



**Cattwright v Principal Secretary, State Department of Lands And Physical Planning
Ministry of Lands, Public Works, Housing & Urban Development & 2 others
(Petition E127 of 2023) [2023] KEELRC 3404 (KLR) (21 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3404 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E127 OF 2023
AN MWAURE, J
DECEMBER 21, 2023**

BETWEEN

JACOB OWINO CATTWRIGHT PETITIONER

AND

**PRINCIPAL SECRETARY, STATE DEPARTMENT OF LANDS AND PHYSICAL
PLANNING MINISTRY OF LANDS, PUBLIC WORKS, HOUSING & URBAN
DEVELOPMENT 1ST RESPONDENT**

**JANEROSE KARANJA – DIRECTOR HUMAN RESOURCE MANAGEMENT &
DEVELOPMENT UNIT 2ND RESPONDENT**

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

JUDGMENT

1. The Petitioner filed a petition dated 27th June 2023. He made the following prayers:-
 - 1) A declaration that within the intendment of Article 10 of *the Constitution* and resonating the intention of Article 232 (e) of *the Constitution* of Kenya, 2010 as read together with section 43(3) of the *Public Service Commission Act* 2017, the Respondents are bound to discharge their public duties in an open, transparent and accountable manner.
 - 2) A declaration that the 1st Respondent’s decision to commence disciplinary proceedings against the Petitioner for not honoring the transfer directive to the Ministry of Environment and Forestry which was later rescinded amounts to a violation of the Petitioner’s right to unfair labour practices under Article 41 of *the Constitution*.
 - 3) A declaration that the actions of the Respondents to frustrate the Petitioner through a targeted transfer to a different ministry where he has no expertise or specialization, and the desire to



remove him from office due to a transfer which was later rescinded by the PSC violates the Petitioner's rights protected under Article 236 of *the Constitution*.

- 4) A declaration that the actions of the Respondents to frustrate the Petitioner through a targeted transfer to a different ministry where he has no expertise or specialization, and the desire to remove him from office due to a transfer which was later rescinded by the PSC violates the Petitioner's rights to fair labour practices protected under Article 41 of *the Constitution*.
 - 5) A declaration that Respondents' decision threatening to institute disciplinary action against the Petitioner for failure to report to the Ministry of Environment and Forestry despite the Petitioner successfully appealing against the decision to transfer him to the said ministry because it was done unprocedurally, is a violation of fair administrative action under Article 47 of *the Constitution*.
 - 6) A declaration that that the actions of the Respondents not to pay the Petitioner his salary, benefits and allowances since June 2022 up to date especially after the Public Service Commission rescinded its decision on 20th March 2023 and failure to assign him duties despite reporting to work daily is an unfair labour practice and contravenes the provisions of Article 41 of *the Constitution*.
 - 7) An order of Prohibition be directed to the Respondents, their agents, servants and/or officers to restrain them from subjecting the Petitioner to any arbitrary decision making and unfair disciplinary proceedings particularly the one emanating from the transfer to the Ministry of Environment and Forestry.
 - 8) An order of Permanent Injunction be issued against the Respondents prohibiting them from breaching the Petitioner's rights to fair labour practices, fair administrative action and subjecting him to any victimization in his work environment forthwith.
 - 9) An order of Mandamus to compel be directed to the 1st Respondent and 2nd Respondent, their agents, servants and/or officers authorized and working under their instructions to reinstate the Petitioner to the payroll and pay him all the accrued salaries, benefits and allowances backdated from June 2022 to date within 30 days.
 - 10) General damages for breach of the Petitioner's Constitutional rights.
 - 11) Costs of the Petition.
2. The Petitioner is an employee of Public Service Commission and joined the service in 2015 as Land Registration Officer.
 3. The 1st Respondent Principal Secretary State Department for Housing and Public Houses Ministry of Lands Public Works, Housing and Urban Development the Accounting Officer in charge of the said Department.
 4. Janerose Karanja is the second Respondent who is the Head and in-Charge of Human Resource Management of Lands and Urban Development.
 5. The 3rd Respondent is the Public Service Commission established under Article 233(1) as read with Article 234(2) of *the Constitution*.
 6. The Petition is premised on articles 10, 19(3)(a), 20(a), 21(1), 22, 23, 28, 41, 47(1), 47(2), 73, 165(3)(d)(11), 232, 236, 258(1) and 259(1) of *the Constitution* of Kenya, 2020.



