



**Nyang'au v County Government of Nyamira & another; Nyang'au (Interested Party)
(Petition E051 of 2021) [2022] KEELRC 1597 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1597 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E051 OF 2021**

**CN BAARI, J
JUNE 16, 2022**

BETWEEN

SHEM OBWORO NYANG'AU PETITIONER

AND

COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT

**COUNTY GOVERNMENT OF NYAMIRA PUBLIC SERVICE
BOARD 2ND RESPONDENT**

AND

GODFREY KIRIAGO NYANG'AU INTERESTED PARTY

JUDGMENT

Introduction

1. Before court is an amended Petition dated 12th October, 2021 and filed in on even date. The Petitioner seeks the following reliefs:
 - i. A declaration that the Petitioner's removal from the position of County Director of Human Resource Management and Development was illegal and unconstitutional.
 - ii. A declaration that the revision of the Petitioner's terms and conditions of service and job group was unconstitutional.
 - iii. An order be issued for the reinstatement of the Petitioner to the position of County Director of Human Resource without interference with his terms of service
 - iv. A declaration that the appointment of the Interested Party, Mr. Godfrey Nyang'au Kiriago is irregular, illegal, null and void and the payment made to him as County Director Human



Resource Management and Development be recovered from him as a debt owed to the 1st Respondent.

- v. A permanent injunction be issued restraining the Respondents from interfering with the Petitioner's execution of his duties as County Director, Human Resources Management and Development.
 - vi. General damages for the malicious and mala fides contravention of the Petitioner's constitutional rights
 - vii. Costs of the petition.
 - viii. A restraining order
2. Parties sought to canvass the petition through written submissions. Both parties filed their submissions.

The Petitioner's Case

3. The Petitioner's case is that he was appointed by the 2nd Respondent as the County Head of Human Resources of the 1st Respondent through a competitive process under Job Group R with effect from 9th December, 2019. The Petitioner further avers that by a letter dated 18th August, 2015, he was confirmed to the position on permanent and pensionable terms of service.
4. The Petitioner states that the 2nd Respondent by a letter dated 18th December, 2015, communicated its decision to re-designate him as the County Director of Human Resource Management under Job Group R with effect from 1st January, 2016, and by yet another letter dated 19th September, 2016, the 2nd Respondent upgraded and appointed the Petitioner to the position of County Director Human Resource Management and Development under Job Group S with effect from 1st October, 2018
5. The Petitioner states that he was sent on a fifteen-day administrative leave vide a letter dated 6th June, 2018, ostensibly to pave way for Human Resource Skills Audit and Payroll cleansing Project with instructions not to visit County Offices till notified.
6. The Petitioner states that he was not notified of any allegations of impropriety, misconduct or any act of neglect or dereliction of duty that informed the need for the audit or which would justify what was clearly an adverse action against him, and neither was the outcome of the process made known to him.
7. The Petitioner avers that vide a letter dated 4th July, 2019, the 1st Respondent sent him on yet another administrative leave for 30 days allegedly to pave way for what it called a Payroll Cleansing Project, and Once again, he was not notified of any allegations of impropriety.
8. The Petitioner states that upon expiry of the second administrative leave, and without being furnished with the findings of the audit, he was on 23rd August, 2019 served with an interdiction letter of similar date.
9. It is the Petitioner's case, that being aggrieved and fearing dismissal without following due process, the Petitioner, together with four other employees facing the same predicament filed Judicial Review No. 14 of 2019 seeking orders to stop the process at the Employment and Labour Relations Court Kisumu. The matter was settled by consent on 19th December, 2019 on terms that the Petitioner be reinstated unconditionally. The Petitioner further states that he resumed duty on 16th January, 2020, as the County Director of Human Resource Management and Development in the department of Public Service Management.



10. The Petitioner states that on 27th February, 2020, the Petitioner received a letter dated 25th February 2020 from the 1st Respondent transferring him to the County Department of Education and Vocational Training as Director Education and again on 23rd June, 2020, he was transferred to the County Public Service Board as Director Human Resource but which transfer was revoked and he was instead sent to the department of Health Services as Director Human Resource Management.
11. The Petitioner states that the positions to which he was transferred to in the manner stated above were not, and are not in existence in the county organizational structure and establishment.
12. The Petitioner avers that he contested the transfers and protested to the 2nd Respondent but no step was taken to reverse the illegalities.
13. The Petitioner states that the Respondents have proceeded to alter his terms of employment to his disadvantage as per the July, 2021 pay-slips where his position was downgraded from Job Group “S” to “R” with a substantial reduction in remuneration.
14. The Petitioner states that the Respondents actions are a violation of articles 10, 232, 55, 235, 41 and 47 of the Constitution, and sections 60, 61, 62 and 63 of the County Government Act.

