



Otieno v Nkanata & 2 others; Njane & 12 others (Interested Parties) (Petition E016 of 2022) [2024] KEELRC 2606 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2606 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E016 OF 2022
MA ONYANGO, J
OCTOBER 24, 2024**

BETWEEN

LINDON NICHOLAS OTIENO PETITIONER

AND

FRANKLIN MUTUMA NKANATA 1ST RESPONDENT

JOYCE NAISIALA ENE YIAILE 2ND RESPONDENT

THE NGOS CO-ORDINATION BOARD 3RD RESPONDENT

AND

DAVID NJANE INTERESTED PARTY

STEPHEN MONYONCHO INTERESTED PARTY

AISHA ABDI INTERESTED PARTY

JOSEPHINBE NGATIA INTERESTED PARTY

DORIS MUTHINI INTERESTED PARTY

JOYCE NAISIALA INTERESTED PARTY

ALVIN NTIMAMA INTERESTED PARTY

MERCY SOY INTERESTED PARTY

BENARD BWOMA INTERESTED PARTY

CHARLES MUGO INTERESTED PARTY

FRANCIS TUMUTI NJOGU INTERESTED PARTY

MOHAMED MUKTAR INTERESTED PARTY

RICHARD CHESOS INTERESTED PARTY



JUDGMENT

The Petition

1. The Petition herein was filed on 24th January 2022 and amended on 3rd February 2022.
2. As at the time of filing of this petition, the Petitioner was employed by the 3rd Respondent as a Manager in the legal services division.
3. The 3rd Respondent is described in the Amended Petition as a body established under section 3 of the NGOs Co-ordination Act, 1990 charged with the responsibility of registering and regulating non-governmental organizations in Kenya.
4. The 1st to 13th Interested parties are colleagues of the Petitioner and members of staff of the Respondent holding various positions in the 3rd Respondent's board.
5. The 1st and 2nd Respondents who were added as Respondents in the Amended petition are not described in the Amended Petition nor the reason for their joinder stated.
6. It is the Petitioner's case that on 19th February 2021, the 3rd Respondent held a special board meeting during which it made a resolution to adopt a new organisational structure, grading and staff establishment.
7. It is the Petitioner's case that under the new organisational structure, grading and staff establishment, the staff of the 3rd Respondent including the interested parties would convert from their grades and designations to the new grades and designations.
8. The Petitioner further states that under the new organizational structure, grading and staff establishment, the Petitioner who is a manager in the legal services division is to be demoted to the position of Principal Officer, Legal Affairs and thus scuttling his job growth, career and promotion prospects.
9. It is the Petitioner's case that his transition and those of each of the interested parties is illustrative of the skewed manner that the implementation of the new organisational structure, grading and staff establishments was to be implemented without regard to merit or established principles of human resource management.
10. The Petitioner avers that the new organisational structure and mode of implementation was illegal, unfair and oppressive to the petitioner and other staff of the Respondent.
11. The Petitioner also contended that the Respondents have refused and neglected to award and pay to the Petitioner, the 5th and 12th Interested Parties non-practising allowance which they are entitled to, even after the same had been approved.
12. The Petitioner particularised the illegality, unfairness and oppressiveness of the new organization structure as follows:
 - i. That the Respondent made the resolution to change the organizational structure, grading and staff establishment without subjecting the proposal to public participation or the participation by the affected members of staff.



