



Republic v Public Procurement Regulatory Authority & another; Waweru (Exparte) (Judicial Review Application E058 of 2024) [2024] KEELRC 13494 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13494 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E058 OF 2024**

B ONGAYA, J

DECEMBER 19, 2024

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

**IN THE MATTER OF THE DECISIONS BY THE PUBLIC PROCUREMENT
REGULATORY AUTHORITY DATED 18TH OCTOBER 2024 AND 29TH OCTOBER 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT REGULATORY AUTHORITY 1ST RESPONDENT

DIRECTOR GENERAL, PUBLIC PROCUREMENT REGULATORY

AUTHORITY 2ND RESPONDENT

AND

PATRICK MICHAEL NDUNGU WAWERU EXPARTE



JUDGMENT

1. The ex parte applicant filed the notice of motion dated 19.11.2024 through Costin & Webster Law and learned Counsel Mr. Kimanthi and Ms. Lily Maina appeared in that behalf. The application was under sections 8 and 9 of the Law Reform Act, Cap. 26; Order 53 rule 3 of the Civil Procedure Rules, 2010; and, all other enabling provisions of the law. He seeks the following orders:
 1. An order of Certiorari, to remove into this Honourable Court and quash the decisions of the respondents dated 18.10.2024 and 29.10.2024, seeking to re-designate, redeploy and transfer the applicant from the 1st respondent's Internal Audit Directorate in its Headquarters at Nairobi Offices to the Compliance Monitoring Directorate in its Western Regional Office in Kisumu;
 2. An order of Prohibition directed at the respondents, its agents, employees, servants, officers or any other person acting in its name or on its behalf to refrain from re-designating, redeploying and transferring the applicant from its Internal Audit Directorate in its Headquarters at Nairobi Offices to any other Directorate and regional office without his express unequivocal consent, as required under Section 40 of the Public Service Commission Act and Section 10(5) of the Employment Act.
 3. An order of Mandamus compelling the respondents, its agents, employees, servants, officers or any other person acting in its name or on its behalf to discharge its mandate in a manner in tandem with the Constitution, Employment Act, Public Service Commission Act, other applicable laws and free of bias, victimization and discrimination.
 4. Provide for costs of the application.
2. The application was based upon the grounds set out in the ex parte applicant's statutory statement and verifying affidavit (filed together with the application for leave to file the instant application) both sworn on 14.11.2024. The ex parte applicant's case was as follows:
 - a. He was employed by the 1st respondent herein sometime in January 2016 and on or about 30.08.2022, it appointed him as a Senior Internal Auditor.
 - b. Through a letter dated 16.03.2023, the 1st respondent, through its Director General, 2nd respondent herein, irregularly re-designated, re-deployed and transferred him from his current position of Senior Internal Auditor (Internal Audit Directorate) in Nairobi Headquarter offices to the position of Senior Compliance Officer at the Authority's Western regional office in Kisumu.
 - c. He subsequently challenged the said deployment and transfer in court vide Nairobi ELRC Petition No. E075 of 2023, Patrick Michael Ndungu Waweru vs. Public Procurement Authority & 2 others, where it was declared null and void. The Court further noted that he was being victimized for having performed his internal audit roles as per law and regulations. Notably, the respondents never appealed the said judgment.
 - d. During the pendency of the suit before Court, he experienced continued victimization and discrimination, as he was not assigned any work, despite reporting to work diligently. He raised his concern with the 2nd respondent vide a letter dated 02.08.2023 with a follow-up letter dated 18.10.2023, but the same has never been responded to.



