



Koech v Public Procurement Regulatory Authority & 2 others (Petition E151 of 2024) [2024] KEELRC 13247 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13247 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E151 OF 2024**

B ONGAYA, J

NOVEMBER 27, 2024

**IN THE MATTER OF ENFORCEMENT OF ARTICLES 2(1),
3(1), 258(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF VIOLATION OF ARTICLES 27(1) (2) (3) (4) & (5),
28, 45, 47(1), 48, 50(1), 53(2) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

BETWEEN

STEPHEN KIPNGETICH KOECH PETITIONER

AND

PUBLIC PROCUREMENT REGULATORY AUTHORITY 1ST RESPONDENT

PATRICK WANJUKI 2ND RESPONDENT

PUBLIC PROCUREMENT REGULATORY BOARD 3RD RESPONDENT

JUDGMENT

1. The petitioner filed the petition and supporting affidavit both dated 30.09.2024 through E. E. Otieno Law & Company Advocates, seeking the following prayers:
 - a. A declaration be and is hereby issued that the 1st respondent’s decision to transfer and/or deploy the petitioner to Kisumu without considering the unique circumstances that exist within his family particularly the special care needed to a child was in violation of Article 45 of *the Constitution* of Kenya.



- b. A declaration be and is hereby issued that the petitioner's right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair was violated and/or infringed.
 - c. An order be and is hereby issued quashing the decision of the 1st respondent to transfer and/or deploy the petitioner away from his family, until such a time as the circumstances particularly with respect to the petitioner's ailing child shall improve.
 - d. An order do issue restraining the respondents by themselves, their agents, employees, servants, assigns and/or representatives from in any way harassing, victimizing, discriminating and/or disturbing the petitioner.
 - e. Costs be paid by the respondents.
2. The petitioner averred as follows:
- i. The petitioner works as a Principal Compliance Officer for the 1st respondent, a parastatal established under Section 8 of the Public Procurement & Asset Disposal Act, 2015 (hereinafter "PPAD Act"). The 2nd respondent is the Director General (DG) of the 1st respondent while the 3rd respondent is established under Section 10 of the PPAD Act to oversee the management of the 1st respondent.
 - ii. On 06.09.2024, the 1st respondent wrote to the petitioner vide letter Ref: P/F No. 2011047 captioned "Transfer to Ppra Kisumu Regional Office", transferring the petitioner to its Kisumu regional office effective 30.09.2024.
 - iii. The petitioner's arbitrary transfer to the 1st respondent's Kisumu Regional Office is unprocedural, unlawful, was done in bad faith, and constitutes discrimination against his person. The 1st respondent has no regional office in Kisumu as per its organizational structure and the petitioner was therefore basically transferred to a non-existent office, in contravention of the 1st respondent's policy and structures.
 - iv. Furthermore, the petitioner is married and lives with his wife with whom they have two children aged 5 and 2 years. One of his children has a medical condition that requires attention and close monitoring by both parents. The said child is also or has been under close observation of a Consultant Pediatrician, Dr. Ian Kaburu, who has recommended that for effective observation and in order to attend to any medical emergencies, the petitioner should live with his family in Nairobi.
 - v. The petitioner being aggrieved with the decision of the 1st respondent, appealed to the 2nd respondent but his appeal was declined. However, the respondents did not accord him a fair hearing as he was never invited to attend any hearing leading to the rejection of his appeal against his transfer. His right to a fair hearing and/or fair administrative action under Article 47 of *the Constitution* and under the Fair Administrative Actions Act was consequently violated and/or contravened.
 - vi. In addition, the 2nd respondent's internal memo dated 20.09.2024, rejecting his appeal against the decision, was served upon him by email on 25.09.2024, only five (5) days before he would be required to report to his new station and 16 days after he had lodged the appeal. The respondents were clearly buying time in order to frustrate his intended appeal to the 3rd respondent and he was therefore prejudiced from the outset, against his right to a fair procedure.



