



**Kenya County Government Workers Union v Nairobi County Public Service Board & 2 others (Petition E119 of 2021) [2024] KEELRC 1451 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1451 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E119 OF 2021**

**MA ONYANGO, J**

**JUNE 6, 2024**

**IN THE MATTER OF THE CONSTITUTION OF  
KENYA, 2010, ARTICLES 10, 19, 22, 23, 41, 47**

**AND**

**IN THE MATTER OF THE ALLEGED AND THREATENED  
VIOLATION AND CONTRAVENTION OF ARTICLES 10, 19,  
22, 41, AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, SECTION 2**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012, SECTION 72 (2)**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007, SECTION 2**

**AND**

**IN THE MATTER OF THE EMPLOYMENT AND  
LABOUR RELATIONS COURT ACT, SECTION 12**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, SECTION 12**

**AND**

**IN THE MATTER OF THE ARBITRARY TRANSFERS OF COUNTY EMPLOYEES  
TO NEW DEPARTMENTS/SECTIONS WITHOUT FORMAL TRAINING**



**BETWEEN**  
**KENYA COUNTY GOVERNMENT WORKERS UNION ..... PETITIONER**  
**AND**  
**NAIROBI COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**  
**DR. JAIRUS MUSUMBA, PHD ..... 2<sup>ND</sup> RESPONDENT**  
**MAJOR GENERAL MOHAMED BADI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner herein is a Trade Union duly registered under the *Labour Relations Act*, 2007 whose mandate is to represent the interests of its members who are members of staff of the County Governments.
2. The 1<sup>st</sup> Respondent is a public body established under the Section 57 of the County Government's Act, 2012 as read with Article 235 of *the Constitution* of Kenya, 2010.
3. The 2<sup>nd</sup> Respondent was at the time of filing this petition, the Acting Secretary and Head of County Public Service, Nairobi City County while the 3<sup>rd</sup> Respondent was the Director General, Nairobi Metropolitan Services.
4. In its petition dated 23<sup>rd</sup> July, 2021, the Petitioner avers that five (5) of its members received instructions from the 1<sup>st</sup> Respondent, vide the letter dated 1<sup>st</sup> July, 2021 signed by the 2<sup>nd</sup> Respondent herein, transferring and/or redeploying their duties as follows:



No	Name	Previous Position	Transferred/ Redeployed Position
1.	Regina Kabugo Irimu	County Security and Compliance Section/ Department	Agriculture, Livestock and Fisheries Sector
2.	Joseph Kipsang Koskei	Deputy Director, Inspectorate	Deputy Director, Youth & Sports
3.	Bildard Ogweno Tindi	Security Compliance Sector	Agriculture, Livestock and Fisheries Sector
4.	Caroline Wairimu Njuguna	Security Compliance Sector	Commerce, Tourism and Industrialization Sector
5.	Benjamin Omondi	Director, City Inspectorate	Director, Tourism and Industrialization Sector

5. The Petitioner states that subsequent to the above, an additional Seven (7) other members were notified of their secondment to the Nairobi Metropolitan Services vide the letter dated 6<sup>th</sup> July, 2021 signed by the 3<sup>rd</sup> Respondent. The seven (7) members were redeployed as follows: -



No	Name	Previous Position	Transferred/ Redeployed Position
1.	Tom Seme Oyath	Directorate of Enforcement, NMS	Department of Environment, Water and Sanitation
2.	Sapan Lilimo	Directorate of Enforcement, NMS	Department of Health Services
3.	Mary Ruabala	Directorate of Enforcement, NMS	Department of Energy
4.	Tony Michael Kimani	Directorate of Enforcement, NMS	Department of Roads, Transport and Public Works
5.	Patrick Misigo	Directorate of Enforcement, NMS	Department of Lands, Urban Development and Housing
6.	Wilson Kiptanui Too	Directorate of Enforcement, NMS	Department of Administration
7.	Haggai Malongo	Directorate of Enforcement, NMS	Department of Lands, Urban Development and Housing

