



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E016 OF 2021

IN THE MATTER OF ARTICLES 10, 20, 21, 22, 23, 75, 82,

234, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION AND/OR APPREHEND

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER ARTICLES 27, 28, 41 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF SECTION 4(1)

OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF COUNTY GOVERNMENT ACT, 2012 (ACT NO. 17 OF 2012)

AND

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF THE ILLEGAL

AND UNLAWFUL TRANSFERS WITHOUT INVOLVEMENT OF THE

PUBLIC SERVICE COMMISSION, AND WITHOUT IDENTIFYING THE

ACTING APPOINTEES THROUGH TO A FAIR, OPEN, COMPETITIVE,

MERIT BASED AND INCLUSIVE RECRUITMENT PROCESS

AND

IN THE MATTER OF UNLAWFUL APPOINTMENT OF THE ALLEGED HEAD OF

DIVISION OF ENVIRONMENTAL AND DEPUTY HEAD AND PUBLIC SERVICE

COMMISSION HUMAN RESOURCE POLICIES AND PROCEDURE MANUAL

FOR THE PUBLIC SERVICE, FEBRUARY, 2017

BETWEEN

THE ASSOCIATION OF PUBLIC HEALTH OFFICERS (APHOK)

NAIROBI BRANCH...PETITIONER/APPLICANT

AND

DIRECTOR GENERAL NAIROBI METROPOLITAN SERVICES.....1ST RESPONDENT
DIRECTOR HEALTH SERVICES (NMS).....2ND RESPONDENT
THE PUBLIC SERVICE COMMISSION.....3RD RESPONDENT
THE COUNTY GOVERNMENT OF NAIROBI..... 4TH RESPONDENT
THE COUNTY PUBLIC SERVICE BOARD.....5TH RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT

AND

DR. JOSEPHINE KIBARU MBAE1ST INTERESTED PARTY
MARGARET SUNGUTI.....2ND INTERESTED PARTY
RAPHAEL MULI.....3RD INTERESTED PARTY
DIRECTOR PUBLIC HEALTH4TH INTERESTED PARTY
PUBLIC HEALTH OFFICERS AND TECHNICIANS COUNCIL.....5TH INTERESTED PARTY

JUDGMENT

1. The petition was filed on 5th February, 2021 by the petitioner described as Association of Public Health Officers (**APHOK**) Nairobi Branch. The petitioner purports to represent the interest of over 300 Public Health Officers working under Nairobi Metropolitan Services.
2. The Cause of Action as set out under paragraphs 1 to 32 under the title '**Facts of the Case**' is that the 1st respondent, the Nairobi Metropolitan Services through the 1st Interested Party, Dr. Josephine Kibaru Mbae has unlawfully effected transfers of members of the petitioner without giving them a hearing notice or reasons. That the 1st Interested Party has no mandate to transfer these members.
3. That in the instant case, the 80 employees were not issued with a transfer letter. The names of the Affected 80 employees, their positions in the Public; the stations they were at before and where they have been transferred to is not set out in the body of the petition.
4. The said transfers and appointments are said to be in violation of Section 43 of the Public Service Commission Act; Clause B30 of the Public Service Commission, Human Resource Policies and Procedures Manual for the Public Service February, 2017 and in violation of Article 10(2), 27(1), 8(2) 47, 73(2) (a), 129, 152(4) (e) and 232 (1) (d) (f) (g) and 1 of the Constitution of Kenya, 2010 in that due process was not followed in the transfers and was therefore, whimsical, arbitrary, and gross abuse of office.
5. Furthermore, due process was not followed in the appointment of Margaret Sunguti and Raphael Muli as the Head of Division of Environmental Health and Deputy Head respectively. That the decision to hand pick them without following an open, fair, competitive, accountable and transparent recruitment process violated the afros provisions.
6. In particular, Public Service Commission Code of Regulations (Human Resource) Policies and Procedures Manual for Public Service, 2016 Section B.4, B.19 and B.30 were violated in the recruitment process aforesaid. Interim Orders were issued under Prayer 2 of the Notice of Motion with respect to the transfers referenced under **EOP/NMS/MEMO/VOL. 11** in respect of Public Health officers, dated March, 2014. No injunctive relief was granted in respect of the appointments of the 3rd and 4th interested parties.
7. The Petition is supported by Supporting Affidavit of Brown Ashira Olaly, the Secretary General Nairobi Branch of the Petitioner and the 2nd Petitioner herein. The 2nd Petitioner deposes that she is a victim of the unlawful and illegal transfer/posting vide a posting order dated 6th January, 2021 and that she has been authorized to swear this affidavit and other pleading on behalf of the officers listed in annexure **BOA-1**.
8. The Petitioner prays for orders set out in the Petition as follows:-

(A) **AN ORDER QUASHING** the letter referenced No. **19991071395/24/6/20** of 24th June, 2020 appointing the acting Head Division Environmental Health and Deputy Head respectively and also the position of the 1st Interested party until a competitive and fair recruitment process is concluded.

QUASHING the transfer of the Petitioner's members by the 1st Respondent and retaining them in their current position and assignment as deployed unless lawfully transferred or deployed.

