



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT ELDORET

COURT NAME: ELDORET LAW COURT

CAUSE NUMBER: ELRCPET/23/2020

CITATION: EDWIN PCHUMBA LOITANGIRO AND ANTHONY PTOO LOCHAP AND 2 OTHERS VS

JUDGMENT

1. By a Petition dated 26th November, 2020 the Petitioner alleged violations of several articles of the Constitution as affects them. The Petitioners therefore sought orders among others from this Court that: -

i. A declaration that within the intendment of section 29 of the County Assembly Services Act 2017 and Article 47(1) as read together with article 236 of the Constitution the Respondents cannot denote, redeploy, interdict, transfer, suspend the County Assembly Staff from their positions without due process.

ii. A declaration that the transfer of the 2nd Petitioner Anthony Ptoo Lochap continued in a letter dated 28th July, 2020 from Director Committee Services to Director Research and Information Services is unconstitutional because of the breach of article 41, 47 and 236 of the Constitution of Kenya, 2010.

iii. A declaration that the transfer of the 3rd Petitioner John Madaa Takaramoi contained in a letter dated 28th July, 2020 from Senior Accounts Controller to the position of Internal Auditor 1 is unconstitutional because of the breach of article 41,47 and 236 of the Constitution of Kenya, 2010.

iv. A declaration that the transfer of the 4th Denis Rotich Plapan contained in a letter dated 28th July, 2020 from Director Finance and Accounts to Director Budget and Fiscal Analysis is unconstitutional because of the breach of article 41, 47 and 236 of the Constitution of Kenya, 2010.

v. A declaration that the transfer of the 3rd Petitioner John Madaa Takaramoi continued in a letter dated 23rd October, 2020 for a period of six months (180 days) on half pay without due process is unconstitutional because of the breach of article 41, 47 and 236 of the Constitution of Kenya, 2010.

vi. A declaration that the transfer of the 4th Petitioner Denis Rotich Plapan continued in a letter dated 23rd October, 2020 for a period of six months (180 days) on half pay without due process is unconstitutional because of the breach of article 41, 47 and 236 of the Constitution of Kenya, 2010.

vii. A declaration that the decision of the Respondents to illegally and irregularly transfer, denote suspend and/or interdict the Petitioners herein without the advice of the Staff Advisory Committee as provided for in section 29 of the County Assembly Services Act, 2017, is an illegal decision within the meaning of Article 47(1) and (2) of the Constitution.

viii. An order of Judicial review in the form of certiorari do issue to quash

a. The letter dated 28th July 2020 transferring the 1st Petitioner Edwin Pechumba Loitangiro from the position of Procurement Officer 1 to the position of Senior Records Manager.

b. The letter dated 28th July 2020 transferring the 2nd Petitioner Anthony Ptoo Lochap from Director Committee Services to Director Research and information Services.

c. The letter dated 28th July 2020 transferring the 3rd Petitioner John Madaa Takaramoi contained in a letter dated 28th July, 2020 from Senior Accounts Controller to the position of Internal Auditor 1.

- d. The letter dated 28th July 2020 transferring the 4th Petitioner Denis Rotich Plapan contained in a letter dated 28th July, 2020 from Director Finance and Accounts to Director Budget and Fiscal Analysis.
- e. The letter dated 23rd October, 2020 interdicting the 3rd Petitioner John Madaa Takarani for a period of six months (180 days) on half pay.
- f. The letter dated 23rd October, 2020 interdicting the 4th Petitioner Denis Rotich Plapaa for a period of six months (180 days) on half pay.
- g. The un-approved Julyu,2020 organogram which ahs neither been subjected to public participation nor reviewing by a hired a reputable human resource firm.
- h. A permanent injunction be issued restraining the Respondents from transferring denoting, interdicting, suspending, and removing from office the Petitioners and all staff of West Pokot County Assembly without due process.

