



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC JUDICIAL REVIEW APPLICATION NO. E017 OF 2021

IN THE MATTER OF ORDER 53, RULE 1, OF THE CIVIL PROCEDURE ACT

AND

IN THE MATTER OF COUNTY GOVERNMENTS ACT, NO. 4 OF 2017 ARTICLES 10, 22,23,41,73,232

AND

IN THE MATTER FOR AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF

PROHIBITION, CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF SECTION 5, 10(5) AND 13 OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 7 AND 8 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015

REPUBLIC.....APPLICANT

VERSUS

COUNTY ASSEMBLY OF KIAMBU SERVICE BOARD.....1ST RESPONDENT

SPEAKER COUNTY ASSEMBLY OF KIAMB.....2ND RESPONDENT

CLERK, COUNTY ASSEMBLY OF KIAMBU.....3RD RESPONDENT

AND

JAMES MBUGUA KAMAU.....EX-PARTE APPLICANT

KIAMBU COUNTY PUBLIC SERVICE BOARD.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF KIAMBU.....2ND INTERESTED PARTY

JUDGMENT

1. The Exparte Applicant filed the Notice of Motion application dated 2nd July, 2021 on the even date praying for orders:-

(a) An order of Certiorari do issue to quash the unilateral decision/resolution of the Respondents to permanently transfer the Ex-parte Applicant from the Kiambu County Assembly to the 2nd interested party as his services are no longer needed by the 2nd interested party and from removing him from the Kiambu County Assembly payroll and further withholding his salary and other accrued benefits.

(b) An order of Mandamus do issue compelling the Respondents herein to facilitate the Ex-parte Applicant to resume his duties as the duly appointed Director of Procurement with full pay and without loss of any benefits and seniority, responsibilities or physical office space occupied prior to the forced secondment.

(c) An order of Prohibition do issue directed against the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from permanently transferring and/or seconding the Ex-parte Applicant to the 2nd respondent without his consent and in compliance with the due procedure and the applicable provisions of the law especially the Constitution, Fair Administrative Action Act, 2015, the Public Service Commission Act, 2017, the County Assembly Services Act, 2017 and the Public Service guidelines on Norms and Practices.

(d) An order of prohibition do issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the advertising, interviewing, recruiting, employing, confirming in employment anyone else or replacing the Ex-parte Applicant as the Director of procurement, Kiambu County Assembly.

E. An order of prohibition do issue restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever or otherwise from frustrating and/or taking any action against the Ex-parte Applicant including re-designation, deployment, secondment or any action that affects the ex-parte Applicant contract of employment and his labour rights contrary to the relevant law and following the due process.

F. A declaration that the unilateral resolution, decision and general conduct of the Respondent and in particular the purported permanent transfer of the ex-parte applicant from the Kiambu County Assembly to 2nd interested party without giving him an opportunity to be heard, is unreasonable and in breach of procedure, ultra vires, unlawful, wednesbury unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice and void ab initio.

G. A declaration that the ex-parte applicant's fundamental freedoms and labour rights have been violated.

H. Compensation to the applicant for the violation of his labour rights, fundamental rights and freedoms.

I. That any other and further relief that this Honourable Court may deem fit and just to grant in the circumstances.

2. The application is premised on grounds set out on the face of the application which may be summarized that the Ex-parte Applicant was employed by the Kiambu County Assembly as the Director of Procurement.

3. That the applicant served the Assembly diligently until the 11th April, 2018 when the respondents involuntarily and without seeking his consent seconded him to the interested parties for a period of three (3) years as a Director – Department of Finance, Economic Planning and ICT under procurement section.

4. Upon the expiry of the secondment period the interested parties released the ex-parte applicant back to the Kiambu County Assembly and his payroll data was transferred back to the County Assembly.

