



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU**

**COURT NAME: ELDORET LAW COURT**

**CASE NUMBER: ELRCJR/E003/2021**

**CITATION: MOSES KIRUI TOROITICH VS COUNTY SECRETARY, COUNTY GOVERNMENT OF BARINGO AND COUNTY GOVERNMENT OF BARINGO AND 1 OTHERS**

**RULING**

**ON 2021-11-22 BEFORE HON. JUSTICE J. N. ABUODHA**

1, The applicant herein brought the Judicial Review application herein seeking orders that:

(i) AN ORDER OF CERTIORARI is issued to bring to this Honourable Court for purposes of being quashed the decision of made on 25.08.2021 by the 1st Respondent purporting to transfer the applicant from the department of Finance and Economic Planning to the department of Industry, Commerce and Co-operative development to perform the duties of director of Co-operatives.

(ii) AN ORDER OF PROHIBITION against the Respondent prohibiting the said Respondents whether by themselves their servants, agents, officers or whosoever otherwise from in any manner whatsoever unlawfully acting or continuing to act upon or enforcing or continuing to enforce or maintaining or continuing to maintain the purported transfer the applicant from the department of Finance and Economic Planning to the department of Industry, Commerce and Co-operative development to perform the duties of director of Co-operatives.

2. The application was accompanied by the statutory statement and the Supporting Affidavit of the ex parte applicant Moses Kirui Toroitich who deponed on the main that

(i) THAT I am the Director, Supply Chain Management in the County Government of Baringo.

(ii) THAT I was appointed Director Supply Chain Management in the County Government of Baringo and was issued with an employment contract to that effect.

(iii) THAT the recruitment followed an advertisement by the 2nd Respondent to fill the vacant position of Director Supply Chain Management and after a competitive recruitment process conducted by the Interested party, I was declared the successful candidate.

(iv) THAT I have industriously served in my position from the date of my appointment exhibiting competence in all tasks assigned. I am not a subject of any disciplinary proceedings by the Interested Party.

(v) THAT vide his letter dated 14th June, 2021 the 1st respondent asked me to proceed on annual leave whereupon I proceeded to the sid leave and reported back on the 13th of August, 2021.

(vi) THAT the 1st Respondent thereafter on the 25/08/2021 purported to transfer me from the department of Finance and Economic Planning to the department of Industry, Commerce and Co-operative Development to perform the duties of Director Co-operatives.

(vii) THAT prior to the purported transfer/reshuffle, the office of the Director Co-operatives did not exist in Baringo County and the creation thereof has in any event not been sanctioned by the 1st Interested Party as required by law. To the best of my knowledge, that office does not exist.

(viii) THAT my application of interest and subsequent recruitment to the office of Director Supply Chain Management was informed by my training in matters procurement and supply chain management. I am aware of my own knowledge that the position of directors within the county government are technical position hence the recruitment of persons holding qualifications specific to those positions.

(ix) THAT from the request to proceed for leave and subsequent transfer, it is apparent that the 1st Respondent is acting in bad faith.

(x) THAT the purported transfer is illegal, ultra vires null and void as the 1st Respondent does not have powers to carry out the transfers and or disciplinary control over the directors without the sanction of the County Public Service Board the 1st Interested Party herein.

(xi) THAT the transfer/reshuffle was NOT sanctioned by the 1st Interested Party as required by law.

(xii) THAT I am aware of my own knowledge that the Interested party vide its letter dated 24th of March, 2021 revoked the boards delegated authority to the 1st Respondent to carry out administrative and disciplinary functions reserved for the Interested party pursuant to the provisions of Section 86(1) of the County Government Act.

(xiii) THAT the administrative action leading to my transfer/reshuffle was illegal as it contravenes the Constitution of Kenya, violates my right to a fair hearing as well as the provisions of the County Government Act, in so far as it undermines the independence of the civil service in the carrying out of its functions.

3. The 1st and 2nd respondent filed a Replying Affidavit through one Francis Komen in which he deponed in the main that

(i) THAT I am the 1st Respondent and the County Secretary of the 2nd Respondent hence competent to make and swear this affidavit.

