



REPUBLIC OF KENYA



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**Wanjala v General & another (Employment and Labour Relations Petition
E033 of 2022) [2022] KEELRC 12722 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12722 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E033 OF 2022**

M MBARŪ, J

MAY 12, 2022

BETWEEN

PIUS WANJALA PETITIONER

AND

CABINET SECRETARY MINISTRY OF HEALTH 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The ruling herein relates to the petitioner's application dated March 17, 2022 filed under the provisions of articles 159(2), 47, 41, 23 and 22 of the *Constitution* and section 3A of the *Civil Procedure Act* and rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and seeking for orders that;
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of the petition/application, this court be pleased to issue an order restraining the respondents by themselves or through their juniors and/or agents from blocking the applicant's access to his substantive office of Senior Deputy Director at Nairobi Quality Control Laboratory to allow him perform his duties of Senior Director with forthwith payments of his lawful attached salaries and allowances.
 4. This court may issue any other appropriate order.
 5. Costs of this application be provided for.
2. The application is supported by the petitioner's affidavit and on the grounds that on March 16, 2022 the respondents blocked his access to his office and workplace at National Quality Control Laboratory



(NQCL) yet his position as Senior Deputy Director is not in dispute and what is in dispute and pending determination by the court is whether he should continue as acting Director of NQCL which position he has held since November 1, 2021 pending the appointment of the Board of Management. The respondents have now put an acting Director, Dr Matilu Mwau from March 14, 2022, which appointment is illegal and has led to his removal from the Biometric door opening system to block him from accessing the office, NQCL.

3. Other grounds in support of the application are that the respondents have no power to stop the petitioner from accessing his workplace and to perform his duties as Senior Deputy Director on the face of an unambiguous conservatory order issued on July 17, 2020 suspending the letter dated July 13, 2020 allowing the petitioner to continue serving as Senior Deputy Director, NQCL and which order was reinforced by the court on October 8, 2020.
4. In his affidavit, the petitioner avers that the respondents have concealed the fact that following his suspension and court orders, the Central Posting Committee headed by the Head of Public Service, his posting to Interior Department of Correctional Services - Prisons in letter dated March 9, 2021 was rescinded through letter dated May 6, 2021. On March 5, 2022 the petitioner received death threats through his phone from unknown people so as to leave NQCL. These events followed harassment by the respondents who have continued since the year 2020. He has reported the matter to the police.
5. The petitioner also avers that the respondents have operated with impunity in conduct of public affairs and unless the orders sought are issued he will suffer loss and damage and his constitutional rights violated.
6. In his supplementary affidavit, the petitioner avers that he is a civil servant employed through the Public Service Commission in the Ministry of Health at the rank of Senior Deputy Chief Pharmacist and deployment/post at NQCL assigned the position of Senior Deputy Director in consultation with the Ministry of Health in fulfilment of section 35G (f) of the *Pharmacy and Poisons Act*. Other deputy directors were appointed and deployed to NQCL and placed as department heads, particularly Dr Ernest Mbae, Dr Sarah Materu, Dr H Kwena, Dr R Manani all civil servants.
7. The respondents have now illegally appointed Dr Matilu Mwau as the acting Director of NQCL instead of confirming the petitioner in a position he has been acting since the exit of Dr Chepkwony. The petitioner has been on the NQCL payroll and has been paid Ksh.30, 000 while acting Director and in a letter dated May 6, 2021 the Head of Public Service cancelled the transfer to Interior- Department Correctional Services – Prison following court orders in ELRC Petition No 105 of 2020 which petition the petitioner had filed following victimisation by the respondents and where he had commenced contempt of court proceedings.
8. The petitioner also avers that the appointment of Matilu Mwau as acting Director NQCL is pure impunity by the respondents on the grounds that the statutory authority to appoint belongs to the Board of Management under section 35 H of the Pharmacy and Poisons Board and section 34 of the *Public Service Commission Act*. The appointment of Dr Matilu is contrary to judgement in ELRC Petition No 124 of 2019. The appointed officer is unqualified to be appointed since he is not a pharmacist and the failure by the respondents to appoint a Board of Management has resulted in the illegal appointment.
9. The petitioner also avers that the stoppage of his salary and access to his office from March 16, 2022 is unlawful since through letter dated November 1, 2021 he was appointed acting director, NQCL and conservatory orders should issue herein under the principles outlined in the case of *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others*, Supreme Court No5 of 2014 [2014] eKLR; *Nubian Rights Forum & 2 others v Attorney General & 6 others*; *Child Welfare Society & 8 others (interested*



