



REPUBLIC OF KENYA



**KENYA LAW**  
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**Union of Kenya Civil Servants (UKCS) v Nairobi City County Government  
& 3 others; Office of the Deputy President, State Department of Devolution  
(Formerly Ministry of Devolution and the Asals) & another (Interested Parties)  
(Petition E096 of 2023) [2024] KEELRC 815 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 815 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E096 OF 2023**

**B ONGAYA, J**

**APRIL 8, 2024**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF: VIOLATION AND/OR THREAT OF  
VIOLATION OF THE RIGHT TO FAIR LABOUR PRACTICES UNDER  
THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 10, 21, 22, 23, 41, 43, 47,  
162(2) (A), 235, 236, 258, 259 AND 260 OF THE CONSTITUTION OF  
KENYA, 2010 OF THE LAWS OF KENYA.**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENT ACT, 2012.**

**AND**

**IN THE MATTER OF: THE LABOUR RELATIONS ACT, NO. 14 OF  
2007.**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENT OF NAIROBI**

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**IN THE MATTER OF: THE UNION OF KENYA CIVIL SERVANTS**



**BETWEEN**

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**UNION OF KENYA CIVIL SERVANTS (UKCS) ..... PETITIONER**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**COMMITTEE ON LABOUR & SOCIAL WELFARE, NAIROBI CITY COUNTY  
GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE BOARD, NAIROBI CITY COUNTY  
GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT**

**NAIROBI CITY COUNTY ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**OFFICE OF THE DEPUTY PRESIDENT, STATE DEPARTMENT OF  
DEVOLUTION (FORMERLY MINISTRY OF DEVOLUTION AND THE  
ASALS) ..... INTERESTED PARTY**

**PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**

**JUDGMENT**

1. The petitioner filed the petition dated 30.05.2023 through Nyamweya Mamboleo Advocates praying for the following orders:
  - a. A declaration be and is hereby made that the Union Members are lawful employees of the 1<sup>st</sup> respondent.
  - b. A declaration be and is hereby made that Nairobi City County Government, either by itself, its agents and servants, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein, or any other person howsoever acting, are in utter breach of Circular Ref No.PSC/ADM/13/(13) dated 13<sup>th</sup> April 2021, Circular Ref. No. PSC/ADM/13/(18) and the Internal Memo Ref. No. EOP/NMS/HRM/3/20/VOL.II/53 dated 19<sup>th</sup> January 2022, all served upon the NMS and the 1<sup>st</sup> respondent.
  - c. A declaration be and is hereby made that Nairobi City County Government, either by itself, its agents and servants, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents herein, or any other person howsoever acting, are in utter breach of the Framework for the Handover of the Transferred Functions from the National Government to the Nairobi City County Government.
  - d. An Order of Certiorari to remove to the Court, and quash the sectoral report on the inquiry regarding the absorption of inspectorate officers employed by the Nairobi Metropolitan Services laid on the table of the assembly on Tuesday, 11<sup>th</sup> April 2023 and any and all processes flowing from the said Report.
  - e. A declaration be and is hereby made that the recommendations in the sectoral report on the inquiry regarding the absorption of inspectorate officers employed by the Nairobi



Metropolitan Services laid on the table of the assembly on Tuesday, 11<sup>th</sup> April 2013 are illegal, null and void for being in violation of Article 41 of Constitution of Kenya, 2010 and Article 3.3 of the Framework for the Handover of the Transferred Functions from the National Government to the Nairobi City County Government.

