a function that is constitutionally devolved to the 1st Respondent, a County Government but which had, at the time of their employment, been temporarily delegated to the National Government. Therefore, they were serving and continue to serve in the county public service.
- 81. The Claimant misconstrued the scope of application of the 3rd Respondent’s circular dated 3rd August 2021 which was issued in a bid to address the operationalization of the Public Service Superannuation Service Scheme Act. It (the Claimant) mistook the circular as applying to the 3rd to 131st Interested Parties when it did not. The instrument targeted employees in the service of the National Government
- 82. As such, this suit, in so far as it is founded on the aforesaid circular, is misconceived.
- 83. Consequently, the case is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED ON THE 29TH DAY OF FEBRUARY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

....for the 1st and 2nd Respondents

.....for the 3rd Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

B. O. M MANANI

JUDGE

