



**Mwaniki v Registered Trustees of the Sisters of Mercy [Kenya] t/a Mater Misericordiae Hospital
& 2 others (Cause E573 of 2020) [2023] KEELRC 917 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 917 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E573 OF 2020**

J RIKA, J

APRIL 20, 2023

BETWEEN

THERESA WANJIRU MWANIKI CLAIMANT

AND

**REGISTERED TRUSTEES OF THE SISTERS OF MERCY [KENYA] T/A MATER
MISERICORDIAE HOSPITAL 1ST RESPONDENT**

**THE REGISTERED TRUSTEES OF THE CONGREGATION OF THE SISTERS
OF MERCY- KENYAN PROVINCE 2ND RESPONDENT**

TERESA OMODING 3RD RESPONDENT

JUDGMENT

Rika J

Court Assistant: Emmanuel Kiprono

Gacau Kariuki & Company Advocates for the Claimant

Chiuri Kirui & Rugo Advocates for the Respondents

1. Through the Statement of Claim, amended on 11th March 2021, the Claimant states that she is a Registered Nurse, and holds a Bachelor's of Science Degree, from Chuka University.
2. The 1st Respondent is a Charitable Trust, under the Trustees [Perpetual Succession] Act, Cap 164 the Laws of Kenya. The 2nd Respondent similarly is described as a Charitable Trust registered by the Sisters of Mercy, to oversee all Charitable Trusts under the Sisters of Mercy in Kenya. The 3rd Respondent was a colleague of the Claimant, serving as the Nurse – In – Charge at the ICU/HDU, Mater Hospital, at the time the dispute arose.



3. The Claimant states that she was employed by the 1st Respondent as the Chief Nursing Officer at the Mater Hospital. She was offered a contract for a period of 3 years, commencing 4th June 2018, to 3rd June 2021. The contract was reviewed, upon completion of 6 months' probation, to a period of 5 years, commencing 4th June 2018, to 3rd June 2023.
4. Her duties were defined in detail in the contract. In summary, her role was to coordinate all nursing services.
5. She worked diligently. There were no complaints concerning her work. She was involved in preparation of Covid-19 Centre, when the pandemic arrived at our shores, in 2020.
6. On 27th May 2020, the 1st Respondent placed all Employees on a pay cut, and unpaid leave of 2 months, to mitigate the business challenges brought about by Covid-19.
7. Before the Claimant took the 1st month of her unpaid leave as advised, she was asked to hand over her docket to the 3rd Respondent.
8. She found this advice suspicious, because there was in place, a Deputy Chief Nursing Officer, whose unpaid leave schedule, was not in conflict with the Claimant's.
9. She commenced unpaid leave on 10th July 2020. She was to start the 2nd month in September 2020. While on leave, she was informed that the Mater Hospital CEO Prof. Mwenja had resigned. Sister [Dr.] Mary Ngui had taken over in an acting capacity.
10. She was preparing to resume duty at the end of her 2nd month of unpaid leave, when she received a call from the new CEO, Sister Ngui, instructing her to proceed with her 2nd month of unpaid leave. She complied and resumed on 10th September 2020.
11. Sister Ngui issued the Claimant a letter of transfer dated 7th September 2020, upon the Claimant's return. She was transferred from the main Mater Hospital, to the 1st Respondent's Karen Medical Centre, as the Unit-in- Charge. It was explained that in a meeting held in August 2020, it was decided that in line with the Nursing Council of Kenya Guidelines, a Chief Nursing Officer had to be a holder of Master's Degree.
12. The Claimant considered herself to have been demoted through the unwarranted transfer. She had not been consulted about transfer. She was not prepared for any change in her contract. She had just returned to work from 2 months of unpaid leave. She made her objection made through various correspondences to the 1st and 2nd Respondents. The 2nd Respondent advised that transfer had been discussed by the relevant parties, and the decision was final.
13. The 3rd Respondent was appointed to replace the Claimant, as the Chief Nursing Officer, with effect from 10th September 2020. The Claimant's contract had not been altered. She had not been issued a new contract.
14. While the Claim was pending in Court, the 1st Respondent issued the Claimant a letter to show cause why she should not be disciplined, alleging that she had failed to report for duty. She replied, stating that the matter was now before the Court. She was invited for disciplinary hearing on 2nd October 2020. Hearing was scheduled for 6th October 2020. Hearing was about the disputed transfer to Karen Medical Centre. The Claimant did not attend hearing, holding that the matter was before the Court, and therefore sub judice.
15. The 1st and 2nd Respondents went on with the disciplinary hearing in the absence of the Claimant, culminating in her summary dismissal.



