



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

PETITION NO. E009 OF 2021

IN THE MATTER OF ARTICLES 10,27,28, 29(D), 41, 50, 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 29(D), 41 AND 50 OF TE COPNSTITUTION OF KENYA

AND

AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2021(ACT NUMBNER 17 OF 2012)

AND

IN THE MATTER OF ILLEGAL STOPPAGE OF SALARY FOR THE PETITIONER

BETWEEN

WILSON MUNGAI.....PETITIONER

VERSUS

THE COUNTY SECRETARY, COUNTY GOVERNMENT OF NAKURU.....1ST RESPONDENT

COUNRT GOVERNMENT OF NAKURU.....2ND RESPONDENT

NAKURU COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

JUDGEMENT

1. The Petitioner is the director of Finance management of the 2nd Respondent having been employed vide an appointment letter dated 27th June, 2014 having gone through a rigorous recruitment exercise.
2. The Petitioner avers that on 28th August, 2017, the Governor of the 2nd Respondent through a press briefing send all sub county and ward administrator together with a number of directors on compulsory leave with immediate effect without giving reason for the said decision. The petitioner was among the directors who was send home on compulsory leave however that his salary was stopped.
3. On 22nd September, 2017, while the Petitioner was still serving his compulsory leave he received letter reference no.199990019513 transferring him to ICT department to serve on the same capacity. However, that in ICT department there was no position of Director of Finance and the same only existed in the office of the County treasury.
4. The petitioner asserts that the move by the Respondent to send him on compulsory leave then stop his salary without subjecting him to any disciplinary process violated his rights to fair administrative action and freedom from discrimination as envisaged under the constitution of Kenya.

5. He maintains that that his rights under Article 27 and 28 have also been violated when the Respondent stopped his salary and then re-deployed him to a department where his expertise is not needed thus subjecting the petitioner to unreasonable working conditions.

6. Articles 41, 47 and 50 of the Constitution as to fair labour practices, fair administrative Action and fair hearing were not adhered to since the Respondent failed to subject the claimant to any hearing before sending him on compulsory leave and stopping his salary.

7. The Petitioner therefore prays for judgement against the Respondents for Orders that; -

a) THAT a declaration be issued to declare the decision made by the Respondents to send the petitioner on compulsory leave vide a letter Ret No. 19990019513/2 dated 28th August, 2017 and stopping his salary is unconstitutional and therefore unlawful on account of Violation of his fundamental rights guaranteed by the Constitution of Kenya.

b) THAT a declaration be issued to declare the decision made by the Respondents to stop the petitioner's salary is unprocedural, irregular, unlawful actuated by malice and hence unconstitutional and therefore unlawful on account of violation of their fundamental rights guaranteed by the Constitution of Kenya.

c) THAT an order of Certiorari be issued to bring into this Honourable Court for purposes of being quashed the decision made by the Respondent to stop the petitioner's salary.

d) THAT a declaration be issued to declare that petitioner remain as the lawful holders of the positions of Director of Finance Management in the department of the County treasury in the County government of Nakuru, the 2nd Respondent herein.

e) That the Honourable Court be pleased to Order for compensation and General damages to issue for violation of the Petitioners rights and an inquiry into quantum be undertaken.

f) That the petitioner be paid costs.

8. The Respondent opposed the Petition by filing a replying Affidavit deposed upon on the 30th June, 2021 by **Philip Rono**, the acting director of the 2nd Respondent' Human Resource department.

9. It is contended that the Petitioner was deployed to the ICT and E-Government Department however he failed to report.

10. It is stated that the Petitioner was send on compulsory leave commencing on 9th October, 2017 till 2nd April, 2018 in order for the Respondents to carry out investigation on the petitioner conduct.

11. When his compulsory leave lapsed the petitioner did not report back to work till 6th August, 2018 when the Respondent were forced to issue him with a show cause letter for being absent from work without permission, which he never responded to leading to the stoppage of his salary. That when the Petitioner's salary was stopped he responded to the show cause letter on the 12th March, 2021 and therefore his salary was reinstated pursuant to this Court Orders issued on 23rd March, 2021.

