



Ali v National Health Insurance Fund & 2 others; Transparency International & 2 others (Interested Parties) (Cause E714 of 2022) [2022] KEELRC 13443 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13443 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E714 OF 2022
BOM MANANI, J
DECEMBER 7, 2022**

BETWEEN

KHADIJA ALI CLAIMANT

AND

NATIONAL HEALTH INSURANCE FUND 1ST RESPONDENT

JOSEPH TONUI 2ND RESPONDENT

ROSEMARY GACHEMI 3RD RESPONDENT

AND

TRANSPARENCY INTERNATIONAL INTERESTED PARTY

STATE CORPORATIONS ADVISORY COMMITTEE INTERESTED PARTY

INSTITUTE OF HUMAN RESOURCE MANAGEMENT .. INTERESTED PARTY

RULING

Introduction

1. The applicant is an employee of the 1st respondent serving in the position of Senior Assistant Manager, Human Resource. In July of 2022, the applicant received a letter from the 2nd respondent informing her that she had been re-designated to the position of Branch Manager, Gikomba Branch. Consequently, she was required to report to the respondent’s Regional Manager, Nairobi to be given details regarding her job description and targets. She was to also be allocated duties that fit her new position.
2. This decision appears not to have been received well by the applicant for the various reasons that she has advanced in her response dated August 10, 2022. Hence her decision to move the court to seek that the re-designation and transfer be halted.



3. Accompanying the statement of claim is the application dated October 4, 2022 for stay of the 1st respondent's decision to re-designate and transfer the applicant until the case is heard and determined.
4. On behalf of all the respondents, the 2nd respondent has filed an affidavit in response to the aforesaid application. In a nutshell, the respondents are opposed to the application for the reasons that they advance in the replying affidavit.
5. The parties agreed to canvass the application through written submissions. Save for the interested parties who have yet to enter appearance in the cause, the respondents have filed their joint submissions through counsel on record for them.

Applicant's Case

6. In the affidavit in support of her application, the applicant gives a history of her career growth since joining the 1st respondent in February 2002 as a personnel officer. Over time, she has grown through the ranks to her current position.
7. It is the applicant's case that as a result of this career development, she has invested heavily in enhancing her expertise in the field of human resource management. That the proposed re-designation and transfer to head a branch office of the 1st respondent will throw her into uncharted waters as she has no training in this new area. She will have to undergo fresh training to fit into the new position.
8. The applicant also argues that re-designating her to the position of branch manager as proposed will deprive other deserving personnel who have been serving in the positions of assistant branch managers the opportunity of rising to the position of branch managers. This will have the ripple effect of stifling their career development.
9. The applicant argues that her proposed re-designation is not made in good faith. She alleges that she has over time raised a red flag over corruption and other malpractices in the 1st respondent institution a fact that has made part of the management of the 1st respondent uncomfortable with her presence. And hence the decision to re-designate and transfer her as some form of punishment.
10. The applicant also points out in her submissions that prior to the re-designation and transfer there were no consultations with her. In her view, the proposed re-designation violates the tenets of fair labour practice and the requirement for consultation provided for under section 10(5) of the [Employment Act](#).

Respondents' Case

11. The respondents oppose the motion on the ground that the re-designation and transfer has been done in the ordinary course of execution of the 1st respondent's mandate. That the 1st respondent, as the employer of the applicant, has the managerial prerogative to deploy employees (including the applicant) to meet its recurrent human resource requirements. That this prerogative is secured by the 1st respondent's human resource manual which the applicant is not just aware of but also accepted to be bound with. That the applicant's re-designation and transfer was therefore not out of the ordinary and ought to be viewed as any other normal staff rotation and transfer.
12. The respondents further argue that the human resource manual between the parties provides for employee grievance resolution procedures which the applicant ought to invoke. That instead of seeking to address her grievance in the manner contemplated under the policy, the applicant has rushed to court with the current motion. By this and in a sense, the respondents suggest that the current case is premature.