16. She prays for Judgment against the Respondents for: -
- a. Declaration that the actions of the 1st and 2nd Defendant [Respondents], in transferring the Claimant from the main Hospital where she held the position of Chief Nursing Officer, to Karen Medical Centre as Unit- in- Charge, amounted to unfair demotion of employment and in breach of the contract of employment dated 1st November 2018.
 - b. Declaration that the 1st Respondent's summary dismissal of the Claimant from employment was irregular, wrongful and unlawful.
 - c. Payment of terminal dues, including: salary for the month of September 2020 at Kshs 420,000; salary from 1st to 7th October 2020 at Kshs 138,000; 1- month salary in lieu of notice at Kshs 420,000; gratuity from the year 2018-2020 at Kshs 420,000; salary from October 2020 to June 2023 at Kshs 13,860,000; and leave allowance at Kshs 420,000 – total Kshs 15,678, 000.
 - d. Compensation for unfair and unlawful termination.
 - e. Certificate of Service.
 - f. Costs.
 - g. Interest.
 - h. Any other suitable remedy.
17. The 1st and 3rd Respondents filed their Statement of Response dated 30th March 2021. They state that the 2nd Respondent is neither a natural, nor an artificial person, with the requisite capacity to sue, or to be sued. The 3rd Respondent is an innocent Employee who is similarly improperly joined to the Claim.
18. The 1st Respondent states that it was wholly within its mandate to employ and transfer the Claimant. While she was on leave, the 1st Respondent learnt that the office of Chief Nursing Officer, was supposed to be filled by a holder of Master's Degree. This was not a requirement made by the 1st Respondent; it was a requirement from the regulatory body. The 1st Respondent sponsors a nursing school and due to its standing in the nursing profession, had to rectify the anomaly.
19. The Claimant, having been a registered Nurse for over 20 years, is aware of the 'Standards of Nursing Education and Practice in Kenya,' and should have brought the same to the attention of the 1st Respondent.
20. Transfer was in tandem with the nursing professional standards, and in accordance with the Claimant's contract of employment.
21. As the Chief Nursing Officer, the Claimant was In- Charge of nursing Students who were undertaking internship and attachment, at the Respondent's facility.
22. The Claimant was a former Sister of Mercy. She was a Trustee of the Registered Trustees of the Sisters of Mercy. She had interacted and worked closely with Priests and Sisters and was best suited to serve at the Karen Satellite, a facility which mostly catered for Catholic Priests, Seminarians and others based at Karen.
23. The Claimant's contract was to be amended to reflect the change, but her conduct, frustrated this. There was no order restraining the 1st Respondent from proceeding with the disciplinary hearing. The Respondent exercised its managerial prerogative. There was no other Claim, pending in another Court, for the principle of sub judice to apply.