6. The Petitioner states that the transfers and/or redeployments were to take effect immediately, with its members being asked to surrender their uniforms, insignia and other enforcement equipment in their custody to the Director, Enforcement and report to the Director, Administration, for assignment of duties.
7. That upon receipt of the transfer and/or redeployment instructions the Petitioner's members did report to their new stations only to be informed that there was no work for them at their new assignments.
8. The Petitioner averred that the impugned transfers and/or redeployments of its members was unlawful and unfair, contrary to the provisions of Articles 10, 19, 22, 23, 28, 41 and 47 of *the Constitution* of Kenya, 2010 as read with sections 2 and 12 of the *Employment Act*, 2007 as the same were tantamount to unlawful redundancies.
9. Aggrieved by the Respondents actions the Petitioner filed the instant petition seeking the following orders: -
  - a. A declaration be and is hereby issued that the Respondents violated the Constitutional rights of the Petitioner's members through arbitrary, dehumanizing, and victimizing transfers/ redeployments



- b. This Honourable Court be pleased to issue an Order of prohibition prohibiting the Respondents from continuing with the impugned transfers and/or redeployments until this Petition is heard and determined.
  - c. This Honourable Court be pleased to grant an Order of certiorari quashing the impugned decision by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents
  - d. This Honourable Court be pleased to issue a permanent injunction restraining the Respondents either by themselves or through their agents and/or servants from redeploying or transferring the affected Petitioner's members from one department or section of the County to other unless and until they have been trained on their new jobs.
  - e. Costs of the Petition be provided for.
10. In support of the Petition, the Petitioner filed an Affidavit deponed by ROBA S. DUBA the Petitioner's Secretary General on 23<sup>rd</sup> July, 2021 in which he reiterates the averments made on the face of the petition.
  11. Given the urgency of the matter the petition was filed together with a notice of motion application under certificate of urgency seeking the following reliefs:
    - a. That this Application be certified as urgent and heard on priority basis and ex-parte in the first instance.
    - b. That pending the inter-partes hearing and determination of this Application and the Petition, this Honourable Court be pleased to issue conservatory orders order restraining the Respondents from continuing with the impugned transfers and redeployments until the hearing and determination of this Petition.
    - c. That the costs of this Application be in the cause.
  12. The Application is premised on the grounds on the face of the motion and is further supported by the Affidavit of ROBA S. DUBA sworn on 23<sup>rd</sup> July, 2021.
  13. The application was however dismissed for want of prosecution on 29<sup>th</sup> September, 2021 following the failure of the Petitioner to attend court to prosecute the same.
  14. In response to the Petition, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection dated 20<sup>th</sup> June, 2022 raising the following grounds: -
    - a. The Petition is premature as the Petitioner has not extinguished all the available legal channels of appeal before approaching this Honourable Court as provided under: -
      - i. Section 77 of the County Government Act; and
      - ii. Section 87 (2) of the [Public Service Commission Act](#)
    - b. The Petitioner has no locus to bring this Petition.
  15. The 3<sup>rd</sup> Respondent on his part filed a Replying Affidavit deponed by Ochieng Jackogango, the senior Human Resource Management and Development Officer, Nairobi Metropolitan Services on 8<sup>th</sup> February, 2022 in which he avers that the redeployment and/or transfers of the petitioner's members was lawful and upon recommendation from the Regional Commissioner.



16. Mr. Jackogango further deponed that the redeployment was also done in accordance with the provisions of Clause 2 of the instrument establishing the Nairobi Metropolitan Services to facilitate secondment and/or redeployment of officers from the Nairobi City County to the Nairobi Metropolitan Services.
17. The affiant contends that the petition as filed lacks merit and therefore urged this Honourable Court to dismiss it with costs to the Respondents.
18. The 2<sup>nd</sup> Respondent did not participate in the proceedings.
19. The Petition was disposed of by way of written submissions.

