



REPUBLIC OF KENYA



**Wanjohi v Public Service Commission & another (Petition E116 of 2022)  
[2023] KEELRC 2914 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2914 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E116 OF 2022  
MA ONYANGO, J  
NOVEMBER 16, 2023**

**BETWEEN**

**JOHN GICHUKI WANJOHI ..... PETITIONER**

**AND**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL  
PLANNING ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner is employed by the Public Service Commission, the 1<sup>st</sup> Respondent, as a Principal Land Registrar at the Ministry of Lands and Physical Planning and currently stationed at the Nairobi Land Registry. The 2<sup>nd</sup> Respondent is the Cabinet Secretary Ministry of Lands and Physical Planning.
2. The Petitioner filed the Petition dated 5<sup>th</sup> July 2022 on 7<sup>th</sup> July 2022 alleging that the 1<sup>st</sup> Respondent violated Articles 20 and 41 of *the Constitution*, Article 47 of *the Constitution* as read with the provisions of *Fair Administrative Action Act*, 2015 and the *Public Service Commission Act*, 2017 in transferring him from the Ministry of Lands and Physical Planning to the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (State Department for Transport) vide the letter Ref: PSC/19/111(38) dated 15<sup>th</sup> June 2022.
3. The Petitioner therefore seeks the following orders against the Respondents:
  - a. A declaration be and is hereby issued that the 1<sup>st</sup> Respondent's transfer decision against the Petitioner as contained in the letter Ref No: PSC/19/111/(38), dated 15<sup>th</sup> June 2022 and communicated to the Petitioner vide the 2<sup>nd</sup> Respondent's letter dated 27<sup>th</sup> June 2022 transferring him from the Ministry of Lands and Physical Planning to the State Department for Transport violates his right to fair labour practices and fair administrative action as guaranteed under Articles 41 and 47 of *the Constitution* respectively and is thus illegal, null and void.



- b. A judicial review order of certiorari do issue quashing the 1<sup>st</sup> Respondent's transfer decision contained in the letter Ref No: PSC/19/111/(38) dated 15<sup>th</sup> June 2022 transferring the Petitioner from the Ministry of Lands and Physical Planning to the State Department for Transport as well as the 2<sup>nd</sup> respondent's letter Ref:20060550045/107 dated 27<sup>th</sup> June 2022 conveying the said transfer decision to the Petitioner.
  - c. Damages for unfair labour practices
  - d. An order for costs of this Petition
  - e. Any other relief the court deems just and fit
4. The Petition is supported by the affidavit of John Gichuki Wanjohi, the Petitioner herein.
  5. The 1<sup>st</sup> Respondent opposed the Petition vide its Replying affidavit dated 18<sup>th</sup> July 2022 while the 2<sup>nd</sup> Respondent filed Grounds of opposition dated 2<sup>nd</sup> August 2022.

### **The Petitioner's Case**

6. It is the Petitioner's case that he is aggrieved by his transfer to the State Department for Transport as the same was effected in an opaque manner and in total disregard to his fundamental rights to fair administrative action and labour rights under both *the Constitution* and the *Employment Act*.
7. The Petitioner avers that the Respondents' transfer decision as conveyed does not inform him of the basis for his transfer to the State Department for Transport or the position and duties he is to perform at the State Department for Transport.
8. The Petitioner states that the said transfer also comes hardly one and a half years since he was transferred arbitrarily and inhumanely from Mombasa Lands Registry to his current station.
9. The Petitioner opines that the transfer decision is malicious as it is being used to circumvent the orders of the court in Nairobi ELRC case no. E024 of 2021, John Wanjohi Gichuki vs Principal Secretary, Ministry of Lands and Physical Planning and 2 others. It is the Petitioner's case that the court vide orders granted on 15<sup>th</sup> September 2021 stayed another unprocedural decision to transfer him to Isiolo Land Registry barely 5 months after he was transferred from Mombasa and during his prevailing frail health following a life-threatening accident that necessitated surgeries. He states that it is unjust and unfair for the Respondents to effect another transfer without regard to the Petitioner's rights and interests while aware of the prevailing orders and his delicate health condition.
10. According to the Petitioner, section 43 of the *Public Service Commission Act*, 2017 makes it mandatory to ensure any transfer effected should lead to improved service delivery and must be influenced by service needs. The Petitioner states that the Respondents' transfer decision as communicated to him does not demonstrate or explain the unique skills he possesses and the service needs that such skills shall improve at the State Department for Transport.
11. It is therefore contended that the failure to disclose the justification for the said transfer violates the Petitioner's right to fair administrative action and the right to be supplied with reasons for the administrative decision under Article 47 of *the Constitution* and the Fair Administrative Act, 2015.
12. The Petitioner further contends that Clause B.31(1) of the Human Resource Policies and Procedures Manual for the Public Service, May 2016, provides that employees who wish to move from one ministry to another will have to apply for vacant positions as and when advertised and that given that the Petitioner never applied for any transfer to the State Department for Transport as none had been