7. The background of the suit is that on 14th April, 2022 the Cabinet Secretary Ministry of Lands wrote to the Public Service Commission seeking approval to re-deploy some officers from the Ministry. Public Service Commission responded by its letter dated 15th June 2022 and deployed the Petitioner to the Ministry of Environment and Forestry where he says his technical specialisation was not required.
8. The Petitioner and other officers lodged an appeal from the decision of the Public Service Commission but the Public Service Commission dismissed the appeal.
9. Still the Petitioner sought a review of that dismissal by his letter of 19th December, 2022.
10. On 20th March 2023 the Public Service Commission rescinded the decision to transfer the Petitioner from the Ministry of Lands.
11. Meanwhile the Petitioner had continued to work in the Ministry of Lands until 13th September 2022. He was served with a Notice to Show Cause to show why disciplinary action should not be taken against him for failure to obey a lawful order. He was given 21 days to respond and he failed to respond within 21 days.
12. Nevertheless, no disciplinary action was taken against him
13. On 25th April 2023 the Petitioner was invited to appear before the Ministry Human Resource Management Advisory Committee on 27th April 2023 to show cause on the show cause letter dated 16th September 2022.
14. He says the notice was too short to prepare for the hearing.
15. He says meanwhile he was admitted to Nairobi Hospital and on 26th April 2023 through his advocates Frank Karanja and Company Advocates he wrote to the 1st Respondent asking for the meeting to be rescheduled to another date. He said he did not get a response.
16. He says he was discharged from hospital on 6th May 2023 and was put on sick off for 14 days from the date he was discharged.
17. He says on 13th June 2023 he received another show cause letter from the Public Service Commission dated 6th June 2023 alleging he had not reported on duty from 8th July 2022 to 20th March 2023. That was the period in which he was unlawfully transferred to the Ministry of Environment and Forestry to the time the transfer was rescinded. He was given 21 days to put a response.
18. The Petitioner says he has not been paid salary since June 2022 and has not been allocated any duties even after the transfer was rescinded.
19. He avers this is contrary to fair labour practices and also section 75(5) of *Public Service Commission Act* 2017 which provide that “where the PSC sets aside a decision the public officer shall revert to previous status held and receive attendant benefits as though the decision set aside was never made.
20. The Petitioner says his rights to fair labour practices and fair administrative process under Articles 4, 47 and 236 of *the Constitution* are being violated by the threat to dismiss the Petitioner from employment without fair reasons. He says he is entitled to approach court under section 7 of the fair administrative Actions Act 2015.

3rd Respondent’s Replying affidavit

21. The Public Service Commission Dr. Simon K. Rotich deponed a replying affidavit dated 14th September 2023. He says that the commission received a letter from the Cabinet Secretary of Lands



asking for approval to transfer of officers out of the Ministry as Cabinet Secretary would only handle transfers of officers of Grade 9SG7.

22. He says the commission wrote for deployment of seven officers dated 15th June 2022 and Petitioner was deployed to the Ministry of Environment and Forestry.
23. He says Petitioner and other officers wrote an appeal dated 13th June 2022 asking for rescission of the transfer and commission rejected the appeal vide their letter of 21st September 2022.
24. The Petitioner wrote for a review of the decision vide his letter of 19th December 2023 and Commission granted the review vide his letter dated 20th March 2023. He says that however there was an error as review was not under section 175 of *Public Service Commission Act 2017* but was under section 77 of the Public Service Commission Regulation 2020 which provide that:

“77. Except as otherwise provided for in a contract of service, this Part shall apply to resignation, retirement, pension or other benefits due to a public officer.”
25. He says that he is advised by his counsel that despite the right of appeal or review to the commission the decision made shall not be deferred or suspended pending determination of the appeal or application for review. The filing of appeal by Petitioner did not defer the Commission’s decision to transfer him.
26. He says Petitioner was sent a show cause letter dated 16th September 2022 and admitted he did not respond.
27. He further says Petitioner never asked for consent to proceed on sick leave contrary to section 30 of the *Employment Act*.
28. He says Petitioner on 27th April 2023 failed to appeal to Human Resource Management Advisory Committee and his file was forwarded to the Commission for decision.
29. The Petitioner was asked to explain his absence from work from 8th July 2022 to 20th March 2023 and this is a legal requirement.
30. The 3rd Respondent says the Petitioner could not be paid for a time he never worked until his transfer was rescinded.
31. He says Petitioner never raised issue of his salary not being paid until 20th March 2023 when his transfer was rescinded.
32. The 3rd Respondent says it only wants a determination of Petitioner in the 8 months he did not report to work.
33. The 3rd Respondent says the interim court order granted by court should be set aside and the petition herein should be dismissed with costs to the respondent.

