



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

JUDICIAL REVIEW NO. E003 OF 2021

MOSES KIRUI TOROITICH.....PETITIONER

VERSUS

THE COUNTY SECRETARY COUNTY GOVERNMENT OF BARINGO.....1ST RESPONDENT

COUNTY GOVERNMENT OF BARINGO.....2ND RESPONDENT

THE COUNTY PUBLIC SERVICE BOARD BARINGO COUNTY.....INTERESTED PARTY

JUDGMENT

1. By a notice of motion dated 17th September, 2021 the applicant sought orders among others that:

a) An order of certiorari is issued to bring to this Honourable Court for purposes of being quashed the decision made on 25/08/2021 by the 1st Respondent purporting to transfer the applicant from the department of Finance and Economic planning to the department of Industry, Commerce and Co-operative development to perform the duties of director of Cooperatives.

b) An order of prohibition against the Respondents prohibiting the said Respondents whether by themselves, their servants, agents, officers or whosoever otherwise from in any manner whatsoever unlawfully acting or continuing to act upon or enforcing or continuing to enforce or maintaining or continuing to maintain the purported transfer the applicant from the department of Finance and Economic planning to the department of Industry, Commerce and Co-operative development to perform the duties of director of Co-operatives.

2. The application was supported by the statutory statement and the affidavits of the applicant Moses Kirui Toroitich who deponed on the main that:

a) That I am the Director, Supply Chain Management in the County Government of Baringo.

b) That I was appointed Director Supply Chain Management in the County Government of Baringo and was issued with an employment contract to that effect. (Annexed herein and marked MKT 1 is a copy of the letter of appointment.

c) That the recruitment followed an advertisement by the 2nd Respondent to fill the vacant position of Director Supply Chain Management, and after a competitive recruitment process conducted by the interested party, I was declared the successful candidate.

d) That I have industriously served in my position from the date of my appointment exhibiting competence in all tasks assigned. I am not a subject of any disciplinary proceedings by the interested party.

e) That vide his letter dated 14th June 2021, the respondent asked me to proceed on annual leave whereupon I proceeded to the said leave and reported back on the 13th of August 2021.

f) That the 1st respondent thereafter on the 25/8/2021 purported to transfer me from the department of Finance and Economic planning to the department of Industry, Commerce and Co-operative Development to perform the duties of Director Co-operatives.

g) That prior to the purported transfer/reshuffle, the office of the Director Co-operatives did not exist in Baringo County and the creation thereof has in any event not been sanctioned by the 1st interested party as required by law. To the best of my knowledge,

that office does not exist.

h) That my application of interest and subsequent recruitment of the office of Director Supply Chain Management was informed by my training in matters procurement and supply chain management. I am aware of my own knowledge that the position of directors within the county government are technical position hence the recruitment of persons holding qualifications specific to those positions.

i) That from the request to proceed for leave and subsequent transfers, it is apparent that the 1st Respondent is acting in bad faith.

j) That the purported transfer is illegal, ultra vires, null and void as the 1st respondent does not have powers to carry out the transfers and or disciplinary control over the directors without the sanction of the County Public Service Board, the 1st interested party herein.

k) That I am aware of my own knowledge that the interested party vide its letter dated 24th of March 2021 revoked the boards delegated authority to the 1st respondent to carry out administrative and disciplinary functions reserved for the interested party pursuant to the provisions of Section 86 (1) of the County Governments Act. (***Annexed herein and marked MKT 4 is a copy of the letter dated 24/03/2021***).

l) That the administrative action leading to my transfer/reshuffle was illegal as it contravenes the Constitution of Kenya, violates my right to a fair hearing as well as the provisions of the County Government Act, in so far as it undermines the independence of the civil service in the carrying out of its functions.