2. The facts upon which the Petition was brought included among others that:

i. Sometimes in 2020 there was a procurement of insurance service providers for the County Assembly where the professional procurement process resulted in Madison Insurance Limited winning the bid. However, the County Assembly Service Board led by the Speaker preferred AAR Insurance Kenya Limited. It wanted the decision changed contrary to the procurement regulations. This did not succeed and the accounting officer (the Clerk of the County Assembly) awarded the tender to Madison Insurance Limited.

ii. As a result, the County Assembly Board began a massive purge targeting employees of the County Assembly who participated in the decision to award Madison Insurance Limited the tender.

a. The Clerk of the County Assembly was suspended without due process for a period of 90 days (later extended for another 90 days) there is suit before this Honourable Court on this issue.

b. The Deputy Clerks of the County Assembly in charge of Finance and Administration were targeted for removal and suspension, this Honourable Court has issued an order in Eldoret ELRC Petition NO. 21 of 2020, Daniel Kakosom Dapanuke and Another versus The Secretary West Pokot County Assembly and Others staying the process.

c. The County Assembly has continued the pattern of unfairly and unlawfully targeting more staff as follows: -

i. The 1st Petitioner EDWIN PCHUMBA LOITANGIRO the Procurement Officer 1 who is a qualified procurement professional in a sector that is regulated by Kenya Institute for Supplies Management under the Supplies Practitioners Management Act, 2007 has been transferred to Senior Records Manager, without due process.

d. The 2nd Petitioner, ANTHONY PTOO LOCHAP, has Been transferred from Director Committee Services To Director Research and Information Services, a Position which does not exist even in the un-approved Organogram. However, the problematic organogram which the County Assembly Services Board is using and which ahs not been approved and subjected to public participation -does not even contain the position. Further the Petitioner complains that the new position does not match his skills, knowledge and experience.

e. The 3rd Petitioner JOHN MADAA TARARAMOI has Been transferred from Senior Accounts Controller to the position of Internal Auditor 1 a position which he is not qualified for. He is a Certified Public Accountant and not a Certified Internal Auditor. The Two qualifications are professionally distinct. Further, the Petitioner has now been interdicted for a Period six months (180 days) on half salary. This is a Precipitate decision that has been done without due Process. More importantly the Petitioner has not been Heard, he just received an interdiction letter.

f. The 4th Petitioner DENIS ROTICH PLAPAN been Transferred from Director of Finance and Accounts to a position of Director, Budget and Fiscal Analysis without due process. Later on 23rd October, 2020. he was interdicted for a period of six months (180 days) on half pay. This is a major decision that should have been made after hearing the Petitioner. The Petitioner was never heard.

iii. The Petitioner aver that the entire provisions of Article 236 of the Constitution of Kenya as read with Articles 47 and 27 have been breached by the Respondents because of the precipitate decision to interdict the 3rd and 4th Petitioners for an unreasonable period of Six months (180 days) on half pay without being heard.

iv. The interdiction for a period of six months (180 days) on half pay without being heard further breaches the provisions of Fair Administrative Action, 2015

v. Moreover, the Petitioner aver that the complaint outlined in the Petition targeting staff for punishment, demotion, transfer to position they do not qualify for and thereafter interdicting their without being heard is a breach of the Petitioners right to fair labour practices guaranteed by Article 41 of the Constitution of Kenya.

vi. Section 29 of the County Assembly Service Act, 2017 requires that the decision of the County Assembly service Board on human resource matters can only be based on the recommendation of the Staff Committee. No such recommendations have been made. In

addition, the County Assembly Services Board has targeted Members of the Committee from unlawful removal from office, interdiction, transfer and suspension rendering it dysfunctional.

vii. The Petitioners are appreciably apprehensive that the interdiction will be extended for a further period of six months (180 days) on half pay – without due process therefore depriving the Petitioners of their legitimate expectation to continue in employment. Further the Petitioners are apprehensive that more employees will be targeted by the County Assembly Services Board in what is emerging as a pattern of massive abuse of power.

viii. The Respondents have been implementing decisions based on an organogram developed in July 2020 which has neither been subjected to public participation nor reviewed by a hired reputable human resource firm as required by section 24(4) of the County Assembly Services Act, 2017.