- f. A declaration be and is hereby made that refusal by the 1<sup>st</sup> respondent to the follow through and finalize the process of translation of terms of services of union members from contract to permanent and pensionable is violation of Article 41 of the Constitution of Kenya, 2010, Article 3.3 of the Framework to the Handover of the Transferred Functions from the National Government to the Nairobi City County Government and the Circular dated 3<sup>rd</sup> August 2021 by the Public Service Commission.
- g. A declaration be and is hereby made that the affected union members are, for all intent and purposes, employees of the 1<sup>st</sup> respondent on the permanent and pensionable terms.
- h. A declaration be and is hereby made that the action of respondents jointly or severally, of failing to upgrade the union members job group from job group J to Job group K is illegal, irregular and/or unconstitutional for being in contravention of Articles 27 and 41 of the Constitution of Kenya, 2010.
- i. A permanent injunction restraining the 1<sup>st</sup> respondent by either itself or its agent, from suspending, retaining, stopping or otherwise interfering with the remuneration and payment of the applicant's salary in any manner whatsoever.
- j. A declaration be and is hereby made that the respondent's actions, violate and totally disregard the protection of the union members' labour rights as a guaranteed under Article 41.
- k. An order of Certiorari to remove to the Court, and quash the Chief Officer Security and Compliance sector's memo dated 4<sup>th</sup> May 2023 and referenced number COSEC /CO/3/8 VOL II/1/23, intending to recruit 1000 new enforcements and all recommendations and processes flowing from the said memo.
- l. An order of certiorari to remove to this court, and quash the letter dated 9<sup>th</sup> May 2023, and referenced NCC/CS/DCA/HRM/44/2023, purporting to forward to the Chief Executive Officer of the Nairobi County Public Service Board for implementation of the memo Ref. NO. COSEC/CO/3/8/VOL II/1/23.
- m. A conservatory order, restraining the respondents, their agents, servants and/or any other persons acting on their direction or authority, from recognizing, effecting and actualizing the recommendations in the Report of the Sectoral Committee on Labour and Social Welfare on the Inquiry Regarding the Absorption of inspectorate officers employed by the Nairobi Metropolitan services adopted and passed in the 11<sup>th</sup> sitting of Nairobi City County Assembly.
- n. An Order directing the respondents to immediately cease and desist from any actions that threaten to violate the labour rights of the petitioner's union members.
- o. An order mandamus directing the 1<sup>st</sup> respondent to implement the directions given in Circular Ref. No. PSC/ADM/13/(3) dated 13<sup>th</sup> April 2021 Circular Ref No. PSC/ADM/13/(18) and the Internal Memo Ref. No. EOP/NMS/HRM/3/20/VOL.II/53 dated 19<sup>th</sup> January 2022 translating the affected Union Members terms of service from contract to Permanent and Pensionable.



- p. An Order Mandamus directing the 1<sup>st</sup> respondent to implement the directions given in Circular Ref. No. PSC/ADM/13/(13) dated 13<sup>th</sup> April 2021, Circular Ref. No. PSC/ADM/13/(18) and the Internal Memo Ref. No. EOP/NMS/HRM/3/20/VOL.II/53 dated 19<sup>th</sup> January 2022 upgrading the affected union members from Job Group J to Job Group K.
- q. Costs of this petition against the respondents.
2. The petition was based upon the supporting affidavit of petitioner's Secretary General, Tom Mboya Odede filed together with the petition and sworn on 30.05.2023. The petitioner's case is as follows:
- a. The petitioner is bringing this suit on behalf of its one hundred and twenty four (124) members (hereinafter Union Members) who are workers of the defunct Nairobi Metropolitan Services (hereinafter NMS). The list of the 124 Union Members is exhibited.
- b. That the Deed of Transfer through which the defunct NMS was formed came to an end in 2022 and the National Government of the Republic of Kenya, through the 1<sup>st</sup> Interested Party, and the 1<sup>st</sup> respondent entered into an agreement on the Framework for the Handover of the Transferred functions from the National Government to the Nairobi City County Government. The copy of the Framework for the Handover of the transferred functions is exhibited.
- c. That once the NMS became defunct, the respondents have been purporting that there is a question of legality of all Union Members' employment status in the 1<sup>st</sup> respondent.
- d. That instead of absorbing the union members as per the circular directives, the 2<sup>nd</sup> respondent tabled a report in the Assembly on 11.04.23 and recommended that the enforcement officers or cadets or any other officers recruited under the defunct NMS be redesignated by the national government; the county has no obligation to absorb the said enforcement officers whose contract and term expired in November 2022; and, without justification of recruitment beyond the deed of transfer, the Security and Compliance Department if in need of more officers to make their request to the County Public Service Board for fresh recruitments and thereto, advertisement and interviews to be put in motion.
- e. That the overall effect of the recommendations was that the Union Members would be rendered redundant and unfairly terminated from employment.
- f. That the right of the Union to keep employment of its members is under attack from the respondents and by the 4<sup>th</sup> respondent adopting the report of the 2<sup>nd</sup> respondent the threat is real than perceived. The deponent highlighted parts (xv) – (xxviii) of the exhibited report by the 2<sup>nd</sup> respondent.
- g. The petitioner stated that the actions of the respondents are in the detriment of the union members and a violation of their statutory and constitutional rights.
- h. The deponent urged that the Honourable Court grants the prayers as sought.
3. In response to the Petition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed their grounds of opposition dated 30.10.2023 as well as the replying affidavit of Nyamwaya Nyagara, the Chief Executive Officer and Secretary of the Nairobi County Public Service Board (the 3<sup>rd</sup> Respondent herein) sworn on 21.12.2023 and filed through Ogejo, Omboto & Kijala Advocates LLP.
4. In their grounds of opposition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents stated as follows:



- a. That the petition as drawn is lacking in form and in substance and does not meet the threshold set out in the locus classicus case of *Anarita Karimi Njeru V The Republic (1976-1980)*, as the Petitioner has failed to plead and tender evidence in support of the manner in which the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondents have infringed on their constitutional rights as alleged.
  - b. That the petition does not meet the evidentiary threshold of granting the orders sought as the facts and grounds upon which the petition is premised do not raise any violation to warrant granting orders as prayed for in the petition.
  - ii. That this petition offends the doctrine of contract as the Public Service Commission having been among the contracting parties and the employing authority of the petitioner's members, are the rightful party to bring forth this petition. This is informed authoritatively by Halbury's Laws of England, 3<sup>rd</sup> Edition, Volume 8, paragraph 110, where Hancox JA reiterated that
 

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it”.
  - ii. That the petitioner is seeking to enforce an agreement that they were not party to.
  - iii. That the petition is prematurely before the Honourable Court there having been covenanted other forums before which the matter could have been heard and is in violation of section 31 of the *Intergovernmental Relations Act* No.2 of 2012.
  - iv. That the petition as presented is a wanton abuse of the court process, scandalous, frivolous, misconceived, vexatious and intended to embarrass the court and the legal process.
  - v. That the petition and application as presented is not legally tenable and should be dismissed with costs.
5. In their replying affidavit of Nyamwaya Nyagara, the deponent defined the parties herein and the legal framework of their establishment and further stated:
- a. That the defunct NMS was staffed by the 2<sup>nd</sup> Interested Party in line with the transferred functions to serve as Compliance and Enforcement officers with their contracts running from September 2021 to October 2024.
  - b. That the 2<sup>nd</sup> Respondent was dissatisfied with the process and procedure used by the NMS in recruitment of the union members and since they were not involved in the procedure, which they termed as illegal, they made recommendations against them being absorbed by the 1<sup>st</sup> respondent after the NMS became defunct.
  - c. That the 2<sup>nd</sup> interested party hence acted ultra vires in recruiting the union members as the Security and Compliance function was not within the scope of the functions transferred to the National Government by Article 3, Gazette Notice No. 1609 Vol. CCXXII-No. 38.
  - d. That the union members are welcome to make applications for any desired position, including their current ones whether the same have been or are yet to be advertised.
  - e. That the petitioner has not met the requirements of a petition and that the same should be dismissed with costs.