3. The respondent filed a replying affidavit through one Francis Komen in which he stated among other that:

a) That I am the 1st respondent and the County Secretary of the 2nd Respondent hence competent to make and swear this affidavit.

b) That the said application for Judicial Review orders of Certiorari and prohibition dated 17th September 2021 against the respondents seeking to quash the decision made on 25th August, 2021 by the 1st respondent transferring the applicant from the post of Director, Supply Chain Management in the Department of Finance and Economic Planning County Government of Baringo in respect to the letter of 25th August 2021, lacks merit and I made in bad faith.

c) That it is indeed not in dispute that the applicant was employed by the County Government of Baringo on 15th April, 2019 as Director, Supply Chain Management with effect from 1st May, 2019.

d) That vide letter dated 25th August 2021 the applicant was transferred from the Department of Finance and Economic Planning where he was serving as Director, Supply Chain Management to the Department of Industry, Commerce and CO-operative Development as Director, co-operatives. ***Annexed and marked FK1 is a copy of the transfer letter dated 25th August 2021***.

e) That as the County Secretary of the 2nd Respondent and the Head of Public Service, I reserve the prerogative on behalf of the 2nd Respondent to organize the plan its operations as the Chief Accounting officer.

f) That we occasionally deploy/transfer employee from one department to another in a bid to enhance service delivery.

g) That the transfer of the applicant from the Department of Finance and Economic Planning to the Department of Industry, Commerce and Co-operative Development was a normal horizontal transfer as the Applicant is still serving in the position of Director and has not lost any salary and allowances. He still enjoys all the privileges of his former office.

h) That this was not a demotion or a dismissal of the applicant but rather a task in re-organization of the 2nd Respondent's operations, and which the 2nd respondent reserves a right to do.

i) That deployment does not amount to dismissal or even demotion. Section 64 of the County Governments Act gives the Respondent and interested party the mandate to deploy employee within the county public service. It also gives employers power to appoint employee in an acting capacity in another office. Section 62 gives the interested party the power to establish or abolish any office in the county public service. Section 44(3) of the County Government Act provides that the 1st Respondent shall be the head of the County public service.

j) That my action of deploying the ex parte applicant to another department is lawful and was done in good faith to enhance efficiency in the county public service.

k) That the applicant reported to his new station on 2nd September 2021 without any complaint.

l) That it was however noted by his supervisor that the Applicant absented himself from his station after reporting without due cause or notice necessitating a letter dated 17th September asking the Applicant to explain his absence without notice or permission from his supervisor.

m) That the application is overtaken by events as the ex parte applicant has already reported to his office as Director of CO-

operatives while Mr. Nixon Kandawala has already reported and is undertaking the functions of director at the department of Finance and Economic Planning. ***Annexed and marked FK3a is a copy of the internal memo dated 17th September 2021 and FK 3B being the letter dated 2nd September, 2021.***

n) That the Applicant's transfer to the Department of Industry, Commerce and Co-operative Development does not amount to constructive dismissal or the applicant as the said Department exist, has an office and staff and the Applicant is qualified to head it as its director.

o) That the deployment of the Applicant is a normal employment practice for purposes of enhancing efficiency in the workplace.

4. In his submission in support of the application, Mr. Tororei for the applicant submitted in the main that the events leading to the purported transfer from the position of Director Procurement, Supply Chain Management to department of industry, commerce and cooperative development was characterized by ill motive illegalities. The claimant according to counsel was sent on leave to facilitate the elevation of the Nixon Kandwala to the position previously occupied by the applicant even though he did not possess the requisite qualification to fill that position.

5. According to Counsel, he was sent on leave to facilitate the elevation of one Nixon Kandawala to the position previously occupied by the applicant even though he did not possess the requisite qualification to fill that position.

6. According to counsel, it was only the applicant who was moved in the alleged transfer hence could only be construed as a witch-hunt. Further, despite numerous protests that the applicant was being moved to a non-existent office, the respondent did not provide any evidence that the said office existed and who the previous holder was.

7. Mr. Tororei further submitted that section 65 of the County Government Act read together with section 63 made it mandatory for appointments and promotions to be conducted through a competitive process. The respondent had therefore by crafty means avoided this by fashioning a reshuffle. According to counsel, a reshuffle could only be for persons of concurrent status. It was not meant for carrying out promotions through the back door.

8. The applicant having worked as director supply chain management was rightfully in the correct docket as it was his area of expertise. The transfer therefore greatly prejudiced him and placed him in a docket he lacked requisite competence which would ultimately lead to his removal from office. Counsel further submitted that by writing to the applicant to take annual leave vide a letter dated 14th June, 2021 and report back on 13th August, 2021, the respondent calculated to move to transfer the applicant. The allegations of incompetence and disciplinary proceedings commenced after the transfer were designed to give an illegal process a seal of legitimacy. According to Counsel, the transfer was premature and the basis for transfer offended the legitimate expectation of good relationship between an employer and employee.