- vii. The 2nd respondent rejecting his appeal necessitated his other appeal to the 3rd respondent, which he lodged on 26.09.2024. He then wrote to the 2nd respondent on 27.09.2024 reminding him of the pending appeal and requesting a variation of the reporting date to the new station pending hearing and determination of the said appeal. His request was however not responded to and he was unable to report to his new station as was required in his transfer letter.
 - viii. Through an email dated 25.09.2024, the petitioner had sought mitigating measures from the 1st respondent's Regional Office Coordinator and Deputy Director. He was advised to relocate his family to Kisumu as a mitigating measure and was assured the 1st respondent would cater for the costs of his movement as per the 1st respondent's Human Resource Policy & Procedures Manual (HR Manual). However, the said relocation to Kisumu would not be possible since it would require his wife to resign or seek a transfer from her employer, which is not likely to be possible anytime soon. It would also be unreasonable for him to move to Kisumu with the children and leave his wife behind as he would be overwhelmed with the two children.
 - ix. Whereas the 1st respondent also advised the petitioner to plan or discuss his leave schedule with his supervisor as a mitigating measure, this would not address the very fundamental question of the welfare of his family considering he would only be entitled to 21 leave days annually.
 - x. It is in the best interest of the petitioner's children that he lives with them to assist in taking care of them. The circumstances under which his family finds itself in particularly the health of the sick child makes his case peculiar and worthy of special attention and recognition. The respondents' decision to transfer or deploy him without considering the said unique context of his family is in contravention of Article 45(1) of *the Constitution*.
3. The respondents filed a replying affidavit sworn by Mwangi Kahora Gitonga on 29.10.2024, through Munyao, Muthama & Kashindi Advocates. He averred that:
- i. In February 2023, the 1st respondent circulated an internal advertisement to all its employees inviting them to apply for eight (8) positions that were open within the Authority. The advertisement included job descriptions of the advertised roles, including that of the Principal Compliance Officer Grade PPRA 4, which expressly stated that the workstation of the successful applicant would be the 1st respondent's headquarters in Nairobi or a regional office.
 - ii. The petitioner applied for the position of the Principal Compliance Officer Grade PPRA 4 in accordance with the internal advertisement and the provided job description. The 1st respondent considered his application and found him successful, and by a letter dated 31.08.2023, informed him of his promotion to the said position. The petitioner accepted the terms of the promotion letter by signing it on 13.09.2023.
 - iii. The petitioner's promotional letter had, inter alia, the provisions that: the petitioner would be deployed from time to time to work within various functional areas of the 1st respondent, its regional offices or at the Head Office in Nairobi depending on the exigencies of work (clause 5); and other terms of the petitioner's employment would remain as set out in the initial contract of employment and the 1st respondent's HR Manual (clause 6).
 - iv. The 1st respondent's HR Manual, which forms part of the petitioner's terms of employment pursuant to the promotional letter, provided that: it may be necessary for the Authority to transfer its employees from one department or region to another (clause 2.34.1); as a general policy, employees will be required to rotate their posting every 3 years (clause 2.34.3); and where a transfer maintains the same position and salary, this is referred to as a lateral transfer



(clause 2.34.6). Additionally, the HR Manual provided under clause 12.2 that an employee aggrieved by decision that does not relate to discipline may file an appeal to the DG and if not satisfied by decision of the DG, may appeal to the Board.