3. The respondents through one Catherine Mukenyang filed a Replying Affidavit to the Petition in which she deponed among others that:

i. THAT I am the Speaker and the Chairperson of County Assembly Service Board hence competent to swear this affidavit.

ii. THAT I have the authority of the 2nd and 3rd Respondent and 1st and 2nd Interested Party to swear the affidavit.

iii. THAT the new organizational structure is contained in the County Assembly Strategic Plan for 2019-2023 which involved public participation and was also developed by a reputable Firm of consultants (Kenya Literature Bureau) and approved and adopted by the Members of the County Assembly as evidence in the Internal Memo dated 21st November 2018, 22nd March 2019. Delivery Order Dated 17th August, 2020, Local Service Order dated 22nd January 2020 and Invoice dated 24th July 2020.

iv. THAT the new organizational structure stabilized new offices in accordance with Article 23(1) of the Constitution, Section 12 of the County Governments Act No.17 of 2012, Section 24 Of the County Assembly Service Act No. 24 of 2017.

vi. THAT on 27th July, 2020 the 3rd Respondent resolved to Transfer the Petitioners to other departments due to the Reviewed structure and approved organogram pursuant to Section 24 of the County Assembly Service Act which aimed at enhancing service delivery and optimizing performance.

vii. THAT the 1st, 2nd, 3rd and 4th Petitioners were moved to hold positions of Senior Records Manager, Director Research and Information Services, Internal Auditor 1, and Director Budget and Fiscal Analysis respectively.

viii. THAT the 3rd Respondent made the said decision on advice of the Staff Advisory Committee and in accordance with the County Human Resource Manual. The decision to transfer the petitioners was communicated to them through letters dated 28th July, 2020 and the petitioners do not confess the transfer but assured their new positions and roles as evidenced by their pay slips and other bundle of documents signed by the petitioners as holder of their respective new offices.

ix. THAT according to the letters addressed to the Petitioners re-designation was a lateral movement and their salaries, allowances and any other benefits were per their earlier appointment.

x. THAT subsequently the 1st and 2nd Interested Parties were appointed as the Director Committee Services and Director Finance and Accounts respectively and to date, they have been discharging their duties diligently.

xi. THAT the petitioners willingly assured their new position therefore they are estopped from alleging that the transfer was done without any undue process. In any event the transfer did not affect the terms and conditions of their previous appointments to the County Assembly Service.

xii. THAT the transfer of the petitioners was done in accordance with the County Human Resource Manual and Section 29 of the County Assembly Services Act which gives the 3rd Respondent powers to transfer of employees on advice of the Staff Advisory Committee.

xiii. THAT the reasons for the transfer is well explained in the letters dated 28th July 2020. The allegations that the petitioners were transferred to victimize them for having performed their function of office are not true, they are unfounded and not supported by evidence.

xiv. THAT in response to the allegations that the 2nd Petitioner was transferred to a non-existing position, I wish to state that Article 235(1) of the Constitution, Section 12 of the County Government Act No. 17 of 2012 and Section 24 of the County Assembly Services Act No 24 of 2017 empowers the 3rd Respondent to create such offices as it considers or expedient for the efficient delivery of the services.

xv. THAT in response to the issue of interdiction of the 3rd and 4th Petitioners, I wish to state that section 27 of the County Assembly Service Act, 2017 entitles the 3rd Respondent to undertake such steps of disciplinary control over the officers of the Service. The 3rd and 4th Petitioners were interdicted on advice of the Staff Advisory Committee for reasons given in the interdiction letter dated 23rd October, 2020.

xvi. THAT the interdiction was done in accordance with the County Human Resource Manual and Section 27 and 29 of the County

Assembly Services Act. The interdiction of 180 days is reasonable medical Insurance cover.

4. In the submission in support of the Petitioner, Mr. Munyao for the Petitioner submitted that redesignation of the petitioners alluded to by Ms Catherine Mukenyang in her replying affidavit was suspicious coming immediately after Madison Insurance winning the bid. Secondly the redesignation and interdiction seemed to target County employees involved in the tender process.

5. Counsel further submitted that section 69 of the County Assembly Services Act provided that an officer redesignated should possess the requisite skills needed for the office or position that they are being redesignated to.

6. Mr. Munyao further submitted that despite the averments in the replying affidavit of Catherine Mukenyang that the new organizational structure was in accordance with article 23(1) of the Constitution and section 12 of the County Government Act among others, the Petitioners were never afforded any opportunity as to why they were being redesignated and were never given a chance to accept or decline the transfers as required by Section 69(2d) of the County Government Act. In support of this position, Counsel relied on the case of Benardic Mtoto Mwambili V County Public Service Board Taita Taveta County (2018) eKLR in which Makau J stated that under section 10(5) and 41 of the Employment Act as well as article 47 of the Constitution before taking any action to the detriment of an employee, the employer must accord the employee a prior fair hearing.