The Respondents’ Case

15. The Respondents’ case is that the Petitioner was sent on administrative leave to pave way for payroll cleansing. The Respondents further state that the Petitioner was paid his full salary in the period he was in leave.
16. The Respondents admit that the Petitioner was interdicted on 23rd August, 2019, for failure to highlight anomalies in the appointment of various categories of staff including support cadre and nurses, irregular assignment of personal numbers, failure to approve processing of new appointments, upgrading of staff and failure to control information workflow amongst others.
17. It is the Respondents’ case that Kisumu ELRC Judicial Review No. 14 of 2019 was amicably settled, and a consent recorded wherein parties agreed to amicably resolve the differences between them.
18. The Respondents admit the Petitioner’s assertion that he was deployed to the department of education and vocational training, and thereafter deployed to the department of health as Director of Human Resources management.
19. The Respondents’ contend that as at 21st January, 2021, the Petitioner’s docket was that of Director Human Resource in the department of health, and not County Director Human Resources as alleged.
20. The Respondents asserts that section 72 of the County Government Act permits the Respondents to deploy or transfer public officers within its employment for effective service delivery and which it has routinely done. The Respondents further state that deployment is a common exercise within the public service, and which is recognized by law and hence the deployment of the Petitioner is neither illegal nor is it an unfair administrative action.
21. The Respondent further states that contrary to the Petitioner’s assertion, the position of Director Human Resources Management in the department of health, and that of Education and Vocational Training, has always existed in the establishment of the County Government. The Respondents further states that the law empowers them to establish offices within the county public service.
22. The Respondents states that the Petitioner is currently the Director Human Resources Management in the Respondents’ department of health where he was last deployed, and has not demonstrated any



prejudice suffered as a result of the deployment to this department. The Respondents further states that the Petitioner has remained in their employment on permanent and pensionable basis.

The Interested Party's Case

23. The Interested Party states that it is not true that he was appointed the substantive Director Human Resources. He asserts that he was instead seconded to the position by his parent employer at the request of the 1st Respondent pursuant to the law, policy and regulations governing secondment.
24. The Interested Party states that his secondment is for a limited period, and was approved by the Public Service Commission and the 2nd Respondent and upon the approval, appointed to the position by the 1st Respondent.
25. It is averred that secondment is not recruitment whose procedure is largely governed by the Employment Act and the County Government Acts, and did not therefore call for the advertisement of the position and other recruitment processes as alleged.
26. The Interested Party states that by virtue of him being already a civil servant was legally seconded to the service of the Respondents having already undergone a recruitment process to the position he held at his parent ministry/employer and was thus not subject to undergo a repeat recruitment process.
27. The Interested Party contends that the Petitioner holds the position of Director Human Resources Management at the Respondents' department of health, and as at 21st January, 2021, the position of County Director Human Resources was vacant. He further denies having taken over the Petitioner's position.
28. The Interested Party avers that the Petitioner was not removed from office, instead, he was deployed within the employ of the Respondent and which action is within the law, policy and Regulation. He states that the petition is misguided, incompetent and ought to be dismissed.

The Petitioner's Submissions

29. The Petitioner submits that the action of the Respondents placing him in a position in which his duties cannot be described is an unfair labour practice which offends the requirements of article 41 of Constitution.
30. The Petitioner further submits that the actions of the Respondents are unlawful and unreasonable and in contravention of article 47 of the Constitution and the Fair Administrative Actions Act. It is further submitted for the petitioner that his deployment to an office that does not exist is a violation of section 59 of the County Government Act and article 232 of the Constitution.
31. The Petitioner submits that amongst the reliefs he seeks from the court is reinstatement to his previous position of County Director of Human Resources Management without interfering with his terms of service. He further submits that the communication in respect of his deployment amounts to a revision of his contract of service, and a usurpation of the powers of the 1st Respondent. He sought to rely on the holding in the case of Alloice King'ala Ngerenza & 3 Others v Speaker, Nyamira County Assembly & 3 Others (2016) eKLR to buttress his submission.
32. The Petitioner submits that the appointment of the Interested Party violates the principles of fairness and merit as the basis of appointment in the county public service enshrined in article 232 of the Constitution as read with section 66 of the County government Act.



33. It is submitted that the Respondents have meted out the worst treatment against the Petitioner which treatment entitles him to an award of general damages for the infringement of his rights. He sought to rely in the case of *M W K & Another v Attorney General & 3 others* [2017] eKLR.