12. The Respondent then stated that the Petitioner has not yet reported to work, neither has he been allocated any duties by his superiors and that the stoppage of salary was to elicit some reaction from him and make him attend work.

13. It is contended that the petition herein has been filled prematurely and the same ought to be dismissed.

14. The Petition was canvassed by written submission with the petitioner's filing submissions on the 4th October, 2021, while the Respondent filed theirs on the 18th October, 2021.

Petitioner's Submissions

15. The gist of the Petitioner submissions is that the he was employed as a Director of Finance with expertise on finance and that his transfer to ICT department was a move made by the Respondent to destabilize him as his services were of no use to the said department. He then argued that, the respondent as the employer is tasked with the duty of allocating him duties and his transfer to ICT without any duties allocated to him or space to work from crippled him therefore the Respondent cannot blame him for not working when the Respondent ought to allocate him duties in line with his expertise and skills.

16. The Petitioner then submitted that the stoppage of his salary was in violation of his rights and the fact that he was transferred to a department he lacks expertise in with no office space was in violation of his right to fair labour practices.

Respondents Submissions.

17. The Respondent on the other hand submitted that they followed procedure in issuing the Petitioner with a show cause letter since the petitioner after completing his compulsory leave continued staying away from work for another 6 months without permission. It was argued that the Petitioner ought to have reviewed the Respondent decision of stopping his salary in accordance with sections K.10 and K11 of the Human Resource Policies and Procedures Manual for Public Service of 2016 and instead filed this petition without exhausting all internal dispute resolution mechanisms as envisioned under section 9(3) of the Fair Administrative Actions Act as read together with Article 159 (2)

(c) of the Constitution, as such the Petition herein has been filed pre-maturely.

18. The Respondent then reinforced their argument on the doctrine of exhaustion by citing the case of **Speaker of the National Assembly V James Njenga Karume [1992] eklr** and the case of **umoja Innercore Tena Matatu Sacco society Limited and another V Commissioner for Cooperative Development & 25 others[2017] eklr**.

19. The respondent then submitted that the Petitioner's action and response toward is job is wanting having been absent from employment from 2nd April, 2018 to date without any permission or excuse thereof. It was argued that the Petitioner authored his own misfortune and the Respondent should not be held responsible for it.

20. The Respondent wants the Petition herein dismissed with costs.

21. I have examined the averments of the parties herein. It is true on 22/9/2017, the petitioner herein was transferred to ICT Department in the same capacity.

22. It appears that the petitioner served in ICT Department where he had been transferred until February 2021 when his salary was stopped.

23. The respondent aver that on 9th October 2017, the petitioner was sent on compulsory leave and was to report back on duty on 2/4/2018.

24. That upon lapse of the leave, the petitioner didn't report back to work. He was subsequently issued with a show cause letter to which he responded vide a letter of 12th March 2021 querying stoppage of salary. That his salary was then reinstated pursuant to a court order of 23/3/2021.

25. The respondent aver that to date the petitioner has not reported back to work and his whereabouts are unknown.

26. The respondent exhibited their APP PR2 showing that the petitioner was initially sent on compulsory leave vide a letter of 28/8/2017.

27. Then on 6/10/2017 he was also sent on another 120 day leave with effect from 9/10/2017 which was his leave pending since 2013.

28. According to the respondent's letter of 6/8/2018 the 120 leave was to end on 2/4/2018. In the same letter, the respondents indicated that the whereabouts of the petitioner were unknown.

29. It is not therefore clear how they served him with the said letter. On 27/1/2021 they now served him with another letter indicating they were now proceeding to stop his salary.

30. From the chronology of the facts of this petition, there seems to be something amiss which has not been brought to this court's attention.

31. The respondents aver that the petitioner is not in office and his whereabouts are not known.

32. The petitioner on the other hand aver that he has no place to work from as he was transferred to a department that does not need his services and he has no work to perform.

33. These administrative issues cannot be solved by this court without goodwill on the part of the parties.

34. I will therefore direct that the parties resolve the standoff amicably before further direction of this court.

DATED AND DELIVERED IN OPEN COURT THIS 30TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Gakinya for Petitioner – present

Kinuthia for Respondent – present

Court Assistant – Fred