



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 230 OF 2016

MICHAEL MURIUKI MUTURI.....CLAIMANT

VERSUS

WATER RESOURCES MANAGEMENT AUTHORITY.....RESPONDENT

JUDGEMENT

1. The genesis of the instant claim is the claimant's transfer from the respondent's Nairobi sub regional office to Isiolo sub regional office. The claimant was aggrieved by the said transfer which he termed as unlawful, wrongful and malicious. He further based his claim on previous transfers by the respondent. The claimant further cited the respondent over unpaid transfer allowance. As a result, he seeks the following reliefs against the respondent;

- a) A permanent injunction restraining the respondent and or its agents and or servants from transferring and or relocating him from Nairobi station to Isiolo sub regional station;**
- b) A mandatory injunction to compel the respondent and or its agents and or servants to forthwith remit all the statutory deductions of National Hospital Insurance Fund, check off SACCO loan repayments, pension scheme contributions, equity bank loan repayments;**
- c) Kshs 229,725/=,**
- d) Costs of the suit; and**
- e) Interest at court rates.**

2. The claim was opposed through a response which was later amended on 15th September, 2021. Through its response, the respondent states that the claimant has only been transferred twice since he was employed and that he is not entitled to the transfer allowances prayed for. The respondent further averred that the delay in remitting the claimant's statutory deductions as well as the SACCO and bank loan repayments was occasioned by the transitional challenges when it took over its functions from the Ministry of Water and Irrigation.

3. The matter proceeded for hearing on 21st October, 2021, with each side calling oral evidence.

Claimant's case

4. At the commencement of the hearing, the claimant adopted his witness statement together with the bundle of documents filed with his claim as part of his evidence in chief. He also produced the said documents as exhibits before court.

5. The claimant told court that he was initially employed by the Ministry of Water and Irrigation but his services were later transferred to the respondent.

6. It was his testimony that he was posted to Kibwezi sub regional office vide a transfer letter dated 1st September, 2011. That vide another letter dated 26th May, 2012, he was transferred to the respondent's Mombasa sub regional office, then thereafter to Malindi Coastal substation vide another letter dated 22nd August, 2013. That while in Malindi, he received another letter dated 7th February, 2013, transferring him back to Mombasa sub regional office. That subsequently, he was transferred to Nairobi vide another letter dated 9th April, 2014. That having served in Nairobi for close to two years, he was transferred to Isiolo sub regional office vide a transfer letter dated 11th January, 2016.

7. The claimant told court that upon receiving the transfer to Isiolo sub regional office, he appealed to the respondent's Chief Executive Office citing the fact that he was taking care of his ailing parents and that his son was undertaking a diploma course. He thus requested for the transfer to be suspended for a period of two years but he did not receive any decision on his Appeal. That he was thereafter suspended without pay, and as such, he moved the court whereupon he obtained orders, which effectively reinstated him back to duty.

8. The claimant further told court that the respondent had effected statutory deductions from his salary, as well as SACCO and bank loan repayments but failed to remit the same as appropriate. He further stated that he was yet to receive the transfer allowance in respect of the transfers from Muranga to Kibwezi, Mombasa to Malindi and Malindi to Mombasa. In conclusion, he asked the court to allow his claim as prayed.

9. In cross examination, he told court that he replied to the respondent's letter which had requested him to submit proof in support of his Appeal against the transfer, but admitted that the same was not on record.

Respondent's case

10. The respondent tendered oral evidence through Mr. Festus Riungu who testified as RW1. He identified himself as the Chief Human Resource Officer of the respondent. He also adopted his witness statement and the respondent's bundle of documents as part of his evidence in chief. He also produced the said documents as exhibits before court.

11. Mr. Riungu told court that the respondent is mandated by the Constitution and the Water Act, to deploy officers to all areas within the country including Isiolo which need a Surface Water Officer. That the employment relationship between the respondent and the claimant commenced on 1st September, 2011 following his transfer of service from the Ministry of Water and Irrigation. That the claimant never objected to his transfer from Kibwezi substation Mombasa sub regional office and back to Nairobi hence is estopped from challenging the same.

12. That the transfer to Isiolo sub regional office was solely undertaken so as to ensure that the residents had reasonable access to clean and safe water in line with the respondent's mandate. He further stated that he acknowledged receipt of the claimant's appeal to Isiolo sub regional office whereupon he requested him to furnish proof of reasons for the appeal. That in the meantime, he advised the claimant that the transfer had been suspended for a period of 30 days on humanitarian grounds. That the claimant never furnished any proof in support of his Appeal, hence he was reminded to do so vide another letter dated 14th April, 2016, but he failed to comply. That subsequently, the claimant was suspended without pay, but by then he had obtained injunctive orders hence he was retained in his current station, Nairobi.