1st & 2nd Respondents’ Replying affidavit

34. The 1st and 2nd Respondents in their replying affidavit deponed by Janerose Karanja and dated 27th September 2023 averred that the Petitioner was transferred to the Ministry of Environment and Forestry with effect from 8th July 2022 vide a letter dated 15th June 2022.
35. She says the Petitioner did not report to the new station and his whereabouts were unknown. She says that the Petitioner was issued with a Notice to Show Cause letter dated 16th September 2022 and he was given 21 days to respond. His salary was stopped.



36. The deponent avers the Petitioner never reported to the Petitioner and did not respond to the Notice to Show Cause on the allegation he was indisposed.
37. Petitioner was asked in writing to handover all government equipment and did not respond.
38. Petitioner prayed for review of the Respondents' decision dated 19th December 2022 and Respondent allowed the review under section 75 of Public Service Commission Act 2017. He was directed to report back to work.
39. She says the Petitioner did not respond to the Notice to show cause dated 16/9/2022 and was asked also to appear before the Ministry Human Resource Committee on 27th April 2023 but he did not attend.
40. On 6th June 2023 Petitioner was asked to explain why he absented himself from duty from 8/7/2022 to 20/3/2023 and he did not respond.
41. The 1st and 2nd Respondent prays the Petitioner's petition be dismissed.

Petitioner's Submissions

42. The Petitioner submitted that he was unlawfully transferred by the 3rd Respondent to the Ministry of Environment and Forestry where his specialization was not needed. He appealed the decision and later applied for a review which was successful. It is the Petitioner's submission that his transfer was arbitrary and did not consider Section 43(3)(a) and (c) of the Public Service Commission Act, 2017. He relied on *Sandy Mokeira Morara v Principal Secretary Ministry of Lands & Physical Planning & another* [2018] eKLR.
43. It was submitted that for the Petitioner that the transfer was not justified and thus arbitrary because his specialization would not be utilized as he lacked the requisite expertise to work in the said Ministry of Environment and Forestry.
44. The Petitioner submitted that the transfer was used by the then Cabinet Secretary, Ministry of Lands to target specific officers including the Petitioner to get them out of the Ministry of Lands without any lawful reasons. This amounted to unfair labour practices and was against the tenets of the rule of law and good governance in Article 10 of the Constitution. Further, the said action interfered with the independence of the 3rd Respondent in contravention to the provisions of Article 249 (2) of the Constitution.
45. The Petitioner avers that it is not disputed that he challenged his transfer through an appeal to PSC and later a review which was successful on 20th March 2023. However, the Respondents issued the Petitioner with a show cause letter on 16th September 2023 to explain why he had not reported to the Ministry of Environment and Forestry. It is the Petitioner's submission that after the PSC rescinded its decision, the Petitioner had/has a legitimate expectation that all issues arising from the said transfer were settled and should not be revisited again.
46. The Petitioner submitted that the Respondent's action to invite him to appear before the Ministerial Human Resource Management Advisory Committee on 27th April 2023 and the subsequent issuance of a Notice to show cause letter by the 3rd Respondent on 6th June 2023 on issues related to the transfer was tainted with malice and was in bad faith.
47. The Petitioner submitted that this court has the mandate to interfere with and restrain the Respondents from taking any further disciplinary action against the Petitioner for events that have already been settled. He relied on the case of *Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others* [2015] eKLR.



48. The Petitioner submitted that the matters arising from the show cause letters issued on 16th September 2022 and 6th June 2023 have already been overtaken by the decision of the 3rd Respondent dated 20th March 2023. Therefore, the Respondents should be restrained from going back to institute disciplinary proceedings to deliberate on that same issue.
49. The Petitioner avers that despite successfully allowing the Petitioner's review on 20th March 2023 and directing him to resume duties in the State Department of Lands Nairobi, the 1st and 2nd Respondents have been frustrating him by failing to allocate him any assignments, a working space and failure to reinstating him to the payroll. It is the Petitioner's submission that the Respondent's actions grossly violate his rights to fair labour practices as enshrined in Article 41(1) and (2) of *the Constitution*.