(ii) THAT I have read and understood the import, purport and purpose of the Applicant's application dated 27th August, 2021 specifically paragraph six(6) and wish to respond as follows:

(iii) THAT the said prayer that the granting of leave to the Applicant to institute these Judicial Review proceedings do operate as stay of actions of the Respondents maintaining or continuing to maintain the transfer/reshuffling leading to removal/transfer of the Applicant from the post of Director, Supply Chain Management in the Department of Finance and Economic Planning County Government of Baringo in respect to the letter of 25th August, 2021, lacks merit and is made in bad faith.

(iv) THAT it is indeed not in dispute that the Applicant was employed by the County Government of Baringo on 15th April, 2019 as Director, Supply Chain Management with effect from 1st May 2019.

(v) THAT vide letter dated 25th August, 2021 the Applicant was transferred from the Department of Finance and Economic Planning where he was serving as Director, Supply Chain Management to the Department of Industry, Commerce and Co-operative Development as Director, Co-operatives.

(vi) THAT as the County Secretary of the 2nd Respondent and the Head of Public Service, I reserve the prerogative on behalf of the 2nd Respondent to organize and plain its operations as the Chief Accounting Officer.

(vii) THAT the transfer of the Applicant from the Department of Finance and Economic Planning to the Department of Industry, Commerce and Co-operative Development was a horizontal transfer as the Applicant is still serving in the position of Director.

(viii) THAT this was not a demotion or a dismissal of the Applicant but rather a task in re-organization of the 2nd Respondent's operations and which the 2nd Respondent reserves a right to do.

(ix) THAT the Applicant reported to his new station on 2nd September, 2021 without any complaint.

(x) THAT the Applicant having reported to the Department of Industry Commerce and Co-operatives Development the prayer by the Applicant for a stay of transfer/reshuffle of the Applicant espoused in paragraph six (6) in the application dated 27th August, 2021 is overtaken by events and this Honourable Court cannot issue orders in vain.

(xi) THAT it was however noted by his supervisor that the Applicant absented himself from his station after reporting without due cause or notice necessitating a letter dated 17th September asking the Applicant to explant his absence without notice or permission from his supervisor.

(xii) THAT stay of transfer/reshuffling of the Applicant in the circumstances will be tantamount to allowing the Applicant to abscond duty in his new station at the Department of Industry, Commerce and Co-operative Development and yet he is still drawing a salary> Furthermore, the said Department will be unmanned by a director.

(xiii) THAT If a stay is issued as prayed for by the Applicant it will in effect mean that there will be two Directors at the Department of Finance and Economic Planning since a new Director one, Mr. Nixon Kandawala has already reported and ais undertaking the functions of Director at the Department of Finance and Economic Planning the Applicant having handed over at the Department of Finance and Economic Planning and reported at the Department of Industry Commerce and Co-operatives Development.

(xiv) THAT the Applicant's transfer to the Department of Industry, Commerce and Co-operative Development does not amount to constructive dismissal of the Applicant as the said Department exists, it has an office and staff and the Applicant is qualified to head it as its director.

4. The single issue before me at this stage is whether the leave to Apply for Judicial Review Orders which was granted on 31st August, 2021 by Hon. Justice Onesmus N. Makau should operate as a stay.

5. In support of the contention that leave should operate as a stay Mr. Tororei for the applicant has submitted among others that in determining whether grant of leave ought to operate as stay, the court's direction is invoked and the discretion ought to be exercised judicially and that a stay would be ordered where the decision was yet to be implemented or was in the course of implementation.

6. Counsel further submitted that the purpose of a stay order in Judicial review proceedings is to prevent the decision maker from continuing with the decision-making process if the

decision has not been made or suspend the validity and implementation of the decision that has been made.

7. It was his contention that the Court should note that in spite of the order that the applicant remains transferred pending determination of the issue of stay, there has been no substantive replacement of the applicant in the department of Finance and Planning. Mr. Nixon Kandawala who was elevated to the position during the applicant's leave was still on acting capacity. No other Director was transferred to fill the position.