### **Petitioner's Submissions**

20. In its Submissions the Petitioner maintained that the 1<sup>st</sup> Respondent's exercise of its power to transfer/ redeploy its members of staff did not comply with the mandatory provisions of Section 72(2) of the County Government Act. It further maintained that the transfers and/or redeployments should have been done in consultation with the Petitioner union considering the effect such changes would have on the Petitioner's members.
21. The Petitioner submitted that the Respondent did not give reasons for the purported transfers and/or redeployments contrary to the provisions of Article 47 of *the Constitution* of Kenya, 2010 nor did it give the Petitioner's members an opportunity to be heard prior to arriving at the decision to transfer and/or redeploy them contrary to the provisions of Article 50 of *the Constitution* of Kenya, 2010.
22. The Petitioner argues that the 3<sup>rd</sup> Respondent does not have the power to transfer and/or redeploy employees of the County as he alleges. For emphasis the Petitioner relied on the Court findings in the case of *Okiya Omtatah Okioti v Nairobi Metropolitan Services & 3 Others (2020) eKLR* where the Court held that the 3<sup>rd</sup> Respondent lacked the power to purport to redeploy or transfer the Petitioner's members.
23. To further buttress this argument the Petitioner relied on the cases of *Malier Unissa Karim v Edward Oluoch Odumbe (2015) eKLR* and *Geoffrey Mworira v Water Resources Management Authority & 2 Others (2015) eKLR*.
24. The Petitioner submitted that its Petition has merit and urged this Honourable Court to allow it as prayed.
25. The Petitioner urged this Honourable Court to find the impugned transfers and/or redeployments of its members by the Respondents amounted to gross violation of the Constitutional rights of its members and that the Petitioner was entitled to the reliefs sought in the Petition.

### **1<sup>st</sup> Respondent's Submissions**

26. In its submissions the 1<sup>st</sup> Respondent urged that the Preliminary Objection dated 20<sup>th</sup> June, 2022 meets the legal requirement as set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited (1969) E.A 696* and as further highlighted in the case of *John Mundia Njoroge & 9 Others v Cecilia Muthoni Njoroge & Another (2016) eKLR* thus urged this Court to allow it as prayed.
27. The 1<sup>st</sup> Respondent further submitted that this Court lacks jurisdiction to hear and determine this matter the Petitioner's members having failed to exhaust the remedies on appeal as provided under Section 77 (1) of the County Government Act as read with Section 87 (2) of the Public Service Act that



provides for appeals to the Public Service Commission. To buttress this argument the 1<sup>st</sup> Respondent relied on the findings in the cases of *Evans Shipala Mulunji (suing as an Administrator of the Estate of Everlyne Khabukwi Mulunji) v County Government of Kakamega (2022) eKLR* and *Association of Public Health officers (Aphok) Nairobi Branch v Director General Nairobi Metropolitan Services & 5 Others; Josephine Kibaru Mbae & 4 Others (Interested Parties) (2022) eKLR* where the Courts in dismissing the Petitions held that the courts lacked jurisdiction to hear the matters as the same offended the doctrine of exhaustion in line with the provisions of Section 87(2) of the Public Service Act and Section 77 of the County Government Act.

28. It is further submitted that the Petition filed is devoid of merit as the Petitioner failed to exhaust available remedies available and/or disclose to this Court the existence of such remedies. The 1<sup>st</sup> Respondent further argues that the Petitioner has failed to demonstrate exceptional circumstances under which this Court's jurisdiction may be invoked in the circumstances. For emphasis the 1<sup>st</sup> Respondent relied on the Court's findings in the case of *Speaker of the National Assembly v James Njenga Karume (1992) eKLR* where the Court of Appeal held that where there is a clear procedure for redress of a particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.
29. The 1<sup>st</sup> Respondent further contended that the Petitioner lacks locus standi to institute the instant Petition on behalf of the Grievants herein having failed to include any authority to act as proof that they had consented to the alleged representation. To fortify this argument the 1<sup>st</sup> Respondent cited the case of *Association of Public Health Officers of Kenya v Narok County Chief Officer, Medical Services & 2 Others (2019) eKLR*.
30. The 1<sup>st</sup> Respondent further maintained that the impugned transfer of staff was legal as it was done within the confines of the law and that no evidence was availed by the Petitioner to prove that the transferred members of staff did not have work in their new postings as alleged in the Petitioner. The 1<sup>st</sup> Respondent therefore urged this Court to disregard this allegation for want of proof.
31. In conclusion the 1<sup>st</sup> Respondent argues that the petition as filed is devoid of merit and in the circumstances urged this Court to dismiss it with costs to the Respondents. The 1<sup>st</sup> Respondent further urged this Court to find its Notice of Preliminary Objection dated 20<sup>th</sup> June, 2022 with merit and to allow it as prayed.