24. The 1st Respondent did not intend to dismiss the Claimant, but her absenteeism left the 1st Respondent no alternative. She was only entitled to salary for the month of September 2020, which was paid on 25th September 2020 through a direct credit to her bank. Transfer was neither a demotion nor a breach of the contract. The 1st Respondent prays the Court to dismiss the Claim with costs.
25. The Claimant filed Reply to the Statement of Response, dated 10th May 2021. She states that the 2nd Respondent is a corporate body, registered under Trustees [Perpetual Succession] Act, Cap 164 the Laws of Kenya. The 2nd Respondent issued the Claimant the letter of transfer, from the 1st Respondent's Hospital; it allegedly held the meeting in August 2020 where it was decided that the Claimant is transferred; it disqualified the Claimant from continued service as the Chief Nursing Officer; it demoted the Claimant; it replaced the Claimant with the 3rd Respondent; and the acting CEO instructed the Claimant, to contact the 2nd Respondent on matters touching on her transfer. The 3rd Respondent is a necessary party to the Claim, because she can shed light on the manner of her appointment to replace the Claimant.
26. The Claimant gave evidence on 23rd June 2022 when she closed her case. Evelyn Njeri Maina, 1st Respondent's Legal Services Manager, gave evidence on 28th October 2022, closing the hearing. The Claim was last mentioned on 16th February 2023, when Parties confirmed filing and exchange of their Closing Submissions.
27. The Claimant adopted the contents of her Amended Statement of Claim, Witness Statement and Documents on record, as her evidence-in-chief.
28. She was employed in 2018 through a letter of appointment. The letter was signed by the CEO and Head of Trustees. It was not signed by the 2nd Respondent. She was issued a contract dated 4th June 2018, signed by the CEO Prof. Mwenja and Head of Trustees, Sister Itotia. She was based at the main Hospital in South B estate, Nairobi.
29. On completion of 6 months of probation, she was issued another contract. It was for an improved period of 5 years, 2018-2023. The initial contract was for 3 years. She reported to the CEO, who was an Employee of the 1st Respondent.
30. The Claimant narrated how she was, alongside other Employees, required to take 2 months of unpaid leave, occasioned by the Covid-19 challenges. She handed over to the 3rd Respondent. On resuming she found Prof. Mwenja had been replaced by Sister Mary. She was handed the letter of transfer, authored by the 2nd Respondent. The 2nd Respondent was not her Employer. She had not been consulted on transfer. She requested for time to reflect on transfer. She consulted and was told that transfer stood. She did not have a Master's Degree. She had been recruited as the Holder of a Bachelor's Degree. A Master's Degree was not a requirement on appointment. She had served as a Matron at Mutomo for 7 years and at Consolata Kieni in Embu, for 9 years. She had always strived to further her education. She started off as a Community Nurse. She did Bachelor's of Science Degree course, and enlisted for Master's Degree, while in service. She received commendations in all the stations she served. She did not conceal anything on recruitment. There was no requirement that the holder of the office of Chief Nursing Officer, must be the holder of a Master's Degree. It was not a requirement in the advertisement for the vacancy, at the time the Claimant successfully applied for opening. She was not employed as a Nun. She left sisterhood in 2006. She felt slighted by the allusion by the Respondents, that she was suitable for the Priests at Karen. Her contract stated that she would work at the main Hospital. She did not frustrate the Respondents, in further amendment of the contract as alleged. The matter was in Court, when the Respondents alleged to institute disciplinary proceedings. They had no right to discipline the Claimant.