7. Counsel further submitted that good governance can only be achieved when the persons who are qualified to perform the tasks for which they are appointed to perform, do those tasks in good faith. Therefore, the respondent's action to demote, interdict, redeploy and redesignate the petitioners without written reasons or due process breached the provisions of article 41,47,50, 232 and 236 of the Constitution.

8. Regarding whether deployment amounted to demotion, Counsel submitted that the deployment amounted to demotion because first of all, they did not meet the requirements of section 69 of the County Government Act more so because some of the petitioners like the 3rd Petitioner were deployed to departments they were not qualified for.

9. According to Counsel, whether or not there was a reduction in salary, the redesignation and or transfer amounted to demotion since there was no point in deploying the petitioners to positions, they were not skilled for.

10. Regarding public participation and the organogram, counsel submitted that the structure was not reviewed by a Human Resource firm as required by section 24(4) of the County Assembly Services Act.

11. According to Counsel, the Kenya Literature Bureau which the respondent alleged, was not a reputable human resource firm, KLB was a publishing house and a state corporation founded in 1947 to provide high quality educational publication and priority services. Further KLB was tasked by the respondent to design, layout and print the respondent's strategic plan for 2019-2023, County newsletters and County brochures. Consequently, the respondent did not place any evidence before the Court to show that indeed a reputable firm was consulted to advise on the effectiveness and the efficiency of reviewing the organizational structure.

12. Mr. Munyao further submitted that the said organizational structure was generated without consulting relevant stakeholders and or public participation as required under article 10 of the

13. In conclusion Counsel submitted that the Petitioners had established that due procedure was not followed by the respondents and that their actions offended the rule of law and principles of natural justice hence the petition ought to be allowed with costs.

14. Ms Jeruto for the 1st, 3rd Respondents and then Interested Party submitted that the redeployment and or redesignation of the Petitioners was lawful. According to Counsel, the respondent had power under article 235 of the Constitution to redeploy and redesignate employees.

15. In the discharge of this function the County Government operates through various organs including County Assembly Public Service Board.

16. It was on the above provision that the 3rd respondent reviewed the County Assembly operations, conducted performance analysis and having identified an effective service delivery through the new organizational structure, redeployed the petitioners in the manner it did. Ms Jeruto relied on the decision of this Court in Daniel Kakosom Dapamuke and Another -v- The Secretary, County Assembly Board West Pokot and 2 others Pet 21 of 2021 in which the Court held that article 235(1) of the Constitution confers on the County Government powers among others to establish and abolish offices in its public service and that the power had been cascaded to section 24 of the County Assembly Service Act and empowers the County Public Service Board to establish such offices in the service as it considers necessary or expedient for efficient performance of the functions of the service

17. Ms Jeruto further submitted that in the exercise of this power to redesignate, there was no strict requirement in law that officers be given a fair hearing or trial as this would only apply if the affected officers were being disciplined. To this extent, formal communication on restructuring and redeployment such as was done in this case was sufficient. The petitioner received formal letters and assumed duties in their respective positions following their redeployment which resulted from a review of the County Assembly Organogram.

18. According to Counsel, the redeployment of the petitioners was not a disciplinary process that would otherwise warrant the invocation of fair administrative action processes under article 47 and 50 among others of the Constitution and the Fair Administrative Action Act. There was no requirement for obtaining of consent or representation of the petitioners on their perception of the redeployment before it was done. On this point Counsel relied on the case of Daniel Namenya Naburi and 9 Others V County Assembly Service Board, Busia County and Another (2019) eKLR in which the court held that there was no need for the Board to seek consent of the petitioners since it was a policy decision being implemented.

