



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. E027 OF 2021

IN THE MATTER OF ARTICLES 3, 10, 20, 21, 22(1), 27,

41(1), 47, 48, 258(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULES 4, 10, 11, 13, AND 20 OF THE

CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION

AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF

THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE ROADS ACT NO. 2 OF 2007

AND

IN THE MATTER OF THE EMPLOYMENT ACT NO. 11 OF 2007

AND

IN THE MATTER OF SECTIONS 4,6,7,10,11 AND 12 OF THE

FAIR ADMINISTRATIVE ACT NO. 4 OF 2015

BETWEEN

MARGARET WANJA MUTHUI.....PETITIONER/APPLICANT

VERSUS

MINISTRY OF TRANSPORT, INFRASTRUCTURE

HOUSING, URBAN DEVELOPMENT AND

PUBLIC WORKS.....1ST RESPONDENT

KENYA RURAL ROADS AUTHORITY (KeRRA).....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Petitioner filed the petition dated 23rd February, 2021 praying for the following orders: -

(a) *A declaration that the action by the 1st respondent and the 2nd respondent to deploy the petitioner to the 1st respondent's office is in breach of her constitutional rights under the Constitution of Kenya, the fair administrative action Act and the employment Act and the said action is null and void for all intents and purposes.*

(b) *An order of Judicial Review of Certiorari do issue quashing the decision of the 2nd respondent made vide its letter dated 10th February, 2021 pursuant to the 2nd respondent's board meeting of 10th February, 2021 on the basis of the directive by the 1st respondent vide the 1st respondent's letter ref. MOTIHUD & PW/1/A 35.44 Vol 1 dated 9th February, 2021, deploying the petitioner to the 1st respondent's office.*

(c) *An order of Judicial Review of Prohibition do issue to prohibit the respondents from deploying the petitioner to any other office other than the office of her contractual employer, the 2nd respondent without following the right procedure.*

(d) *That a perpetual mandatory injunction and/or the prerogative order of prohibition do issue restraining the 1st and 2nd respondents either by themselves or through their agents and/or servants from recalling/deploying and/or releasing the petitioner from the 2nd respondent's headquarters to any other department without just cause.*

(e) *That the respondents be condemned to pay the costs of this petition; and*

(f) *The Honourable Court be pleased to grant any other relief or order that this honourable Court may deem fit to grant.*

Facts

2. The brief facts of the suit are that the petitioner was employed by the 2nd respondent, Kenya Rural Roads Authority (KeRRA) vide a letter dated 7th October, 2009 in the position of Procurement Officer. The petitioner was promoted to the position of Procurement Manager in 2014.
3. By a letter dated 13th February, 2017, the 2nd respondent (KeRRA), deployed the petitioner to the office of the Performance Management and Co-ordination under the Presidency. This deployment followed a directive by the 1st respondent (**Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works**) hereinafter the '**Ministry**' dated 8th February, 2017 deploying the Petitioner to the said office.
4. The Petitioner filed petition No. 11 of 2017 protesting the deployment. The case was heard and determined in favour of the petitioner by a judgment dated 19th February, 2018 of Hon. Wasilwa, J.
5. The present suit was precipitated by a new deployment of the petitioner vide a letter dated 10th February, 2021 in terms of which the petitioner was removed from the position of Procurement Manager with KeRRA and deployed to the Ministry.
6. The petitioner states that the deployment was in breach of the judgment of the Court delivered on 19th February, 2019 in Petition No. 11 of 2017.
7. The petitioner states that KeRRA has no authority or power to deploy and/or release the petitioner to the Ministry since the petitioner has an employment contract with KeRRA and not with the Ministry as per the judgment of the Court aforesaid.
8. That the said deployment is in violation of Section 7 of the Fair Administrative Action Act, 2015 and Section 10 (5) of the Employment Act, 2007.
9. That the petitioner has legitimate expectation to work for KeRRA and not with the Ministry in terms of her expertise.
10. That KeRRA did not follow the laid down procedures and rules of deployment and therefore its action is *ultra vires* and in breach of Article 41 of the Constitution.
11. That the deployment is malicious and is actuated by the petitioner's steadfast support for the rule of law and principles guiding Procurement Procedures at KeRRA.
12. That the deployment was hurriedly conducted between the 9th February, 2021 and 11th February, 2021 which in itself is evidence of malice.
13. Wherefore, the petitioner prays for the reliefs sought.

The petition is supported by an Affidavit of the Petitioner and attachments relevant to the matter including the letter dated 10th February, 2021 written to the petitioner by the Chairman of KeRRA, Professor (Engineer) Oyako Mbeche which reads: -

“This is in reference to the letter Ref. MOTIHUD & PW/1/A.35.44 Vol. I dated 9th February, 2021 from the Cabinet Secretary, Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works and subsequent Board meeting on 10th February, 2021. You are hereby released to report to the office of the Principal Secretary, State Department of Infrastructure for

assignment of duties with effect from 11th February, 2021.