31. Cross-examined, the Claimant told the Court that the reason for termination was stated in the letter of termination. It was said that she refused to transfer. She had questions over the transfer. She did not report at Karen as instructed. She did not clear with the 1st Respondent. Her contract stated that she would perform other duties beyond those of the Chief Nursing Officer at the Hospital. She was in charge of Students. She was in charge of Interns. She was aware of the Standards set by the Nursing Council. It was not because of these Standards, that she enrolled for her Master's Degree. Her contract was signed by Prof. Mwenja and Sister Itotia. Transfer was signed by Sister Gitau who was a Commissary appointed by Vatican, for disputes settlement. The person who signed her contract, was aware about the Nursing Standards.
32. The Claimant had a Deputy at the time she was instructed to hand over to the 3rd Respondent. Her Deputy was on probation at the time. The 3rd Respondent was in charge of the ICU. She had a Master's Degree. The Claimant was not harassed by Security. She was not tortured. Transfer did not affect her remuneration. The 2nd Respondent has capacity to be sued. The 3rd Respondent did not wrong the Claimant in any way. The Claimant consented to extension of her unpaid leave. It would avoid double planning for reliever. The Claimant had the opportunity to respond to the letter to show cause. She responded through her Advocate. There was no order granted by the Court to stop transfer.
33. Redirected, the Claimant told the Court that she declined transfer, because it was a demotion. It was not made by her Employer. She did not clear because the matter is still pending in Court. She was being moved to a position which was not in her contract. The salary was the same, but salary in not everything. Her profession was at stake. She was at the time of giving the evidence in Court, the Head of Nursing at Mathari Consolata Hospital, Nyeri. She however earns less at Mathari, than she earned at Mater.
34. Manager Legal Services, Evelyn Njeri Maina relied on her Witness Statement and Documents filed by the Respondents.
35. She told the Court that the Claimant was dismissed after she absconded. She declined transfer to Karen. She was transferred for compliance purposes. The Claimant was consulted by the CEO before transfer. Her contract provided for transfer. Transfer was not arbitrary. It was not a demotion. She was going to head another Unit. Her salary remained unchanged. She did not report at Karen. The Respondent issued letter to show cause and called the Claimant to disciplinary hearing. She did not attend hearing, holding that the matter was already in Court. She was not paid her terminal benefits, or issued certificate of service, because she did not clear. The 3rd Respondent was appointed Chief Nursing Officer, after the Claimant's contract was terminated.
36. Maina told the Court that the 1st Respondent is a Trust, which owns the Hospital. The 2nd Respondent is a Congregation of Nuns from Ireland. It does not have capacity to use and be sued. Transfer was not based on malice.
37. Cross-examined, Maina told the Court that the Claimant had a written contract. Her position was Chief Nursing Officer. She had gone through probation and was confirmed. She was stationed at the main Hospital at Nairobi. This was captured in her contract. There was no complaint about her performance.
38. Maina was not aware if it was a requirement at the time the Claimant was recruited, that the holder of the position must have a Master's Degree. The requirement came with the new leadership at the 1st Respondent, in 2019. The Claimant was employed in 2018 and confirmed the same year. She was consulted by the CEO before transfer. Maina did not have evidence of this consultation on transfer.



39. The Claimant was being transferred to Karen Unit as the CEO of the Unit. The letter of transfer did not specify this. It did not mention CEO. The letter states, 'we decided.' 'We' refers to the Trustees. It did not involve the Claimant. It was a decision of the Trustees. The contract allowed her to be transferred. She was not being transferred as Chief Nursing Officer. She was transferred as Unit-in-Charge. She was not employed as Unit-in-Charge. Her contract had not expired. It is not true that the Respondent unilaterally changed her contract.
40. There was no advertisement for the position of Chief Nursing Officer, when the 3rd Respondent was hired. There was no consensus on transfer. This did not amount to unfair labour practice. The Claimant was not told on recruitment, that she was not qualified. She did not accept transfer. The rest of her terms and conditions of employment remained the same. Dismissal was on account of absconding. She had not accepted the duty she was accused of absconding. The Respondents were served with the Summons from the Court. It was before the summary dismissal. There was no order barring disciplinary hearing. The Claimant had a right to come to Court. She explained why she could not attend disciplinary hearing. Redirected, Maina reiterated that the Claimant was dismissed for absconding; there was no injunction against the disciplinary hearing; and she agreed to transfer through her contract.
41. The issues as understood by the Court, are: -
- a. whether the 2nd and 3rd Respondents are properly sued;
 - b. whether termination was based on valid reason[s];
 - c. whether procedure was fair; and,
 - d. whether the Claimant merits the remedies sought.

