



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Chief Executive Officer Kenya Medical Supplies Authority & 2 others  
(Petition E210 of 2022) [2023] KEELRC 1779 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1779 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E210 OF 2022**

**SC RUTTO, J**

**JULY 14, 2023**

**BETWEEN**

**CHRISTINE MWANGI ..... PETITIONER**

**AND**

**THE CHIEF EXECUTIVE OFFICER KENYA MEDICAL SUPPLIES  
AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH ..... 2<sup>ND</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner who is an employee of the Kenya Medical Supplies Authority (KEMSA) has brought the instant Petition dated 5<sup>th</sup> December, 2022, through which she seeks the following orders: -
  - a. A declaration that the decision of the 1<sup>st</sup> respondent to transfer her to Mombasa was in violation of the *Constitution* as well as the *Kenya Medical Supplies Authority Act* and thus null and void.
  - b. A declaration that the 1<sup>st</sup> respondent is not to hold the position of the Chief Executive Officer of Kenya Medical Supplies Authority or hold any other public office within the Republic of Kenya.
  - c. An order of judicial review of certiorari to quash the decision by the 1<sup>st</sup> respondent transferring her from Nairobi to Mombasa.
  - d. An order of prohibition preventing the 1<sup>st</sup> Respondent from transferring, re-designating or demoting her without the approval of the Board of the *Kenya Medical Supplies Authority Act*.
  - e. General damages.



- f. Costs of the suit.
  - g. Any other relief or further reliefs that the Honorable Court may deem fit.
2. The genesis of the instant Petition is the Petitioner's transfer from Nairobi to Mombasa Regional Depot. The Petitioner believes that the decision to have her transferred emanated from the directive of the 1<sup>st</sup> Respondent that she should process payments for Oraro & Co. Advocates in respect of legal services rendered to KEMSA.
  3. She further avers that upon the insistence of the 1<sup>st</sup> Respondent, she initiated payment for the sum of Kshs.8,780,538.00 but subsequently cancelled the same upon realizing that she had been misled by the 1<sup>st</sup> Respondent.
  4. The Petitioner further states that the 1<sup>st</sup> Respondent engaged in improper conduct including doctoring of minutes as well as instructions letter to circumvent the legal requirements that authorized such instructions to be issued by the Chief Executive Officer of KEMSA. As part of the scheme to go round the legal requirements, the 1<sup>st</sup> Respondent instructed her chief of staff to illegally amend the minutes of the meeting held on 14<sup>th</sup> October, 2022 to remove the fact that the Board Chair of KEMSA had issued instructions to Oraro & Co. Advocates and substituting the Board Chair with one of her predecessors in an acting capacity.
  5. That the 1<sup>st</sup> Respondent prepared an internal memo confirming that the firm of Oraro & Co. Advocates had rendered legal services to KEMSA contrary to the established procedures that require such confirmation to emanate from the legal department.
  6. The Petitioner further avers that the 1<sup>st</sup> Respondent purported to divert funds meant for restructuring of KEMSA towards payment of legal fees without approval of the Board of Directors of KEMSA.
  7. She further states that on 27<sup>th</sup> October, 2022 the 1<sup>st</sup> Respondent herein wrote to her transferring her to Mombasa Regional Depot and directing the person in charge of the depot to allocate her duties despite the fact that she is superior to the said person in charge of the Mombasa depot.
  8. That on 9<sup>th</sup> November, 2022, the 2<sup>nd</sup> Respondent herein wrote to the 1<sup>st</sup> Respondent directing her to reverse certain decisions that had been made without consulting the Board of Directors of KEMSA including deployment of staff. Despite the letter dated 9<sup>th</sup> November, 2022 from the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent asked the Finance Manager to allocate her (Petitioner) duties.
  9. The Petitioner contends that the 2<sup>nd</sup> Respondent sits in the Board of Directors of KEMSA and was therefore in a position to ensure that the directives issued to the 1<sup>st</sup> Respondent were effected but failed to do so.
  10. According to the Petitioner, the transfer was occasioned by the determination by the 1<sup>st</sup> Respondent to carry out irregularities and illegalities in execution of her duties as the Chief Executive Officer of KEMSA.
  11. The Petitioner further avers that all accounting work for KEMSA are carried out at Nairobi and the Mombasa depot where she was purportedly transferred to, only holds third party stocks which belong to the parent ministry of KEMSA and other departments and thus KEMSA only supplies storage space for the stocks. That she was transferred to Mombasa depot where no accounting work takes place and thus effectively ensuring that she cannot carry out her role as an accountant.



12. The Petitioner further states that the 1<sup>st</sup> Respondent caused her access rights to KEMSA's Enterprise Resource Management "ERP" system to be withdrawn thus making it impossible for her to effectively discharge her duties.
13. According to the Petitioner, the actions and omissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have led to breach of her constitutional rights.