On behalf of the Board of Directors, I thank you for the services you have rendered to the Authority as a Procurement Professional. Do kindly make arrangements to immediately hand over the office as per the Authority's Regulations.” (emphasis mine)

15. The judgment by Hon. Wasilwa, J. is attached to the petition and the orders made by the Court related to a deployment of the petitioner by KeRRA by a letter dated 8th February, 2017 and 13th February, 2017. The orders read as follows: -

45. It is my finding that indeed the orders made transferring the Petitioner to the 1st Respondent was made illegally, unreasonably and without authority. I therefore allow the Petition and make the following orders: -

1. A declaration that the act of the 1st Respondent directing the 2nd Respondent to deploy the Petitioner to the office of Performance Management and Co-ordination under the presidency is a breach of the latter's constitutional rights under Articles 47, 41, and 50 of the Constitution.

2. An order of Judicial Review do issue to quash the decision of the Respondents made by letters dated 8th February 2017 and 13th February 2017 deploying the Petitioner to an office to undertake duties on which she has no expertise.

3. An order of Judicial Review of prohibition do issue to prohibit the Respondents from deploying the Petitioner to any other office without following the right procedure.

4. The 1st and 2nd Respondents will pay costs of this suit.

Response

16. The petition is opposed by a replying affidavit of KeRRA, the Ministry and the Hon. Attorney General sworn to by one Charles Wambugu, the Deputy Director, Human Resource and Administration of KeRRA who states that the petition is riddled with falsehoods; misstatements and non-disclosure of material facts in that the deployment of the petitioner in 2017 to the office of the Performance Management and Co-ordination under the Presidency is not in any manner connected to the present deployment vide the letter dated 10th February, 2021 which deployed the petitioner to the office of the Principal Secretary, The State Department of Infrastructure within the Ministry (**2nd respondent**) to oversee procurement processes within the state department and the letter made no reference at all to any dispute pending between the parties.

17. That in any event, the matter of a tender dispute was determined by the High court in Judicial Review Misc. Application No. 100 of 2017 and the decision of the Public Procurement and Administrative Review Board was quashed by the Court leading to a retender of the tender. That it is therefore dishonest on the part of the petitioner to link this matter to her deployment.

18. That indeed the petitioner reported to the office of the Principal Secretary following the deployment on 23rd February, 2021 but the petitioner has failed to disclose this fact in her petition. Letter of reporting is attached and marked annexure ‘**CW3.**’

19. That on 24th February, 2021, when Hon. Lady Justice Maureen Onyango granted Orders in Nairobi Petition E027 of 2021, Nairobi ELRC Petition No. E019 of 2021 was still active and the said orders were obtained on material non-disclosure. That on 26th February, 2021, the petitioner's advocate withdrew Nairobi ELRC Petition No. E019 of 2021.

20. That the deployment of the petitioner vide letter dated 10th February, 2021 was in order and in accordance with relevant Legislation, Policy and Regulation.

21. That there was no malice in the decision leading to the deployment. That the respondents have maintained a cordial relationship with the petitioner even following the Court decision in Petition No. 11 of 2017.

22. That the petitioner has been deployed to the Ministry to oversee procurement which is her area of expertise.

23. That the petitioner did not lodge any appeal contesting her deployment with KeRRA's Board of Directors nor did she file any complaint to the Public Service Commission as the law dictates for hearing and consideration.

24. The suit is therefore premature and it ought to be struck out for failure to exhaust internal mechanisms.

25. That the petition lacks basis and it be dismissed with costs.

26. The petitioner filed a further affidavit sworn to on 23rd February, 2021, a further affidavit sworn on 26th February, 2021 and a supplementary affidavit sworn on 31st March, 2021 and additional supplementary Affidavit sworn on 10th November, 2021. The petitioner denies any material concealment and/or dishonesty as alleged by the respondents in the replying affidavit. The petitioner admits having filed the two suits via two different advocates since the first advocate had not communicated to her on the developments. Therefore, Petition E019 of 2021 was withdrawn when interim orders were obtained in petition No. E027 of 2021. The petitioner denies having abused the Court process. That filing two suits arose from genuine desperation on the part of the petitioner to access justice.

27. The petitioner states that there is no appeal process in place within KeRRA as an organization. That KeRRA has no authority to deploy the petitioner to the Ministry as per the pronouncement of the Court in Petition No. 11 of 2017. That the petition be granted as prayed.

