



**Mbalanya v Kenya Ports Authority (Employment and Labour Relations
Petition 3 of 2020) [2023] KEELRC 1000 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1000 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS PETITION 3 OF 2020**

AK NZEI, J

APRIL 20, 2023

BETWEEN

ERNEST M MBALANYA PETITIONER

AND

KENYA PORTS AUTHORITY RESPONDENT

JUDGMENT

1. On April 28, 2020, the Petitioner herein filed an evenly dated Constitutional Petition seeking the following reliefs:-
 - a. A declaration that the transfer of the Petitioner vide the letter of posting dated May 17, 2019 was unlawful, unreasonable, and un-procedurally (sic) unfair and lacked any lawful effect and hence null and void ab initio.
 - b. A declaration that the Petitioner had a legitimate expectation that he would work as a Trainer, Equipment Operations at Bandari Maritime Academy.
 - c. That the Respondent's decision to post the Petitioner to Lamu Jetty vide a letter dated May 17, 2019 be quashed and the Petitioner's status subsisting as at May 16, 2019 be reinstated forthwith.
 - d. Costs of the petition.
2. The Petitioner pleaded, inter-alia:-
 - a. That the Petitioner was employed by the Respondent on June 17, 1995 as a Docker, upon which he underwent training courses both locally and internationally and attained the status of Training Officer, Equipment Operations, as from November 23, 2010.



- b. That on January 20, 2012, the Petitioner was deployed by the Respondent to Bandari College as an Assistant Training Officer Equipment Operations Grade HM3.
- c. That the Petitioner's station at Bandari College was a strategic posting considering that the College had the necessary sophisticated equipment to train Equipment Operators and there was a constant flow of trainees and hence the Petitioner was in a position to actively put his own extensive expertise as a trainer into use.
- d. That vide Legal Notice No 233 dated November 28, 2018, Bandari College was converted into the Bandari Maritime Academy whereby all the assets, Machinery, apparatus and materials previously owned by Bandari College were vested upon the newly formed Academy.
- e. That under Clause 22 of the aforesaid Legal Notice, all persons who were members of staff of the Bandari College were deemed as staff of the Academy unless such a member elect not to continue in the service of the Academy.
- f. That the effect of the aforementioned Clause effectively placed the Petitioner under the Academy.
- g. That vide a letter dated May 17, 2019 and received by the Petitioner on May 23, 2019, the Respondent's General Manager, Human Resource and Administration, posted the Petitioner from Bandari College Mombasa to Conventional Cargo Operations, Lamu Jetty, and was required to report to the new station with immediate effect. That the said letter was addressed to the Head of Conventional Cargo Operations and the Acting Head, Bandari College, and copied to the Petitioner.
- h. That in effect, the said letter altered the Petitioner's terms of employment by the posting to Lamu Jetty which had no capacity of infrastructure to train equipment operators and there were no plans to set up such operations.
- i. That the Respondent's actions as per the letter dated May 17, 2019 were in contravention of constitutional and statutory provisions, and that the Respondent breached the Petitioner's right to fair labour practices as provided in Article 41 of the Constitution in that:-
 - i. The letter dated May 17, 2019 did not give any reasons for the Petitioner's posting from Mombasa to Lamu.
 - ii. The Respondent did not consult the Petitioner before the transfer.
 - iii. The transfer was on short notice as the transfer was to take effect immediately.
- j. That the Respondent's abrupt decision to transfer the Petitioner from Bandari Maritime Academy to Lamu Jetty contravened Article 47 of the Constitution because:-
 - i. The transfer letter dated May 17, 2019 did not contain any reasons for the transfer.
 - ii. The transfer was unlawful since it sought to circumvent the provisions of Legal Notice No 233 which placed the Petitioner under the newly formed Bandari Maritime Academy.
 - iii. The decision to transfer was procedurally unfair since the transfer was effected without consultation with the Petitioner as required under Section 10(5) of the Employment Act.