- ii. The new organizational structure, grading and staff establishment has been done arbitrary and without any explanations on what it is intended to achieve or how it will promote efficiency at work.
 - iii. The new organizational structure, grading and staff establishment is vague and confusing on the roles of certain members of staff to lower positions thus compromising their growth and career prospects.
 - iv. The new organizational structure, grading and staff establishment is being implemented in a haphazard and discriminatory manner and thus undermines the rights of other staff to be promoted on merit
 - v. The change of organizational structure, grading and staff establishment does not conform in terms of implementation, to the management policy, career progression guidelines and human resource instruments of the Respondent.
 - vi. The Respondent in passing the resolution to change the organizational structure, grading and staff establishment ignored the input of the JDAC committee even after they were trained at great expense to evaluate and advise the board in conceiving, designing and implementing the new organizational structure
 - vii. The action n by the Respondent in changing the organisational structure, grading and staff establishment is unlawful and ultra vires because they have not been donated the power to do so under the NGOs Co-ordination Act, 1990 Act which stipulates the powers and roles of the Board.
13. The Petitioner seeks the following reliefs in his Petition:
- i. A declaration that the actions of the Respondent's Board to change the organizational structure, grading and staff establishment is unlawful, unprocedural, oppressive and unfair
 - ii. A judicial review order of certiorari quashing the resolution by the Respondent to change the organisational structures, grading and staff establishment.
 - iii. Grading and staff establishment is unlawful, unprocedural , oppressive and unfair
 - iv. A judicial review order of certiorari quashing the resolution by the Respondent to change the Petitioner's designation as legal manager-legal services division to that of principle officer-legal affairs.
 - v. An order of mandamus compelling the Respondent to pay to the Petitioner a non-practicing allowance.
 - vi. Costs of this suit.

Response to Petition

14. The Petition was opposed by the Respondents through a Replying Affidavit sworn on 10th March 2022 by Franklin Mutuma Nkanata, the 1st Respondent. In that affidavit, the deponent states that the 3rd Respondent launched an exercise aimed at developing an efficient and effective organisational structure, grading and staff establishment which was done in accordance with the Constitutional provisions of fairness and transparency and the provisions of the *Fair Administrative Action Act*.



15. The Respondents state that the Petitioner's allegation that they conducted the review of the organisational structure, grading and staff exercise in a rushed manner and without consulting employees does not have any basis and no proof has been tendered in support of the allegation.
16. It is the contention of the Respondents that the Petitioner has attached the new organizational structure which he challenges as discriminatory, but he has intentionally and maliciously failed to acknowledge that the Board did not have a pre-existing and approved organizational structure in place prior to the development of the impugned structure.
17. According to the Respondents, the previous arrangement had no criteria on promotions and had grouped a number of staff in a horizontal line of authority and accountability, but the new organizational structure, grading and staff establishment ensured effective and efficient service delivery while creating a clear line of accountability and authority therefore addressing the mischief in the old system.
18. According to the Respondents, the impugned organizational structure, grading and staff establishment reveals that there was no loss of remunerative benefits previously earned by the employees. They aver that it is misleading for the Petitioner to alleged that the new structure has the effect of demoting and demoralizing employees.
19. The Respondents further state that the new organizational structure, grading and staff establishment creates a progressive career pathway thus providing an opportunity for clear career growth to all employees.
20. It is the Respondents' case that the Petitioner has failed to appreciate the importance of a clear organizational structure and seeks to thrive in the unstructured system that previously existed. That the Petitioner's claims are purely as a result of resistance to change.
21. According to the Respondents, the new structure was implemented and has been in operation since March 2021. The Respondents aver that the Petitioner actively aided in the implementation of the new structure as the Boards Principal Legal Officer in charge of legal affairs and therefore cannot question the changes one year down the line.
22. The Respondents further state that the Petitioner fully participated in the development of the new organizational structure, grading and staff establishment, accepted and signed the offer letter of his new position on 1st March 2021 and has been performing his functions in the new role under the new structure since 1st March 2021.
23. It is the Respondents further contention that the organizational structure, grading and staff establishment was subjected to meaningful and qualitative public participation in accordance with Article 118(1)(b) of *the Constitution*.
24. On the issue of payment of non-practising allowance, the Respondent submits that the Petitioner, the 5th and 12th Interested Parties are aware that this court lacks jurisdiction to entertain the matter as a similar matter is pending before the Court of Appeal in *National Environmental Management Authority v Erastus Gitonga & 4 Others: Law Society of Kenya & Another (Interested Parties) (2021) eKLR*.
25. According to the Respondent, this court ought to stay the instant suit especially the determination on the issue of non-payment of practising allowance since the matter is already pending before the court of appeal.