The Respondents and the Interested Party's Submissions

34. The Respondents submit that the Petitioner cannot claim to have been deployed to an office that is not in the Respondents' organogram when the office he claims to occupy is not itself expressly set out within the Respondents' organizational structure.
35. It is further submitted that it is the prerogative of the Respondent in managing her workforce to deploy and/or transfer officer for efficient service delivery and that courts should not interfere with the powers of an employer to deploy/transfer its staff unless it can be determined that an employer has violated the law. They sought to rely on the holding in the case of *Geoffrey Mworira v Water Resources Management Authority* [2015] eKLR to buttress this position.
36. It is the Respondents further submission that the Petitioner has not proved violation of his rights through the deployment and/or transfer to various departments within its service.
37. It is submitted that the Petitioner had been erroneously designated as a Chief Officer at job group S, while his actual position was that of a Director Human Resource Management which falls under job group R in the Respondents' organizational structure. It is submitted that the Petitioner has not denied that he never was a chief officer and that the pay slips produced I evidence in this petition are a clear indicator of the anomaly.
38. It is submitted that the issue concerning the secondment of the Interested Party to the Service of the Respondents has been dealt with by this court and the said decision is subject of an appeal now before the court of Appeal. It is further submitted that the Interested Party sought stay of the orders in that judgment, and that the stay has since been granted.
39. It is the Respondents further submission that they have not violated any of the Petitioner's rights by deploying him, as the law allows them to deploy when necessary for efficient service delivery.
40. The Respondents finally submit that the Petitioner has failed to prove specifically how the Respondents violated his constitutional rights. They had reliance on the holding in *National Law Monthly Limited v Kenya Electricity Generating Company & Others* [2013]eKLR to support this position.

Determination

41. I have considered the petition, the replies filed by the Respondents and the Interested Party and the rival submissions. The issues that fall for determination are:
- i. Whether the Petitioner's deployment/transfer and revision of his terms and conditions of service was unconstitutional
 - ii. Whether the Petitioner deserves the reliefs sought

Whether the Petitioner's Deployment was Unconstitutional

42. It is not disputed that the Petitioner was appointed by the 2nd Respondent as the County Head of Human Resources of the 1st Respondent through a competitive process under Job Group R with



effect from 9th December, 2019. It is also agreed that the Petitioner was confirmed to the position on permanent and pensionable terms of service.

43. The Petitioner's position is that having been substantively appointed to the position of County Director of Human Resource Management, he could not be transferred to a different position as this would amount to losing his substantive position. He contends that his re-designation was arbitrary and had nothing to do with improving service delivery.
44. The evidence before court confirms the Petitioner's assertions in so far as the appointment and confirmation are concerned. The letter confirming the Petitioner's appointment indicates the appointment to the position of County Head of Human Resource Management to be on permanent and pensionable basis. In yet another letter dated 18th December, 2015, the Petitioner was re-designated to the position of County Director of Human Resources Management, and the re-designation was said to take effect on 1st January, 2016- one month later.
45. The facts subject of Kisumu ELRC Judicial Review No. 14 of 2019, which was settled out of court are also not contested.
46. The Respondents are further said to have upgraded the Petitioner vide a letter dated 19th September, 2016, but which upgrade was to take effect on 1st October, 2018 which is exactly two years later. This letter in my opinion is quite telling on why an employer would give a promotion that takes effect two years later. Why not wait to promote an employee close to the time the promotion is intended to take effect? Section 70 (2) of the [County Government Act](#) states thus:
- “If a public officer has been promoted, the head of department shall within sixty days after the date of the promotion release the public officer to take up the promotion and if the officer is not so released, he or she stands released upon the lapse of sixty days.”
47. Common practice is that the effective date of appointment, acting appointment, promotion or re-designation is the date of the decision to appoint, promote or re-designate. Further pursuant to section 70(2) of the [County Government Act](#), it is envisaged that when an officer is promoted, he is expected to take up the promotion in not less sixty days.
48. I will let this question linger, and proceed to address the issue before court, which is to determine the constitutionality or lack thereof of the deployment/transfer and revision of terms and conditions of service of the Petitioner.
49. The Respondents contend that it was within their statutory power pursuant to sections 72(2) and 56 of the [County Government Act](#) to deploy and/or transfer the Petitioner from the position of County Director of Human Resource Management and Development to any other office within the county public service. Section 72(2) of the [County Government Act](#) states:
- “(1)
- (2) The power to deploy a county public officer from one department to another shall vest in the head of the county public service.”
50. The letter deploying the Petitioner to the department of Education and Vocational Training was signed off by then Acting County Secretary and Head of Public Service. Section 56 of the [County Government Act](#) provides that the County public service shall be headed by a county secretary. The Petitioner was to hold the position of Director Education at this department.



