



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. E077 OF 2020**

**IN THE MATTER OF DENIAL OF RIGHTS, VIOLATION AND INFRINGEMENTS OF ARTICLES 10, 22, 23, 28, 31, 41,47,48,50,172 AND 258 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTIONS 2,5, AND 26 OF THE EMPLOYMENT AND LABOUR ACT, NO. 11 OF 2007**

**AND**

**IN THE MATTER OF SECTION 32 AND THE THIRD SCHEDULE OF THE JUDICIAL SERVICE ACT NO. 1 OF 2011**

**AND**

**IN THE MATTER OF SECTION 4 AND 12 OF FAIR ADMINISTRATIVE ACTION, ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF RULES 7 AND 17 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT PROCEDURE RULES, 2016**

**AND**

**IN THE MATTER OF RULES 3(4), 4, 11, 13, 19 AND 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF REGULATIONS 11, 35, 38, 78, 79, AND 80 OF THE JUDICIAL SERVICE (CODE OF CONDUCT AND ETHICS) REGULATIONS, 2020**

**AND**

**IN THE MATTER OF THE JUDICIAL SERVICE HUMAN RESOURCE POLICES AND PROCEDURES MANUAL**

**BETWEEN**

**DAMACLINE BOSIBORI NYAKUNDI.....PETITIONER**

**VERSUS**

**THE CHIEF JUSTICE AND PRESIDENT**

**OF THE SUPREME COURT OF KENYA.....1<sup>ST</sup> RESPONDENT**

**THE JUDICIAL SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

THE CHIEF REGISTRAR OF THE JUDICIARY.....3<sup>RD</sup> RESPONDENT

HON. MR. JUSTICE JAIRUS NGAAH,

PRESIDING JUDGE, NYERI LAW COURTS..... 4<sup>TH</sup> RESPONENT

HON. MS. WENDY K. MICHENI

CHIEF MAGISTRATE, NYERI LAW COURTS.....5<sup>TH</sup> RESPONDENT

HON. LUCY MUTAI, CHIEF MAGISTRATE,

NYANYUKI LAW COURTS..... 6<sup>TH</sup> RESPONDENT

AND

KENYA MAGISTRATES'

AND JUDGES ASSOCIATION.....1<sup>ST</sup> INTERESTED PARTY

LEGAL AID CLINIC.....2<sup>ND</sup> INTERESTED PARTY

### RULING

1. The Applicant in the application dated 10/11/2020 prays for an order in the following terms: -

- (a) The matter be certified urgent and it be heard ex parte in the first instance.
- (b) Pending the hearing and determination of this Application and Petition, an interlocutory injunction be issued suspending the implementation of the 1<sup>st</sup> Respondent's letter dated 29<sup>th</sup> September, 2020.
- (c) Pending the hearing and determination of this Application and Petition, an interlocutory injunction be issued suspending the implementation of the 4<sup>th</sup> and 5<sup>th</sup> Respondents' internal memorandum and letter dated 21<sup>st</sup> May, 2020 and 26<sup>th</sup> May, 2020 respectively.
- (d) Pending the hearing and determination of this Application, an interlocutory prohibitory injunction be issued against the Respondents, proscribing them from:
  - (i) *transferring, suspending, removing the Applicant from employment;*
  - (ii) *barring the Applicant from discharging her gazetted duties;*
  - (iii) *barring the Applicant from attending to her Court in Nyeri Law Courts; or`*
  - (iv) *In any other way interfering with her employment through administrative decisions in a manner that is not anticipated by law or under the Applicant's contract of employment.*
- (e) Any other relief the Court deems fit to grant.
- (f) Costs of this Application be borne by the Respondents.

2. The Application is supported on grounds set out on the face of the application numbered 1 to 16 and buttressed in the supporting affidavit of the applicant sworn to on 10<sup>th</sup> November, 2020.

3. The nub of the application is that by a letter dated 29/9/2020, the 1<sup>st</sup> respondent has without reasons and in violation of the Constitution, the law and Transfer Policy Guidelines for Judicial Officers transferred the applicant from her duty station at Nyeri Law Courts and is expected to assume duty in a new station on 23<sup>rd</sup> November, 2020.

4. That the Applicant has been denied access to her Court since March, 2020 yet she was supposed to finalise all matters partly heard by her. That the denial of access has been unlawfully perpetrated by the 4<sup>th</sup> and 5<sup>th</sup> Respondents who have usurped the powers of the 2<sup>nd</sup> Respondent as the Applicant's employer.