(B) **A DECLARATION THAT** the 1st Respondent has violated Article **10, 73, 75, 232 and 236** of the Constitution.

(C) **A DECLARATION THAT** the decision by the 1st Respondent to have the Petitioner transferred is unconstitutional and or illegal and disregarded due process of the laid down laws and regulations.

(D) **A DECLARATION THAT** the handpicking and the purported appointments of the 1st and 2nd interested parties as acting Head and Deputy to the division of Environmental Health was unlawful and unconstitutional and therefore, invalid, null and void **ab initio**.

(E) An order be issued by this Honourable Court directing that the Revised Scheme of Service for Public Health Assistants and Public Health Officers issued on March, 2014 be set aside in entirety to be reviewed competitively; and for that purpose the parties be directed to undertake relevant review consultations or meetings and to file in the Court the revised scheme of service.

(G) The costs of this Petition be borne by the Respondents.

(H) Any other or further relief that this Honourable Court may deem fit and just to grant.

Replying Affidavit of 1st and 2nd Respondents

9. The 1st and 2nd respondents opposed the petition vide a replying affidavit of **Kang'ethe Thuku**, the Deputy Director General of the Nairobi Metropolitan Services who deposes *inter alia* that pursuant to Article 189 of the Constitution of Kenya, on 25th January, 2020, the Nairobi City County Government signed a Deed of Transfer of Functions and transferred four functions to Nairobi Government. That the four functions include County health Services.

10. That the Nairobi Metropolitan Services was affirmed by the Court on 17th September, 2020 in High Court Employment and Labour Relations Court Petition No. 52 of 2020.

11. That under Article 5.6 of the deed of transfer, the relevant Human Resource for the Implementation of the Agreement was to be seconded from the County Government to the National Government.

12. That under Article 5.7 of the deed the County Public Service Board in consultation with the Public Service County Public Service Board in consultation with the Public Service Commission were to terminate the necessary instruments to facilitate secondment and/or deployment of the necessary human Resources.

13. That pursuant thereto be secondment and deployment of staff/guidelines instrument was developed.

14. That on 6th April, 2020 the process of secondment of staff performing the transferred functions from Nairobi City County Government to Nairobi Metropolitan Services commenced while at the end, over 6,500 staff including members of the Petitioner herein were duly seconded to Nairobi Metropolitan Services.

15. That on 20th March, 2020, Director General Nairobi Metropolitan Services was appointed as the authorized officer by Public Service Commission as per Article 234 (5) of the constitution and Section 31 of the Public Service Commission Act and all relevant Regulations.

16. That the Director has full mandate to discharge Human Resource function related to the secondment and/or deployment of personnel including members of the petitioner.

17. That on 6th July, 2020, the Director communicated the posting in the entire directorate of Health Services and did not focus on any particular profession or cadre.

18. That the petitioners have not demonstrated any ill motive or targeting in the said posting to warrant the order sought. In any event, they do not have the mandate to represent the profession cadre attendance in the said posting such as medical officer; nurses, nutritionists; CHA, HRIO, Pharmaceutical technologist, medical laboratory technologist, RCO, KRCHN, clerical officer, head managers, BSCN, ECN, laborer, cleaning supervisors, SNO support staff, MLT, clinical officers etc.

19. That the subject posting is not a transfer within the meaning of the Act but normal deployment of offices from one office to the next within their professions and within Nairobi city.

20. That the Petitioner has not demonstrated any prejudice to be suffered by the deployed staff. In any event any grievance that may arise may be considered within the established internal mechanism.

21. That on the contrary, prohibition of deployment is likely to lead to chaos in the management of the health workers in Nairobi especially during this COVID – 19 pandemic and cause untold suffering to the Public at large. That this is against public interest.
22. There is no evidence of discrimination against any person in the petition.
23. That with regard to the post of Head of Environment and Health Division and the Deputy, the Nairobi Metropolitan Services has not yet advertised the posts and the same are only occupied in acting capacity. Therefore, the complaint is misconceived and the provisions of Article 10 and 232 of the Constitution do not apply.
24. That there is no evidence adduced to show that the 3rd and 4th interested parties are not qualified to hold the said officers in acting capacity.
25. That the petition is completely devoid of merit and it be dismissed with costs.
26. The 1st and 2nd respondents filed a further replying affidavit sworn to on 3rd May, 2021 in which is deposed that the contents of earlier replying affidavit dated 18th February, 2021 are reiterated. That on 9th March, 2021, the deponent received a memoranda signed by the members of the 1st petitioner annexed to the affidavit and marked KTI in which the alleged to be over 300 members disassociate themselves from the petition and state that they are not aware of it.
27. The members state that though their signatures were used, the same were illegally obtained from a document signed in 2017.
28. That the 2nd petitioner included names of officers who have since retired and therefore are not active members of the service and or the association.
29. That the said retired officers have no interest in the suit herein. That the 1st petitioner in which they are members is a welfare association and not a trade union and therefore lacks capacity to sue and be sued.
30. That their names were included in the suit without any consultation and/or consent and the same be expunged from the Court records as they have no interest in the suit.
31. That the suit is therefore incurably defective as it goes against the Civil procedure Rules, 2010.
32. That the 1st respondent raises this as a Preliminary Objection for the petition to be struck out.
33. The petitioner did not file a further affidavit in response to the allegations made in the further replying affidavit of the respondent.
34. The petitioner and the 1st, 2nd, 3rd and 6th respondents filed their written submissions.
35. The issues for determination are:-
- (a) Whether the Court has jurisdiction to hear and determine the matter.
 - (b) Whether the 1st petitioner has locus standi to institute this petition.
 - (c) Whether the petitioner has demonstrated any threat and/or violation to the 1st and 2nd petitioner's rights.
 - (d) Whether the petitioners are entitled to any reliefs.
36. The jurisdiction of the Court is set out under Section 12 of Employment and Labour Relations Court Act, 2014 and Article 162(1) of the Constitution.
37. The issues raised herein are to do with appointment and deployment of staff. These are issues within the jurisdiction of this Court. The Court has no difficulty in finding that it has jurisdiction to entertain this suit.
38. On the issue of Locus standi, the Court looks at the Decision by Mbaru, J. in **Association of Public Health Officers of Kenya –vs- Narok County Chief Officer, Medical Services & 2 Others [2019] eKLR** in which the Court struck out the petition since the Association did not demonstrate it was one of the organization authorized to bring suits on behalf of employees under Section 12 of the Employment and Labour Relations Court Act, 2014.
39. The Court stated”-