- e. On 06.09.2024, he received a letter from the 2nd respondent inviting him for a ‘consultation’ meeting with the Human Resource Management Advisory Committee (HRMAC) on 16.09.2024, over his proposed re-designation, deployment and transfer to the 1st respondent’s regional office in Kisumu. He attended the said meeting as scheduled and indicated he did not consent to the move. Further, in a letter dated 17.09.2024, he stated that he had informed the Committee that he had declined the proposed designation, re-deployment and transfer.
- f. Through a letter dated 18.10.2024, he received communication from the 2nd respondent, on the 1st respondent’s decision to retain the applicant’s position as a Senior Internal Auditor but deploying him to the Compliance Monitoring Directorate and transferring him to the Authority’s Kisumu regional office. With this, the applicant alleges that the 1st respondent has therefore impliedly undertaken and out-rightly effected a re-designation of the applicant without following the laid down legal procedures under Section 40 of the Public Service Commission (PSC) Act, thus violating his rights as an employee in the public service. He says he is also exposed to further victimization and would not have any opportunity for career progression as a compliance officer. The cited section 40 of the *Public Service Commission Act, 2017* states as follows;
- “ (1) The criteria for appointment of public officers prescribed under this Part shall apply when selecting public officers for re-designation.
- (2) A public officer who wishes to re-designate shall apply, in writing, to the respective authorized officer or to the Commission through the concerned authorized officer, as the case may be, for re-designation.
- (3) A public officer may be re-designated to hold or act in a public office if—
- (a) the office is vacant;
- (b) he or she meets all the qualifications;
- (c) the re-designation shall not disadvantage any public officer who is already serving in the particular cadre;
- (d) the officer has consented to such a decision; and,
- (e) the decision shall not reduce the public officer’s salary.
- (4) A re-designation shall take effect on a date to be determined by the Commission or authorized officer.”
- g. Further, the respondents’ decision was unmerited and meant to demoralize him and ultimately push him out of employment through continuous frustration and “non-performance”. Their actions also clearly amount to contempt of the Court’s Judgment dated 24.07.2023.
- h. On 23.10.2024, he appealed the 1st respondent’s decision to the 2nd respondent, whom he urged to consider his submissions dated 17.09.2024, Section 10 of the *Employment Act* and Section 40 of the PSC Act. Thereafter on 30.10.2024, he received a letter dated 29.10.2024 from the 2nd respondent informing him that his appeal had been declined. He was further expected to confirm acceptance of the deployment and transfer by close of business on 30.10.2024, failure of which his employment would stand terminated effective 31.10.2024.



- i. It was out of the respondents' harassment, coercion, threats of termination of his employment, and fear of losing his source of income that the applicant reluctantly accepted the transfer and was informed that he was expected to report to his new job and workstation on 18.11.2024.
 - j. He is apprehensive that the respondents' said actions are an outright violation of rules of natural justice, his right to a fair hearing, access to justice, and fair administrative action, as he was not accorded sufficient time to exhaust all the laid down internal complaint procedures as per the 1st respondent's Human Resource Policy and Procedures Manual (hereinafter "the HR Manual").
 - k. This Court should therefore intervene as he risks suffering serious violation of his rights to equal opportunity in employment, against discrimination and victimization and to fair administrative action. The respondents, on the other hand, will not suffer any prejudice if the application and the orders sought therein are allowed.
3. The application was opposed by the respondents' replying affidavit of Mwangi Kahora Gitonga sworn on 28.11.2024 and filed through Munyao, Muthama & Kashindi Advocates. Learned Counsel Ms. Irene Kashindi and Ms. Mellap Wataka appeared in that behalf. They prayed that the application be dismissed with costs and urged as follows:
- i. The 2nd respondent is empowered by Section 23 of the Public Procurement and Asset Disposal (PPAD) Act to employ staff to carry out its functions under the Act. The Authority has a staff establishment of 197 with a current posting of 64 and is therefore severely understaffed. Further, there exist lack of funding to facilitate recruitment of additional staff members. It is hence necessary that the 2nd respondent ensures that the available employees are utilized and engaged in the most efficient way to enable the exercise of its functions under the PPAD Act.
 - ii. Part of the 2nd respondent's managerial prerogative to optimally engage employees entails transferring employees from one department or station to another in accordance with the provisions of clauses 2.34.1, 2.34.3, 2.34.6 and 2.35.3 of the 1st respondent's HR Manual. Under clause 12.2, an employee aggrieved by a decision that does not relate to discipline may file an appeal to the Director General and if not satisfied by the decision of the Director General, may appeal to the Board.
 - iii. The letter dated 06.09.2024 informed the applicant of the proposal to redeploy him as Senior Compliance Officer Grade 5, the same job grade as the one he currently holds, and to transfer him to the Kisumu regional office. This was informed by the 2nd respondent's need to organize its employees effectively and further because the applicant had been involved and actively participated in compliance assessment for public procurement processes by public entities.
 - iv. In the consultative meeting held with the applicant on 16.09.2024, the 2nd respondent's HRMAC members informed him that his skills as an internal auditor were relevant to the new proposed role, which has a function for specialized audit. Upon his request, the applicant provided a written response letter dated 17.09.2024 confirming his readiness to carry out specialized audit roles before further recruitment of additional employees was undertaken.
 - v. The 2nd respondent's Committee considered the applicant's response in its meeting held on 16.10.2024 and communicated its decision by a letter dated 18.10.2024. The applicant's appeal was thereafter considered and the decision to uphold his deployment and transfer was expressly communicated to him.