## **2<sup>nd</sup> Respondent's Response**

14. In response to the Petition, the 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn by Mr. Peter Tum, the Principal Secretary in the State Department for Medical Services, Ministry of Health. Through the said Affidavit, the 2<sup>nd</sup> Respondent distanced the Ministry of Health from management of staff of KEMSA. He avers that KEMSA is responsible for management of staff under the Kenya Medical Supplies Act. That therefore, the Ministry should not be held liable for the internal human resource functions discharged by an autonomous state corporation.
15. The 1<sup>st</sup> Respondent did not file any response to the Petition.

## **Submissions**

16. When the matter came up for directions on 8<sup>th</sup> February, 2023, the Court directed that the Petition be canvassed by way of written submissions and to that end, issued timelines for purposes of compliance. Besides, the Petitioner, the other parties did not file their written submissions as the same are not on the Court's physical court record and are not traceable on the online portal.
17. On the part of the Petitioner, it was submitted that the only explanation as to why she was posted where her services are not required, is that the 1<sup>st</sup> Respondent wanted to get rid of her at the head office. She argued that the decision of the 1<sup>st</sup> Respondent was illogical and meant to spite her perhaps for spoiling the party.
18. She further argued that the 1<sup>st</sup> Respondent is unfit to hold public office and that by flouting the procurement laws, the 1<sup>st</sup> Respondent has failed the high threshold set out in the Constitution. Citing the case of *Kenya Human Rights Commission & another v Non-Governmental Organisation Co-ordination Board & another* (2018), the Petitioner further submitted that the documentation on record demonstrates that the 1<sup>st</sup> Respondent is not only vindictive, but is also a person willing to flout every rule in the book to achieve her selfish ends.
19. Placing reliance on the case of *Rachel Muthetu Ndambuki v Cabinet Secretary, Ministry of Lands and Physical Planning & 2 others* (2020) eKLR, the Petitioner urged the Court to find that she has proved her case to the required standard and should therefore be granted the prayers sought in the Petition.

## **Analysis and Determination**

20. I have considered the Petition, the Response thereto, the evidentiary material before me as well as the submissions on record and consequently, isolated the following issues for determination: -
  - i. Whether the Respondents violated the Petitioner's constitutional rights; and
  - ii. Whether the Court should grant the orders sought in the Petition.



## Constitutional violation?

21. As stated herein, the genesis of the Petition is the Petitioner's transfer from Nairobi to Mombasa Regional Depot. According to the Petitioner, her transfer was connected to the processing of legal fees for the firm of Oraro & Co. Advocates. In the Petitioner's view, her transfer was in bad faith.
22. The record bears that the 1<sup>st</sup> Respondent through an internal memo dated 21<sup>st</sup> October, 2022 addressed to the Ag. Finance Manager, confirmed that services had been rendered by Oraro & Co. Advocates and requested for payments to be made as per the invoices submitted.
23. Through an Internal Memo dated 24<sup>th</sup> October, 2021, to the Acting Finance Manager, the Petitioner identified the documents that were necessary for purposes of making payments for legal fees and proceeded to note the documents that had been provided and those that were yet to be availed. In this regard, she cited the relevant Standard Operating Procedures. The said internal memo reads in part: -

“In the payment for Oraro & Company Advocates, the following documents have been provided:

1. Notice of prequalification- the prequalification list availed is from central Bank of Kenya.
  2. Letter of Instructions from KEMSA for engagement- The letter of instruction has been done by CEO to the Advocates firm. The letter is dated 30<sup>th</sup> August, 2021, while the letter seeking a prequalification list from the CBK is dated 12<sup>th</sup> November, 2021. This implies that KEMSA engaged the firm prior to requesting for the prequalification list from CBK.
  3. Outcome of the case (judgment)/proof of work done- This is yet to be provided by CEO's office.
  4. Fee note- this has been provided.
  5. In cases of disbursements charges- provide support documents- this is yet to be provided.”
24. It is notable that the Petitioner's transfer was effected on 27<sup>th</sup> October, 2022. This was shortly after she had raised discrepancies noted in the documentation supporting payment to Oraro & Co. Advocates. To be precise, the intervening period was three days. It was therefore a strange coincidence that the Petitioner was transferred upon raising the said discrepancies. As stated herein, the 1<sup>st</sup> Respondent did not respond to the Petition hence did not controvert the Petitioner's allegation that the transfer was in bad faith and was connected to the processing of payments in respect of the legal services rendered by the firm of Oraro & Co. Advocates.
  25. Interestingly, some of the discrepancies raised by the Petitioner had also been raised by the KEMSA's Legal Officer through an internal memo dated 13<sup>th</sup> April, 2022, addressed the Ag. Chief Executive Officer. The internal memo reads in part:-

“Whereas the authority was able to acquire the prequalified list from the Central Bank of Kenya, it is not clear how the firm of Oraro was identified as the Authority ought to have subjected the prequalified list of the Central Bank of Kenya and the Authority's own list through a competitive bidding process in compliance with Section 56(2) of the *PPADA*.



In addition, for the fee notes to be processed, the Finance Department requires the below documents:

- a. Notice of prequalification.
- b. Letter of Instructions from KEMSA for engagement.
- c. Outcome of the case (judgment).
- d. Fee note.
- e. In cases of disbursements charges-provide support documents
- f. ETR receipts for cases where VAT is applicable.