10. In reply, the respondents filed the replying affidavit of Ruth Maina Kibaara the Deputy Director, Human Resources Management and Development in the Ministry of Health and avers that the petition and the amended petition herein are anchored on orders, ruling, judgement, allegations and documentary evidence in other suits before this court or the Court of Appeal.
11. The petitioner's substantive position according to records is that of senior deputy chief pharmacist and upon posting to Prisons he was transferred to State Department of Correctional Services and therefore the Ministry of Health no longer pays his salaries.
12. Ms Kibaara also avers that the petitioner is on a mission to capture the NQCL a semi-autonomous government agency without due regard to the law, court orders and directives from the employer. Since the year 2012 the petitioner has been in violation of court orders. He has resulted into threatening the respondent and using the police as done through ELRC Petition No 105 of 2020 using contempt of court applications.
13. On March 5, 2021 the contempt of court application was placed before court and in view of Court of Appeal ruling delivered on November 20, 2020 the court directed the petitioner to await the full judgement from the Court of Appeal. The petitioner is now forum shopping with the knowledge that he has obtained similar orders from this court under a different cause and the instant petition is meant to review what he was unable to address and obtain under different petitions.
14. Ms Kibaara also avers that there is no evidence that the Board of Management of NQCL consulted the Ministry of Health when appointing the petitioner as the Senior Deputy Director in fulfilment of the section 34G(f) of the Pharmacy and Poisons Act. Professor Matilu Mwau is the acting Director at the moment because it is only the Board of Management that can appoint a substantive Director.
15. The petitioner's workplace at NQCL ceased following orders of March 11, 2013 in ELRC Petition No 15 of 2012 and following a ruling by the Court of Appeal in Civil Appeal No 107 of 2020 and ruling in ELRC Petition No 105 of 2020 and the petitioner cannot file the instant petition as a review of existing court orders.
16. The posting of the petitioner to Prisons was done by the Inter-Ministerial Committee whose membership is drawn from Head of Public Service, Ministry of Public Service, the National Treasury, Ministry of Interior, and Public Service Commission. The posting was done in accordance with section 43(4) (a) of the Public Service Commission Act and Regulations B.31 (2) of the Human Resource Policies and Procedures Manual for the Public Service of May, 2016. The Minister was only implementing the decision of the Central Human Resource Management Postings Committee through the Head of the Public Service to ask the petitioner to report to Prisons.
17. Ms Kibaara avers the conservatory orders sought by the petitioner and the prayers in the amended petition cannot issue because his case is based on the wrong assumption that the deployment/transfer would paralyse NQCL but the Ministry of Health has many qualified civil servants other than the petitioner who can serve the NQCL. Conservatory orders herein will disrupt operations since the transfer has affected more than 100 employees and to give the petitioner different treatment would be discriminatory and would hinder the employer from exercising its prerogative powers. The allegations he has made of counterfeit medicines getting into the country in the absence of the petitioner is without foundation and the respondent should be allowed to reorganise its departments and the application and amended petition should be dismissed with costs.



Submissions

18. The petitioner submitted and reiterated his application and affidavits and relied on the case of *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 others* [2014] eKLR that the court should grant conservatory orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the court, in the public interest. That conservatory orders are not in their nature interested with addressing the merits of the matter but to be granted on the inherent merit of a case and bearing in mind the public interest.