6. The 4<sup>th</sup> Respondent also filed their replying affidavit dated 20.07.2023 through Diro Advocates LLP sworn by Edward Obwori Gichana the Clerk of Nairobi City County Assembly and the Secretary of the Nairobi City County Assembly Service Board. It was stated as follows:
  - a. That the employment of the petitioner's members lies with the 3<sup>rd</sup> respondent, and such, the variation of their terms of employment including postings or absorption lies with the 3<sup>rd</sup> respondent.
  - b. That the petition herein is premature since the *Intergovernmental Relations Act* No.2 of 2012 section 32(1) provides that any dispute arising from such agreements as the framework for handover of functions to be adhere to the dispute resolution mechanism provided for in the said framework with judicial proceedings as the last resort.
  - c. That the petitioner has failed to exhaust the mechanisms as set out in the framework.
7. The 1<sup>st</sup> interested party filed grounds of opposition dated 03.07.2023 through the learned Litigation Counsel Ms. Elizabeth Mwangi for the Honourable Attorney General. It was urged as follows:
  - a. The 1<sup>st</sup> interested party has been misjoined in the proceedings.
  - b. The respondents are an independent entity with the mandate to manage their own human resource functions including recruitment and appointment.
  - c. There is no cause of action against the 1<sup>st</sup> interested party or at all.
  - d. The 1<sup>st</sup> interested party mandate in respect of the subject matter in the proceedings is functus officio.
  - e. The 1<sup>st</sup> interested party should not be enjoined in the matter as this is a matter of employer-employee relationship and the 1<sup>st</sup> interested party is neither an employer nor an employee in the matter.
  - f. The 1<sup>st</sup> interested party prays that it be expunged from the proceedings or in the alternative the petitioner's petition be dismissed against it with costs.
8. The 2<sup>nd</sup> Interested Party did not file any documents.
9. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
10. To answer the 1<sup>st</sup> issue, The Court returns that the recruitment of Compliance and Enforcement Officers by the 2<sup>nd</sup> interested party for the 1<sup>st</sup> interested party under which the Nairobi Metropolitan Services was a Department was ultra vires the Deed of Transfer of powers and functions dated 25.02.2020. As submitted for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents Article 187 of *the Constitution* of Kenya 2010 provides for the transfer of powers and functions between national and county governments. Pursuant to that provision the 1<sup>st</sup> interested party and the 1<sup>st</sup> respondent concluded a Deed of Transfer dated 25.02.2020 transferring county government functions to the 1<sup>st</sup> interested party namely County Health Services; County Transport Services; County Planning and Development Services; and County Public Works, Utilities and Ancillary functions. The 1<sup>st</sup> interested party formed the Nairobi Metropolitan Services (NMS) as a special conduit to ensure the effective performance of the transferred services. Upon the material on record and in particular the Deed of Transfer dated 25.02.2020, Compliance and Enforcement was not one of the transferred power and function and therefore the 2<sup>nd</sup> interested party acted outside the deed in purporting to recruit staff in the Compliance



and Enforcement services of the 1<sup>st</sup> respondent. As submitted for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent, the recruitment appears to have offended Articles 5.6 and 5.7 of the Deed of Transfer which provided that the relevant human resources for the implementation of the agreement shall be seconded from the County Government to National Government and, the County Public Service Board shall, in consultation with the Public Service Commission formulate the necessary instruments to facilitate the secondment and deployment of necessary human resources. The petitioner's members in issue not having been drawn out of the existing Security and Compliance Department of the County Government and the 3<sup>rd</sup> respondent not having been involved, the recruitment was not consistent with the terms of Articles 5.6 and 5.7 of the Deed of Transfer.