13. The respondents contend that the applicant's request is devoid of merit. That it does not meet the conditions for the grant of interim orders of injunction. In the respondents' view, any injury that the applicant may suffer in the event of the re-designation and transfer being reversed by the court can be adequately compensated through an award of damages.

Analysis

14. It is trite law that employers enjoy managerial prerogative to manage human resource issues within their organizations. This power entitles the employer to make decisions that he deems necessary for the growth and the general wellbeing of the enterprise (see *Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organisation (KALRO)* [2017] eKLR). In exercise of this power, the employer has the right to hire, transfer, re-designate, deploy and discipline staff as appropriate.
15. As a general rule, courts of law must refrain from interfering with the employer's right to exercise this power. It is not for the court to take over the position of the employer and purport to determine how the workplace should be run (see *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR).
16. However, the exercise of the employer's managerial prerogative must not be abused to justify actions that compromise the right to fair labour practices. The power must be exercised within the confines of the law. Where there is evidence of manifest abuse of the employer's prerogative aforesaid, the court will intervene to ensure observance of due process. In *Thomson Kerongo & 2 others v James Omariba Nyaoga & 3 others* [2017] eKLR, the court observed as follows on the subject:-

“The court will only interfere where there is breach of the process and even so, only with a view to setting the process right.”
17. In effect, it is clear to me that whilst courts lean towards protecting the principle of managerial prerogative to allow the employer to run the workplace in the manner that he deems best, they are nevertheless prepared to question the use of this power where it appears to have been invoked for ulterior reasons and in violation of the law governing the subject matter under consideration. Ultimately, whether a court should intervene in the exercise of the power is a matter to be determined on a case by case basis.
18. I have considered the arguments by the parties in the application before me. The applicant argues that to re-designate her from the human resource department of the 1st respondent to its branch portfolio amounts to alteration of a term of her contract without consulting her contrary to section 10 (5) of the *Employment Act*. In response, the respondents argue that the re-designation and transfer are in line with the applicant's contract of service as read with the 1st respondent's human resource manual.
19. Clause 2 of the letter of appointment issued to the applicant on February 11, 2002 states as follows:-

“While holding the above position, your duty station will be NHIF Headquarters. However, the Fund may at its sole discretion, reassign you other duties or transfer you in any other capacity to any area or station in which the Fund operates. In this regard terms and conditions of service may be subject to review.”



20. Clause 12 of the same letter reads as follows:-

“Notwithstanding anything contained herein, you will also be subject to the Fund’s staff rules, regulations, notices, standing instructions etc as issued and or amended from time to time.”

21. The human resource policy (HR policy) that the parties rely on is that dated August 2020 and marked JT 8 on the replying affidavit filed by the 2nd respondent. Clauses 2.32 and 2.35 of the policy deal with the issue of re-designation, posting and transfer of staff. The clauses give the management of the 1st respondent wide powers to re-designate, post and transfer members of staff with the consequence that the affected staff will be moved from one department or region to another.
22. The procedure for staff transfer and rotation is also set out in an elaborate manner. According to the HR policy, if a member of staff has been in service in one directorate or region for three years, he is eligible for transfer, rotation or re-designation.
23. The process of movement of such staff is triggered in one of the two ways under the HR policy. Under clause 2.35.11, it may be triggered by the Head of Directorate who is to make a proposal to the employee on the proposed movement. In this context, it does appear to me that the HR policy does contemplate the input of the affected staff in the process. This is because clause 2.35.12 of the policy requires that the Head of Directorate makes a proposal to the affected employee who will then consider the proposed job rotation.
24. The fact that the employee is allowed the latitude to consider the proposal can only be understood to mean that the employee’s input is required. This necessarily connotes some form of consultations between the Head of the Directorate and the employee.
25. The process may also be triggered under clause 2.35.13 of the HR policy when an operational requirement for an employee to be transferred to another position is identified. Under this clause, where such need arises, the 1st respondent’s Chief Executive Officer and Head of Directorate, HRM consult over the matter. The said officers then prepare and submit a list of the employees to be moved to the Board or Chief Executive Officer for approval. Once the approval is given, the affected employees are to be notified through letters issued to them. In the latter scenario, it appears to me that the need for consultation with the affected employees is not contemplated.
26. Under clause 13 of the policy, a detailed grievance resolution procedure is provided. The procedure is to address various employee grievances including, in my view, the one raised by the applicant in these proceedings. The procedure allows for both an internal and external resolution of disputes with the latter involving conciliation and mediation. Whilst the internal process can be at the instance of an employee, the external conciliation and mediation process must be with the blessings of the 1st respondent.
27. According to the documents filed by the applicant, she has served in the Human Resource department of the 1st respondent since 2002 when she was appointed as a personnel assistant. On the date of her re-designation in July 2022, she had served in this department for approximately 18 years.
28. The applicant has annexed to her affidavit several academic certificates evidencing her specialization in the area of human resource management. She has also been registered by the Institute of Human Resource Management as a practicing Human Resource Professional.
29. On July 20, 2022, the 2nd respondent issued an internal memo to the Chief Executive Officer of the 1st respondent proposing transfers, re-designations and redeployments that affected twenty one (21)