5. That the Applicant reported to the Clerk County Assembly, the 3rd respondent on 10th May, 2021 for the purposes of resuming duties but the respondents wrote a letter dated 7th May, 2021 to the Exparte Applicant stating that the 209th sitting of the 1st respondent and 1st interested party had resolved to permanently transfer the Exparte Applicant to the 2nd interested party which fact the Exparte Applicant disputes in that the 1st interested party wrote a memo dated 19th April, 2021 to the 2nd interested party disowning the alleged resolution by 209th sitting between the 1st interested party and 1st respondent. That the 2nd interested party had officially released the Ex-parte Applicant to the 3rd respondent and that the interested parties had transferred the Exparte Applicant's payroll to the 2nd respondent.

6. That the purported transfer is untenable, unlawful and unfair as the interested parties duly advised the respondents.

7. That the Applicant wrote to the respondents a letter dated 10th May, 2021 setting the record straight but the respondents never took any action to facilitate the applicant to resume office and duties but have obstructed him to access his office and to resume duties.

8. The 3rd respondent reiterated its stand in a letter dated 17th May, 2021 received by the applicant on 19th May, 2021 that it had permanently transferred the applicant to the Executive arm of Kiambu County Government.

9. The respondents have placed an advert on the Daily Nation Newspaper dated Friday, 25th June, 2021 advertising the job vacancy for the post of Director of Procurement and calling for candidates to apply on or before 16th July, 2021.

10. The applicant pray that the action by the respondents be enjoined so as not to render the application nugatory. That the applicant did

not receive his salary for May, 2021 despite all assembly employees having been paid.

11. The applicant was informed upon inquiry from the Human Resource Department that he has no payslip.
12. The applicant was unable to file tax-returns by 30th June, 2021 and risks being penalized for the default caused by the respondents.
13. The applicant states that the purported transfer of the applicant was arbitrary, irrational, unreasonable, and unlawful, since the applicant was a permanent and pensionable employee of the Assembly.
14. That the applicant and his family are suffering deprivation of a source of income due to the unlawful conduct by the respondents and prays to be awarded as prayed.
15. The 1st and 2nd interested parties filed replying affidavit to the Exparte application sworn to by the County Solicitor **Daniel Kiraithe**, in which he confirms that the Exparte applicant was appointed on permanent and pensionable terms by the County Assembly of Kiambu. That the 1st respondent initiated the secondment of the Exparte Applicant without the request or prompting by the 1st and 2nd interested parties and only requested the 1st interested party to absorb the Exparte applicant vide the letter attached to the Exparte application and the interested parties absorbed the Exparte applicant on secondment terms for a period of 3 years which is non-renewable in accordance with the law.
16. That the Exparte Applicant automatically reverted to his old position upon expiry of the term of secondment.
17. That the interested parties were never involved in the decision to have the applicant seconded in the first place but only received a request subsequently.
18. That the respondents are responsible to pay the salary of the applicant since expiry of the secondment.
19. The interested parties deny that there was any joint resolution by the 1st interested party and the 1st respondent to transfer the Exparte Applicant permanently to the County Executive and the 1st interested party prepared an advisory addressed to the County Secretary and copied and delivered to the respondents to that effect. That the Exparte Applicant's permanent transfer is not tenable in law since it would amount to varying the terms and condition of his employment.
20. That the interested parties have not violated any rights of the Exparte Applicant and no adverse orders should issue against them.
21. The 1st 2nd and 3rd respondents filed a replying affidavit sworn to by the Secretary of the 1st respondent **Mr. Simon Kimani Rugu** on 3rd August, 2021. He deposes that the application has been brought prematurely in violation of Section 9(2) of the Fair Administration Action Act which provides:-