5. That there are outstanding administrative and employment issues between the Applicant and the 4<sup>th</sup> and 5<sup>th</sup> Respondents which require to

be resolved before the impugned decision of the 1<sup>st</sup> Respondent takes effect. That if this is not done, it would expose the Applicant to a hostile work environment at the new station.

6. That the Applicant risks being charged with absconding duty by her employer, the 2<sup>nd</sup> Respondent if the Court does not grant the interim orders before the effective date on 23<sup>rd</sup> November, 2020.

7. That the 4<sup>th</sup> and 5<sup>th</sup> Respondents have also failed, refused and/or declined to issue the applicant with a release letter/report and to allow her to hand over her duties which is a mandatory procedure.

8. That the 1<sup>st</sup> Respondent has issued an administrative action which is incapable of being implemented as a result of the conduct of the 4<sup>th</sup> and 5<sup>th</sup> Respondents which pre-date the alleged transfer of the Applicant by the 1<sup>st</sup> Respondent.

9. Through a letter dated 9<sup>th</sup> October, 2020, and received by the Applicant on 14/10/2020, the 1<sup>st</sup> Respondent has failed to constitute a committee to review the Applicant's request for reconsideration of the purported transfer as per Judiciary Transfer Policy. That the 1<sup>st</sup> and 3<sup>rd</sup> Respondents have failed to furnish the Applicant with reasons for their decision despite the request.

10. That the conduct by the Respondents amount to unreasonable and arbitrary use of power of transfer against judicial officers. That the Respondents are jointly and severally unlawfully permitting, wastage of public resources by excluding the Applicant from work whilst she is on payroll on tax payer's costs.

11. That the process of relocating from Nyeri to a new station is expensive and extremely draining whilst the applicant is on fragile health.

12. That the application be granted and interim orders issued pending the hearing and determination of the petition.

13. The respondents filed replying affidavit sworn to by Ann A. Amadi on 18/1/2021 together with annexures attached thereto in which she deposes that the Applicant was employed by the 2<sup>nd</sup> Respondent on 16/11/2017 and granted a letter of offer dated 9/10/2017 and was posted to Nanyuki Law Courts as a Resident Magistrate.

14. That the Applicant's confirmation was deferred on the basis of the recommendation from the Office of Director of Public Prosecution, the confidential report from her Supervisor at the time and complaints raised bordering on her inability to relate well with other Court users, staff and her colleagues.

15. That whilst at Nanyuki Law Courts, several complaints were raised against the applicant by Judiciary Stakeholders, and other Court users. A report dated 1<sup>st</sup> August, 2018 was submitted by the Registrar of Magistrates' Court regarding the conduct of the Applicant.

16. According to that report, the Head of Station and the regional office of the Director of Public Prosecution had complained that the Applicant was frustrating counsel assigned to prosecute in her Court.

17. That the Applicant repeatedly threatened to jail them to an extent that all counsel feared attending the Applicant's Court. The Registrar of Magistrates' Courts wrote to the Presiding Judge – Nanyuki raising concerns about these challenges. Court assistants were reluctant to accept deployment to the Applicant's Court.

18. The Applicant was transferred to Mariakani Law Courts to defuse the simmering tension at the Nanyuki station but the applicant did not report to the station citing that she was awaiting the decision of her appeal against the transfer. The office of Ombudsman advised that the Applicant proceed on the transfer pending consideration of her Appeal.

19. The Secretariat of the 2<sup>nd</sup> Respondent also recommended disciplinary action against the Applicant which did not go to fruition since the Applicant was subsequently transferred to Nyeri Law Courts. The Applicant was involved again with run ins with her colleagues and various stakeholders including the Office of Director of Public Prosecution and the members of the Nyeri Bar Association. These complaints culminated into disciplinary proceedings which aborted when the complaints were withdrawn.

20. The respondents took drastic steps including removal of the Applicant from the cause list to inspire lost confidence at the station. Meanwhile the Applicant declined to be transferred.

21. On 16/5/2019, the Hon. Chief Justice instituted disciplinary proceedings against the Applicant based on her unbecoming and unprofessional conduct. The Applicant was suspended from discharging her official duties on 30/5/2018. The complaints against the Applicant were subsequently withdrawn.