- members of staff including the applicant. On the face of it, this correspondence appears to have been issued under clause 2.35.13 of the HR policy.
30. From the preliminary evidence placed before me, the applicant has served in her current position for more than three years. She was therefore, due for transfer and rotation under clause 2.35.11 of the HR policy.
 31. Undoubtedly, the 1st respondent has the power to re-designate, rotate and transfer staff. However, these powers must be exercised within the law and the 1st respondent's HR policy.
 32. Whilst the 1st respondent's power to transfer staff is subject to little constraints, the power to re-designate must be exercised in compliance with section 10(5) of the *Employment Act*. This is because a re-designation unlike a simple lateral transfer has the consequence of changing the employee's job description. Under section 10(5) of the *Employment Act*, where the employer elects to make changes to the employee's contract on matters affecting inter alia, the employee's job description, the employer needs, in consultation with the employee, to revise the contract to reflect the change and notify the employee of the change in writing. In my view, this process must precede the actualization of the proposed changes.
 33. The requirement under section 10(5) of the *Employment Act* underlies some of the provisions in the 1st respondent's HR policy. Clause 2.35.2 of the policy for instance requires the 1st respondent to provide fair and equitable guidelines to the process of transfer and rotation of staff. This requirement is meant to ensure that in the process of re-designation, the rights of the affected employees are not unduly prejudiced. This, in my view, can only be achieved if the decisions to re-designate employees are preceded with some form of consultative process between the employer and employee. It is for this reason that it is important to draw a clear distinction between a bare transfer and re-designation of employees.
 34. The need for consultations in the process of staff re-de-designation by the 1st respondent is further fortified by the recognition at clause 2.35.4 of the HR policy that some staff may not be capable of rotation and or re-designation because of their seniority and nature of responsibilities. In the context of the applicant, the preliminary evidence placed before the court suggests that her specialization is in the field of human resource management. With this in mind, it becomes a matter of concern whether re-designating her to the position of branch manager is consistent with clause 2.35.4 of the 1st respondent's HR policy.
 35. I have considered the available case-law on the question of re-designation as opposed to bare lateral transfer of staff in the same capacity. From the decision, it appears to me that employers ought to handle re-designations more cautiously in order not to unduly prejudice the employee's career development. This is especially if the effect of the re-designation is to remove the employee from a well trodden career path into a new area (see *Republic v CEO, Youth Enterprise Development Fund & another Ex-Parte Entone Wasonga* [2018] eKLR and *Ken T Sungu v Kenya Ports Authority* [2020] eKLR).
 36. The respondents argue that re-designating the applicant from Senior Assistant Manager-HR to Branch Manager does not change her employment contract as contemplated under section 10(5) of the *Employment Act*. With respect, this observation appears inaccurate.
 37. Section 10(5) of the *Employment Act* obligates an employer to consult an employee on changes that may affect inter alia, the job description of the employment. The letter to the applicant dated July 29, 2022 ordering her re-designation and transfer specifically requires her to report to her Regional Head for "issuance of a comprehensive job description, work targets and immediate allocation of duties commensurate to your position." I understand this statement to mean that the applicant's job