- iv. The transfer was not subjected to the approval of the Human Resource Management Committee as required under Clause B.13(c) of the Respondent's Human Resource Manual 2017 as transfer of the Petitioner, who was a Grade HM3 Officer, required approval of the Committee.
 - v. The transfer was unreasonable and was actuated by malice as the Petitioner was posted to a station where his skill set was not required as per his job description and has not been assigned any specific duties at his new station for 11 months.
 - vi. That in the premises, the decision to transfer the Petitioner was arbitrary and not informed by any strategic reasons or necessary transitional measures as the Respondent was well aware that the Petitioner's skill set and expertise could not be put to use in Lamu Jetty, the new station.
- k. That the Petitioner has been forced into idleness in his new station for a period of 11 months since he has not been assigned any duties, and in any event his skill set cannot be utilized in his new station which does not have the requisite equipment and infrastructure for training equipment operators.
 - l. That there is now a great risk that the Petitioner has been set up for redundancy considering that the Respondent's Board is now scheduled to carry out a review of work force to identify members of staff who are idle and without any specific assigned duties, for purposes of declaring them redundant. That there are very high chances that the Petitioner will be declared redundant due to the arbitrary transfer to Lamu where he has been retained in an idle position for 11 months.
3. The petition is supported by the Petitioner's affidavit sworn on April 28, 2020, to which quite a number of documents are annexed, and a supplementary affidavit sworn on June 9, 2020. The supporting affidavit replicates the averments made in the petition and annexes documents in support thereof. Among the documents annexed to the petitioner's supporting affidavit are the Petitioner's letter of appointment dated June 22, 1995, a bundle of copies of the Petitioner's certificates and commendation letters, the Respondent's letter dated April 12, 2012 communicating to the Petitioner the Respondent's Human Resource Committee of the Board's approval of transfer of the Petitioner to the post of Assistant Training Officer (Equipment Operations) Grade HM3 with effect from February 20, 2012 and adjusting his salary accordingly, the Respondent's letter dated November 22, 2010 posting the Petitioner to Bandari College to act against the post of Assistant Training Officer (Equipment Operations), Grade HM3, Legal Notice No 233 dated November 28, 2018 and the Respondent's letter dated May 17, 2019 posting the Petitioner from 'Bandari College' to Conventional Cargo Operations (Lamu Port) on the same grade.
 4. The petition was opposed by the Respondent vide a replying affidavit of Daniel O Ogutu sworn on June 3, 2020 and filed in Court on June 4, 2020. Is t deponed in the said affidavit, inter-alia:-
 - a. That on November 22, 2010, the Respondent made the decision to transfer the Petitioner to the then Bandari College as an Assistant Training Officer (Equipment Operations) on an acting capacity; a decision that accorded with the Petitioner's previous requests and the fact that his knowledge and skill, being among the trainers in equipment operations, would be utilized at the college for the benefit of the Respondent's operational and strategic goals.
 - b. That following completion of the Respondent's organizational structuring in the year 2012, the Petitioner was transferred to the substantive post of Assistant Training Officer (Equipment Operations) Grade HM3, in the same station.