Further to the competitive bidding gap identified, we note that the matter is yet to be concluded to warrant payment as per the above requirements.”

26. What manifests from the foregoing memo is that the concerns raised by the Petitioner were valid and not far-fetched. Given the timing of the Petitioner’s transfer, I am led to conclude that it is highly probable that the same was effected when she raised discrepancies touching on the documents supporting the payment to the firm of Oraro & Co. Advocates.
27. What’s more, as per the Petitioner’s letter of transfer, she was to report to the Depot In Charge, an officer who was junior to her in rank. Again, this position was not controverted by the 1<sup>st</sup> Respondent as no Response was tendered to the Petition.
28. Further, the Petitioner’s contention that there was no role for her to carry out at the Regional depot in Mombasa was not controverted. In this regard, the Petitioner stated that there are no accounting systems in place at Mombasa and further, her access rights to KEMSA Enterprise Resource Management System had been taken away at the behest of the 1<sup>st</sup> Respondent despite the fact that she had not been moved to another department. Yet again, this position was not challenged in any way by the 1<sup>st</sup> Respondent. Indeed, one wonders why the Petitioner who was a financial accountant, would be transferred to a station with no accounting systems. I find this to be quite disingenuous if not vindictive on the part of the 1<sup>st</sup> Respondent.
29. Over and above, according to clause 5.22 of KEMSA’s Human Resources and Procedures Manual, a copy of which was exhibited by the Petitioner, “an employee may be called upon to perform any other reasonable duty based on the needs of the Authority. In this case, there was no evidence that the Petitioner’s services and skills were required at KEMSA’s Regional Depot in Mombasa. The question thus is why was she transferred?
30. In light of the foregoing set of circumstances, I am led to conclude that the Petitioner was only transferred when she raised discrepancies regarding the documents supporting payment for legal services to the firm of Oraro & Co. Advocates. Indeed, whichever way you look at it, there was no other reason to trigger the Petitioner’s transfer and in any event, no plausible reason has been given to validate the same.
31. From all indications, the Petitioner was being penalized for performing her duty. All she did was raise discrepancies that were not in conformity with KEMSA’s Standard Operating Procedures relating to payment for legal services. No doubt, the actions of the 1<sup>st</sup> Respondent amounted to violation of Article 236(a) of the Constitution which prohibits victimization or discrimination of a public officer on account of having performed the functions of his or her office in accordance with the Constitution



or any other law. This was in addition to violation of the Petitioner's right to fair labour practices as guaranteed under Article 41 of the *Constitution*.

32. Coupled with the foregoing, it is notable that the 1<sup>st</sup> Respondent had been instructed by the then Principal Secretary, Ministry of Health not to effect significant deployment of staff during the transition period or cause changes in the management of human resource in contravention of Circular No. OP/CAB.26/4A/VOL.1(4) dated 19<sup>th</sup> September, 2022, issued by the Head of Public Service. Consequently, the 1<sup>st</sup> Respondent was asked through the said letter to rescind the decisions and actions she had undertaken and to confirm action in her reply. There is no evidence that this was done. As it is, the Petitioner's transfer was one of such actions the 1<sup>st</sup> Respondent had been prohibited from undertaking. As no response was tendered to this Petition, it follows that no explanation was given for contravening the Circular cited.
33. The foregoing further confirms the 1<sup>st</sup> Respondent's disregard for the national values and principles of governance spelt out under Article 10 of the Constitution.
34. All things considered, I am satisfied that the Petitioner has established that there was a constitutional violation and that her fundamental rights were breached by the 1<sup>st</sup> Respondent when she affected her transfer in the manner described herein.

### Reliefs

35. In view of the foregoing, I find that the Petitioner is entitled to some of the reliefs sought being a declaration that her rights under Article 41 of the Constitution were violated by the 1<sup>st</sup> Respondent in that her transfer from Nairobi to Mombasa Regional Depot lacked basis and was not justified at all.
36. On account of the said constitutional violation, I will award the Petitioner damages. Pursuant to Article 23(3) (e) of the *Constitution*, this Court has authority to grant compensation where there is breach of a fundamental right. I am of the considered view that Ksh.1,500,000.00 is reasonable compensation for the violation of the Petitioner's constitutional rights aforesaid.

### Orders

37. In the end, I enter judgment in favour of the Petitioner in the following terms: -
  - a. A declaration is hereby issued that the decision of the 1<sup>st</sup> Respondent to transfer the Petitioner from Nairobi to Mombasa Regional Depot was in violation of the Constitution and therefore null and void.
  - b. An order of certiorari is hereby issued quashing the decision by the 1<sup>st</sup> Respondent transferring the Petitioner from Nairobi to Mombasa Regional Depot.
  - c. The 1<sup>st</sup> Respondent shall pay to the Petitioner general damages assessed at Kshs 1,500,000.00.
  - d. The 1<sup>st</sup> Respondent shall meet the costs of this Petition.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

Appearance:



Mr. Kamwaro for the Petitioner

Ms. Rop for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

No appearance for the 1<sup>st</sup> Respondent

Court Assistant Abdimalik Hussein

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