- vi. The applicant has misapprehended the functions of the 2nd respondent as there is a difference between the procurement function and the procurement process. The said deployment and transfer will therefore not be prejudicial because he will be engaged in activities related to the procurement function, which allows for application of his professional skills and qualifications including special audits.
 - vii. Contrary to his assertions, the applicant accepted willingly the terms of the deployment and transfer set out in the letter of 18.10.2024 after a rigorous consultative process and exhaustion of the internal grievance-handling process.
 - viii. The applicant's deployment and transfer is lawful further because the Kisumu office remains understaffed and lacks the requisite skill establishment that is with the applicant. Additionally, the 2nd respondent's general policy is to transfer employees every three (3) years and considering the applicant has been based at the Head Office in Nairobi for more than three years, it is only fair that he be transferred in accordance with policy. Exempting him from application of this general policy would expose the 2nd respondent to claims of discrimination by other employees.
4. The ex parte applicant thereafter, with leave of the Court, filed the further affidavit sworn on 03.12.2024. He stated that since both the investigation and specialized audit departments are predominantly based in the Nairobi Headquarters and not at regional offices, which means he should remain in the Internal Audit Directorate in Nairobi to undertake any additional duties and responsibilities. That he lacks the necessary educational background and experience to be re-deployed to the compliance department or technical function. That nobody has ever been re-designated, redeployed or transferred to work in another department including regional offices and some of the officers have worked in the same directorate from 2011 when the Authority was established, in line with clause 2.34.2 of the HR Manual. He further averred that the tone and wording of the respondents' letter dated 29.10.2024 demonstrates that he was never given an opportunity to exhaust all the internal laid down grievance handling procedure as alleged thus necessitating the intervention of this Honourable Court. That the respondents have also failed to address the Court on him being denied work since April 2023.
 5. The parties filed their written submissions and orally highlighted before Court on 04.12.2024. The Court has considered the material on record and returns as follows.
 6. First, there is no dispute that parties are in employment relationship. The 1st respondent initially employed the applicant as an internal auditor Grade 6 per the letter dated 15.01.2016. The letter incorporated the 1st respondent's Human Resources Policies and Procedures Manual (the Manual) as part of applicable terms and conditions of service. The 1st respondent promoted the petitioner to Senior Internal Auditor per the letter dated 07.08.22. There is no dispute that the respondent is an employer in the public service, the applicant is a public officer, and, the Public Service Commission applies to the employment relationship.
 7. Second, there is no dispute that the applicant is a professional Certified Public Accountant of Kenya (CPA-K) and is a member of the Institute of Certified Public Accounts of Kenya (ICPAK), Institute of Internal Auditors of Kenya (IIA-K), and Information Systems Audit & Control Association (ISACA). There is no dispute that the applicant's qualifications are consistent with the respondent's prescribed qualifications of the position the applicant holds of Senior Internal Auditor, grade 5.
 8. Third, by the letter dated 06.09.2024, the respondent proposed to re-designate, deploy and transfer the applicant to the Compliance Monitoring Department as a Senior Compliance Officer, grade 5 and for the applicant to be transferred to Kisumu Regional Office effective 30.09.2024. The letter invited



the applicant to attend a consultative meeting on 16.09.2024 at 10.00am at the respondent's 5th Floor Boardroom. The applicant attended the meeting and objected to the proposed decision. He requested and was permitted to write to the respondent, after the meeting and in the interest of inequality of arms to put his objection on record, about his objections to the proposed decision. The applicant in his letter dated 17.09.2024 wrote the points of objection to the following effect:

- a. The proposed decision undermined his legitimate expectation for personal professional and career development. The re-designation, transfer, and redeployment would deny him an equal opportunity for development in his chosen career in internal audit spanning over 15-years and he was being thrown to uncharted waters with no clear career growth line.
- b. There was no link between his qualifications, skills, competencies and membership to professional bodies to the discharge of the respondent's core mandate while performing the role of a Senior Compliance Officer. If implemented, the decision would neither enhance his professional or career growth or development nor enhance the respondent's efficiency and effectiveness in service or mandate delivery.
- c. The letter inviting him to the meeting had acknowledged that the applicant had "... demonstrated competence, merit and ability in performance in internal audit function and previous compliance audit exercises." The internal audit of compliance monitoring department was always undertaken as a routine internal audit exercise just like other departments including human resource and administration; ICT; ARB; Finance and Accounts and others. It was no reason to remove him from his cadre of internal audit and in which he had heavily invested over the years.
- d. In consideration of interests of both parties at the meeting and in view of the planned recruitments to address the staffing shortages; the applicant's career progression; the applicant's family issues; and, the applicant's psychological exposure, the applicant requested the meeting as follows:
 - i. The claimant not to be re-designated re-deployed and transferred but to retain his position and title as Senior Internal Auditor based at the Head Office.
 - ii. For the sake of synergy in the respondent Authority, the claimant was willing to be temporarily assigned investigation and or specialised audit assignments awaiting recruitment of compliance officers and, the applicant to undertake the temporary duties as a CPA-K.
- e. By the letter dated 18.10.2024, the respondent referred to the consultative meeting and the applicant's letter of 17.09.2020 and advised to the effect as follows:
 - i. The applicant's request in the letter of 18.10.2024 had been noted and taken into account.
 - ii. The applicant had all qualifications for career growth in the cadre of Compliance Officers and who as well undertook special audits and investigations and were drawn from diverse backgrounds. The applicant had all stipulated qualifications for a Senior Compliance Officer and the applicant had been involved in the work of Senior Compliance Officers including undertaking special audits and investigations that was as well undertaken in the Regions.
 - iii. Due to staffing constraints, only one officer, the Acting Director Internal Audit, would undertake the internal audit function. That had been the case since May 2023.



- iv. His deployment to the compliance function was prudent to maximize delivery of the respondent's core mandate
 - v. Transfer to the Western Region in Kisumu was not a health hazard but a normal transfer. In any event, the respondent had provided a health insurance cover.
 - vi. Based on the foregoing, it had been decided that the applicant retains his title as Senior Internal Auditor grade PPRA 5 and deployed to Compliance Monitoring and transferred to Western Regional Office in Kisumu where he will report to the Regional Offices Coordinator as his supervisor and through the Head of the Regional Office. He was kindly requested to arrange to handover and report to the new duty station by Monday 11.11.2024.
 - vii. The applicant acknowledged and accepted the transfer letter by signing a copy of the letter on 30.11.2024. He signed confirming his acceptance to take up the position subject to the terms set out in the letter.
- f. By letter, dated 23.10.2024, the applicant appealed for the respondent to review the decision as conveyed in the letter dated 18.10.2024 and upon his letter dated 17.09.2024; section 10 of the *Employment Act*; and, section 40 of the *Public Service Commission Act*, 2017. The applicant further stated, "In the event that my appeal will be declined, I pray that the reporting date be extended proportionately to the days it will take for this appeal to be heard and determined."
- g. The 1st respondent replied by the letter dated 29.10.2024 to the following effect:
- i. It was not clear whether the applicant was appealing against re-designation, transfer or deployment. It was being clarified that he had been transferred to the Compliance and Monitoring Directorate and deployed to the Western Regional Office, Kisumu with his title of Senior Internal Auditor grade PPRA 5 so that he had not been re-designated.
 - ii. With respect to section 10 of the *Employment Act* on particulars of employment, clause 12 of his letter of employment had incorporated the provisions of the Manual.
 - iii. The letter concluded thus, "Should you be unwilling to take up the deployment and transfer, your employment shall be terminated effective 31st October, 2024 taking into account the provisions of the *Employment Act*, 2007."
9. Fourth, the Court has considered the flow of the events. The Court finds that indeed the applicant has invested heavily in his chosen profession and career as an internal auditor. The Court finds that the applicant has also confirmed that he has been involved in special audits and investigation assignments of the Monitoring and Compliance Department of the 1st respondent. The Court also finds that there is nothing on the record to suggest that the applicant lacks any of the qualifications for the cadre of 1st respondent's compliance officers.
10. Fifth, while there is no established office of Senior Internal Auditor at Kisumu, it appears to the Court that the applicant is being transferred to perform special audit and investigation duties in the Western Region at Kisumu and to retain the designation of Senior Internal Auditor, PPRA 5 personal to himself. The Court has carefully considered the consultations parties engaged in as envisaged in sections 10 of the *Employment Act*, 2007 and the section 40 of the *Public Service Commission Act*, 2017. The officer, the applicant's wish, not to be re-designated has been upheld. It appears to the Court that the decision was made in a detailed consultative process of the parties should balance the applicant's



desire to remain in his chosen career and profession while accommodating the respondent's prerogative to arrange delivery of its core mandate within the scarce and available human resources. It should be that once the compliance officers are recruited, the applicant should be redeployed back to the internal audit directorate.