- c. That on May 17, 2019, the Petitioner was transferred from (the then) Bandari College to the Respondent's Lamu Port on the same employment terms.
 - d. That Lamu Port is a strategic investment of the Government of Kenya under the LAPSET Corridor Projects effected and implemented through the Respondent and other Government Agencies, with a view to achieving Vision 2030, and is presently the biggest project of the Respondent.
 - e. That the Respondent therefore requires highly skilled manpower to actualise operations at the new port in a seamless manner; and that employees in various departments of the Respondent have also been transferred to Lamu Port in order to render crucial services.
 - f. That an employer has managerial prerogative to transfer its employees from one work station to another for purposes of satisfying the manpower needs of the employer, as was done in this case, and that the prerogative is anchored in Section B.13(a) of the Respondent's Human Resource Manual 2017.
 - g. That (the then) Bandari College was a department under the Respondent's Human Resource Division until November 16, 2018 when it was succeeded by Bandari Maritime Academy established as a separate legal entity, independent of the Respondent, pursuant to the Bandari Order made under the *State Corporations Act* and Published as Legal Notice No 233, in Kenya Gazette Supplement No 149 of November 28, 2018.
 - h. That the Respondent's employees posted to (the then) Bandari College as at the time of commencement of the Order on November 28, 2018 were deemed to be staff of the Bandari Maritime Academy, though the employees had the option of choosing not to continue in services of the Academy. That the Petitioner was stationed at Bandari College at the time of his transfer to Lamu Port on May 17, 2019.
 - i. That the Petitioner was an employee of the Respondent at the time of transfer, within the confines of the *Employment Act* which defines an employee to mean 'a person employed for a wages or a salary.' That at the time of transfer, the Petitioner continued to draw his salary and allowances from the Respondent, notwithstanding the provisions of the said Legal Notice.
5. From the foregoing pleadings, it was a common ground that the Petitioner, then an Assistant Training Officer in the Respondent's employment, was vide the Respondent's letter dated November 22, 2010, posted to Bandari College, which was then under the Respondent, to act against the post of Assistant Training Officer (Equipment Operations), Grade HM3. Subsequently the Petitioner was, vide the Respondent's letter to the Petitioner dated April 12, 2012, translated (confirmed) to the post of Assistant Training Officer (Equipment Operations) Grade HM3 with effect from January 20, 2012; and his salary was adjusted accordingly.
6. It was further a common ground that while the Petitioner was serving at Bandari College, Legal Notice No 233, which established Bandari College as a separate legal entity in the name of Bandari Maritime Academy was established on November 28, 2018. Indeed, (it was deponed on behalf of the Respondent (in the replying affidavit of Daniel O Ogutu) as follows:-
- 22. That (the then) Bandari College was a department under the Respondent's Human Resource Division until November 16, 2018, when it was succeeded by the Bandari Maritime Academy established as a separate legal entity, independent of the Respondent pursuant to Bandari Maritime Order made under the *State Corporations Act* and published as Legal Notice No 233, in Kenya Gazette Supplement No 149 dated November 28, 2018.



- 23 The Petitioner was stationed at Bandari College at the time of his transfer to Lamu Port on May 17, 2020.
7. Legal Notice No 233, published on November 28, 2018, reads in part:-
- Legal Notice No 233
- State Corporations Act* [CAP 446]
- In Exercise of the powers conferred by Section 3(1) of the *State Corporations Act*, I, Uhuru Kenyatta, President and Commander in-chief of Kenya Defence Forces, make the following Order-
- The Bandari Maritime Academy Order, 2018
1. This Order may be cited as the Bandari Maritime Academy Order a2018.
 2. .
 3.
 - (1) There is established an Academy to be known as the Bandari Maritime Academy.
 - (2) The Academy shall be a body corporate with perpetual succession and a common seal, and which shall in its Corporate name be capable of (a) suing and being sued.'
8. Section 3(1) of the *State Corporations Act* provides as follows:-
- (1) The president may, by order, established a state corporation as a body corporate to perform the functions specified in that order.
 - (2) A state corporation established under this Section shall; -
 - (a) Have perpetual succession.
 - (b) In its corporate name be capable of suing and being sued;
 - (c) Subject to this Act, be capable of holding and alienating movable and immovable property.'
9. The import of all the foregoing is that by dint of the order published on November 28, 2018 as Legal Notice No 233, the then Bandari College, in which the Petitioner herein was working as a Training Officer (Equipment Operations), Grade HM3, became a State Corporation and therefore a separate legal entity independent of the Respondent herein and its name changed to Bandari Maritime Academy.
10. Paragraph 22(1) of the said Legal Notice (No 233) provides:-
- ' (1) Any person who, immediately before the commencement of this order, was a member of staff of the Bandari College shall be deemed to be a member of staff of the Academy for the unexpired period of his or her service in accordance to his or her terms of services.'
11. In my view, the Petitioner became an employee of the Bandari Maritime Academy, which is a body corporate, with effect from the date of the order establishing the new State Corporation (Bandari



Maritime Academy). According to the Respondent, the Order was made on November 16, 2018 and was published on November 28, 2018 as Legal Notice No 233 of (2018).