The Court Finds: -

42. The Claimant was admitted to the Register of Community Health Nurses, on 25th October 1999.
43. She graduated with a Bachelor of Science Degree in Nursing, from Chuka University, on 10th November 2017.
44. The Claimant was contracted by the 1st Respondent on 4th June 2018, as the Chief Nursing Officer. She was stationed at the 1st Respondent's Mater Hospital, in South B, Nairobi.
45. She was to work on probation for 3 months, under the first contract document, dated 4th June 2018. The second contract dated 1st November 2018 indicates that the probationary period was 6 months.
46. She completed probation successfully and was confirmed through the letter dated 21st November 2018. Confirmation was effective from 4th December 2018. Her monthly salary was Kshs 420,000, with annual medical cover of Kshs 50,000. The first contract offered the Claimant a period of 3 years. This was improved to 5 years upon confirmation. Other terms and conditions of service, remained as stated in the original contract.
47. Both contract documents contain an arbitration clause. It requires Parties, in event there was a dispute on the contract, to go through mediation. If there was no settlement on mediation, they were required to go through arbitration by a single Arbitrator, appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya. The clause states that the Court would be the forum of last resort.



48. The Court enquired from the Parties' Advocates in the course of the hearing about this clause. They both affirmed the jurisdiction of the Court. It is presumed that they prosecuted the Claim in Court as a forum of last resort.
49. 2nd and 3rd Respondents' capacity. It is clear from the Pleadings and the Evidence before the Court, that the 3rd Respondent is not properly sued as a Respondent. She did not employ the Claimant. She was a fellow Nurse and Employee, with no decisional control, over the employment of the Claimant. She did not in any way supervise or manage the Claimant. She was the Nurse-in-Charge at the ICU. She was employed in the position previously held by the Claimant – Chief Nursing Officer. She was employed on the basis that she, unlike the Claimant, held a Master's Degree, which was a requirement by the Regulator, Nursing Council of Kenya. The 3rd Respondent was not signatory to the Claimant's contract of employment.
50. The prayers sought in the Amended Statement of Claim are not directed at the 3rd Respondent. No actionable grievance against the 3rd Respondent is disclosed. She did not transfer the Claimant. Declaratory order sought against the 1st and 2nd Respondents on transfer, does not involve the 3rd Respondent. She was a fellow Employee, with no capacity to pay the Claimant compensation or any terminal dues. She could not be asked to issue Certificate of Service to the Claimant, and pay costs and interest.
51. It is not suggested anywhere in the Pleadings, Evidence or Submissions by the Claimant, that the 3rd Respondent was an Employer of the Claimant, within the meaning of the term 'Employer,' under Section 2 of the *Employment Act*, which is: any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company. The 3rd Respondent was not shown to be an agent, foreman, manager or factor of the Co-Respondents. She did not have any contract with the Claimant.
52. The Claim against the 3rd Respondent, Teresa Omoding, is dismissed with costs to be paid to her by the Claimant.
53. The legal capacity of the 2nd Respondent, and capacity as the Claimant's Employer, is less clear. The Respondents, through their in-house Counsel Evelyn Maina, state that the 2nd Respondent is a Congregation of Nuns from Ireland, and is neither an artificial nor a natural person, with a legal capacity. It has a letterhead which does not cloth it with a legal capacity. Maina explained in her evidence that the 2nd Respondent is a Congregation of Nuns from Ireland. It is not a body corporate.
54. The Claimant states at paragraph 2 of the Amended Statement of Claim, that the 2nd Respondent is a Charitable Trust, registered by the Sisters of Mercy to oversee all charitable trusts under the Sisters of Mercy within Kenya.
55. The Claimant however, did not exhibit a Certificate of Incorporation, showing that the 2nd Respondent is registered in Kenya, as a Charitable Trust. There is a Certificate of Incorporation with respect to the 1st Respondent, which is exhibited by the Respondents. There is therefore no documentary proof on record, to establish that the 2nd Respondent is a registered Trust.
56. There were decisions relating to the dispute, which were made in the name of the 2nd Respondent. Why would a Congregation of Nuns from Ireland, take employment decisions against a Kenyan Nurse, and turn around and say they do not have capacity to sue or be sued? The Memo dated 10th July 2020, informing Staff of the Mater Hospital that Sister Mary Ngui had been appointed as the Acting CEO,