8. Further that the reply filed by the respondents clearly indicated that there was no other Director who was affected by the alleged reshuffle and that the net effect of the transfer of the applicant from his position and elevation of his deputy amounted to declaring a vacancy in the position of Director, Supply Management and filing the same with the applicant's deputy without following the due process. It was imperative that the recruitment of the applicant was through a competitive process hence the law enjoined the respondent to follow the same process to fill the position with a new person.

9, Mr. Yego for the respondent on the other hand submitted that the applicant was seeking an order that effectively sought to reinstate him to his previous position as Director Supply Chain Management, a position now held by a Mr. Nixon Kandawala in an acting capacity.

10. To this extent Counsel relied on the case of George Philip Wekulo v. LSK & Another where the Court stated that the principles which guided the grant of leave to operate as a stay of proceedings in question were that where a decision sought to be quashed has been implemented, stay order is no longer efficacious as there may be nothing remaining to be stayed. According to Counsel, the ex parte applicant had already reported to his new office as Director Co-operatives in the Department of Industry, Commerce and Cooperative Development following his deployment on 25th August, 2021. The applicant however took French leave and absconded himself from duty prompting the Respondent to commence disciplinary proceedings against him.

11. Mr. Yego further submitted that the applicant's deployment was a normal employment practice and that section 64 of the County Government Act gives the respondent power to deploy employees within the County Public Service. It was therefore clear that the decision sought to be challenged by the ex parte applicant had been implemented hence the stay application lacked merit.

12. Mr. Yego further submitted that the applicant had not demonstrated that the substantive motion would be rendered nugatory if stay was not granted. The substantive motion sought to quash the decision of the respondent in deploying the applicant to the department of Industry, Commerce and Cooperatives as a Director. The issue will be determined by the Court upon hearing submissions from both parties.

13. As observed earlier, the issue before me at this stage concerns

The issue of whether leave granted on 21st August, 2021 should operate as a stay of the decision of the respondent to transfer the ex parte applicant as Director, Development of Finance and Economic Planning to Department of Industry, Commerce and Cooperative development.

14. The ex- parte applicant has contended among others that the transfer was malicious in that it came about when he was on compulsory leave and further that his junior was appointed to the position he was transferred from in an acting capacity.

15. The respondent on the other hand has argued among others that the transfer was a management prerogative of the respondent and an employment practice and further that the transfer was horizontal and did not amount to a demotion. The applicant still earned the same salary as the one he earned prior to transfer.

16. The ex parte applicant in rejoinder has contended that he was recruited through a competitive selection hence his replacement should be through a similar process. He further contended that he was recruited to the position based on his credentials and competencies hence his transfer amounted to constructive dismissal.

17. The Court agrees with Counsel for the respondent that transfer or deployment of staff is a management prerogative and this Court will on very rare and exceptional circumstances interfere.

18. Allegations have been made by this ex parte applicant that the 1st respondent has no capacity to transfer or deploy him. This responsibility according to the ex parte applicant is on the County Public Service Board.

19. This argument has been countered by the 1st respondent who has reiterated that it does have power to transfer and deploy the ex parte applicant.

20. The Court further noted that the ex parte applicants reported to his new office where the Court directed, he remains without the disciplinary proceedings initially intended against him.

21. From the foregoing the Court will take the view that the stay of the transfer would disincentivize the ex parte applicant from pursuing to conclusion, the substantive application. Further since the arguments in support and opposition of leave are more or less similar to those in the main application, it would be convenient to deal with them once, in order to save the Court's time.

22. In the circumstances the Court will decline to order that leave to apply for Judicial Review does operates as a stay but would instead direct that ex parte applicant files and serves submissions in support of the substantive application within 7 days of this ruling. The respondent will thereafter make a response within a similar period after service.

23. The matter to be mentioned on 17th of January, 2022 for allocation of a ruling date.

24. It is so ordered.

**GIVEN UNDER MY HAND AND SEAL OF THIS COURT ON 2021-12-01 11:58:59**

**SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)**

**THE JUDICIARY OF KENYA.**

**ELDORET ELRC**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**DATE: 2021-12-01 11:58:59**