12. Issues that fall for determination, in my view, are:-
 - a. Whether the Petitioner was the Respondent's employee as at May 17, 2019 when the Respondent purported to transfer him to Lamu Port.
 - b. Whether the transfer was lawful and procedurally fair.
 - c. whether the petition raises a constitutional issue.
 - d. Whether Petitioner is entitled to the reliefs sought.
13. On the first issue, the Petitioner submitted that he ceased to be an employee of the Respondent on November 28, 2018 after the newly established Bandari Maritime Academy succeeded Bandari College, and that pursuant to paragraph 22(1) of the Bandari Maritime Academy Order 2018, the Petitioner acquired a new employment status with the Academy from November 28, 2018. The Petitioner further submitted that the Respondent's decision to transfer the Petitioner was contrary to the provisions of the Bandari Maritime Order, 2018 because:-
 - a. The Respondent transferred the Petitioner to Lamu Port on May 17, 2019, (6) months after November 28, 2018 when the president issued the order and the Petitioner opted to remain an employee of Bandari Maritime Academy. That by May 17, 2019 when the Respondent purported to effect the transfer, the Petitioner had already ceased to be an employee of the Bandari College, and had become an employee of Bandari Maritime Academy.
 - b. That since Clause 3(2) of the Order had given Bandari Maritime Academy a separate legal status distinct from that of the Respondent, the Respondent could not lawfully usurp the powers of the Bandari Maritime Academy, and that as a matter of law, the Respondent had no power to transfer the Petitioner as at May 17, 2019 as he was no longer an employee of the Respondent and/or Bandari College.
 - c. That the Respondent's purported exercise of power to transfer was contrary to paragraph 22(1) of the Order and therefore ultra vires.
14. On the other hand, the Respondent submitted that:-
 - a. Implementation of the Order published on November 28, 2018 vide Legal Notice No 233 published in Kenya Gazette Supplement No 149 required a transition process which was steered by a committee composed of various representatives of intergovernmental departments.
 - b. That this transition culminated into an assets and business transfer agreement and some employees and assets of the then Bandari College remained in KPA's employment and possession, while some were taken over by the newly established Academy.
15. I have read through the Replying Affidavit of Daniel O Ogutu referred to in paragraph 4 of this judgment, which the Respondent informed the Court on September 19, 2022 would be the Respondent's response to the petition, and I have not seen any averments and/or pleading on any asset and business transfer agreement regarding Legal Notice No 233 (the Bandari Maritime Academy Order, 2018) or any form of agreement stating which employees of the defunct Bandari College remained in KPA's employment and which were taken over by the newly established Bandari Maritime Academy (the new State Corporation).