51. In a second letter subject of this petition, the Respondent transferred the Petitioner from the Department of Education and Vocational Training to the County Public Service Board as Director Human Resource. The transfer letter was by the County Secretary and Head of County Public Service. In yet another letter dated 21st January, 2021, the Petitioner was transferred to the Respondents' department of health Service in a similar position as in the previous transfers/deployments.
52. There is no doubt that the Petitioner's transfers were made by the officer authorized so to do in accordance with Section 56 of the County Government Act. This court however notes that the deployment of the Petitioner from one department to another were made in quick succession, and so soon before the ink in the consent entered in Kisumu ELRC Judicial Review No. 14 of 2019, could dry.
53. The Petitioner's assertion that his terms and conditions of service were revised has in my opinion not been proved in view of the Respondents' evidence indicating correction of an obvious anomaly that assigned the Petitioner the position of Chief Officer which he has not at any point in this petition claimed to have held.
54. In my opinion, the fact that deployment/transfer is an administrative action allowed under Statute, means that the deployment of the Petitioner was not unconstitutional.
55. Secondly, the issues subject of the Petitioner's petition, are matters that could have been addressed through a normal cause before this court as they revolve around matters covered under statutes, institutional policies and Regulations. This takes me to the general persuasive principle in *Barbara De Klerk* where it was held that where a legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question.
56. I associate with the holding in the case of *National Law Monthly Limited v Kenya Electricity Generating Company & Others* [2013] eKLR cited by the Respondents where Mumbi Ngugi J stated thus:
- “... as this is a petition alleging violation of constitutional rights, it is incumbent on the petitioner, in order to succeed, to demonstrate, with a reasonable degree of precision, the provisions of the constitution which have been violated with regard to it, and the manner of such violation.”
57. Deployment/transfer is an employer's administrative tool meant to facilitate the achievement of an efficient and effective service if used prudently.
58. That the Petitioner was deployed/transferred albeit frequently, and the allegations of review of terms and conditions of service are all employment issue that could have been dealt under the *Employment Act*, 2007, through a normal cause and not by way of a constitutional petition. In the case of *Re Application by Bahadur* [1986] LRC 297, a case from Trinidad & Tobago, the Court held thus:-
- “... The *Constitution* is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that law and not under the *Constitution*.”



59. Again in the South African case of SA *Naptosa & Others v Minister of Education Western Cape & others* [2001] BLLR 338 at 395, the Western Cape High Court had this to say:-
- “... If an employer adopts a labour practice which is thought to be unfair, an aggrieved employee would in the first instance be obliged to seek remedy under the Labour Relations Act. If he or she finds no remedy under the act, the Act might come under scrutiny for not giving adequate protection to a constitutional right ...”
60. Closer home, the Court of Appeal has severally held that where a fundamental right is regulated by legislation, such legislation, and not the underlying constitutional right, becomes the primary means for giving effect to the constitutional rights. In the case of *Daniel N. Mugendi v Kenyatta University & 3 Others* [2013] eKLR, the Court held:
- “... Citing the case of *Alphonse Mwangemi Munga & Others v African Safari Club Ltd* [2008] eKLR, the learned judge was persuaded that the Constitution had to be read together with other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the constitutional court and making constitutional issues of what is not. With all the foregoing, the learned judge concluded that the claim placed before her by the appellant was based on employment - a matter that should have instead been taken to the Industrial Court which had constitutional and statutory jurisdiction over such matters and not the High Court in the form of a constitutional reference ...”
61. The Court of Appeal also addressed this issue in the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, where it stated: -
- “... In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed ...”
62. In *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR the Court of Appeal again emphasized thus:
- “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.”
63. The legality or lack thereof of the secondment of the Interested Party was as correctly submitted for the Interested Party, dealt with by this Court in Kisumu ELRC No. E047 of 2021(Vincent Omas Omarita v County Government of Nyamira & Others) and the determination therein is subject of an active appeal. This court is therefore functus officio in so far as the issue of secondment of the Interested Party is concerned, and I let it rest.
64. In whole, I find and hold that the petition does not disclose a cause of action anchored on the Constitution, and offends the principle of Constitutional avoidance. Accordingly, the petition being so incompetent, is hereby dismissed in its entirety.



65. Parties shall bear their own costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS
16TH DAY OF JUNE, 2022.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Otieno present for the Petitioner

Ms. Katila present for the Respondents & Interested Party

Christine Omollo- C/A