Submissions

28. The petitioner filed submissions on 6th November, 2021 and additional submissions dated 31st January, 2022. The Petitioner reiterates the grounds set out in the petition and relies on the judgment of Hon. Wasilwa, J in ELRC Petition No. 11 of 2017 to assert that KeRRA had no authority to deploy her to the Ministry and that the decision violated the Fair Administrative Actions Act, the Employment Act, and Articles 41(1) (6), 47, and 50 of the Constitution of Kenya, 2010.

29. The Petitioner relied on the decision of the Court of Appeal in ***Civil Application No. NAI 1 of 2017 (UR 1/2018) - Dr. Fred Matiangi – vs- Miguna Miguna & 4 Others*** in which the Court ruled *inter alia*

“When Courts issue orders, they do so not as suggestions or plea to the persons they are directed.....”

30. The petitioner also referred to ***Hadkinson –vs- Hadkinson [1952] 2 All ER 567 (supra)*** where the English Court of Appeal restated the sanctity of Court orders and obligation by the persons in respect of which the orders are directed to obey them. The petitioner also cited the Court of Appeal decision in ***Civil Appeal No. 214 of 2008, Freight in Time Limited –vs- Image Apparels Limited*** (per Warsame, Sichale and Kantai JJA,) in which they restated the principles enunciated in ***Hadkinson –vs- Hadkinson (supra)***.

31. The 1st, 2nd and 3rd Respondents filed their submissions dated 26th January, 2022, in which they restated the facts set out in the replying affidavit and that the Court finds that the petition lacked merit and it be dismissed.

32. The respondents submit that this petition is not related to petition 11 of 2017 at all. In the present case, the petitioner was released by the Board of KeRRA and not by the Cabinet Secretary Ministry of Transport. In this case the petitioner has been released to the mother ministry and not the Office of the President as was the case in Petition 11 of 2017. In the present case, the petitioner is to continue serving in her area of expertise, being procurement.

33. That KeRRA’s Human Resource Management Policies and Procedures Manual, |Section 2.33 provides that: -

“The Authority may from time to time reorganize the staff establishment of the organization. This may necessitate the re-designation of titles and job description. The re-designation of an employee may require re-deployment.”

34. The respondent referred the Court to ***Muchanga Investments Limited –vs- Safaris unlimited (Africa) Limited & 2 Others – Civil Appeal No. 25 of 2002 [2009] KLR 229***, stating that institution of multiple suits by the petitioner amounts to abuse of Court process.

35. That the petitioner was guilty of this vice and the petition be dismissed for failure to disclose any cause against the respondents.

Determination

36. From the start, the court notes that the petitioner has the onus in terms of Section 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya to prove on a balance of probabilities that which she alleges.

37. In terms of the case of ***Anarita Karimi Njeru (1979) KLR 154***.

The test was stated thus;

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

A petitioner must state with specificity what rights and or fundamental freedoms have been threatened and/or violated by the respondent. The petitioner herein states that her deployment by KeRRA to the mother ministry of Transport violated Section 7 of Fair Administrative Action Act. Section 10(5) of the Employment Act, Article 41(1) (b), 47 and 50 of the Constitution of Kenya, 2010 without any degree of precision how the respondents violated these specific provisions.

38. The judge in the judgment of the Court in Petition 11 of 2017 made specific declarations based on the facts before her which may be summarized as follows: -

(a) That the action by the Ministry of Transport

directing Kenya Rural Roads Authority to deploy the Petitioner to the office of the president was in breach of the Petitioner’s Constitutional rights under Articles 47, 49 and 50.

(b) The Court quashed the decision by the respondents

made by letters dated 8th and 13th February, 2017 deploying the Petitioner to an office to undertake duties on which she has no expertise.

(c) Prohibited the respondents from deploying the

petitioner to any other office without following the right procedure.

39. It is the respondents' case that if the respondents were in breach of the aforesaid directives by the Court, then the rights of the petitioner pronounced in the said judgment ought to have been enforced vide an appropriate application in the same petition, being Petition No. 11 of 2017 and not by seeking to enforce that judgment on a different set of facts and in a new suit. This is a procedure unknown in law.

40. These specific pleadings by the petitioner cannot therefore form the basis of a new petition under Article 22 and 23 of the Constitution of Kenya. The suit in this respect again falls foul to the criteria and threshold enunciated in **Anarita Karimi Njeru** case where the learned judges stated that: -

Accordingly, we read section 84(1) as providing the individual with a means of obtaining redress only if he has never had or has not already utilised such other action as was lawfully available to him. The applicant cannot, therefore, now be heard on this application if the steps she has taken amount to such other action. But to what does "action" refer" Unfortunately, neither counsel dealt with this point. Section 86(1) of the Constitution (which is the definition provision covering section 84) does not interpret the word, whilst section 3 of the Interpretation and General Provisions Act defines it (save where there is something in the subject or context inconsistent"

41. The Court is satisfied from the facts before Court that KeRRA has the mandate and/or Authority to deploy its staff including to the mother ministry provided that the employee is deployed to a position that is suitable to his/her qualifications.