### **Analysis and Determination**

32. Having considered the petition, affidavits, submissions and authorities cited by the parties, the issues for determination are whether this Court has jurisdiction to hear the instant Petition, whether Section 77 of the County Government Act 2012 and Section 87(2) of the Public Service Act ousts the jurisdiction of this Court, whether the Preliminary Objection dated 20<sup>th</sup> June, 2022 is merited and finally, whether the Petitioner is entitled to the orders sought in the petition.
33. Section 77 of the *County Governments Act* provides as follows –
  77. Appeals to the Public Service Commission
    1. Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.



2. The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
  - a. recruitment, selection, appointment and qualifications attached to any office;
  - b. remuneration and terms and conditions of service;
  - c. disciplinary control;
  - d. national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of *the Constitution*;
  - e. retirement and other removal from service;
  - f. pension benefits, gratuity and any other terminal benefits; or
  - g. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.
3. An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

34. Part XV of the *Public Service Commission Act* provides as follows: -

Part XV — Hearing And Determination of appeals in Respect Of County Government Public Service

85. The Commission shall, in order to discharge its mandate under Article 234 (2) (i) of *the Constitution*, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of —
  - a. recruitment, selection, appointment and qualifications attached to any office;
  - b. remuneration and terms and conditions of service;
  - c. disciplinary control;
  - d. national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of *the Constitution*;
  - e. retirement and other forms of removal from the public service;
  - f. pension benefits, gratuity and any other terminal benefits; or
  - g. any other decision the Commission considers to fall within its constitutional competence to hear and determine an appeal in that regard.

86.

1. Any person who is dissatisfied or affected by a decision made by any authority or person in respect of a County Government



public service may appeal to the Commission against the decision.

2. An appeal under subsection (1) shall be in writing
3. and made within ninety days from the date of the decision: Provided that the Commission may consider an appeal out of time if, in the opinion of the Commission, the circumstances warrant it.
4. The Commission shall make regulations to guide the hearing and determination of appeals from the county public service boards. Appeal from County Government public service. Procedure for appeal. 181 2017 Public Service Commission
5. After considering an appeal under this section the Commission may —
  - a. uphold the decision;
  - b. set the decision aside;
  - c. vary the decision as it considers to be just; or
  - d. give such directions as it may consider appropriate with respect to the decision.

35. It is the position of the Respondents that the Petitioner has not exhausted the procedure provided under Section 77 of the County Government Act and Section 87 of the Public Service Act and therefore the suit offends the doctrine of exhaustion.

36. The Doctrine of Exhaustion is defined in Blacks’ Law Dictionary 10<sup>th</sup> Edition as follows –

“exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.

37. Further Section 90 of the [Fair Administrative Action Act](#) provides for the Doctrine of Exhaustion thus –

9. Procedure for judicial review

1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of [the Constitution](#).
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 sub-section (1).
  4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
  5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.
38. The doctrine was aptly captured by the Court of Appeal in the case of *Republic v National Environment Management Authority Ex parte Sound Equipment Ltd (2011) eKLR*, where the Court of Appeal observed: -
- “... Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...”
39. Further in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR* the Court held as follows;
- “The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”
40. The question that this court must deal with as a preliminary issue is whether the Petitioner who is a trade union seeking redress on behalf of its members is bound by Section 77 of the County Government Act and Section 87 of the Public Service Act.
41. Disputes by trade unions are provided for under section 62 of the *Labour Relations Act* as follows:
- 62.(1) A trade dispute may be reported to the Minister in the prescribed form and manner–
    - (a) by or on behalf of a trade union, employer or employers’ organisation that is a party to the dispute; and
    - (b) by the authorised representative of an employer, employers’ organisation or trade union on whose behalf the trade dispute is reported.
  - (2) A person reporting a trade dispute shall
    - (a) serve a copy by hand or registered post on each party to the dispute and any other person having a direct interest in the dispute; and