“It therefore begs the question of on whose behalf are the petitioners working since the members whom they purport to represent have not consented to the filing of this petition. The petitioner has only attached the members’ certificates and no letter of authority to act for and on their behalf. Such Certificates are not the authority required by the Court.”

40. In the present case, authority to bring this Court by the alleged affected members has not been filed before Court. Furthermore, the authority to file the petition has been specifically challenged in the further replying affidavit and the petitioners did not file any supplementary affidavit to demonstrate they have authority to litigate on behalf of deployed employees of the Nairobi Metropolitan services. The 1st and 2nd respondents have especially questioned the list of employees attached to the petition and specifically deponed that this is a list of members obtained from a document signed in 2017.

41. Not only has the authority of the petitioner to bring this suit been brought to question but allegations bordering on fraudulent extraction of a list signed several years for purposes of filing this suit be made and same have gone unanswered.

42. Considering these circumstances, the Court has no difficulty in holding that the petitioners have failed to demonstrate that they have **locus standi** to bring this petition on behalf of the alleged grievants against their employer.

43. Furthermore, in terms of the Court of Appeal decision in **Mumo Matemu –v-s Trusted Society of Human Rights and the Anarita Karimi case**, the necessary threshold to be met in a petition alleging constitutional violation has not been met.

44. The petitioner does not disclose in which way or manner the rights of deployed employees of the Nairobi Metropolitan Services have been threatened or violated by the respondents and the violated parts. Indeed, the petition lacks any specific pleadings regarding any of the alleged employees including the 2nd petitioner and how the deployment contents in the letter by the 1st interested party dated 22nd February, 2021 has threatened and or violated their specific rights. The Court is left with no knowledge whatsoever about any personal particulars of the said deployment.

45. It is clear to the Court that the petitioner has failed to demonstrate any case against the respondent and the 1st interested party or the issue of impugned deployments.

46. With regard to the alleged appointments of the 3rd and 4th interested parties, there is no evidence that the two officers were specifically served with petition itself. However, the 1st and 2nd respondents have specifically stated that no substantive appointments with regard to the impugned positions of Head of Environment and Health Division and the Deputy.

47. The evidence by the respondents which is not challenged by the petitioners in a supplementary affidavit is that the 3rd and 4th Interested Parties hold those positions in Acting capacity pending advertisement of the positions in future. The respondent state that the petitioner did not adduce any evidence to show how the appointments of the 3rd and 4th interested parties has threatened and or violated the rights of the petitioners nor have they demonstrated that these officers are not qualified to hold the positions in Acting capacity.

48. The case by the petitioners on the issue of appointment of the 3rd and 4th interested parties lacks merit and I also dismissed.

49. It should also be noted that the public service, be it in the County Government and or National Government is provided with internal mechanisms of resolving grievances arising from employment matters before coming to Court. The relevant provisions of the County Governments Act, and the Public Service Act provides for Appeal mechanisms in disputes such as this before a matter is brought to Court. See the Decisions of the Court of Appeal and Employment & Labour Relations Court on this point.Resercher)

50. This view has held sway for a long time as seen in the case of **Speaker of the National Assembly –vs- James Njenga Karume (1992)** **eKLR** where the Court of Appeal emphasized:-

“In our view, there is considerable merit in the submission that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.....”In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly, invoking the constitutional route in the circumstances of this case was misguided. The Constitution should not be turned into a thoroughfare for resolution of every kind of common grievance.”

51. Accordingly the petition lacks merit on all facts and is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 17TH DAY OF FEBRUARY, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Onyancha, for the Petitioners

Mr. Odukenya for the 1st, 2nd, 3rd and 6th respondents and Association for the 4th and 5th respondents.