42. The petitioner has failed to demonstrate that the deployment in this particular case was not to a suitable position since the respondent has shown that the petitioner was to deal with procurement matters within the ministry, which is her area of expertise.

43. As a matter of fact, the petitioner has failed to disclose any cause of action against KeRRA and the Ministry pursuant to the deployment from the petition itself and the supporting documentation presented before Court.

44. The petitioner subsequently filed petition No. 120 of 2021 on 28th July, 2021 following her suspension by Kenya Rural Roads Authority by a letter dated 14th July, 2021. The petitioner again relies on the judgment of Hon. Wasilwa, J. in petition No. 11 of 2017 to fault her suspension.

45. The petitioner further states that she may only be suspended if convicted of a serious criminal offence and/or is facing criminal offence on corruption and economic crimes. That the suspension is in breach of Clause 11.7 and 11.17 of its Human Resource Management Policies and Procedures Manual.

46. The petitioner states that the suspension also ought not to happen when there is a pending suit regarding her status in E&LRC Petition E0127 of 2021.

47. That the suspension violates Article 47 of the Constitution and that an order of judicial review of certiorari do issue quashing the decision of KeRRA to suspend the petitioner vide the letter dated 14th July, 2021.

48. The Court gave direction on 28th July, 2021 that Petition E120 of 2021 be served, responded to and it be placed together with any other pending suit by the same parties.

49. The petitioner filed submissions in respect of petition No. 120 of 2021 together with submissions in Petition 027 of 2021. The petitioner reiterates that the subject matter of her employment was *subjudice* as at the time of her purported suspension by KeRRA and so it was inappropriate for KeRRA to proceed to suspend her.

50. That in any event, the suspension violated Clause 11.7 of the KeRRA's Human Resource Policies and Procedures Manual. That the same also violated rules of natural justice and Fair Administrative Action Act. That it also amounted to unfair labour practice in violation of Articles 41(1) (b) Article 47(1) (2) and (3) and Article 50 of the Constitution. That the suspension also violated the orders of Hon. Wasilwa, J. in the judgment of the Court in Petition No. 11 of 2017. That Petition E120 of 2021 be allowed together with Petition E027 of 2021.

51. The respondent filed submissions with regard to petition 120 of 2021 and states that the petitioner was fairly suspended. That the petitioner holds a public office and since she is under investigation and is being suspected of benefiting from illicit funds and proceeds of crime and corruption, it is only fair and just that the petitioner is placed under suspension pending the hearing and determination of the same.

52. That the Asset Recovery Agency is an independent body and the proceedings against the petitioner in the Anti-Corruption and Economic Crimes Division were initiated by the agency and not by KeRRA as is alleged by the petitioner.

53. That KeRRA cannot prudently retain the petitioner in office whilst being faced by such serious allegations relating to corruption and economic crimes.

54. That the petition is opposed since Chapter 6 of the Constitution on Leadership and Integrity binds the petitioner and the respondent and it was fair and just to suspend the petitioner pending the investigations and proceedings before the Anti-Corruption Division of the High Court.

55. **With regard to petition 120 of 2021, the Court will at the outset state that KeRRA cannot continue to have its cake and eat it.**

56. **In Petition E027 of 2021, KeRRA has successfully pleaded that it lawfully deployed the petitioner to the mother Ministry of Transport, the 2nd respondent therein.**

57. **Having done so, and whilst the matter was *subjudice* pending determination, KeRRA cannot at the same time purport to exercise its authority as an employer of the petitioner. KeRRA ought to have held its horses and await determination of petition E027 of 2021.**

58 Accordingly, the Court finds in Petition 120 of 2021, that KeRRA, the respondent in petition 120 of 2021 has no authority to suspend the petitioner who it had lawfully deployed to the Ministry of Transport within effect from 10th February, 2021.

59. Accordingly, the final determination of Petition E027 of 2021 as consolidated with Petition 120 of 2021 is as follows: -

(a) Petition E027 of 2021 lacks merit and is dismissed in its entirety.

(b) To the extent, that Kenya Rural Roads Authority deployed the petitioner lawfully to the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works with effect from 10th February, 2021, Kenya Rural Roads Authority was no longer the employer of the petitioner and so the letter of suspension dated 14th July, 2017 is null and void and has no effect on the employment of the petitioner. The same is quashed by the Court.

(c) In view of the findings above, each of the parties to meet their costs of the consolidated petitions.

60. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022

Mathews N. Nduma

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, this Judgment has been delivered to the parties online with their consent. 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 18 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.

Mathews N. Nduma

Judge

Appearances

Mr. N.O. Sumba for Petitioner

M/s Odhiambo for Respondent

Mr. Ekale – Court Assistant