26. The Petition was filed together with an application by way of notice of motion of even date in which the Petitioner sought the following orders:
1. That this application be certified urgent and heard ex parte in the first instance
 2. That there be a temporary stay of the implementation of the resolutions of the board during the 33rd special board meeting that was held on 19th February, 2021, to change the organizational structure, grading and staff establishment of the NGOs Co-Ordination Boards pending the hearing and determination of this application inter parties
 3. That there be a temporary stay of the implementation of the resolutions of the board during the 33rd special board meeting that was held on 19th February, 2021, to change the organizational structure, grading and staff establishment of the NGOs Co-Ordination Board pending the hearing and determination of the petition herein.
 4. The Petitioner, the 5th and the 12th Interested Parties are Advocates of the High Court of Kenya and are entitled to non-practising allowance which the Respondents have failed, neglected and or refused to implement. The same should be implemented forthwith and backdated to the time the manual was approved.
 5. Costs.
27. On 17th May 2022, the court directed that the petition together with the application proceed by way of written submissions.

Submissions

28. The Petitioner's submissions are dated 5th October 2022 while the Respondents' submissions are dated 14th November 2022
29. The Petitioner has submitted that the proposed new organizational structure breaches the Public Service guidelines which require that an organization transiting staff from one structure to another should be careful to avoid destabilizing, disadvantaging or discriminating staff in such an exercise.
30. According to the Petitioner, the new organization structure, grading and staff establishment breaches clause 1.1.11 and 2.3 under the general provisions of the approved Human Resource Manual as read with the career progression guidelines of the Respondent.
31. The Petitioner submitted that the change of the organizational structure by the Respondent is malicious, arbitrary and was done in bad faith with the sole intention of discriminating and demoting certain staff while creating senior positions for some other favoured staff.
32. The Petitioner submits that the change to the new organization structure is without basis and will not make the 3rd Respondent more efficient in discharging its mandate.
33. On payment of non-practising allowance, the Petitioner submits that he is an active advocate of the High Court of Kenya. That other advocates employed by other government and semi-autonomous government agencies similar to the 3rd Respondent herein are paid a non-practising allowance but the 3rd Respondent has refused to pay the Petitioner the same.
34. In summary, it is submitted that the changes to the organizational structure that were implemented or proposed by the 3rd Respondent are oppressive, discriminatory and fundamentally distort the career prospects and growth of the Petitioner and his colleagues.



35. The Respondents on their part identified the issues for determination to be:
- i. Whether the Respondent's Board was in the right in conducting the organisational structure, grading and staff establishment
 - ii. Whether the organisational structure, grading and staff establishment was done in an unfair, illegal and oppressive manner
 - iii. Whether the matter of the 5th -12th Interested Parties entitlement to non-practising allowance should be heard with the instant suit.
 - iv. What orders should issue
36. On the first issue, the Respondents submitted that section 8(2) of the NGOs Coordination Act expressly gives the Board powers to appoint such officers as it deems necessary to perform its function. That the 3rd Respondent is mandated by its constituting statute to do all that is necessary to ensure it lawfully performs its mandate. That grading of its staff falls within its mandate.
37. It is the Respondents' submission that the overhauling or creation of a new organizational structure, grading structure and staff establishment where there was no structure, is a way of improving the performance of the Board and creating a clear ranking system where everyone is appraised on their own duties within the establishment.
38. It is submitted that the Board did not act on its own in formulating a new career progression guideline and organizational structure. That it did so in consultation and with approval of the State Corporation Advisory Committee (SCAC) and the relevant ministry.
39. On the second issue, it is the Respondents' submission that although the Petitioner has averred in his pleadings that the procedure of creating a new organizational structure, grading structure and staff establishment was done in an unfair, illegal and oppressive manner, he did not pleaded with a degree of specificity how the alleged violations violated of his constitutional rights happened or particularize which rights were violated.
40. Regarding the allegation made by the Petitioner that there was a lack of public participation in the process, the Respondents submitted that the process was inclusive as it included all employees and managerial staff input on the changes proposed and undertaken by the Board.
41. According to the Respondents, the entire process was facilitated by a team of consultants from the Directorate of Public Service Management (DPSM) which conducted the exercise in five working days and submitted a report on the same to the Board.
42. The Respondent submitted that the Board mostly engaged the Managerial and Departmental Heads in the process of making the new human resource policy instruments. That the Petitioner being one of the managers played a major role in the development of the human resource policy instrument. That he should have sought intervention of the court during the development stage if he was aware of any unfairness and oppressiveness of the procedure.
43. Regarding the issue whether the Petitioner and the 5th and 12th Interested Parties are entitled to non-practising allowance, the Respondent submitted that the same issue is pending in the Court of Appeal in *National Environmental Management Authority v Erastus Gitonga & 4 others: Law Society of Kenya & Another (Interested Parties) (2021) eKLR* and deciding on the issue by this court would be in contravention of section 6 of the [*Civil Procedure Act*](#).
44. The Respondents urged the court to dismiss the petition



