



**Sila v Secretary, Makueni County Public Service Board, Government of Makueni County & 6 others (Constitutional Petition 54 of 2023) [2023] KEELRC 1558 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1558 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CONSTITUTIONAL PETITION 54 OF 2023**

**B ONGAYA, J**

**JUNE 22, 2023**

**(FORMERLY PETITION NO.3 OF 2023 AT MACHAKOS)**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE  
CONSTITUTION OF KENYA ARTICLES 2(1), 10(1), 19, 20, 27(1),  
29(D), 37, 41, 47 (2), 50(1) (E), 54(1) (A) AND 236**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE  
FAIR ADMINISTRATIVE ACTION ACT, SECTIONS 4(1) (2) (3)  
AND (4)**

**IN THE MATTER OF PUBLIC SERVICE COMMISSION ACT  
SECTION 40 AND 43**

**IN THE MATTER OF THE COUNTY GOVERNMENT ACT  
SECTION 60, 63 (1), 64(2), 69 (2), 72 (2), 75, 87 (A) (B)**

**IN THE MATTER OF THE EMPLOYMENT ACT SECTIONS  
3(3), 9, 10 (1) (5)**

**IN THE MATTER OF THE EMPLOYMENT AND LABOUR  
RELATIONS COURT ACT, SECTION 4, 12 AND 20(1)**

**BETWEEN**

**JOHN NZIOKA SILA ..... PETITIONER**

**AND**

**THE SECRETARY, MAKUENI COUNTY PUBLIC SERVICE BOARD,  
GOVERNMENT OF MAKUENI COUNTY ..... 1<sup>ST</sup> RESPONDENT**



ZIPPORAH WAMBUA, ACTING CHIEF OFFICER, DEVOLUTION, PUBLIC PARTICIPATION, COUNTY ADMINISTRATION AND SPECIAL PROGRAMMES .....	2 <sup>ND</sup> RESPONDENT
MARK MUTHOKA, SUBCOUNTY ADMINISTRATOR, MAKUENI SUB COUNTY .....	3 <sup>RD</sup> RESPONDENT
ALEX MAKAU NZAMBU, WARD DEVELOPMENT OFFICER, KIKUMBULYU NORTH WARD .....	4 <sup>TH</sup> RESPONDENT
COUNTY SECRETARY AND HEAD OF COUNTY PUBLIC SERVICE, GOVERNMENT OF MAKUENI COUNTY .....	5 <sup>TH</sup> RESPONDENT
MAKUENI COUNTY PUBLIC SERVICE BOARD .....	6 <sup>TH</sup> RESPONDENT
GOVERNMENT OF MAKUENI COUNTY .....	7 <sup>TH</sup> RESPONDENT

## JUDGMENT

1. The petitioner filed the petition and a notice of motion on March 1, 2023 through P.M Mutuku & Company Advocates. In the application the petitioner prayed for interim orders suspending the letter dated January 17, 2023 issued by the 2<sup>nd</sup> respondent recalling the petitioner to the respondent's head office; and, suspending the letter of deployment dated January 18, 2023 issued by the 2<sup>nd</sup> respondent; and suspending the letter dated January 19, 2023 appointing Alex Makau Nzambu to act in the position of sub-county civic education co-ordinator –Kibwezi West as issued by the 2<sup>nd</sup> respondent. The petitioner prayed that the letters not to be implemented in the interim.
2. The petitioner's case is that he was employed by the 6<sup>th</sup> respondent to serve the 7<sup>th</sup> respondent as the sub-county civic education co-ordinator. He was confirmed in appointment on June 17, 2016 to permanent and pensionable terms and conditions of service. The impugned letters were issued by the 2<sup>nd</sup> respondent because of on-going grievances by staff about medical cover and the same is done as a mere scape goat. The petitioner has received a show cause letter dated erroneously dated June 6, 2023 for highlighting the issue on the staff WhatsApp group known as Makueni County Reform Agenda. He replied the show cause letter on January 12, 2023 but as at filing of the petition he had not received further communication. By letters dated 17<sup>th</sup> and 18<sup>th</sup> January 2023 he has been recalled to head office and deployed or re-assigned in the Makueni Sub-County Administrators Office with totally new roles from his initial employment. The reassignment is contrary to his letter of employment dated April 15, 2014. The respondents can only perform functions or duties as given by law failing their actions must be null and void.
3. Thus the petitioner states that the actions as communicated in the letters are ultra vires, unconstitutional and invalid, null and void as in violation of articles 10(2) and 47 of the [Constitution](#).
4. In the petition the petitioner prayed for the following orders:
  - a. Declaration that his fundamental rights under the [Constitution](#) were violated.
  - b. Declaration that the decision of the 2<sup>nd</sup> respondent dated January 17, 2023, January 18, 2023 and all subsequent and related decision of the 2<sup>nd</sup> respondent and other respondents are illegal and irregular.