13. As regards the issue of the statutory deductions, Mr. Riungu informed court that the delays were occasioned due to transitional challenges arising from the transfer of the water function and staff from the Ministry of Water and Irrigation. That the challenges had since been addressed and the arrears had since been remitted as required under law. In this regard, he referred the court to the payment vouchers and schedule of payments which had been admitted as part of the respondent's evidence.

Submissions

14. Both parties filed written submissions upon close of the hearing, with the claimant submitting that the frequent transfers by the respondent were unconstitutional, unlawful, wrongful, illegal and malicious hence amounted to unfair labour practices. That as such, the respondent had violated his constitutional rights enshrined under Article 41 and 47 of the Constitution. He further submitted that the respondent had failed to determine his appeal against the transfer to Isiolo sub regional office hence the said delay was contrary to Article 47 of the Constitution. On this issue, he urged the court to consider the determination in the case of **Nairobi ELRC No. 31 of 2018; Sandy Mokeira Morara vs the Principal Secretary, Ministry of Land and Physical Planning & another** and **Nyeri ELRC Petition No. 4 of 2015, Geoffrey Mworira vs Water Resource Management Authority & 2 others**.

15. The claimant further submitted that the claim for transfer allowance was not time barred as the same constituted a continuing injury by dint of section 90 of the Employment Act. He placed reliance on **Nairobi ELRC no. 193 of 2013; Alfred Mwangi vs Delmonte**.

16. On its part, the respondent submitted that the claimant's transfer was in line with clause 10.2.1 of its Human Resource Policy Manual (HR Manual) which permits the Chief Executive Officer to deploy any member of staff to any station within the country. It further submitted that the claimant was yet to exhaust the internal grievance resolution mechanisms stipulated under clause 10.17.11 of the HR Manual. On this issue, it relied on the case of **Geoffrey Muthinja & another vs Samuel Muguna Henry & 176 others (2015) eKLR**. The respondent further submitted that the claim for transfer allowance was time barred as the cause of action arose more than 3 years prior to the filing of the suit by the claimant. It thus asked the court to consider the case of **Attorney General & Another vs Andrew Maina Githinji & another (2016) eKLR**. The respondent further submitted that the issue regarding deductions was overtaken by events as it had made all the remittances on account of the claimant and that the same were up-to-date.

Analysis and Determination

17. From the record before me, the issues arising for determination are as follows;

i. Whether the claimant's transfer from Nairobi to Isiolo was lawful and reasonable?

ii. Whether the claim for transfer allowance is statute barred?

iii. Whether the respondent made remittances of the statutory deductions, SACCO and bank loan repayments on account of the claimant?

Whether the claimant's transfer from Nairobi to Isiolo was lawful and reasonable?

18. The claimant has termed his transfers including the one to Isiolo as unconstitutional, unlawful, wrongful, illegal and malicious. As such, he avers that the same amounted to an unfair labour practice by the respondent. The claimant avers that since he was employed by the respondent, he has been transferred to 6 stations within a span of 4 years. He states that the same were undertaken without any valid reason.

19. The respondent has denied transferring the claimant to six stations. It contends that the claimant has only been transferred twice from the time he was employed in September, 2011, that is, from Kibwezi substation to Mombasa regional office and thereafter to Nairobi.

20. It is therefore prudent to set the record clear. Factually, the claimant was employed by the respondent with effect from 1st September, 2011. It is pursuant to that appointment that he was posted to Kibwezi sub region office. He was later transferred from Kibwezi substation to Mombasa sub regional office through a letter dated 26th May, 2012. Vide a letter dated 22nd August, 2012, the claimant was appointed as the officer in charge of the respondent's Malindi satellite office. On 7th February, 2013, the claimant was once again transferred from the Malindi satellite office back to Mombasa sub region office. This transfer was followed by a subsequent one to Nairobi and which was effected vide a letter dated 9th April, 2014. Thereafter, the claimant was transferred to Isiolo sub regional office vide a transfer letter dated 11th January, 2016.