Determination

19. The core issue herein is whether the court should restrain the respondents from blocking the access of the petitioner to his office at NQCL and allow him to work and be paid his salaries pending the determination of the petition.
20. At this stage, without going into the merits of the Petition and on the rival affidavits and submissions put into account, what the court must address is whether the petitioner has met the threshold for the grant of restraining orders sought. The ingredients for granting an injunction as set by the case of *Giella v Cassman Brown* [1973] EA 358; namely, demonstration of existence of a *prima facie* case with a probability of success; second, that if the injunction sought is not granted, the applicant will suffer irreparable harm; and thirdly, that where the court is in doubt as regards the applicability of ingredient (i) & (ii) above, then the matter should be decided on a balance of convenience. These conditions are aptly summarised in *Kenya Commercial Finance Company Limited v Afraba Education Society* [2001] that;
21. The sequence of granting an interlocutory injunction is firstly, that an Applicant must show a *prima facie* case with a probability of success if this discretionary remedy will endure (sic) in his favour; secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly, when the court is in doubt, it will decide the application on the balance of convenience – see *Giella v Cassman Brown and Co. Ltd* [1973] EA 358 at 360 letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed
22. On the records, it is apparent to this court that the matters herein have had a long history under other petitions particularly ELRC Petition No 124 of 2019 and ELRC Petition No 105 of 2020 and wherefrom the court has issued various orders.
23. There is also Court of Appeal Civil Appeal No 107 of 2020 which granted stay of execution of the Orders issued in ELRC Petition No 124 of 2019 on July 9, 2020.
24. Of interest herein, on February 25, 2022 the petitioner filed application seeking for urgent orders that;
25. The present application be certified extremely urgent and be heard together with application dated February 21, 2020 on March 8, 2022.
26. The order and or ruling of the court on the February 24, 2020 be reviewed and/or varied and/or set aside and/or corrected so as to meet the end of justice.
27. The grounds were that the court had inadvertently set aside the order and overruled order issued on March 5, 2021 in Petition No 105 of 2020 that suspended proceedings to await the outcome of the Court of Appeal in Civil Appeal No 068 of 2020.



28. On February 21, 2022 the petitioner moved this court and filed the instant petition together with application of equal date and seeking for orders that;
28. Pending the hearing and determination of the petition herewith and/or constitution of the Board of Management of National Quality Control Laboratory conservatory Order do issue to the petitioner herein by maintaining his current position of acting Director of National Quality Control Laboratory in the line with the Orders of this court issued on July 17, 2020 by way of stay of the respondents decision through their agents or otherwise of attempted removal of the petitioner from the said position and subsequent conferment of the same to another officer particularly from outside of the National Quality Control Laboratory in blatant usurpation of statutory mandate and powers of the Board of Management of National Quality Control Laboratory.
29. An order that pending the hearing and determination of this application/petition the petitioner application do discharge his duties and functions of Acting Director or National Quality Control Laboratory and henceforth make salaries payments for the month of January, 2022 and onwards to the employees of National Quality Control Laboratory without changing the payroll.
30. The application is made on the grounds that the respondents have deliberately failed to appoint Board of Management for the last two years and created a crisis at NQCL and created a vacuum by failing to appoint a substantive director and the petitioner who has been the acting director should be confirmed to such position. the respondent in Petition No 105 of 2020 confirmed to the court that it had appointed the petitioner as the Senior Deputy director and Dr Hezekiah Chepkwony was appointed Director and in the absence of a board the director proceeded on terminal leave on October 29, 2021 and upon his retirement age on January 9, 2021 the petitioner has remained the acting director and holds sufficient experience for appointment as the substantive office holder.
31. The petitioner has since filed his amended petition herein seeking for various declarations and orders and that his release on transfer by the respondents to Interior – Department of Correctional Services – Prisons is unlawful, unconstitutional, null and void.
32. The various petitions are interlinked and interrelated. These relates to the deployment of the petitioner to the Ministry of Health and NQCL and subsequent deployment/posting/transfer to Prisons.
33. The instant application as outlined above relates to the continued work of the petitioner at NQCL.
34. The petitioner confirms in his supplementary affidavit dated April 22, 2021 [2022?] at paragraph (3) that he is a civil servant under the PSC and was deployed at NQCL and assigned the position of Senior Deputy Chief Pharmacist with consultation with the Ministry of Health.
35. The claimant as a civil servant is subject to deployment by the principal employer, the Public Service Commission. The Ministry of Health or the NQCL is just but a beneficiary of the human resource deployed by the principal.
36. By letter dated April 20, 2020 the Head of Public Service pursuant to the provisions of article 234(5) of the Constitution and Section 31 of the Public Service Commission Act, the Public Service Regulations, the Public Service Commission appointed the Minister, Cabinet Secretary Ministry of Health as the authorised officer of the Ministry of Health with effect from February 28, 2020 with delegated authority over the function of human resource powers and functions.
37. The Minister, under the delegated powers was allowed and given mandate to manage the human resource under his supervision. The delegated authority is in writing. Such power is constitutional and lawful.