“(2) The High Court or a subordinate Court under subsection (1) shall not review an administrative action or decision under this Act, unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section 11.
22. That the applicant accepted to be seconded to the 1st interested party and the decision was not unilateral. That the 1st interested party through the County Secretary acknowledged the secondment vide a letter dated 5th April, 2018 and the Exparte Applicant signed the letter in acceptance of the secondment. That the secondment was in terms of Section 25 of the County Assembly Service Act No. 24 of 2017 and the secondment complied with the provisions of Section 73 of the County Governments Act which empower the 1st Respondent to *inter alia* hire, transfer, and redeploy and second an employee.
23. That the secondment was in the interest of the 1st respondent, the Exparte Applicant and the 1st interested party owing to the fact that the 1st respondent had identified a technical and operational gap that needed to be filled.
24. That the Exparte Applicant did not object to the secondment at all and his current complaint is an afterthought.
25. That the Exparte Applicant retained his terms and conditions of service and was assured of career progression with the 1st interested party.
26. That the respondents have not disabled the payment system with regard to the applicant. That orders sought if granted will curtail and interfere with the respondents statutory duties.
27. That the application lacks merit and it be dismissed with costs.
28. In addition the respondent filed a notice of Preliminary Objection and Grounds of Opposition both dated 9th July, 2021 to wit, Section 77 of the County Government's Act, 2012 as read with Sections 85, 86, and 87 of the Public Service Commission Act ousts and/or adjourns the jurisdiction of the Court to handle this matter as the same is the preserve of the Public Service Commission.

29. Section 77 of the County Government Act, 2012 provides:-

“77 (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public officer may appeal to the Public Service Commission (in this part referred to as the Commission”) against the decision.”

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a County Government including a decision in respect of.....”

30. The respondent submits that an appeal ought to have been instituted under Section 77(2) to the Public Service Commission before filing this application.

31. That Article 234 of the Constitution of Kenya, 2010 provides for the functions and powers of the Public Service Commission to include to hear and determine appeals in respect of County Governments Public Service.

32. That County Governments Public Service consists of both the County Public Service and the County Assembly Service pursuant to the provisions of Article 176(1) of the Constitution of Kenya, 2010 which defines County Government to comprise of a County Assembly and County Executive.

33. That Section 85 and 86 of the Public Service Commission Act, provides as follows:-

“85. The Commission shall, in order to discharge its mandate under Article 234(2) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government including a decision in respect of:-

(a) Recruitment, selection, appointment and qualification attached to any office;

(b) Remuneration and terms and conditions of service;

(c) Disciplinary control.

(d) National values and principles of governance under Article 10 and values and Principles of Public Service under Article 232 of the Constitution.

(e) Retirement and other forms of removal from the Public Service

(f) Pension benefits, gratuity and other terminal benefits;

(g) Any other decision the Commission considers to fall within its Constitutional competence to hear and determine an appeal in that regard.

86(1) Any person who is dissatisfied or affected by a decision made by any authority or a person in respect of a County Government public service may appeal to the Commission against the decision.” (emphasis mine)

34. That from the foregoing, the decision by the County Assembly to transfer the service of the Exparte Applicant to the County Executive is a matter within the jurisdiction of the Public Service Commission and Section 87(2) of the Public Service Commission Act expressly puts the jurisdiction of this Court in the following terms:-

“87(2) A person shall not file any proceedings in any Court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from County Government Public Service unless the procedure provided for under this part has been exhausted.”

35. That the provision is couched in mandatory terms and this Court lacks jurisdiction to entertain the matter.

36. The Court was referred to the Supreme Court decision in Samuel **Kamau Macharia –vs- Kenya Commercial Bank and 2 Others (2012) eKLR** where the Court held:-

“A Court’s jurisdiction flows from either the Constitution or Legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to preclude the jurisdiction of such a Court or tribunal by statute law.”

37. The Court was also referred to the case of **Owners of Motor Vehicle, Lilian S. –vs- Caltex Oil (Kenya) Limited (1989) eKLR** in

which it was held that an issue of jurisdiction should be raised and determined in the first instance and that if a Court finds that it has no jurisdiction, it must down its tools immediately and move no further.