21. It is thus apparent that the commencement date of the employment relationship between the parties was 1st September, 2011 hence any rights and duties within the employment realm, crystallized effective that day. Therefore, the claimant's transfer from Muranga to Kibwezi, was prior to his employment with the respondent. From the claimant's letter dated 3rd October, 2011, and which communicated his reporting to Kibwezi substation, the same appears to have been a first posting since it makes reference to his appointment letter dated 1st September, 2011. Indeed, even his release letter dated 13th October, 2011 refers to the same letter of appointment dated 1st September, 2011. Therefore, in my considered view, the transfers prior to Kibwezi do not count.

22. The respondent in its defence relied on clause 10.2.1 of its HR Manual, which permits the Chief Executive Officer to deploy any officer to any station within the country. It reads as follows;

"The Chief Executive Officer shall deploy or transfer employees to serve in those positions commensurate with their recruitment and qualifications. An employee will be deployed to work in any station in the country."

23. It is presumably on account of the foregoing provision that the respondent effected the claimant's transfers.

24. Further, the respondent has defended the transfers and stated that the same are justified pursuant to Article 6(3) and 43 of the Constitution. Article 6(3) requires all national state organs to ensure reasonable access of its services in all parts of country, while Article 43 guarantees every person economic and social rights and in the context herein, the right to clean and safe water in adequate quantities.

25. Against this background, it is no doubt that the respondent had the prerogative to transfer the claimant where it considered his services were required. Therefore, the respondent's mandate in that regard cannot be denied as it is derived from the law hence is lawful. Having established that the claimant's transfer was lawful, the issue that needs to be resolved is whether the manner in which the said transfers were undertaken was reasonable in the circumstances.

26. Reasonableness of a decision taken by an employer is very subjective and should be determined on a case by case basis. While it is not contested that the crux of the claim herein is the transfer of the claimant from Nairobi sub region office to Isiolo sub region office, it is prudent to reconsider the claimant's previous transfers as the same is central in putting the issue into context.

27. In assessing the reasonableness of a decision by an employer, the South African Labour Appeal Court had this to say in the case of **Nampak Corrugated Wadeville vs Khoza, (JA14/98) [1998] ZALAC 24;**

"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."

28. As stated herein, the claimant had been transferred to 5 stations in a span of 4 years. His longest stint was at the Nairobi sub region office where he had lasted for approximately 1 year 10 months. As such, the claimant had only been stationed in Nairobi for less than 2 years and he was already on his way out, notwithstanding that he had been through 3 other stations within 2 years.

29. In as much as the respondent had the prerogative and discretion to transfer the claimant, it ought to have exercised that discretion reasonably and fairly. By all means, transferring an employee to 5 stations within a span of 4 years cannot be deemed to be a reasonable action. Further, the same was not accompanied by any justifiable reasons.

30. In such instances, an employer is expected to be humane and considerate to the social circumstances of an employee for example, school going children, the need to get accommodation in the new station as well as other considerations. The respondent did not produce any Transfer Policy and made no mention of the same. It was therefore not possible to clearly ascertain the considerations by the respondent in undertaking the transfers. As such, several questions remain unanswered, for instance, was there a policy as to how long an officer can remain in a particular station? what were the considerations taken into account prior to an officer being transferred?

31. The upshot of the foregoing is that the court finds and hold that the transfer of the claimant from the Nairobi sub region office to Isiolo sub region office was lawful but taken in context of the previous transfers, the same was unreasonable in the circumstances.

Whether the claim for transfer allowance is statute barred?

32. The claimant has prayed for unpaid transfer allowance in the sum of Kshs 229,775/=. As I have found that the starting point of the employment relationship, was Kibwezi, the claimant's claim for transfer allowance from Muranga is not admissible. Therefore, what is admissible for consideration is the claimant's transfer from Mombasa subregion office to Malindi satellite station and from Malindi satellite station to Mombasa sub region office.

33. At the outset, the respondent contended that it never transferred the claimant from Mombasa to Malindi and thereafter, Malindi to Mombasa. The record states otherwise.

34. The claimant was appointed as the officer in charge of Malindi satellite office. In this regard, he had to move from his then work station at Mombasa and report to Malindi. Essentially, this was a transfer in every sense of the word despite the letter not using the term "transfer". Either way, the claimant would not have undertaken his new assignment in his then station, which was Mombasa. He had to relocate to Malindi hence that amounted to a transfer. As it came to be, the claimant was transferred back to the Mombasa subregion office roughly 7 months later. Consequently, he had to relocate back to Mombasa. That constituted another transfer.