3rd Respondent's Submissions

50. The 3rd Respondent submitted that the decisions taken by the Respondents are not in violation of the Petitioner's constitutional rights as the same was justifiable. The Petitioner has been accorded all his rights under Article 41, 47 and 236 of *the Constitution* from the date he was transferred to the date the Commission rescinded its decision on 20th March, 2023.
51. The 3rd Respondent submitted the power to initiate any disciplinary proceedings within the Public Service is therefore vested upon the 3rd Respondent as provided in Section 65(1) of the *Public Service Commission Act* and therefore by initiating the disciplinary process, the 3rd Respondent is undertaking its functions within the ambit of the law.
52. The Respondent submitted that the Petitioner failed to report to his duty station and refused to obey the decision of the Commission. Despite the right to appeal or apply for review to the Commission of a decision by an authorized officer or the commission, the decision is not deferred or suspended pending the determination of the appeal or application for review. In this case, the Petitioner appeal before the Commission, did not defer the decision that deployed him to the Ministry of Environment and Forestry. The Petitioner was therefore required to report to the new ministry as he awaited the Commission's decision on his appeal and application for review. It relied on the case of David Tanui v Kerio Valley Development Authority [2016] eKLR.
53. The 3rd Respondent submitted that the Commission by rescinding its decision of 5th July, 2022 through letter dated 20th March, 2023 recognized the fact that in as much as a decision to transfer an employee is its prerogative, an employee has a right to fair administrative action and therefore the Commission granted the Petitioner and the other officers an opportunity to be heard. This is a clear indication that the Commission in handling the Petitioner's issue is acting in good faith.
54. The 3rd Respondent submitted that the Petitioner never complained about non-payment of salary until 20th March, 2023 when it rescinded its decision and reinstated him back to the Ministry of Lands and Physical Planning. This is further evidence that the Petitioner never worked for the period between June 2022 and March 2023.
55. The 3rd Respondent submitted that it has no intention of violating the rights of the Petitioner and only wants to make a determination on the period of 8 months that the officer did not report to work.
56. The 3rd Respondent submitted that this court should not interfere with the process as it is lawfully seeking an explanation of the Petitioner's whereabouts from 8th July 2022 to 20th March, 2023 as he was not working at the Ministry of Lands and Physical Planning and/or the Ministry of Environment and Forestry.



57. The 3rd Respondent submitted that it has not violated Article 236 of *the Constitution* as alleged as other officers who were redeployed through letter dated 15th June 2022 reported to the Ministries and upon the Commission rescinding the decision through letter dated 20th March 2023 they were reinstated back to their positions at the Ministry of Lands and Physical Planning and no disciplinary action was taken against them. The Petitioner's failure to report to the Ministry of Environment and Forestry that has led to the institution of disciplinary proceedings, the Respondents are not discriminating the Petitioner. It relied on the case of Masai Mara (SOPA) Limited versus Narok County Government [2016] eKLR.
58. The 3rd Respondent submitted that the Petitioner has not shown the court how his case has been handled differently from that of the other officers who were deployed through letter dated 15th June 2022.
59. The Respondent submitted that the Petitioner admitted in his supporting affidavit that he never reported to the Ministry of Environment and Forestry from the date of his transfer in June 2022 up until when the Commission rescinded its decision on 20th March 2023. Therefore, the Petitioner cannot seek payment for a period never worked. His payroll details had been transferred to the Ministry of Environment and Forestry and the same remained inactive as he never reported.