9. Mr. Tororei further submitted that the purported transfer was unprocedural and not sanctioned because the 1st respondent lacked the powers to transfer or discipline the applicant. The 1st respondent therefore acted outside its powers. The actions of the respondent of not restrained would continue to undermine the independence of the interested party and set bad precedent as it negated from the purpose of their office which was to professionalize public service and cushion it from politicization.

10. Mr. Yego for the respondent on his part submitted that work transfer was the prerogative of the employer. Therefore, an employer had the discretion for any reason to transfer an employee from one department to another. To state that the 1st respondent could not horizontally transfer the applicant would be to interfere with employer's prerogative to organize and plan its operations. In this respect counsel relied on the case of **Henry Ochido -v- NGO Co-operation Board [2015] eKLR**

11. On the issue whether the 1st respondent had power to effect the transfer, Mr. Yego submitted that section 44 of the County Government Act establishes the office of the County Secretary and provides for its functions. Further Section 59 of the Act provides for the functions of the County public Service Board. The 1st respondent being the head of the County Public Service Board was in charge of administering the offices in the County Public Service. Such administration included establishing and abolishing offices in the County Public Service, appointing persons to hold or act in those offices as well as exercising disciplinary control over and removing persons holding or acting in the County Public Service Offices. Further Section 64 of the County Government Act gives the respondent and the interested party the mandate to deploy employees within the County Public Service.

12. Counsel therefore submitted that as the head of the County Public Service, the 1st respondent was right in the exercise of his lawful duties when he transferred the applicant.

13. On whether the applicant merits grant of judicial review orders, counsel submitted that according to the Fair Administrative Action Act, any person aggrieved by an administrative decision or action may apply for review of the administrative action if among other reasons the person who made the decision was not authorized to do so by the empowering provision, the decision was procedurally unfair and the administrative action unfair.

14. In this regard, Counsel submitted, the 1st respondent was authorized to make transfer decisions and that the decision was procedurally fair as the respondent communicated the decision to the applicant through the transfer letter dated 25th August, 2021 and that the administrative action was not unfair.

15. This court in its ruling delivered on 1st December, 2021 on whether leave to apply for Judicial Review Orders ought to operate as a stay dealt with most of the issues forming part of the present application.

16. In that ruling the Court while declining to order that leave should operate as a stay, observed that transfer or deployment of staff was a management prerogative and that the Court would on very rare and exceptional circumstances interfere with such prerogative.
17. The applicant contends that his transfer was malicious and that he was moved to a department that never existed. The applicant further contended that the 1st respondent had no power to transfer him and further that the transfer was calculated to promote Mr. Nixon Kandawala to the position he previously held without subjecting him to competitive selection.
18. The respondent refuted these allegations stating that the transfer was within its prerogative and that it had powers under the County Government Act to do so. The respondent further stated that the appointment of Mr. Kandawala to the position previously held by the applicant was on acting capacity.
19. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is actuated by malice and or that the decision making authority committed an error of law in the process of taking the decision or further that the decision was made *ultra vires* (without jurisdiction).
20. The issue before me concerns transfer of the applicant from the department of procurement, supply chain management where he was a director to the department of industry, commerce and Co-operative Development in the same capacity.
21. Section 44 of the County Government Act designated the 1st respondent as the head of the County Public Service. Under section 44(3) of the 1st respondent is an *ex-officio* member of the County Executive Committee. In that capacity he among others communicates/conveys the decisions of the County Executive Committee to the appropriate persons or authorities.
22. Under section 46 of the Act, the County Executive Committee has powers among other to establish, continue or vary any department and determine the objects and purposes of the department, determine the number and nature of departments at decentralized units, abolish any department and determine or change the name of any department.
23. In carrying out these functions the Executive Committee inevitably affects the human resource structure and some reorganization and transfer or redesignation inevitably becomes necessary.
24. It is therefore the court's view that the transfer of the applicant was within the mandate of the County Executive Committee which communicates its decisions through the 1st respondent.
25. As observed earlier transfer, redesignation and or redeployment of staff is a managerial prerogative and the Court would be reluctant to interfere with that prerogative unless it's demonstrated that the management acted maliciously, contrary to law or in excess of its jurisdiction.
26. From the material before me, the applicant has not sufficiently demonstrated any of these.
27. The application is therefore found without merit and is hereby dismissed with costs.
28. **It is so ordered.**

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF MARCH, 2022

ABUODHA NELSON JORUM

JUDGE ELRC