- in the wake Prof. Mwenja's resignation, was issued by the 2nd Respondent. The Memo is signed by Sister Mary Gitau, described as the Pontifical Commissary, Sisters of Mercy Kenya.
57. The contested letter of transfer, dated 7th September 2020 was similarly issued to the Claimant by the 2nd Respondent, and is signed by Sister Mary Gitau.
 58. The Claimant states that when the dispute arose on her transfer, she was advised by the CEO, to engage Sister Mary Gitau.
 59. The Claimant cannot be faulted by joining this grouping of Sisters as a 2nd Respondent. Her Claim cannot be defeated on the ground that she has not established that the 2nd Respondent is a juristic entity. An Employee is not to be placed at a disadvantage, on the ground that an Employer's legal or business structure, is not clearly known to the Employee. Employers often adopt labyrinthine legal and business structures, for purposes of avoiding regulatory burdens.
 60. The 2nd Respondent made decisions against the Claimant. It used letterheads under its own name, and also under the name of Mater Hospital. The letters were signed by Sister Mary Gitau, Pontifical Commissary, Sisters of Mercy Kenya. The letterheads also suggest the presence another entity described as Sisters of Mercy- Kenya Province. The Claimant was not wrong in pursuing her Claim against the 2nd Respondent. She may as well have joined the Pontifical Commissary, the Hospital itself or the Sisters of Mercy-Kenya Province. All of them had presented themselves to the Claimant and to the world, as her Employer.
 61. Section 2 of the [Employment Act](#) acknowledges the challenges Employees face, in unmasking these layers of legal and business structures adopted by their Employers, by defining the term 'Employer' broadly.
 62. The Court is not able to conclusively say, if the 2nd Respondent is a juristic person, or a group of natural persons, but it certainly did, through Sister Mary Gitau, Pontifical Commissary, Sisters of Mercy Kenya, present itself to the Claimant as her Employer, or one of her Employers. The Claim cannot be defeated on account of the 2nd Respondent's legal status.
 63. Validity of Reason. The Claimant was instructed to transfer from the Main Hospital to Karen Medical Centre. The instructions issued from Sister Mary Gitau, and were shared with Sister [Dr.] Mary Ngui, 1st Respondent's acting CEO, and Christine Kagwiria, 1st Respondent's Human Resource Director.
 64. She was to serve as the Unit-in-Charge at Karen. She was advised that her other terms and conditions of service remained the same. Her salary remained untouched. The 1st and 2nd Respondents justified transfer on the ground that Guidelines issued by the regulatory body, the Nursing Council of Kenya, required the holder of the Chief Nursing Officer, to have a Master's Degree. The Claimant did not at the time have one.
 65. The Standards of Nursing Education and Practice for Nurses in Kenya, states under Standard 2[10] that all Institutions for training and clinical placements, shall be headed by qualified Nurse Educators and Administrators who meet the following minimum qualifications; Diploma Programme- Degree in nursing or above; Bachelor's Degree Programme- A Master's Degree or above in nursing or related field; and Master's Degree Programme in nursing- A PhD in nursing or in related field.
 66. The Chief Nursing Officer oversaw training and internship of Nurses at the Mater Hospital. The 1st Respondent is also a sponsor and patron of the Catherine Macaulay Nursing School. The Guidelines from the Council required that the Hospital and the Nursing School, are overseen by qualified Nurse Educators and Administrators.