Analysis and determination

60. The issue for determination pertains to the period the Petitioner was instructed to go on transfer from 8th July 2022 to 20th March 2023. The court was informed that the Petitioner was sent a notice to show cause for failure to take the transfer from Ministry of Lands to the Ministry of Environment and Forestry but he did not respond to the said Notice to Show Cause.
61. The evidence on record from the pleadings and submissions was that in 13th September 2022 the Petitioner was sent a Notice to show cause why disciplinary action should not be taken against him. He did not respond to the Notice to show cause.
62. Instead, he applied for review of the decision to transfer him on 19th December 2022. He maintains he continued to report to work in the Ministry of Lands though as from June 2022 he never received his salary and neither was he allocated any duties ever after his transfer was rescinded.
63. The Petitioner's transfer was rescinded under section 75 of *Public Service Commission Act* 2017 which provides:
- 75.
- (1) A person who is dissatisfied or affected by a decision made by the Commission on an appeal may apply for review and the Commission may admit the application if—
 - (a) fresh material facts arise which with due diligence could not be presented when the decision was initially made; or
 - (b) there is an error apparent on the record of the earlier decision.
 - (2) An application for review under subsection (1) shall be in writing and made within six months from the date of the decision to be reviewed: Provided that the Commission may entertain an application for review out of time if, in the opinion of the Commission, the circumstances warrant it.



- (3) Despite the right to apply for review conferred on a public officer by this section, disciplinary action shall not be deferred or suspended pending the determination of the application for review.
- (4) After considering an application for review, the Commission may—
 - (a) uphold the decision;
 - (b) set the decision aside;
 - (c) vary the decision as it considers to be just;
 - (d) give such directions as it may consider appropriate with respect to the decision;
 - (e) direct the refund, reinstatement of remuneration or release of any withheld payments due to the public officer as it considers to be just;
 - (f) direct that disciplinary action be taken against any public officer who has failed to discharge a duty that was the public officer's responsibility to perform in relation to the disciplinary case and the concerned public body has suffered a loss; or
 - (g) make any other appropriate decision in view of the circumstances of the case.
- (5) Where the Commission sets aside a decision under subsection (4)(b), the public officer shall revert to the previous status held and receive the attendant benefits as though the decision set aside was never made.

64. Section 75(3) of the [Public Service Commission Act](#) provides:

“Despite the right to apply for review conferred on a public officer by this section, disciplinary action shall not be deferred or suspended pending the determination of the application for review”.

65. The Petitioner no doubt disobeyed lawful order to report to his new station even as he would have done pending determination of his review. Clearly from June 2022 to March 2023 his whereabouts was not clear and so that constituted grounds for disciplinary hearing,
66. The right thing would have been for him to report to his new station even as he awaited the determination of his review application. Otherwise by failing to report on duty could as well be construed to be an act of desertion of duty which is a serious act that can amount to an act of gross misconduct.
67. Severally he was served with a Notice to show cause and a letter to hand over his duties at the Ministry of Lands and the court has not seen any response from him. He says his advocate did write to the 1st Respondent to the effect that he was unwell and would not attend disciplinary meeting.
68. On 6th June 2023, the Public Service Commission served him again with a Notice to show cause of his absence from duty. There is no response availed to court in response thereto.



69. In the case of David Tanui – Vs- Kerio Valley Development Authority 2016 eKLR, the court held:

“It is incumbent upon an employee even during disciplinary proceedings non-cooperation may constitute valid and fair reason to bring the relationship to an end or impose other appropriate sanctions”.

70. The Petitioner was legally transferred to another Ministry together with others. Without any approval or indication that the transfer had been rescinded he adamantly refused to report to his new station even when he appealed for review of his transfer in December, 2022 he could not explain satisfactorily his failure to report to work since the date of his transfer in June 2022. The 1st Respondent wrote to him again on 13th January 2023 to handover the Government equipment and still he did not respond.

71. Even if his transfer was rescinded on 20th March 2023 the fact remains he did not comply with lawful orders from July 2022 to 20th March 2023.

72. The upshot of the pleadings and the submissions by the respective parties the court is not convinced that the Petitioner has sufficient grounds to prove his prayers 1 – 11 as contained in his petition dated 27th June 2023 as the Petitioner clearly and blatantly disobeyed lawful orders. Furthermore, he did not prove that his transfer was violation of his rights and he needed to report to his new station as he awaited determination of his application for review. He also did not prove he was treated in a discriminatory manner from his other colleagues.

73. Laws and policies are passed to be obeyed and should not be disobeyed at the whim of the people to whom they are made for. The Petition therefore is found unmeritorious and so is dismissed.

74. Each party will meet their respective costs of this petition.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF DECEMBER, 2023.

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ANNA NGIBUINI MWAURE

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

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ANNA NGIBUINI MWAURE



JUDGE