advertised, it would only have been fair that the Petitioner is consulted prior to the making of the decision and supplied with reasons informing him of the need for his transfer.

13. The Petitioner therefore avers that the decision to transfer him from the Ministry of Lands and Physical Planning to State Department for Transport is unprocedural, illegal and null and void ab initio and that the court should have the unprocedural, illegal, irrational and oppressive decision to transfer him stayed, varied, and or set aside in its entirety.

### **The 1<sup>st</sup> Respondent's case**

14. The 1<sup>st</sup> Respondent in its replying affidavit sworn by its Chief Executive Officer, Mr Simon Rotich on 4<sup>th</sup> July 2022 avers that the petition is premature as the petitioner has not exhausted administrative processes that are available to all employees of the 1<sup>st</sup> Respondent. He states that Regulation 77 of the [Public Service Commission Act](#) affords an opportunity to any person aggrieved by the exercise of the Commission's constitutional or statutory powers and functions to make a complaint which the Commission has power to determine.
15. It is deposed that the Petitioner alleges that he appealed to the Commission vide a letter dated 1<sup>st</sup> July 2022 which letter the Commission has not received. According to the 1<sup>st</sup> Respondent, it received a letter on 8<sup>th</sup> July 2022, dated 5<sup>th</sup> July 2022 being a petition written by the Petitioner and five other officers requesting the Commission to reconsider the decision to transfer the Petitioner and five others from the Ministry of Lands and Physical planning to various ministries.
16. It is the 1<sup>st</sup> Respondent's case that by the time it received the letter dated 5<sup>th</sup> July 2022, the Petitioner had already filed this Petition and obtained directions of the court on 8<sup>th</sup> July 2022. The 1<sup>st</sup> Respondent maintains that the Petitioner did not grant the Commission an opportunity to consider his appeal before filing the instant petition.
17. The 1<sup>st</sup> Respondent states that the Petitioner's actions of filing this Petition and the Judicial Review Application No. E024 of 2022 which he disclosed in the instant petition demonstrates bad faith and portrays a litigious employee who is more intent on frustrating the employer by having courts control and determine the employment relationship between the Petitioner and the Respondent.
18. The 1<sup>st</sup> Respondent maintains that it is clear from the Petitioner's conduct that any attempts to have him transferred for purposes of ensuring efficiency and effectiveness have been frustrated by the Petitioner through court cases and orders without proper justification.
19. On the position held by the Petitioner that he ought to have been consulted before a transfer decision was made, the 1<sup>st</sup> Respondent avers that consultation of employees on deployment and transfer decisions would cripple an employer as it would mean that the employer is subject to the direction and control of the employees with regard to where the employee is posted to work.
20. According to the 1<sup>st</sup> Respondent, under clause 6 of the Petitioner's appointment letter, the Petitioner was liable to be posted to any station in Kenya and that he signified acceptance of the appointment letter including acceptance of clause 6 by appending his signature on the said letter. It is further stated that there is no provision in the said clause 6 that subjects the Respondents decision to post the Petitioner to any station in Kenya to justification and consultation with the Petitioner.
21. The 1<sup>st</sup> Respondent further contends that section 43(1) of the [Public Service Commission Act](#) allows the transfer of officers from one ministry to another and that the requirements that should be considered are provided for under Section 43(3) of the Act which the Commission took into account before it transferred the Petitioner.



22. It was stated that the Petitioner has not been transferred outside Nairobi and that further, he has not demonstrated how his transfer to the State Department for Transport has violated his rights enshrined in Articles 41 and 47 of the Constitution
23. The 1<sup>st</sup> Respondent has maintained that contrary to the allegations of the Petitioner, the decision to transfer an employee in the Public Service is not an administrative action that is subject to the provisions of Articles 41 and 47 of the Constitution and the provisions of fair administrative action.
24. It is thus contended that the decision to transfer an employee is the prerogative of the employer and does not in any way amount to violation of constitutional provisions.
25. The court was urged to dismiss the Petition with costs.