11. Sixth, the Court has noted the applicant signed on 30.11.2024, with respect to the 1st respondent's letter of 18.10.2024 in acceptance of the deployment to the Compliance Monitoring Directorate as Senior Internal Auditor grade PPRA 5 and transfer to the Western Region Office in Kisumu. The Court considers that the parties should be bound by that agreement arrived at after the detailed consultations.
12. While making that finding the Court has seriously and deeply considered the need for employers, including those in public service, not to unfairly move public officers across professional cadres in a manner calculated to undermine the employee's professional and career growth and development. The Court has weighed that consideration against the ever-evolving need for employers to rearrange available employees (human resources) in a manner consistent with the prevailing and ever changing needs of the enterprise.
13. It appears to the Court that it should be possible for such rearrangements to be permissible if they are in the best interest of the delivery of the goals of the enterprise; they are made in good faith and consultatively with concurrence of the employee; as far as possible, the rearrangements are implemented with least adverse impact on the employee's professional and career growth and development; and, the worker's new assignments in the rearrangement are such that they do not amount to being "useless or irrelevant" as amounting to a fundamental breach by the employer of the contracted job description or work to be performed by the employee, unless parties agree on fair terms of retraining and re-skilling.
14. The Court's further view is that the employee and the employer should strive to always engage in good faith towards an agreement for such rearrangements so as to retain the employee at work rather than separating through redundancy or other lawful means, while, circumstances exit that in view of the employee's formal qualifications, and, the enterprise changing needs, the employee should be retained in the best interests of both parties. A training and retraining component may as well emerge as a crucial consideration in such processes. The focus should be enabling as many persons already working a continued enjoyment of the right to work. The Court holds that workers and owners of work should readily embrace such rearrangements at work for a just transition especially in view of the looming green jobs and fast technological changes affecting the nature of work and designs of working. Economical sustainability of the enterprise should be possible without the right to work being completely diminished.
15. Thus the Court holds that there is nothing permanent in the nature of work, designs of working, enterprise goals or operational requirements, and, qualifications (competencies) of employees. Accordingly, it appears to the court that the parties in the world of work should embrace fair flexibility for a sustained relationship that meets the parties' best interests especially the continued enjoyment of the right to work. The Court holds that fair flexibility arrangements, retraining, and, reskilling are all facets that parties in the employment relationship cannot wish away in keeping pace with the prevailing and even ever changing needs of the enterprise.
16. In the instant case, the Court has found that the proposed flexibility was fair as manifested in the detailed consultations and the substance of the decision that, in the circumstances, the applicant is deployed to the Compliance Monitoring Directorate as Senior Internal Auditor grade PPRA 5 and transferred to the Western Region Office in Kisumu. The Court's view is that the decision balanced



the delivery of the 1st respondent's core functions while taking into account the applicant's interests especially his professional and career development.

17. The Court upholds the submissions made for the respondents that the applicant has failed to pass the thresholds and to show the justification for grant of the orders of judicial review as prayed for. The applicant was not redesignated. His professional and career growth concerns have been taken into account. The applicant signed accepting the decision that he retains his designation; he is deployed to Compliance Monitoring Directorate; and, he is transferred to Western Region at Kisumu. In view of the applicant's signing to accept the decision and in absence of any material evidence, it cannot be found that the decision was made to victimise the applicant as was found in the earlier decided case between the parties Nairobi ELRC Petition No. E075 of 2023, Patrick Michael Ndungu Waweru vs. Public Procurement Authority & 2 others. The decision made by the 1st respondent in the instant case amounted to fair work flexibility arrangements in the employment relationship. The applicant has not established a justification for exercise of the rare Court's jurisdiction to interfere in the employer's prerogative to perform human resource powers and functions including rearrangement of the delivery of the goals of the enterprise. In particular, the parties exhausted internal consultative procedures and it has not been shown that the decision made was unlawful, unreasonable, ultra vires, or, amounted to refusal to exercise a statutory or public duty. The parties are in a continuing employment relationship and looking at the margins of success, each will bear own costs. The Court has considered the circumstances of the case and the applicant should report as transferred not earlier than 01.02.2025, as will be fixed by the respondents, to allow time for him to deal with incidental personal and family concerns.

In conclusion, the application for judicial review orders of certiorari, prohibition and mandamus, dated 19.11.2024, is hereby determined with orders:

1. The application is dismissed.
2. Each party to bear own costs of the application.
3. The applicant should report as redeployed transferred, not earlier than 01.02.2025 as will be fixed by the respondents, and to allow time for him to deal with incidental personal and family concerns.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