- c. An order declaring the 4<sup>th</sup> respondent's appointment on acting capacity was not procedural and is illegal.
  - d. That the decision by the 3<sup>rd</sup> respondent was irregular and that an order to compensate the petitioner the leave days be granted.
  - e. Permanent injunction restraining the respondents or any of their agents from harassing or intimidating the petitioner.
  - f. Costs and interest.
  - g. Any other order the honourable court may deem fit, just or appropriate in order to achieve the ends of justice.
5. The supporting affidavit has exhibited relevant letters. The letter dated April 15, 2014 appointed the petitioner to the position of Sub-County Education Co-ordinator in the County Public Service. He was to report to the County Secretary and the work station would be notified upon reporting. The letter dated June 17, 2016 confirmed him to permanent and pensionable establishment. Correspondence is exhibited showing county public service employees had grievances about the medical covers. The letter to show cause was addressed to the petitioner dated June 6, 2023 about his social media communication about staff medical cover (on a WhatsApp group known as Makueni reform Agenda. The letter was by the 2<sup>nd</sup> respondent and alleged breach of the code of conduct for public officers. He was to show cause within 7-days why disciplinary action would not be taken against him. He replied by his letter dated January 12, 2023 stating that he had not been given the particulars of allegations and that the acting County Secretary had expressed the same views. He concluded that there was no constitutional, legal and administrative grounds for him to undergo disciplinary action. By the letter dated 17.012023 he was recalled from his Kibwezi West Sub – County station to the County Headquarters effective January 18, 2023 without fail. By the letter dated January 18, 2023 he was deployed to the Makueni Sub-County Administrator's office. His role would be to assist and support in services of the sub-county administrator; compile document and profile sub-county documentation requirements; and to carry out any duty as assigned by the sub-county administrator. He protested the deployment by his letter dated January 23, 2023 lamenting that it was a disguised demotion and it was without due notice. It required consulting him but which had not been done and it came back to back with the initiated disciplinary process. He requested for a review. He has as well exhibited a letter dated January 19, 2023 addressed to Alex Makau Nzambu to act as sub-county civic education coordinator – Kibwezi West Sub –County. The petitioner also addressed to the 2<sup>nd</sup> respondent the letter dated February 13, 2023 lamenting about the unfair letters issued by the 2<sup>nd</sup> respondent and the unfair treatment.
6. The respondents filed a preliminary objection through the County Attorney dated March 13, 2023. They objected to the petition and the application upon the following grounds:
- a. The petition and application offends the doctrine of exhaustion.
  - b. The petition and application violate section 77 of the *County Government Act* No. 17 of 2012, section 87(2) of the *Public Service Commission Act*, 2017, the *Public Service Commission (County Appeals) Procedure Regulations*, 2022, human resources manuals for the Public Service and other lawful regulations.
  - c. The Court lacks jurisdiction as the petitioner has failed to exhaust internal dispute resolution procedures in the public service.