- v. The decision to transfer the petitioner to the Kisumu Regional Office was arrived at taking into account that the said regional office is understaffed and in need of someone with the petitioner's experience and expertise to oversee activities of the office. Secondly, the possibility of transfer to a regional office was specifically communicated to the petitioner through the promotional letter, which he acknowledged and accepted. Lastly, the petitioner has been posted at the 1st respondent's head office in Nairobi for a period of more than 3 years since 11.08.2011 when he was initially employed.
 - vi. The petitioner's appeal memo dated 09.09.2024 to the DG did not raise the allegations of his child's ill health. The petitioner's further appeal memo dated 26.09.2024 to the Board against the decision of the DG cited the same reasons for his refusal to be transferred to Kisumu set out in his appeal memo, and then for the first time, made the allegations regarding his child's ill health. No evidence of the allegations of the sickness has been provided to the 1st respondent or to this Honourable Court. Moreover, the petitioner has not shown that the alleged medical care required cannot be provided in Kisumu.
 - vii. The 3rd respondent Board was still considering the appeal when the petitioner filed the petition herein. Pursuant to the Order issued on 02.10.2024, the Board considered the appeal and rendered its decision upholding the transfer of the petitioner by a memo dated 28.10.2024.
 - viii. The reality is that the operations of the 1st respondent necessitates that its employees are transferred every 3 years, their respective family situations notwithstanding. In addition, the petitioner's spouse is employed by the Judiciary, which also being a public entity, she can seek transfer to a station in Kisumu. In any case, the petitioner's transfer is not permanent as the petitioner will be eligible for rotation after 3 years.
4. The petitioner's supplementary affidavit was sworn on 05.11.2024 and filed through E. E. Otieno Law & Company Advocates. He averred that he did not disclose his child's health to the 1st respondent because exposing such information would amount to waiving his constitutional rights to privacy and to inherent dignity. Furthermore, he was not accorded any hearing after filing the appeal, at which point he would have orally ventilated the issue. He reiterated that a recent medical report (marked SKK-14) has further rendered his two-year old a child with special needs. That in any case, there are other principal compliance officers within the Authority that would be available for rotation as per policy and the Authority could have first consulted on whether any of the officers desired to take up the transfer to the Kisumu regional office.
 5. The petitioner further averred that the 1st respondent being a public institution is bound by Article 10 of *the Constitution* on the national values and principles of governance, particularly human dignity, equity, equality, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability. Very young children like his sick child are among marginalized persons.
 6. The respondents then filed a further affidavit sworn on 11.11.2024 by Mwangi Kahora Gitonga through Munyao, Muthama & Kashindi Advocates. He averred that the appeals process for addressing the petitioner's grievance is not a disciplinary process and there was therefore no requirement to accord him a hearing. That the petitioner cannot assert the right to privacy as the reason for failing to disclose his child's alleged illness and then seek exclusion from the applicable employment policies including



transfer. That the medical report dated 31.10.2024 does not state anywhere that the petitioner is the child's primary caregiver and does not in any way prevent the petitioner from being transferred. There is also nowhere in the said report that the child is referred to as a 'special needs' child and the allegation is therefore made without basis.

7. The respondents further pleaded that the petitioner's contract of service being for provision of services in consideration of the salaries and benefits referred to therein, is a legal and binding agreement between the parties and cannot be rewritten by this Honourable Court as sought by the petitioner. The 1st respondent would be in breach of Article 27(5) of *the Constitution* if it exempted the petitioner from the provisions of the transfer policy. This is because other employees of the 1st respondent have raised similar issues as those raised by the petitioner and were still transferred to different stations in line with the provisions of the policy and in accordance with the exigencies of work. The respondents refuted that the petitioner's child is included in the category of marginalized communities due to the alleged illness. That in any event, the 1st respondent has taken out comprehensive medical insurance as a benefit for its employees and their families. The respondents asked the Court to uphold the transfer of the petitioner as it is in accordance with his terms of employment.
8. The parties filed their respective written submissions.
9. The Court has considered the material on record and upholds the respondent's case. In particular:
 - a. The petitioner has failed to show that the impugned transfer amounted to a demotion. His job description, designation, salary and benefits appear not affected at all.
 - b. The petitioner has failed to show that the transfer is in breach of the contractual terms on place of work or respondents' policy on transfer.
 - c. While it is trite law that decisions are made in the best interest of the child, the petitioner confirms that he has no disclosed to the respondent such best interest in favour of his child that would justiciably be considered to vitiate the looming transfer that is within the contractual provisions.
 - d. Accordingly, the petition must fail as no violation of rights has been established as was alleged.
 - e. The parties continue in employment relationship and to foster best work relationships, no orders on costs of the petition.

In conclusion, the petition is hereby dismissed with no orders on costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 27TH NOVEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