38. In **Republic –vs- Benjamin Jomo Washiali, Majority Chief Whip, National Assembly and 4 Others Exparte Alfred Kiptoo and 3 Others (2018) eKLR**, the Court quoted with approval the case of **East African Railways Corporation –vs- Antony Setu (1973) E.A. 327** where it was held:-

“It is a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Supreme Courts, in the absence of clear and unambiguous language to that effect.”

39. It was submitted that the provisions of Section 87(2) of Public Service Commission Act are clear and unambiguous in ousting the jurisdiction of the Court in this matter.

40. The Court was also referred to the Court of Appeal decision in the case of **Speaker of the National Assembly –vs- James Ng’ang’a Karume (1992) EKLR** where the Court held:-

In our view, there is considerable merit in the submissions 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.”

41. In the case of **Mason Services Limited –vs- Parklands Baptist Church Registered Trustees and Another (2018) eKLR**, Justice Eboso observed:-

One of the key highlights of the Act (Fair Administrative Action Act) is that it has changed the character and scope of judicial review. Secondly, it confers clear and mandatory framework on how judicial review proceedings are to be brought. In my view, the rationale behind the requirement that the internal review and appeal mechanisms be exhausted before judicial review proceedings are commenced is the need to ensure orderly functioning of agencies engaged in administrative and quasi-judicial process. Secondly, there is need to avoid judicial review proceedings which unnecessarily disrupt administrative and quasi-judicial process be finalized before they are subjected to judicial review.

42. On the facts of this case, which are explicit from the pleadings and appear not to be in dispute is that the Exparte Applicant worked for the County Assembly of Kiambu as Director of Procurement. The Exparte Applicant was seconded to the Executive government of Kiambu County for a period of three years by the County Assembly. The Exparte Applicant served the full term of secondment of three (3) years and the Executive Government released the Exparte Applicant back to the Assembly where he was employed as Director of Procurement on Permanent and Pensionable terms. The dispute arose out of a squabble between the County Assembly and the County Executive on whether or not the Exparte Applicant should go back to the Assembly to continue with his permanent job, the Assembly alleging that the Assembly and County Executive had agreed that the Exparte Applicant should be transferred permanently to the County Executive and not return to the County Assembly.

43. Meanwhile, the Exparte Applicant has been removed from the payroll of both the County Executive and the County Assembly and is kept in limbo and without a salary since May, 2021 and has suffered tremendous hardship and suffering due to his inability to pay for his livelihood and that of his children. In addition, the County Assembly has taken steps to recruit a replacement of the Exparte Applicant by advertising for the filling up of the position of Director Procurement in the County Assembly.

44. The County Public Service Board and the County Assembly Public Service Board have not made a decision to resolve this matter which has left the applicant in no man’s land. It is the Court’s considered view that this is a matter that requires urgent relief which is not envisaged under Section 77(1) and (2) of the County Government Act, nor is it feasible under the provisions of Section 85 and 86 of the Public Service Commission Act.

45. If immediate remedy is not granted to injunct the respondents from replacing the Exparte Applicant with a new recruit, whilst the status of the Exparte Applicant remains unknown, the Exparte Applicant is likely to suffer irreparable damage and his right to a fair, just and expeditious administrative action shall be defeated if he were to follow internal administrative and/or quasi-judicial mechanism from agencies that have no mandate to provide temporary or final injunctive relief sought in this Exparte application.

46. For these reasons, the Court finds that there is in the circumstances of this case, no disciplinary and/or administrative decision made by either the County Executive to warrant the Exparte Applicant to be bound by the internal mechanism under Sections 77 of the County Government Act read with Sections 85 and 86 of the Public Service Commission Act.

47. Therefore, the provision of Section 87(2) of the Public Service Commission Act, does not oust the jurisdiction of this Court to hear and determine this matter.