35. Pursuant to clause 4.13.1 of the respondent's HR Manual, an employee's transfer entitles him/her to an allowance. The said clause is in the following terms;

"When travelling on first appointment, transfer...an officer shall be provided with an authority vehicle to transport his luggage. However, in the absence of a vehicle, the officer will be eligible for a baggage allowance."

36. In light of the foregoing provision and having established that indeed, the claimant was transferred, he was entitled to a transfer allowance.

37. The issue of entitlement to the transfer allowance having been settled, the question now is whether the claimant's prayer for the same is time barred as argued by the respondent. It is not in doubt that the claimant's transfer to the Malindi station was on 22nd August, 2012 and the transfer back to Mombasa was on 7th February, 2013. The claim herein was filed on 18th February, 2016.

38. Section 90 of the employment Act places a time bar on claims instituted 3 years past the date the cause of action arose. The provision further places a time bar of 12 months in the case of a continuing injury. The section reads as follows;

"Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof."

39. Whereas the respondent argues that the claimant's claim expired 3 years after the transfers were effected, the claimant argues that the same constitute a continuing injury as the parties are still in an employment relationship.

40. The point of divergence appears to be whether the claim constitute a constitute a continuing injury or not. Put another way, whether the cause of action has accrued, and if so, when?

41. In defining what constitutes a cause of action, the Court of Appeal in the case **Attorney General & another vs Andrew Maina Githinji & another [2016] eKLR**, cited with approval the case of **Letang vs. Cooper [1964] 2 All ER 929 at 934** where the term was defined as follows;

"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."

42. To my mind, in the instant case, the cause of action would ordinarily arise at the time the claimant had a cause to complain and this would be when the respondent made a definite decision not to pay the transfer allowance and informed him as much. As it is, there was no evidence that it had made such a decision and communicated the same to the claimant.

43. It is not contested that parties are in a subsisting employment relationship and the claim remains outstanding. From the evidence on record, the respondent has never made any indication that it would not pay the transfer allowance.

44. Above and beyond, the claimant having been aware of the policy requirements and his right to the transfer allowance, he must have had a legitimate expectation that the respondent would comply sooner or later and pay him.

45. In light of the foregoing, the cause of action is yet to arise, as the claimant has never had any cause to complain since he has never been informed by the respondent that his claim for transfer allowance was unpayable. The same therefore constitutes a continuing injury which will only cease in the event the employment relationship is extinguished and the amount remains outstanding.

46. In the circumstances, the claim for the transfer allowance is very much alive and hence is not statute barred.

Whether the respondent made remittances of the statutory deductions, SACCO and bank loan repayments on account of the claimant?

47. The claimant has averred that the respondent erred in failing to remit all the statutory deductions made from his salary as well as his SACCO and bank loan repayments.

48. In evidence, the respondent produced copies of payment vouchers, bank cheques and schedules confirming that it had submitted all the remittances to the appropriate institutions. From the record, it can indeed be ascertained that the respondent had submitted the statutory deductions and the bank loan repayments by the time the suit was being heard. As such, I find that the claim to that extent is now overtaken by events.

Reliefs

49. The claimant has sought a permanent injunction against his transfer from Nairobi sub region office to Isiolo sub region office. Without doubt, such an order will have the effect of directing the respondent in the manner in which it is required to perform its duties. With due respect, that is not the role of the court. On this issue, I am guided by the Court of Appeal's determination in the case of **Judicial Service Commission vs Gladys Boss Shollei & another [2014] eKLR**, where Kiage JA stated that **"Courts cannot micro-manage the human resource function of other institutions be they in the public or in the private sector."**

50. I fully adopt the sentiments by the learned Judge and as such, the court restrains itself from issuing any order in the nature of a permanent injunction. Be that as it may, the respondent is by law required and expected to exercise its discretion reasonably, in the discharge of its mandate.

51. Further, it would be prudent for the respondent to develop a Transfer Policy to guide the manner in which transfer of employees is undertaken. This would enhance transparency and predictability as to how and when transfers are to be undertaken.

52. As I have found that the claimant is entitled to the transfer allowance from Mombasa to Malindi and Malindi back to Mombasa, the court awards him the same.

Orders

53. In the final analysis the court awards the claimant transfer allowance, which shall be payable by the respondent as per the prevailing rates at the material time.

54. In view of the existing employment relationship between the parties, it is prudent to order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Mageto

For the Respondent Mr. Ochieng'

Court Assistant Barille Sora

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 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