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

26. The 2<sup>nd</sup> Respondent in opposition of the instant Petition filed grounds of opposition on grounds that;
  - i. The instant application and Petition as instituted is an abuse of the court process, has no merit and is based on a misconception of the law
  - ii. The instant application and petition is premature since the Petitioner has appealed to the Public Service Commission against the transfer decision thus the same offends the doctrine of ripeness
  - iii. The application and Petition offend the statutory provisions of section 9(2)(3) of the Fair Administrative Action Act on the principle of exhaustion of alternative dispute resolution/ internal mechanisms for appeal or review
  - iv. The transfer as undertaken against the Petitioner is not illegal, ultra-vires or in breach of constitutional principles as alleged by the Petitioner herein
27. Based on the foregoing, the 2<sup>nd</sup> Respondent urged the court to dismiss the Petition dated 5<sup>th</sup> July 2022 with costs.
28. As directed by the court on 16<sup>th</sup> December 2022, the Petition was disposed of by way of written submissions. I have perused the record and only found submissions for the 1<sup>st</sup> Respondent.

## **Determination**

29. Before dealing with the issues falling for my determination, it is important to clarify that the issue of exhaustion of internal mechanisms which was raised by the Respondents was dealt with as a preliminary issue before the petition was set down for hearing. On the 11<sup>th</sup> October 2022, the court was informed that the 1<sup>st</sup> Respondent had considered the Petitioner's appeal on his transfer and that the said appeal had been declined, the effect being that the Petitioner was required to proceed for the transfer to the State Department of Transport.
30. From the Petition herein, the rival affidavits and the submissions on record, the only issue for my determination is whether the Petitioner's transfer from the Ministry of Lands and Physical Planning to the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (State Department for Transport) was unfair.
31. The substratum of this petition is the letter of transfer dated 27<sup>th</sup> June 2022 which reads;  
MINISTRY OF LANDS AND PHYSICAL PLANNING



Ref. No, 2006050045/107 27<sup>th</sup> June ,2022

Thro'

Ag. Senior Deputy Chief Land Registrar

Ardhi House

NAIROBI

RE: TRANSFER /RELEASE ON POSTING

This is to convey the decision of the Public Service Commission vide their letter Ref: PSC/19/111/(38) dated 15<sup>th</sup> June,2022 that you are transferred from this Ministry to the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (State Department for Transport)

You should therefore report to the Principal Secretary, State Department for Transport with immediate effect but not later than 8<sup>th</sup> July ,2022 after proper handing over to your supervisor.

By a copy of this letter, the Principal Secretary, State Department for Transport is requested to confirm when you report for duty.

In the meantime, I take this opportunity to thank you for the services that you rendered while in this Ministry and wish you well in your new station.

Signed

Janerose Karanja

FOR: CABINET SECRETARY

Copy to:

Principal Secretary

State Department for Transport

Nairobi

32. The Petitioner has faulted his transfer on grounds that he was not consulted before the said transfer was effected.
33. Section 43 of the *Public Service Commission Act* provides;
  - ...43. (1) Where an authorized officer intends to transfer a public officer from the ministry or department where such a public officer is currently deployed to another ministry or department without a change of designation or grading, the recommendations and comments of the authorized officer concerned shall be sent to the Commission, which shall decide whether the transfer should be approved.
  - (2) Where an authorized officer intends to transfer a public officer from the office where such a public officer is currently deployed to another office of different designation but of similar grading, either in the same ministry or department, the authorized officers concerned shall forward their recommendations and comments to the Commission, which shall decide whether the transfer should be approved.
  - (3) In effecting a transfer the following shall be taken into account—
    - (a) the transfer shall lead to improved service delivery;