48. On the merits of the case, the Court shall not regurgitate facts already set out herein before. The Court finds that the squabbling between the County Assembly and County Executive which has resulted in non-allocation of office and duties to the Exparte Applicant and non-payment of his remuneration has resulted in a gross violation of the Exparte Applicant’s right to fair Administrative Action guaranteed under Article 47 of the Constitution of Kenya, 2010 and under the Fair Administrative Act.

49. The indecisiveness of the County Assembly and the County Executive has subjected the Exparte Applicant to unfair Labour Practice in violation of his right under Article 41 of the Constitution.

50. Furthermore, the action by the County Assembly not to provide office duties and salary to the Exparte Applicant is oppressive,

arbitrary, irrational and unreasonable and is amenable to judicial review considering the circumstances of the case.

51. Furthermore, the Exparte Applicant has been subjected to these hardships without any hearing and or any due process and the respondents have violated the rules of natural justice, by condemning the Exparte Applicant unheard at all.

52. In Civil Appeal No. 138 of 1997, Pashito Holdings Ltd. and Another –vs- Paul Nderitu Ndung’u and Others the Court of Appeal expressed itself as follows:-

“An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared to be no decision.... The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under duty to act judicially.”

53. In the final analysis, the Court finds the application has merit and is allowed. The Court grants the Exparte Applicant the following orders against the respondents jointly and severally:-

1.

(a) An order of Certiorari is issued to quash the unilateral decision/resolution of the Respondents to permanently transfer the Ex-parte Applicant from the Kiambu County Assembly to the 2nd interested party as his services are no longer needed by the 2nd interested party and from removing him from the Kiambu County Assembly payroll and further withholding his salary and other accrued benefits.

(b) An order of Mandamus is issued compelling the Respondents herein to facilitate the Ex-parte Applicant to resume his duties as the duly appointed Director of Procurement with full pay and without loss of any benefits and seniority, responsibilities or physical office space occupied prior to the forced secondment.

(c) An order of Prohibition is issued directed against the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from permanently transferring and/or seconding the Ex-parte Applicant to the 2nd Interested Party without his consent and in compliance with the due procedure and the applicable provisions of the law especially the Constitution, Fair Administrative Action Act, 2015, the Public Service Commission Act, 2017, the County Assembly Services Act, 2017 and the Public Service guidelines on Norms and Practices.

(d) An order of prohibition is issued restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever otherwise from the advertising, interviewing, recruiting, employing, confirming in employment anyone else or replacing the Ex-parte Applicant as the Director of procurement, Kiambu County Assembly.

(e) An order of prohibition is issued restraining the Respondents whether acting jointly or severally by themselves, their servants, agents, representatives or howsoever or otherwise from frustrating and/or taking any action against the Ex-parte Applicant including re-designation, deployment, secondment or any action that affects the ex-parte Applicant contract of employment and his labour rights contrary to the relevant law and following the due process.

(f) A declaration that the unilateral resolution, decision and general conduct of the Respondent and in particular the purported permanent transfer of the ex-parte applicant from the Kiambu County Assembly to 2nd interested party without giving him an opportunity to be heard, is unreasonable and in breach of procedure, ultra vires, unlawful, wednesbury unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice and void ab initio.

(g) A declaration that the ex-parte applicant’s fundamental freedoms and labour rights have been violated.

2. *The respondents to pay to the Exparte Applicant all arrear remuneration due to the Exparte Applicant from the date the same was stopped and to continue to pay the Exparte Applicant in terms of his terms and conditions of service in the position of Director of Procurement County Assembly of Kiambu.*

3. *Costs of the suit.*

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 16TH DAY OF DECEMBER, 2021.

MATHEW N. NDUMA

JUDGE

APPEARANCE

MR. MUGO FOR EXPARTE APPLICANT

M/S KANG'ETHE FOR THE RESPONDENT

MR. MBURUGU FOR 1ST AND 2ND INTERESTED PARTIES.