



REPUBLIC OF KENYA



KENYA LAW
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**Ndiso v County Government of Machakos & 6 others (Petition
E001 of 2022) [2023] KEELRC 1944 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1944 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

PETITION E001 OF 2022

B ONGAYA, J

JULY 28, 2023

**IN THE MATTER OF ENFORCEMENT OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF
INDIVIDUALS UNDER THE BILL OF RIGHTS OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ARTICLES 19, 20, 21, 22 AND 23
OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES 27, 28, 41, 43 & 47 OF THE
CONSTITUTION**

AND

IN THE MATTER OF THE EMPLOYMENT ACT

AND

**IN THE MATTER OF THE FAILURE TO PROMOTE THE
PETITIONER HEREIN AT HIS WORK PLACE AS IS
STIPULATED UNDER HIS TERMS OF EMPLOYMENT**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES,
2013**



BETWEEN

DANIEL MUTUA NDISO PETITIONER

AND

COUNTY GOVERNMENT OF MACHAKOS 1ST RESPONDENT

MACHAKOS COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

THE COUNTY SECRETARY, MACHAKOS 3RD RESPONDENT

THE PUBLIC SERVICE COMMISSION 4TH RESPONDENT

**THE MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY 5TH
RESPONDENT**

THE MINISTRY OF FINANCE AND PLANNING 6TH RESPONDENT

THE ATTORNEY GENERAL 7TH RESPONDENT

JUDGMENT

1. The petitioner filed a petition on 11.04.2022 through Evans Muli & Company Advocates and seeks the following reliefs:
 - a. An order of the Honourable Court declaring that the failure to promote the petitioner herein was an infringement, threat and or violation of his rights and freedoms provided under Articles 27, 28, 41, 43 and 47 of the Constitution of Kenya, 2010.
 - b. An order of declaration of this Honourable Court declaring that the petitioner ought to have been promoted to job group 'P' by the time of his retirement and be and is hereby promoted to job group 'P'
 - c. An order of this Honourable Court directing that the pension of the petitioner herein be calculated as if he retired as an employee in job group 'P' which he ought to have been in had he been promoted as is stipulated.
 - d. An order of this Honourable Court directing the 1st, 5th and 6th respondents to pay the petitioner the dues that accrued as part of unpaid salaries which the petitioner would have received had he been promoted as required totalling to Kshs. 5,154,840/=
 - e. An order of this Honourable Court declaring that the failure to promote the petitioner herein was against and in breach of fair labour practices.
 - f. Damages for infringement of the petitioner's rights and fundamental freedoms provided in the Constitution.
 - g. Any other further order that the Honourable Court may deem it fit and just to grant.
 - h. An order for payment of costs of this petition by the respondents.
2. The petition is supported by the petitioner's affidavit sworn on 11.04.2022 in which he reiterates the averments made in his petition.