- (b) the interest of the children, if any, of the affected public officer; and
  - (c) the transfer shall not be arbitrary.
  - (4) Nothing in this Part shall apply to—
    - (a) the posting of public officers from one station to another in their substantive capacities within ministries or departments; or
    - (b) the transfer between ministries or departments of public officers in any office which is common to departments generally, which shall be effected by the authorized officers concerned in consultation, where necessary, with the Commission.
34. The Public Service Commission Human Resource Policies and Procedures Manual for Public Service provides for transfers between ministries as follows-
- TRANSFERS Transfer from One State Department to another
- B.31 Employees who wish to move from one ministry to another will have to apply for vacant
- (1) positions as and when advertised. Further, deployment of officers in their substantive capacity within a ministry will be undertaken by the respective Authorized Officer on recommendation of MHRMAC.
  - (2) In exceptional circumstances, transfers of officers in Job Group ‘Q’ and above shall be approved by 37 Public Service Commission on the recommendation of the Central Human Resource Management Postings Committee.
35. Section 10(5) of the *Employment Act* further provides-
- (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
36. In the instant case the letter transferring the Petitioner from the Ministry of Lands and Physical Planning to the State Department for Transport does not state the capacity in which he was going to work at the said Department. The position of Principal Land Registrar is specific to the Ministry of Lands and it is possible that the same position does not exist in the State Department for Transport. The Petitioner having been appointed as a Land Registrar, any changes of his job title and duties had to be specified in the letter of transfer and if there were any changes, he ought to have been consulted. The Respondents were further under obligation to state the same in the letter of transfer, including the fact that the transfer was expected to improve service delivery.
37. Section 43 of the *Public Service Commission Act* emphasizes designation and grading. A letter transferring a senior officer like the Petitioner from one Ministry to another must indicate whether he was being transferred in the same designation and grading or if there was going to be a change. Such change must be disclosed to the employee so that he knows the nature of work he was going to perform in the new Ministry and if they are within his skills set and qualifications.
38. From the letter of transfer it is clear that the Petitioner’s transfer does not fall under section 43(4) Act where the 1<sup>st</sup> Respondent can transfer without consideration of the factors under section 43(1), (2) and (3).



39. The fact that section 43 requires the Respondents to take into account the interest of the children, if any, of the affected public officer and that the transfer should not be arbitrary means that in any transfer under the section some form of consultation must be held with the employee to ascertain these particulars.
40. Black's Law Dictionary defines arbitrary to mean-
- Depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules or procedures; or founded on prejudice or preference rather than on reason or fact.
41. The use of the word arbitrary in the section therefore means that that the employee must be consulted where a transfer to a different ministry is being considered to find out his circumstances such as whether he has children likely to be adversely affected by the transfer. The word arbitrary also means that the employee's other circumstances must be taken into account. Such circumstances can only be ascertained through consultation with the employee. Any action taken without consultation with the employee is therefore arbitrary.
42. The court appreciates that transfers in the public service are authorized by both the Act and the policies and regulations. The same is also provided in the Petitioner's letter of appointment. However, the transfers that can be undertaken without reference to the employee are those stated under section 43(4) where it is a posting from one station to another within ministries or departments or where the transfer between ministries or departments is in an office that is common to departments generally.
43. For the foregoing reasons it is my finding that the transfer of the petitioner from the Ministry of Lands and Physical Planning to the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works (State Department for Transport) was arbitrary and in violation of both section 43(3) of the Public Service Act and section 10(5) of the *Employment Act*. In so far as the transfer failed to disclose to the employee the designation and duties he was expected to perform at the new employment station leaving the employee in the dark, the transfer amounted to unfair labour practices contrary to Article 41 of *the Constitution* of Kenya, 2010.
44. In the end, I make the following orders:
- i. A declaration be and is hereby issued that the 1<sup>st</sup> Respondent's transfer decision against the Petitioner as contained in the letter Ref No: PSC/19/111/(38), dated 15<sup>th</sup> June 2022 and communicated to the Petitioner vide the 2<sup>nd</sup> Respondent's letter dated 27<sup>th</sup> June 2022 transferring him from the Ministry of Lands and Physical Planning to the State Department for Transport violates his right to fair labour practices as guaranteed under Article 41 of *the Constitution* and is thus illegal, null and void.
  - ii. A judicial review order of certiorari do and hereby issued quashing the 1<sup>st</sup> Respondent's transfer decision contained in the letter Ref No: PSC/19/111/(38) dated 15<sup>th</sup> June 2022 transferring the Petitioner from the Ministry of Lands and Physical Planning to the State Department for Transport as well as the 2<sup>nd</sup> respondent's letter Ref:20060550045/107 dated 27<sup>th</sup> June 2022 conveying the said transfer decision to the Petitioner.
  - iii. The Petitioner shall have costs of the suit.

**DATED, DELIVERED AND SIGNED AT ELDORET THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**M. ONYANGO**



**JUDGE**