16. Parties will forever be bound by their pleadings, and a party/litigant can never be allowed to purport to 'introduce new pleadings' and/or unpleaded allegations in the submissions made in Court, whether orally or in written.
17. It is my finding that as at May 17, 2019 when the Respondent purported to transfer the Petitioner from Bandari College to Lamu Port, Bandari College had long ceased to exist as a department of the Respondent upon being succeeded by Bandari Maritime Academy on November 28, 2018 as a separate State Corporation (body corporate); and that the Petitioner, who had opted to remain in the new Corporation's employment and remained as an employee of Bandari Maritime Academy for six (6) months following its establishment, could not be arbitrarily transferred by the Respondent to the Respondent's Lamu Port.
18. As a matter of fact, there was no legal entity or a department/ division of the Respondent by the name Bandari College as at May 17, 2019, when the Respondent purported to transfer the Petitioner from Bandari College to Lamu Port. The Respondent could not lawfully arbitrarily transfer the Petitioner as he was legally an employee of Bandari Maritime Academy. The decisions in [*Henry Ochido -vs- Ngo Co-ordination Board \[2015\] eKLR*](#) And [*James Sande Muyeka & 6 Others -vs- Super Foam Limited 2015\] eKLR*](#) cited by the Respondent are not relevant to the present case as they both relate to situations where employers had effected transfer on their employees, hence the employers' prerogative and/or power to transfer their employees.
19. Having arrived at the foregoing finding, it follows that the purported transfer of the Petitioner was unlawful and of no legal effect or validity. This settles the second issue.
20. On whether the petition raises a constitutional issue, the Petitioner pleaded violation by the Respondent of provisions of the [*Employment Act*](#), and specifically alleged change of terms of employment (contract) without consultation, arbitrary transfer without approval of the Respondent's Board's Human Resource Committee pursuant to the Respondent's Human Resource Manual 2017 and unlawful transfer of the Petitioner by the Respondent from a separate legal entity (Bandari Maritime Academy). In my view, these are ordinary employment issues that can adequately be addressed under the [*Employment Act*](#), the [*State Corporations Act*](#) and other relevant statutes. The petition, in my view, does not raise a constitutional issue.
21. The Court of Appeal stated as follows in the case of [*Summaya Athman Hassan -vs- Paul Masinde Simidi & Another \[2019\] eKLR*](#):-

' It is evident that the petition was hybrid combining violations of various rights, employment rights under the [*Employment Act*](#) and breach of Public Officers Ethics Act. However, the underlying complaint was the alleged unlawful interdiction and subsequent dismissal of the 1st Respondent by the Corporation Appellant. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the Petition, the ELRC relied wholly on the provisions of the [*Employment Act*](#).

The Article 41 rights are enacted in the [*Employment Act*](#) and [*Labour Relations Act*](#). The two Acts and the rules made thereunder provide adequate remedy and orderly enforcement mechanisms. The 1st Respondent filed a petition directly relying on the provisions of the [*Constitution*](#) for enforcement of contractual rights governed by the [*Employment Act*](#) without seeking a declaration of invalidity of the provisions of the [*Employment Act*](#) or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the [*Constitution*](#). We adopt and uphold the general principle in the persuasive authority in BARBARA DE KLERK (supra) that where



legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the Communication's Commission Case (supra).'

22. The High Court stated as follows in Bernard Murage -vs- Fineserve Africa Limited & 3 Others [2015] eKLR:-

' 56. I am bound to follow that principle of law since it flows from the other important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through the statutory law, then it is desirable that such a statutory remedy should be pursued first. In that regard, the words of the Court in *Harrkinson -vs- Attorney General of Trinidad and Tobago* [1980] Ac 265 hold true today as they did then;

'The notion that whenever there is a failure by an organ of Government or a public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under chapter 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.'

23. Having said that, and turning to the reliefs sought by the Petitioner, which do not make reference to any infringement or threatened infringement of the Petitioner's fundamental rights and freedoms, and having considered written submissions filed by Counsel for both parties, I enter judgment for the Petitioner against the Respondent as follows:-

- a. A declaration that the transfer of the Petitioner vide a letter of posting dated May 17, 2019 was unlawful and lacked any lawful effect, and was null and void ab initio.
- b. The Respondent's decision to post the Petitioner to Lamu vide a letter dated May 17, 2019 is hereby quashed, and the Petitioner's employment status as at May 16, 2019 (prior to the said letter of posting) is hereby reinstated forthwith.

24. The Petitioner is awarded costs of this petition and interest thereon at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH APRIL 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI



JUDGE

Appearance:

.....for Petitioner

..... for Respondent

