



**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 APPREHENDED 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.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR HEALTH SERVICES (NMS).....2<sup>ND</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF NAIROBI.....4<sup>TH</sup> RESPONDENT**

**THE COUNTY PUBLIC SERVICE BOARD.....5<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**AND**

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| <b>DR. JOSEPHINE KIBARU MBAE .....</b>                     | <b>1<sup>ST</sup> INTERESTED PARTY</b> |
| <b>MARGARET SUNGUTI.....</b>                               | <b>2<sup>ND</sup> INTERESTED PARTY</b> |
| <b>RAPHAEL MULI.....</b>                                   | <b>3<sup>RD</sup> INTERESTED PARTY</b> |
| <b>DIRECTOR PUBLIC HEALTH .....</b>                        | <b>4<sup>TH</sup> INTERESTED PARTY</b> |
| <b>PUBLIC HEALTH OFFICERS AND TECHNICIANS COUNCIL.....</b> | <b>5<sup>TH</sup> INTERESTED PARTY</b> |

**JUDGMENT**

1. The petition was filed on 5<sup>th</sup> 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 1<sup>st</sup> respondent, the Nairobi Metropolitan Services through the 1<sup>st</sup> 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 1<sup>st</sup> 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 B.30 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 (i) 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 stated 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 3<sup>rd</sup> and 4<sup>th</sup> interested parties.
7. The Petition is supported by Supporting Affidavit of Brown Ashira Olaly, the Secretary General Nairobi Branch of the Petitioner and the 2<sup>nd</sup> Petitioner herein. The 2<sup>nd</sup> Petitioner deposes that she is a victim of the unlawful and illegal transfer/posting vide a posting order dated 6<sup>th</sup> January, 2021 and that she has been authorized to swear this affidavit and other pleadings 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 24<sup>th</sup> June, 2020 appointing the acting Head Division Environmental Health and Deputy Head respectively and also the position of the 1<sup>st</sup> Interested party until a competitive and fair recruitment process is concluded.

**QUASHING** the transfer of the Petitioner’s members by the 1<sup>st</sup> Respondent and retaining them in their current position and assignment as deployed unless lawfully transferred or deployed.

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

**(C) A DECLARATION THAT** the decision by the 1<sup>st</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents**

9. The 1<sup>st</sup> and 2<sup>nd</sup> 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 25<sup>th</sup> January, 2020, the Nairobi City County Government signed a Deed of Transfer of Functions and transferred four functions to National Government. That the four functions include County health Services.

10. That the Deed of transfer of services was affirmed by the Court on 17<sup>th</sup> 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 Resources 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 Commission were to formulate the necessary instruments to facilitate secondment and/or deployment of the necessary human Resources.

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

14. That on 6<sup>th</sup> 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 20<sup>th</sup> 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 Regulation.

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 6<sup>th</sup> 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 orders sought. In any event, the petitioners do not have the mandate to represent the profession cadres affected in the said posting such as medical officers; nurses, nutritionists; CHA, HRIO, Pharmaceutical technologist, medical laboratory technologist, RCO, KRCHN, clerical officers, head managers, BSCN, ECN, laborers, cleaning supervisors, Senior 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 officers 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 yet.

24. That there is no evidence adduced to show that the 3<sup>rd</sup> and 4<sup>th</sup> interested parties are not qualified to hold the said offices in acting capacity.

25. That the petition is completely devoid of merit and it be dismissed with costs.

26. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a further replying affidavit sworn to on 3<sup>rd</sup> May, 2021 in which is deposed that the contents of earlier replying affidavit dated 18<sup>th</sup> February, 2021 are reiterated. That on 9<sup>th</sup> March, 2021, the deponent received a memoranda signed by the members of the 1<sup>st</sup> 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 2<sup>nd</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 respondents.
34. The petitioner and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> 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 1<sup>st</sup> petitioner has *locus standi* to institute this petition.
  - (c) Whether the petitioner has demonstrated any threat and/or violation to the 1<sup>st</sup> and 2<sup>nd</sup> 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 case 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 1<sup>st</sup> and 2<sup>nd</sup> 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 has been 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 interested parties. Indeed, the petition lacks any specific pleadings regarding any of the alleged employees including the 2<sup>nd</sup> petitioner and how the deployment itself in the letter by the 1<sup>st</sup> interested party dated 22<sup>nd</sup> 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 respondents and the 1<sup>st</sup> interested party on the issue of impugned deployments.

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

47. The evidence by the respondents which is not challenged by the petitioners in a supplementary affidavit is that the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties hold those positions in Acting capacity pending advertisement of the positions in future. The respondents state that the petitioner did not adduce any evidence to show how the appointments of the 3<sup>rd</sup> and 4<sup>th</sup> 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 3<sup>rd</sup> and 4<sup>th</sup> interested parties lacks merit and is 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 in:-

50. The case of Martin Kabubii Mwangi versus County Government of Laikipia 2019 e KLR the Court observed that:-

*“The exhaustion principle enunciated in precedents such as the case of Secretary, County Public Service & Another v Hulbhai Gedi Abdille (supra) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the County Governments Act. The claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.”*

51. Similarly, in Civil Case No.283 of 2014. James Tinai Murete & Others vs County Government of Kajiado and others - The Court said that:

*“Aside from the views expressed in the two decisions set out above, I take this view for the two additional reasons. First, it is my view that the Legislature could not have intended to establish a dispute resolution mechanism, and then render it redundant immediately by giving parties the option to choose whether to follow it or not. Read as a whole, the provisions of section 77 of the County Government Act evince an intention to have all disputes arising out of appointment, by County Service Boards dealt with by the Public Service Commission, hence its grant to the commission of the mandate in mandatory terms by providing that the commission “shall entertain appeals in respect of recruitments, selection, appointment and qualifications attached to any office’. There is no option given to a party to choose whether or not to file grievances with the commission...”*

52. In County Public Service Board versus Hlbhai Gedi Abdille (2017) e KLR the Court of Appeal held that:

*“There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not only the forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the Respondent’s. In our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.*

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 fronts 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.**