11. To answer the 2<sup>nd</sup> issue, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents and, the 1<sup>st</sup> interested parties have mutually submitted that the County Government and National Government cooperate as interdependent but are distinct. Article 189(1)(a) of [the Constitution](#) provides that government at either level shall perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and in the case of county government, within the county level. Article 6(1) and (2) of [the Constitution](#) 2010 establishes county governments as distinct and independent entities and to cooperate with the national government. Article 234(3)(b) of [the Constitution](#) provides that the powers and functions of the Public Service Commission do not apply to an office in the service of a county government, except as contemplated in clause (2)(i) – relating to the Commission's power and function to hear and determine appeals in respect of county governments' public service. Article 235 is elaborate that a county government is responsible within a framework of uniform norms and standards prescribed by an Act of Parliament for establishing and abolishing offices in its public service; appointing persons to hold or act in those offices and confirming appointments; and, exercising disciplinary control over and removing persons holding or acting in those offices. Section 59 of the [County Governments Act](#) provides for the human resource powers and functions of the County Public Service Board over the county public officers. The Court therefore finds for the submission made for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the action of the interested parties unilaterally recruiting and appointing the petitioner's members in issue to perform Security and Compliance functions was unprocedural and illegal as was not consistent with the cited constitutional provisions and the Deed of Transfer of Powers and Functions. The 3<sup>rd</sup> respondent had objected or protested against the recruitment by the letter dated 16.06.2021 and a further letter dated 27.01.2022.
12. To answer the 3<sup>rd</sup> issue, the Court finds that the circulars relied upon by the petitioner to advance that its members in issue be employed to permanent and pensionable terms of service by the 1<sup>st</sup> and 3<sup>rd</sup> respondents do not apply at all. Circular Ref. No. PSC/ADM/13(13) dated 14.04.2021 was by the Public Service Commission to its authorised officers directing the Commission's authorised officers that all contract employees who had joined the public service as university graduates at entry level be progressed to the next grade on completion of service period of one year per earlier circular Ref. MPOYG/DPSM/4/.1/1/ Vol.III/237 dated 06.11.2017. The Commission had issued the other circular PSC/ADM/13/ (18) to its authorised officers of the defunct NMS and pursuant to operationalisation of the Public Service Superannuation Act and the rolling out of the Public Service Superannuation Scheme that among other directives, all employees appointed at Certificate, Diploma and Graduate entry levels on contract terms from May 2019 to have their terms of service translated to permanent and pensionable terms with effect from the respective dates of appointments. The Court finds that with respect to the petitioner's members in issue, the circulars cannot operate to confer them absorption into the permanent and pensionable service of the 1<sup>st</sup> and 3<sup>rd</sup> respondents. In particular the Court has found that the employment of the union members was outside the Deed of Transfer and further was unconstitutional as the interested parties free of constitutional authority purported



to impose the Compliance and Enforcement officers in the respondents' county government public service. In any event the circulars would only apply to the extent of the Commission's constitutional powers and functions which, in absence of any other thing on record, excluded the public service of the county governments. As submitted for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the members of the union in issue had no basis to evolve a legitimate expectation based on the circulars to be absorbed and emplaced in the permanent and pensionable service of the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

13. To answer the 4<sup>th</sup> issue, while the petitioner has alleged breach of the Bill of Rights and in particular Article 41 on fair labour practices and other cited constitutional provisions, the Court returns that the petitioner has failed to establish such actual or threatened violation of the rights, freedoms and constitutional provisions. The Court has perused the submissions dated 22.03.2024 filed for the petitioner through Rashid Law Advocates. It is urged that the agreement on the framework for handover of transferred functions from national government required the respondents to absorb the affected union members to the County Public Service Board structure depending on county government needs or the Public Service Commission to absorb them if the County did not have the need for the affected members. First, as urged for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the petitioner or its members were not privy to the agreement on the framework for handover of transferred functions from national government and therefore, though beneficiaries, cannot have requisite standing to enforce that provision. Second, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents have shown that the affected members were not valid employees under the Deed for Transfer of Powers and Functions. Third, while the petitioner had an option to pursue the 2<sup>nd</sup> interested party who employed the union members for absorption in the national government, the petitioner has opted to name the Commission as an interested party and not a respondent and with no claims and prayers against the Commission or the 1<sup>st</sup> interested party. The Court finds that in the circumstances, infringement of the legal and constitutional rights as guaranteed under Articles 27 and 47 as against the respondents has not been established at all. The petition must fail as the claims and prayers against the respondents are unjustified as not founded at all. The Court has considered the nature, background and progression of the dispute and each party to bear own costs.

In conclusion the petition is hereby dismissed with orders each party to bear own costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 8<sup>TH</sup> APRIL 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