67. There was nothing irregular about the 1st and 2nd Respondent's instructions to the Claimant in the circumstances. She did not according to the 1st and 2nd Respondent, satisfy the regulator's Standard number 2[10].
68. The Court does not think that the 1st and 2nd Respondents were estopped from raising the concern, on the ground that they did not raise the issue at the time they appointed the Claimant. If it was a regulatory requirement, the 1st and 2nd Respondents were bound to correct the error. It would have been illogical to go on breaching the Standard, once the Respondents became aware about the Standard. There was after all, a new Management, and review of compliance with regulatory standards, was not unexpected.
69. The Court does not find persuasion with the Claimant's explanation, that she was enlisted for a Master's Degree, at the time she was required to be an active holder of a Master's Degree. Her self-advancement in education, even as she served the nursing profession, is laudable, but it did not redress her lack of a Master's Degree and hence suitability, under the Nursing Regulations.
70. The management prerogative doctrine, provides that every Employer has the right to regulate, according to his own discretion and judgment, all aspects of employment. This includes transfer of Employees. The prerogative is subject to the principles of good faith, due regard to employment rights, and transfer must not be aimed at circumvention of the law.
71. The Claimant was not demoted as alleged. She was transferred to a position attracting the same salary as she was being paid as Chief Nursing Officer. She was transferred to the position of Unit-in-Charge at Karen. Karen Medical Centre was like Mater Hospital, a Unit owned by the 1st and 2nd Respondents. This was a lateral movement. There was no loss or diminution of the Claimant's status, her terms and conditions of service. Transfer was on account of a regulatory requirement. It was not motivated by bad faith. It was not punitive. It was based on sufficient cause. It was not unreasonable. The Court has endorsed the principle of managerial prerogative, in E&LRC Cause Number 525 of 2015 between Andrew Majan Chegero v. Ready Consultancy Limited; E&LRC Cause Number 299 of 2015 between Arfan Kasu v. Express Limited Travel Group; and, Industrial Court at Nairobi, Cause Number 1241 of 2010 between Hesbon Wanjohi Kahiko v. Twiga Chemicals Limited.
72. Her contract bound her to act in accordance with the governance instruments of the Hospital, which would include the Nursing Standards. It bound her to perform any other duties as assigned. The Court does not think that even though the Claimant was appointed as Chief Nursing Officer, the 1st and 2nd Respondents were bound to retain her as such, and at the main Hospital, in particular upon becoming aware that she did not meet regulatory standards. Rather than terminate her contract as the Chief Nursing Officer, the 1st and 2nd Respondents, quite reasonably, found her a way out, without significantly affecting her contract.
73. A job title, or description is not cast in bronze. Section 10 [5] of the *Employment Act* contemplates changes in the contract of employment. It allows an Employer, in consultation with the Employee, to revise the contract and notify the Employee in writing. There was room for revision of the contract once she transferred, to capture her new job title. It was the only significant detail of her employment contract which would change with the transfer. All other details remained the same. She declined transfer, and left employment, making it impossible for the Employer to revise her contract. It was not mandatory that revision predates transfer.
74. The Claimant did not report at work, once she learnt about transfer. She was on unpaid leave between 10th July 2020 and 10th September 2020. She was issued the letter of transfer on 10th September 2020. She was to avail herself at Karen. She was to report on 10th September 2020. She did not report at Karen.