Determination

45. Having considered pleadings, submissions and authorities filed by the parties herein, the issues that fall for my determination are:
- i. Whether the actions of the Respondent's Board to change the organizational structure, grading and staff establishment is unlawful.
 - ii. Whether the Respondents violated the Petitioner's rights by
 - iii. Whether the petitioner is entitled to the prayers sought
46. It was the case of the Petitioner that the organizational restructuring, grading and staff establishment carried out by the Respondent was illegal, unfair and oppressive. That the Respondents did not carry out public participation or participation of affected employee, that the same was arbitrary and no explanation was given on what the exercise would achieve or how it would promote efficiency in work, that the same was vague and confusing on the roles of certain cadres, caused a distortion and conflict in roles of certain members of staff, demoted some staff and compromised their job growth and career prospects, was haphazard and the implementation was discriminatory, did not conform to management policy, career progression guidelines and Respondents human resource instruments, and was ultra vires the NGO Coordination Act which stipulates the powers and roles of the 3rd Respondent's Board.
47. The Petitioner however did not submit any evidence to demonstrate any of these averments except his placement in the new grading system.
48. The conversion table as given by the Petitioner is reproduced below:



Current Designation	Current Grade/JG	New Designation	New Grade/ NGOB
Executive Director	-	Executive Director/ CEO	1
Deputy Executive Director	2	Director	2
Manager	3	Manager	3
Manager	4	Principal Officer	4
Assistant Manager Office	5	Senior Officer	5
Senior Officer	6	Officer	6
Assistant Officer	7	Senior Assistant Officer	7
Officer Assistant officer	8	Assistant Officer	8
Support staff Hospitality staff	9	Senior office Assistant	9
-	-	Office Assistant	10

49. From the table it is evident that no employee was going to earn less than they were earning under the old grading structure. What had changed was only designations of some grades.
50. There is however an anomaly in the transition of the Petitioner. He was a manager at Grade 3 in the old grading structure and should have remained as a manager in the new structure. However, the letter written to him states that he was to transition to the designation of Principal Legal Officer which was placed at Grade 4 in both the new and old grading structures. The letter addressed to the Petitioner is reproduced below:

Office Of The Present
Ministry Of Interior & Co-ordination Of National Government
Ngos Co-ordination Board
NGOB/BUR/[PERS/2009](#)5511135 1st March 2021
Lindon Nicolas
C/O NGOs Co-ordination Board
PO Box 44617 – 00100
Nairobi



RE: Transition to the New Organizational Structure, Grading and Staff Establishment

Reference is made to the above captioned subject.

I wish to inform you of the Boards' decision following its 33rd Special Board Meeting held on the 19th February, 2021 as per the Memo issued earlier to all staff.

The board made a resolution that you shall convert into the new NGOs Board organizational structure, grading and staff establishment and deployed to the Legal Services Division. You shall therefore convert to the designation of Principal Legal Officer and retain your current pay grade.

All your other details of employment remain as earlier communicated to you.

Yours Sincerely

Signed

Mutuma Nkanata, MBS

Executive Director/CEO

Copy to: Human Resource Department (personal file)

51. The Organization Structure, Grading and Staff Establishment was implemented in 2021 as is evident in the letter to the Petitioner dated 1st March 2021. The same is annexed as "Annexure FMN 12" to the Respondents' Supplementary Affidavit sworn on 24th May, 2022 by Franklin Mutuma Nkata, the 1st Respondent.
52. At Table 1 of the said FMN12 is the grading structure as reproduced below.