19. On the issue of being targeted Counsel submitted that no evidence was tendered to support this claim. According to Counsel, the redesignation of the Petitioners had nothing to do with their alleged conduct/omission in the procurement process leading to the award of a tender to Madison Insurance.
20. On the issue whether the deployment amounted to demotion counsel submitted that this was not the case since none of the petitioners lost their status or rank and their salary remained the same. The petitioners provided no evidence to support the allegation that the deployment was a demotion. In their failed attempt to show they were demoted the petitioners only focused on the 3rd petitioners while remaining silent on the other three.
21. On the issue whether the organizational structure was created pursuant to section 24(4) of the pursuant to section 24 of the County Assembly Services Act and was contained in the County Assembly strategic Plan for 2019-2023 which was prepared after public participation. The structure was developed by a reputable firm of consultants KLB and further approved and adopted by the members of the County Assembly. The generation of the organizational structure was preceded by a robust public participation process. The claim by the petitioners that there was no public participation was therefore unfounded.
22. Ms Jeruto further submitted that the petitioners were estopped from claiming that their redeployment was unfair and illegal. According to Counsel, section 9(2) of the Fair Administrative Action Act requires an aggrieved party to exhaust internal mechanism before going to Court. The petitioners never raised complaints before the respondents regarding their redeployment. They accepted their new positions and continued to discharge their duties in those new positions. They collected their redesignation letters, signed official documents and continued earning salary. No formal or informal protest was registered by the petitioners following their redeployment. In support of the submissions Counsel relied on the case of Daniel Kakosom Depamauke and Another -v- The Secretary County Assembly Service Board, West Pokot and Another Pet 21 of 2021 where the Court upheld the defence of estoppel by conduct.
23. In conclusion Counsel submitted that the petitioners had not laid basis for the grant of the orders sought.
24. This is a constitutional petition and it is now settled that for a party to succeed in obtaining a declaration over violation of constitutional rights or fundamental freedoms he or she must clearly pick out which article of the constitution has been violated or threatened with violation. They must further demonstrate in what way or manner the violation has occurred or would occur.
25. The petitioners herein allege that their transfer and or redeployment was as a result of their participation in a procurement process sometimes and 2020 which resulted in awarding insurance services to Madison Insurance Limited instead of AAR Insurance which according to them was preferred by County Assembly Board led by the Speaker. This allegation was refuted by the respondent who stated that the petitioners were redesignated after restructuring of the respondent's organogram.
26. The petitioners further attacked the validity of the organogram stating that the same was not done by a professional consultant and further that the same was not subjected to public participation. The respondent as well, refuted these allegations stating that KLB which came up with the organogram was a professional body and further that the same was contained in the respondent's strategic plan for 2019-2023 which underwent public participation and discussion by stakeholders. The respondent further stated that the petitioners accepted the redesignation by collecting their letters and performing the new roles assigned to them and continued to earn salaries. Further the redesignation was horizontal and yielded no loss of salary or benefits.
27. The Court has reviewed in detail the petition and the affidavit and documents in support and has not come across any credible facts or material connecting the redesignation of the petitioners to their participation in the procurement process which they claim led to them being targeted.
28. As correctly pointed by Counsel for the respondents, article 235 of the Constitution read together with section 12(7) of the County Government Act empowers the County Assembly to establish and abolish offices in its public service and provide services and facilities to ensure the efficient and effective functioning of the County Assembly. This is an administrative and policy function and not a disciplinary function that requires the rigours of a fair administrative procedure.
29. The petitioners did not refute the depositions by Ms. Catherine Mukenyang that they accepted their redesignation, discharged their new roles and earned salaries. They only questioned their redesignation when they were interdicted for reasons totally unrelated to their redesignation.
30. As this Court observed in the case of Daniel Kakosom Dapamuke and Another vs The Secretary, County Assembly Board, West Pokot & Another, it is settled principle of equity that if parties enter into a binding legal relationship and afterwards by their own act or conduct consent or acquiesce to something or situation which has effect of leading one of the parties to suppose that strict rights under the binding legal relationship will not be enforced or kept in obedience, it would be inequitable to renege and seek to enforce strictly the terms of the legally binding relationship.
31. The petitioners as observed earlier did not table any credible fact or material before me to support their claim that their redesignation was malicious and amounted to a demotion. They further did not produce any credible fact or material before the Court to show that they contested or protested their redesignation. They are therefore estopped from questioning the same through this petition.
32. For a constitutional petition to succeed the petitioner must pick out the relevant provisions of the Constitution violated or threatened with violation and demonstrate precisely in what manner they have been violated or threatened with violation, It is not enough to pluck out articles of the Constitution and allege they have been violated without presenting facts to demonstrate in what manner they have been violated.
33. In conclusion the Court finds the present petition without merit and hereby orders the same dismissed with costs.

34. It is so ordered.

DATED AT ELDORET THIS 1ST DAY OF OCTOBER, 2021

DELIVERED AT ELDORET THIS 1ST DAY OF OCTOBER, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

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