- (b) satisfy the Minister that a copy has been served on each party to the dispute by hand or by registered post.
  - (3) A trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within
    - (a) ninety days of the dismissal; or (b) any longer period that the Minister, on good cause, permits.
  - (4) If the issue in dispute concerns the redundancy of one or more employees, a trade union may report a trade dispute to the Minister at any stage after the employer has given notice of its intention to terminate the employment of any employee on grounds of redundancy.
  - (5) The reporting of a trade dispute by a trade union under subsection (4) does not prevent an employer from declaring employees redundant on the expiry of notice of intention to declare the employees redundant. Respondent may file replying statement. Interested party may file statement of interest.
42. In the instant case the union decided to file a petition instead of reporting a dispute.
43. The other issue for determination in conjunction to this is whether the Respondents are subject to section 77 of the County Government Act and section 87 of the Public Service Act.
44. In the instrument signed under the *Intergovernmental Relations Act* for Transfer of Functions between the Nairobi City County Government to the National Government it is provided at Article 5 clause 5.6 and 5.7 and Article 7.1 that:
- 5.6. The relevant human resources for the implementation of this agreement shall be seconded from the County Government to the National Government and
  - 5.7 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.
  - 7.1. The National Government shall prescribe and establish an institutional framework for the execution of the transferred functions.
45. It is my considered opinion that the transfers having been effected by the Executive Office of the President Nairobi Metropolitan Services (NMS), the issues arising out of the transfer were not subject to appeal under section 77 of the County Government Act and section 87 of the Public Service Act. These were services that had been transferred to the NMS. NMS was not subject to section 77 of the County Government Act and section 87 of the Public Service Act.
46. For these reasons the preliminary objection fails and is dismissed.
47. On the substantive issue whether the petition has merit, the petitioner avers that the transfers were arbitrary and violated the employees' rights to human dignity guaranteed under Article 28 of *the Constitution*. The particulars given in support of these averments are that:
- a. Most of the affected employees of the county who are also the Petitioner's members upon arriving at their new work stations have not been assigned any work;
  - b. The affected employees are depressed and traumatized by the transfers as they reasonably fear that the County will use their inability to effectively perform their duties in their new workplaces as pre-text to dismiss them from employment;



- c. The affected employees have faced rejection and humiliation in their new work stations with some being told to "hang around" even as their fate is being pondered over;
  - d. The affected employees feel being made victims or pawns in a chess game being played in the County government of Nairobi leadership;
  - e. Being told to surrender their uniforms, insignia, and other enforcement equipment in their custody means that they will be expected to perform totally different jobs in their new work stations, even though these are not jobs they have professionally trained for; and
  - f. Some of the affected members have been transferred/redeployed to none-existing posts, hence effectively rendering their services and employment superfluous. For instance, the Directorate of Youth and Sports to which Joseph Kipsang Kosgei has been transferred does not exist.
48. None of these averments were supported by any evidence. No complaint from any of the employees on whose behalf the petition was filed and none of them swore an affidavit in support of the petition. No letter or other complaint from any of the employees was filed in court. In fact, it is deponed that all the employees complied with the directive on the redeployment letters and reported to the new offices to which they had been transferred.
49. Transfer of employees is a prerogative of the employer and an employer does not need permission of the employee or to consult the employee before a transfer. The terms of service of employees in the public sector, like those of the employees on behalf of whom the suit herein was filed, provide that they can be transferred to any department.
50. The Petitioner did not adduce evidence to prove that any of the employees protested against the transfers for any reason that required consideration by the Respondents which they failed to do. The averments that the employees were rejected, or were not assigned duties, or were given work that they were not skilled in, are not supported by any proof. The averments of victimization are also not supported by any evidence.
51. I find that the petitioner has not proved that it is entitled to any of the orders sought.
52. The upshot of this is that the Petition dated 23<sup>rd</sup> July, 2021 is accordingly dismissed. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED ON THIS 6<sup>TH</sup> DAY OF JUNE**

**MAUREEN ONYANGO**

**JUDGE**