description would be affected as a result of the proposed re-designation. On the face of the preliminary evidence before me, this kind of shift does require consultation with the applicant.

38. The respondents also argue that because the applicant signed the letter of appointment and HR policy which give the 1st respondent powers to re-designate, rotate and transfer her, she is bound to accept the re-designation ordered in July 2022. This is of course the right position if the re-designation is undertaken in compliance with the law. The clauses on transfer and re-designation in the HR policy and the employment contract must be interpreted in a manner that is consistent with and not in conflict with the law. The fact that the two documents give the 1st respondent power to re-designate employees does not mean that they have taken away the duty on the employer to consult the affected employees in terms of section 10(5) of the *Employment Act*.
39. I have considered the respondents' objection to the presence of the case in court. They contend that the matter is prematurely filed since the applicant has not exhausted the internal dispute resolution process provided for under clause 13 of the HR policy. It is true that the HR policy provides for an internal appeals process to address any grievance that an employee may have. It is also evident from the letter by the applicant dated August 10, 2022 that she raised her objection to the proposed re-designation and transfer. The letter is addressed to the 2nd respondent who is perhaps the applicant's immediate supervisor.
40. It is noteworthy that despite her complaint aforesaid, the applicant's grievance was not addressed. Instead, the 2nd respondent wrote to the applicant on August 17, 2022 and August 18, 2022 reminding her to report to her new station and releasing her for this purpose. The two letters neither acknowledge nor make reference to the applicant's letter of August 10, 2022 in which she expressed her objection to the re-designation.
41. On the face of it, the applicant's attempt to seek internal resolution of the problem appears to have failed at least to the extent that her letter of August 10, 2022 did not elicit any response from the respondents. Faced with the release letter of August 18, 2022, the applicant was left with little room to pursue internal resolution of the dispute.
42. A party is bound to resort to existing internal dispute resolution mechanisms only when such mechanisms provide the party with a suitable remedy. The applicant has moved this court for orders to restrain the respondents from re-designating her. This remedy would not be available to her from the 1st respondent's internal dispute resolution forum (see *Catherine Mwibaki Ngambi v International Leadership University* [2022] eKLR).
43. Having regard to the totality of the preliminary evidence placed before me, I am satisfied that the respondents' decision to re-designate the applicant without consulting her is, on the face of it, in breach of section 10(5) of the *Employment Act*. This alone entitles the court to intervene in the exercise of the 1st respondent's managerial prerogative to re-designate the applicant.
44. I am also convinced on the preliminary materials placed before me that the sudden re-designation of the applicant from her long trodden career path could have severe consequences to her career that may not be compensated by an award of damages.
45. I am therefore satisfied that the applicant has met the conditions for the grant of an order of injunction as prayed for in her application.

Determination

46. I grant the applicant's application dated October 4, 2022 in the following terms:-



- a. Pending the hearing and determination of the claim, I stay the directive by the Respondents, their servants and or agents re-designating the applicant from her current position in human resource to the new position of Branch Manager, Gikomba.
- b. Pending the hearing and determination of this cause, the respondents and or their servants and or agents are restrained from interfering with the applicant's execution of her current mandate as Senior Assistant Manager Human Resource on account of matters that are the subject of this litigation.
- c. The applicant shall have the costs of this application.

DATED, SIGNED AND DELIVERED ON THE 7TH DAY OF DECEMBER, 2022.

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondents

..... for the 2nd Interested Party

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