3. The 4th respondent opposed the petition by filing on 15.07.2022 the replying affidavit of Dr. Simon K. Rotich, the Secretary and Chief Executive Officer of the Public Service Commission and learned Principal Legal Counsel Mr. Maurice Ogosso appeared in that behalf.
4. In further opposition to the petition the Honourable Attorney General, on behalf of the 5th, 6th and 7th respondents through learned Chief State Counsel Oscar Eredi filed on 28.07.2022 the replying affidavit of Dr. Margaret Mwakima the Principal Secretary of the State Department for Technical, Vocational education and Training, Ministry of Education.
5. There is no dispute that the petitioner was an employee of the 1st Respondent having been among the 65,011 national Government employees who had initially been seconded and later transferred to the said County by the Public Service Commission vide the letter dated 17th May, 2016.
6. The factual background to the case is as follows. That on 05.04.2007, the petitioner was appointed as an instructor under job group ‘K’ in the Ministry of State for Youth Affairs under the then Office of the Vice President. He was subsequently confirmed in appointment on permanent and pensionable basis vide the letter dated 13.03.2010.
7. The petitioner maintained that following his stellar performance he was promoted to the position of a Senior Youth Training Instructor job group ‘L’ as was communicated vide the letter dated 15.09.2011 by the Ministry of Youth Affairs and Sports. The petitioner was later seconded to the County Government of Machakos effective 01.10.2014 at which time he avers that he was due for promotion to job group ‘M’ under the scheme of service as approved by the 4th respondent but was not promoted.
8. That on 25.06.2015 the petitioner together with other 15 instructors proceeded to petition the County Assembly of Machakos on this and various issues in the Machakos County Youth Training Department. That on 25.11.2015 the education and social welfare committee of Machakos County Assembly received the petition from the instructor’s forum and was considered and made recommendations for the promotion of the instructors. The report was adopted and passed by the whole house. That the 1st and 3rd respondents herein failed to implement the report forcing the petitioner to lodge another petition with the County Assembly of Machakos.
9. The petitioner maintains that failure by the respondents to ensure his promotion as stipulated in law was tantamount to gross misconduct and a violation of his fundamental rights and freedoms as protected under Articles 27, 28, 41, 43 and 47 of the Constitution of Kenya, 2010. He urged this Honourable Court to find his petition with merit and to allow it in terms of the reliefs sought therein.
10. The 4th, 5th, 6th and 7th respondents confirmed the petitioner’s transfer from National Government to the County Government of Machakos and that upon his transfer he ceased to be a staff of the National Government. It is argued that the petitioner’s employment therefore fell within the ambits of the County Public Service Board and in particular as relates to his terms and conditions of service. Further, that the petitioner was bound by the County Government’s policies and procedures. That the petitioner was alive to this fact and in-fact raised grievances with regards to his promotion with the County Assembly of Machakos.
11. The Public Service Commission argues that promotion in the Public Service to certain grades is not automatic but is subject to various factors such as merit, qualifications and other relevant factors as outlined in the Constitution of Kenya, 2010, the Public Service Act, 2017, the Public Service Commission Regulations, 2020 and the scheme of service for youth training personnel, May, 2012.



12. It was argued that the onus of promotion fell squarely in the County Government of Machakos and thus the failure cannot therefore be blamed on the 4th, 5th, 6th and 7th respondents herein. That the petitioner subsequently retired from service effective 02.04.2022.
13. The 4th, 5th, 6th and 7th respondents argue that the petitioner has failed to establish a reasonable cause of action against them and thus this Honourable Court be pleased to dismiss the petition in its entirety with costs to the respondents.
14. The 1st, 2nd and 3rd respondents failed to enter appearance and file response to the petition.
15. To answer the 1st issue for determination the Court returns that indeed the petitioner has failed to raise a reasonable cause of action against the 4th, 5th, 6th and 7th respondents because it is not the petitioner's case that the 4th, 5th, 6th and 7th respondents failed to promote him. The petitioner's case is that while on secondment, the County Government of Machakos failed to promote him.
16. To answer the 2nd issue for determination, the Court returns that the petitioner secondment letter dated 28.05.2015 stated that while on secondment, the petitioner would retain his prevailing terms of service which shall not be varied to his disadvantage. It further stated thus, "Your career development shall be guided by existing policies and scheme of service. The existing training and capacity building will continue to apply and will be managed by the National Government in consultation with County Government." As at time of secondment the petitioner was at Job Group L Senior Instructor effective July 2011. The Scheme of Service exhibited shows Instructors' cadre ends at Principal Instructor Job Group N. Thus, the Court returns that the petitioner's allegations that if he would have been promoted he would have retired at Job Group P is misleading and the claims and prayers in that regard are declined as unjustified. The Scheme of service further states that for Instructors Job Groups H/J/K/L form a common establishment. Thus to move to Job Group M the petitioner must show there was a position that was vacant and he was denied the promotion. The Scheme of Service also shows that to move from Job Group M then to N there are set qualifications on experience, supervisory course or management course, certificate in computer applications, and, demonstrated high degree of administrative and professional competence as well as thorough understanding of the current youth polytechnic training trends and management of youth polytechnics. The petitioner has not demonstrated that he possesses all the prescribed qualifications at all material times. The upshot is that the petitioner has failed to show that he was qualified for the promotions as alleged and claimed and, the 2nd issue for determination is answered accordingly.
17. The petitioner has failed to establish that his rights were violated as alleged. In the circumstances, the petition will fail with no orders on costs.

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

SIGNED, DATED AND DELIVERED IN COURT AT MACHAKOS THIS FRIDAY 28TH JULY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