- d. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are sued in personal capacity and no remedy can be directed at them and the suit against them is incompetent.
  - e. The petition does not disclose expressly any infringement of fundamental rights and freedoms.
7. The respondents subsequently appointed M/S Kamende D.C & Company Advocates to act in the matter. The respondents filed the replying affidavit of Zipporah Wambua (the 2<sup>nd</sup> respondent) and Redempta Kavindu. It was urged as follows:
- a. In January 2023 the petitioner published on the staff WhatsApp Group “The Makueni Reform Agenda” statements calculated to incite staff against the employer, the Government of Makueni County.
  - b. A notice to show cause issued on January 6, 2023 but was erroneously dated June 6, 2023. The petitioner replied to exculpate himself. The 2<sup>nd</sup> respondent requested the County Human Resource Advisory Committee to take up the matter and to investigate the same. As the investigation were being undertaken, a vacancy arose at Mukueni Sub-County Administrator’s Office. Thus the claimant was recalled to Headquarters and deployed to that vacancy within the same Department. Clause 5 of the letter of appointment is clear the job description of the petitioner’s job may change according to needs of the Department. The petitioner reported to the new station on January 19, 2023.
  - c. A hearing notice of the disciplinary case was dated February 22, 2023 and scheduled for March 1, 2023 at the County Headquarters and the in the CS boardroom. The invitation was duly served upon the petitioner.
  - d. The petitioner failed to attend on March 1, 2023 and another hearing notice was issued dated March 8, 2023 scheduling the hearing for March 14, 2023 at 10.00am. Another invitation was served dated March 13, 2023 for a hearing on March 14, 2023 at 2.00pm. he failed to show up. Decisions of the Chief Officers are appealable to the Public Service Commission.
  - e. By his contract of service, he could be assigned any other duties at the County. He has not been demoted and he continues to serve in the same Job Group.
  - f. The suit was filed to defeat the ongoing disciplinary proceedings.
8. The petitioner filed his further affidavit sworn on April 26, 2023. He denied receiving notice of the proceedings and notices as alleged in the replying affidavits.
9. Parties filed submissions on the preliminary objection, the petition and the application. The court considers the application in view that the petition is under consideration for determination in the instant case.
10. The 1<sup>st</sup> issue is whether the preliminary objection should be allowed or not. There are several decisions made at the county government level in the instant case. The first is about the deployment of the petitioner to the Headquarters. The second is the initiation of the disciplinary hearing. The respondents have established that the letter of appointment entitles them to reassign and redefine the job description. If aggrieved in any manner, it appears to the court that the petitioner’s remedy would lie with the internal County Government Procedures such as is vested in the County Public Service Board. It could be that the letter of redeployment failed to be clear that the petitioner continues to hold the position as initially appointed but the court also reckons that such grievance can be resolved within applicable law and the service regulations. The court upholds the submission for the respondents that the proper procedure in any event would be to appeal to the Public Service



Commission. As relates to the disciplinary process, it appears that the same was initiated but has not been concluded. The petitioner says he was not served the invitations to the disciplinary hearing. Indeed, the respondents have failed to show how the invitations were variously served upon the petitioner as alleged. Nevertheless, the court finds that the petitioner would subject himself to the disciplinary procedure as appropriate within the applicable service regulations. It appears to the court that as urged for the respondents, the petition would collapse for failing to show threat or actual violation of constitutional rights and freedoms or better still, breach of the contract falling for enforcement or remedy by the court outside the internal grievance management and then the constitutional and statutory appeal process to the Public Service Commission.

11. To answer the 2<sup>nd</sup> issue, the court returns that it is that the preliminary objection sought striking out of some of the respondents. Some like the 2<sup>nd</sup> respondent was specifically named as actors whose presence was necessary for efficient, complete and effectual determination of the dispute. The court finds that the preliminary objection would not render the suit struck out on that account alone.
12. The Court has considered all circumstances of the petition and each party will bear own costs of the petition.

In conclusion the petition is hereby determined with orders it is dismissed and each party to bear own costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 22<sup>ND</sup> JUNE, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