38. The Minister of Health being the recipient of the deployment of the petitioner officer from the Principal, Public Service Commission by letter dated October 21, 2021 released him upon transfer to another department, the Interior – Correctional Services – Prisons through letter dated April 1, 2021 and further elaborated through letter dated July 1, 2021 addressed to the Head of Public Service.
39. The deployment of the petitioner to the Ministry of Health ended. He was released from the deployment.
40. Effectively, the petitioner was returned to the principal, Public Service Commission and in March, 2021 deployed to another department, Prisons.
41. Whether the deployment of the petitioner to another department from March, 2021 from the Ministry of Health and NQCL is lawful and or in violation of his constitutional rights, such is a matter to be determined on the merits. The petitioner cannot assert that he will not take the transfer, deployment or redeployment. As a civil servant, the petitioner is bound to serve the people of Kenya without distinction on any basis. To do so would be to negate the very principles he is seeking to rely upon, that of fair labour relations.
42. Pursuant to the mandate delegated to the Minister, Ministry of Health by the Public Service Commission pursuant to its constitutional mandate under article 234(5) of the Constitution the Minister has delegated authority to manage its human resource as deemed necessary and appropriate. The constitutional or lawfulness of such delegated mandate where challenged can be gone into at the full hearing of the petition.
43. As the principal employer, Public Service Commission through letter dated April 11, 2022 did a detailed communication to the petitioner and outlined all letters and Petitions filed challenging the deployment from the Ministry of Health, the court orders and on such matters, the petitioner was guided.
44. The petitioner cannot assert as a civil servant under the Public Service Commission that he can only and should remain at the NQCL and should not be deployed or transferred. Such would defeat the very essence of public service and the constitutional mandate of the PSC pursuant to article 234 of the Constitution to manage human resource in the entire public service save for the excluded public offices and public officers stated in article 234(3) of the Constitution. See Manyara Muchui Anthony v Communications Authority of Kenya Petition No E161 of 2021 the court held that Pursuant to Article 234(d) to (h) of the Constitution, the PSC is allowed to manage public service as appropriate.
45. In Caren Chepng'eno Yobsoi v County Government of Bomet & 2 others [2020] eKLR the court held that deployment and or secondment is temporary transition in nature and the principal can recall, transfer, post and or place the subject employee as required.
46. In Public Service Commission v County Government of Bomet [2016] eKLR where the court held that;

Secondment of public officers though not specifically addressed under the Employment Act, 2007 is given meaning under articles 187(2) read together with 189(1)(b) of the constitution, on the transfer of functions from the various levels of Government recognising the responsibility to assist, support and consult and, as appropriate, implement the legislation of the other level of government; and to this end, the 6th schedule at section 15, the transfer of National functions to County governments.
47. And in Naim Bilal Yaseen v Judicial Service Commission [2017] eKLR the court held that the deployment or secondment of an employee from one agency to another does not imply permanent



employment with the agency of deployment and the employee can be recalled back at any stage upon notice back to the principal employer and be deployed as found appropriate.

48. As outlined above, without going into the analysis of the petition, the confirmation by the petitioner that he was deployed with the respondents and has now been transferred/posted/deployed and placed with another department, the ingredients for grant of orders sought at this stage have not been met. His continued failure to report to the new posting and seeking for payment of salary without rendering his labours is not justified to warrant the court to order that he be paid.
49. The court satisfied that the petitioner has not met the threshold for the grant of the orders sought, he shall abide the directions of the Public Service Commission to deploy and transfer him to prisons and failure to abide as directed, the petitioner cannot claim for payment for the periods not at work.
50. The court brings to the attention of the petitioner the provisions of section 19 (1) (c) of the Employment Act, 2007 that;
- (1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—
- ...
- (c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;
51. The employment of the petitioner by the and under the Ministry of Health and NQCL ceased with his transfer/deployment/posting to a different department outside the Ministry of Health.
- Accordingly, the application dated March 17, 2022 is hereby found without merit and is dismissed and the following orders issued;
- a. from the date of transfer and for days the petitioner has not reported to work as directed, no payment is due;
- b. on the petition, the respondents shall reply within 14 days;
- c. Take a hearing date at the registry; and
- d. Costs to the respondents.

DELIVERED IN COURT AT NAIROBI THIS 12TH DAY OF MAY, 2022.

M. MBARŪ

JUDGE

In the presence of:

**Court Assistant: Okodoi

..... **and**