22. Upon her return to Nyeri Law Courts, the Applicant embarked on an exchange of correspondence with the Nyeri Bar Association and the advocates vowed not to appear before her and a letter dated 18/5/2020 was written to the presiding judge on the matter by the Bar Association. Efforts by the Presiding judge to reconcile the parties failed leading to removal of the Applicant from the cause list. The Registrar of Magistrates' Courts was appraised of the matter and visited the station. The Registrar recommended that the officer be transferred because her relationship with the Court users at Nyeri could not be salvaged.

23. The respondents pray that the application be dismissed.

24. The Applicant filed supplementary affidavit joining issue with the respondents in which she denies the allegations of her misconduct set out in the replying affidavit. The applicant reiterated abuse of power by the respondents and misuse of the power to transfer contrary to the respondents' transfer policy. The applicant stated that transfer could not be used as punishment. That she was entitled to fair administrative action and her appeal to be heard before the transfer was effected. That her health situation did not permit the transfer to take place and that the pending issues at Nyeri Law Courts needed to be resolved before she could assume office at another station.

#### Determination

25. The issue for determination is whether the applicant has satisfied the threshold for grant of Conservatory Orders with regard to Public office pending the hearing and determination of the petition.

26. The office of the Resident Magistrate, is an important office in the administration of both criminal and civil justice. The conduct and/or perceived conduct of a judicial officer is central to the discharge of fair and expedient justice to all the Court users.

27. The competing facts deposed to by the Applicant and the respondents point to a grave scenario which if proved true is very detrimental to proper administration of justice and to the overall perception of the judiciary as a whole by the Court users.

28. This situation is to be weighed against the private interest of the Applicant to be or not to be transferred and to be or not to be disciplined based on the defence she has mounted against the allegations made by the respondents in the manner she has conducted herself against Court users and colleagues in the two Court stations of Nyanyuki and Nyeri from the time she was appointed in 2017.

29. As was stated by the East African Court of Justice in the case of **Mary Ariviza & Okoth Mondoh –vs- Attorney General of Kenya and Secretary General of East African Community** at the interlocutory stage, the Court

***“must of course refrain from making any determination on the merits of the Application (read Petition) or any defence of it.***

***A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the Reference (read suit)” (Emphasis mine)***

30. This being a dispute in Public law domain the prerequisite of grant of conservatory orders is guided by the decision of the Supreme Court in the case of **Gatirau Peter Munya –vs- Dickson Mwenda Githinji and 2 Others [2014] EKLK** as follows: -

“86 Conservatory Orders “bear a more decided public law connotation; for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in Public interest. Conservatory orders therefore, are not unlike interlocutory injunctions, linked to such private- party issues as **“the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success”** in the supplicant’s case for orders of stay. Conservatory orders, consequently should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values, and the proportionate magnitude and priority levels attributable to the relevant causes.”

31. In the present case, it must be borne in mind that transfer is not and ought not to be used as punishment for an errant officer. However where relationships between an officer and members of staff, and relationships between an officer with Court users are said to have deteriorated to irretrievable levels, then there is genuine cause for concern which be it not disciplinary in nature may be addressed by placing distance between affected persons and specific constituencies. A transfer may act as a stop gap measure in the circumstances of the case. This however must be determined on specific facts of the case without the employer appearing to elevate transfer of officers to a disciplinary measure. This is where the inherent merit of this matter lies upon full determination of facts on merit at the conclusion of the petition.

32. Meanwhile public interest in this matter as guided by Article 159(1) of the Constitution of Kenya, 2010 is that Judicial Authority is derived from the people and the interest of the people in administration of justice is paramount.

33. On the other hand, the values and principles of public service, bearing in mind that the Applicant is a Public Officer as guided by Article 232(1) of the Constitution include: -

***‘(a) high standard of professional ethics;***

***(b) .....***

***(c) responsive, prompt, effective, impartial and equitable provision of service;***

***(d) .....***

***(e) accountability for administrative acts;***

**and**

**Article 236 which provides A Public Officer shall not be: -**

***(a)....***

**(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”**

34. With the above Constitutional, and legal positions in mind, having considered the guidelines in Gatirau Munya case (*supra*), the Court is satisfied that in order to facilitate ordered functioning of the Courts concerned, whilst upholding the adjudicatory authority of the Court, bearing in mind the public interest in the matter and the constitutional values espoused herein above, the Court does not find this application appropriate for grant pending the hearing and determination of the petition.

35. Accordingly, the Application is dismissed in its entirety with costs in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling 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. Simiyu for the Petitioner/Applicant

M/s Saina for Respondents

Ekale – Court Assistant