Grade	Designation
NGOB 1	Executive Director
NGOB 2	Director
NGOB 3	Manger
NGOB 4	Principal Officer
NGOB 5	Senior Officer
NGOB 6	Officer
NGOB 7	Senior Assistant officer
NGOB 8	Assistant Officer
NGOB 9	Assistant Office Assistant/Driver
NGOB 10	Office Assistant



53. The Staff Establishment for Corporation Secretary & Manager Legal Services Division is at table 4 of the same Document FMN 12 at page 10 thereof (page 16 of the bundle). The same is reproduced below:

S/No	Designation	NGOB Grade	Approved Establishment
1	Corporation Secretary	3	1
2	Office Administrator/Senior	6/5	1
3	Driver/Senior	9/8	1
-	Total	-	3

Table 5 provides for staff establishment for Legal Services Division which seems to overlap with the Staff Establishment for Corporation Secretary & Manager Legal Services Division as set out at Table 4. The same is reproduced below:

S/No	Designation	Job Grade NGOB	Approved Establishment
1	Manager, Legal Services/CS	3	(double as the Corporation secretary)
2	Principal Legal Officer	4	1
3	Legal Officer/Senior	6/5	3
-	Total	-	3

54. From analysis of both tables it is clear that the Petitioner's position was in Grade 3 in both table 4 and table 5. His re-designation as Principal Legal Officer was therefore inconsistent with the 3rd Respondent's Grading Structure.
55. The foregoing being the case I find merit in the averments of the Petition but only in so far as the placement of the Petitioner is concerned.
56. There is further evidence that the 5th Interested Party Mercy Soi, the Legal Officer, also complained about her placement by her letter dated 9th November, 2021 in which she contested being graded as grade 6 - Legal Officer when she had qualified to be placed at Grade 5 as Senior Legal Officer in the Organization Structure, Grading and Staff Establishment.
57. On the issue of Non-Practicing allowance, both the Petitioner and the 5th Interested Party raised the issue of non-payment of the same with the Respondents together with their complaint on the



grading. It is evident from the NGOs CO-ORDINATION BOARD Human Resource Policies and Procedures Manual that the same is provided for at section 4.1.14. as follows:

4.1.14. Non Practicing Allowance

The allowance shall be payable to designated professionals registered by various professional bodies but are not practicing on accordance with the approved Government rates.

58. The Respondents submitted that the issue is pending in National Environmental Management Authority v Erastus Gitonga & 4 Others: Law Society of Kenya & Another (Interested Parties) [2021] eKL and the inclusion of the same in the instant suit is malicious and a waste of this court's time.

59. To buttress the point the Respondent relied on section 6 of the Civil Procedure Act which provides:

6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

60. The Respondents further relied on the decision in Kenya National Commission on Human Rights v Attorney General: Independent Electoral and Boundaries Commission & 16 Other (Interested Parties) where the court held:

“The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit.”

61. The pleadings in the said suit have not been produced before this court. The parties herein are obviously not parties to the said suit from the citation given by the Respondents. Apart from informing the court that the issue is pending before another court no other information on the said suit was availed to this court.

62. The court cannot make a determination on sub judice where the particulars of fact in the alleged pending suit have not been disclosed and the parties to the pending suit are not the same as those in the instant suit.

63. It is my finding that the Petitioner and all other professionals in the Respondent's employment are entitled to the non-practicing allowance as provided in the NGOs CO-ORDINATION BOARD Human Resource Policies and Procedures Manual at section 4.1.14.

Conclusion

64. Having made the findings as above, I find merit in the petition and order as follows:

- a. That the 3rd Respondent reviews the implementation of the organizational structure, grading and staff establishment to remove the inconsistencies noted above and ensure that the staff are not disadvantaged by the implementation of the same.



- b. That the 3rd Respondent do pay to the Petitioner and all eligible employees non-practicing allowance.
- c. The Petitioner's costs be borne by the 3rd Respondent
- d. Any prayers not granted are dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF OCTOBER, 2024

MAUREEN ONYANGO

JUDGE