- She asked for 2 days off, until 14th September 2020. She did not report after 14th September 2020. She instead filed the Claim on 24th September 2020, accompanied by an Application to restrain the 1st and 2nd Respondents from transferring her. She also asked the Court to restrain the 3rd Respondent from taking over as the Chief Nursing Officer. Having gone to Court, she stayed out of work. She did not as much as report to Karen, and engage the 1st and 2nd Respondents on any outstanding issues, she felt were not handled properly by the 1st and 2nd Respondents. She kept away.
75. The Claimant absconded. She failed to report to work. She knowingly failed or refused to obey a lawful and proper command which it was within the scope of her duty to obey, issued by her Employer, or by a person placed in authority over her, by her Employer. In the view of the Court the 1st and 2nd Respondents had valid reason in terminating the Claimant's contract of employment. They invoked absconding, which is an employment offence, under Section 44[4] [a] of the *Employment Act*. They could, in the view of the Court have additional justification, under Section 44[4] [e] of the *Employment Act* on insubordination.
76. There was valid reason[s] as required under Section 43 of the *Employment Act*, to justify termination.
77. Procedural Fairness. The Mater Hospital, Director, Human Resource and Talent Development, Christine Kagwiria issued the Claimant a letter to show cause why disciplinary action should not be taken against the Claimant for absenteeism, dated 23rd September 2020.
78. The Claimant replied on 29th September 2020.
79. She was invited for disciplinary hearing to take place on 6th October 2020. Kagwiria informed the Claimant about her procedural rights in detail. She was advised that she was entitled to be accompanied by a colleague of her choice; she would have the right to question witnesses; she was free to bring her own witnesses and documents; and she would be advised on the outcome within a reasonable time.
80. The Claimant did not attend the hearing. She wrote to the Respondent through her Advocates that she would not attend hearing, because the dispute had been brought to Court. She filed the Claim on 24th September 2020. Her Advocates indicated that the matter was sub-judice, and the Claimant would therefore not attend disciplinary hearing.
81. The Court does not think that this was the right decision by the Claimant. There was no order obtained by the Claimant from the Court, stopping the disciplinary hearing. The sub-judice rule did not apply to disciplinary proceedings commenced by the 1st and 2nd Respondents. The Court is not a platform for disciplinary hearing. Disciplinary hearing is not a judicial platform. The Court would not make a disciplinary decision or try the Claimant for the employment offences of absconding and insubordination. The judicial process and the disciplinary process were entirely different, and barring an order issued by the Court, restraining the 1st and 2nd Respondents from proceeding with the disciplinary hearing, there was absolutely no justification for the Claimant to give disciplinary hearing a wide berth. It cannot be accepted that filing of a Claim in Court, by an Employee faced with disciplinary proceedings, automatically brings to a halt, a disciplinary process at the workplace.
82. The Supreme Court of Kenya, in *Kenya National Commission on Human Rights v The Attorney-General; Independent Electoral & Boundaries Commission & 16 others [Interested Parties]* [2020] eKLR, explained that sub judice is defined in the Black's Law Dictionary 9th Edition, as: "Before the Court or Judge for determination." The purpose of the principle of sub judice is to stop the filing of a multiplicity of suits between the same parties, over the same subject. It does not apply to instigation of disciplinary proceedings by Employers against Employees, at the workplace. Such proceedings cannot be a suit, within the description of Section 2 of the *Civil Procedure Act*. A party relying on the principle



must show that there is more than one suit over the same subject matter; that one suit was instituted before the other; that the suits are between the same parties or their representatives; and that both suits are pending before courts of competent jurisdiction. The principle is based on Section 6 of the *Civil Procedure Act*. It relates to suits filed before the Courts of competent jurisdiction. It applies to civil proceedings, not disciplinary proceedings at workplaces.

83. The 1st and 2nd Respondents went ahead with the disciplinary hearing in the absence of the Claimant on 6th October 2020. The Committee reviewed the facts and decided that the Claimant absconded duty between 14th September 2020 and 6th October 2020. She was summarily dismissed.
84. The Court is not able to find any fault with this procedure. The Claimant was granted a fair opportunity to state her case. She unfortunately kept away from the disciplinary hearing.

It is ordered: -

- a. The Claim against the 3rd Respondent is dismissed with costs to the 3rd Respondent, to be paid by the Claimant.
- b. The Claim against the 1st and 2nd Respondents is dismissed with no order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 20TH DAY OF APRIL 2023.

JAMES RIKA

JUDGE

