



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CONSTITUTIONAL PETITION NO. 124 OF 2019

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 10, 20, 22, 23, 25, 27, 28, 41, 43, 47, 50, 73, 232, 236 & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF PHARMACY AND POISONS ACT, CAP 244, EMPLOYMENT ACT AND THE PUBLIC SERVICE COMMISSION ACT & REGULATIONS

BETWEEN

DR. HEZEKIAH CHEPKWONY.....1ST PETITIONER

DR. PIUS WANJALA.....2ND PETITIONER

DR. GEORGE WANG'ANG'A.....3RD PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF HEALTH.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF HEALTH.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioners brought this petition herein on 15.7.2019 seeking the following reliefs: -

(a) **A DECLARATION THAT** at all times material the Petitioners herein were and are entitled as against the Respondents and all persons to the protection of their Fundamental Rights and Freedoms enshrined in the Bill of Rights which applies to all and binds all State Organs including but not limited to fair labour practices, freedom from discrimination, equal protection and benefit of the law and that in the relationship between the parties herein the Respondents were and remain under a duty to observe the National values enshrined in Article 10 of the Constitution;

(b) **CONSEQUENTLY, AN ORDER THAT** what purports to be the decision of the 1st & 2nd Respondents conveyed vide the 1st Respondent's Memo-list dated 21st June, 2019 specifically Dr. Charles Kandie at No. 110, Dr. Josephat Mbuva at No. 111: 1st Petitioner at No. 49; 2nd Petitioner at No. 112, 3rd Petitioner at fraudulent No. 113 and attendant letters Ref. 1993021312; Ref 1991082265 and Ref. 2002044149 all dated 24th June, 2019 deploying the Petitioner out of National Quality Control Laboratory contravenes the Constitution of the Republic of Kenya and is therefore invalid, null and void and of no effect;

(c) **AN ORDER** prohibiting or restraining the Respondents whether by themselves, their officers, agents and/or servants or employees or any other State or government officer, officials or authorities from acting on the decision of the 1 & 2 Respondents conveyed vide the 1st Repondent's Memo list dated 21st June, 2019 specially Dr. Charles Kandie at No. 110, Dr Josephat Mbuva at No. 111: 1st Petitioner at No. 49; 2nd Petitioner at No. 112; 3rd Petitioner at fraudulent No. 113 and attendant letters Ref. 19930213112; Ref 1991082265 and Ref. 2002044149 all dated 24th June, 2019 deploying the Petitioners out of national Quality Control Laboratory until the hearing and determination of this Petition or further orders of this Honourable Court;

(d) **AN ORDER** that this honourable court be pleased to grant conservatory orders staying the decisions of the 1st and 2nd respondents conveyed vide letter Ref. No. 1993021312; Ref. No. 1991082265 and Ref. No. 2002044149 all dated 24th June, 2019 and 1st Respondent's decision on 2nd Petitioner contained in her Memo dated 21st June, 2019 at No. 112; And the Petitioners herein do maintain their current service status and positions at the National Quality Control Laboratory (NQCL) with power to discharge their duties and enjoy the benefits appertaining thereto pending the hearing and determination of this petition.

(e) **AN ORDER** be issued for just compensation by the Respondents to the Petitioners for an amount or sum to be determined by this Honourable Court for contravention of Fundamental Rights and Freedoms and failure to observe the National values and principles of Kenya as well as principles of public service enshrined in Article 232 of the Constitution as regards the Petitioners herein thereby injuring their feelings and dignity, exposing them to public ridicule and odium and possible prejudice as regards future National Service in view of the requirement of Chapter 6 of the Constitution and occasioning them losses and damages;

(f) **A DECLARATION** that the posting of the 1st Petitioner by the Respondents in utter disregard of his qualifications and the public interest involved in his specialized training is arbitrary, contrary to public policy and is a contravention of the National Values of this Country as contained in Article 10 of the Constitution of Kenya, 2010.

(g) **AN ORDER THAT** the Respondents do pay the Petitioners such compensation as this court may deem appropriate.

(h) **AN ORDER THAT** the costs consequent upon this Petition be borne by the Respondents in any event.

(i) All and any such orders as this Honourable Court shall deem just.

2. The petition is opposed by the respondents by way of Replying Affidavits sworn by M/s Susan Mochache, the second respondent herein, on 24.7.2019 and 6.8.2019.

3. The salient facts of this case are that, on 21.6.2019 the 1st Respondent (the Authorised Officer), directed the 2nd Respondent to execute the approved transfer of 112 officers as recommended by the MHRMAC in a meeting held on 20.6.2019. The 3rd petitioner was not among the 112 officers recommended for transfer but by a letter dated 24.6.2019 Ref. No. 2002044149, the 2nd Respondent purported to transfer him to the National Public Health Laboratories (NPHL) from the National Quality Control Laboratories (NQCL).

4. In addition, the list of 112 officers recommended for transfer by MHRMAC and approved the 1st Respondent indicated that the 1st Petitioner was deployed from NQCL to the Division of Health Products and Medical Technologies but the 2nd respondent wrote letter dated 24.6.2019 deploying him to Mathari Hospital. On the other hand, the list by MHRMAC recommended, the 1st Respondent approved and the 2nd Respondent wrote letter dated 24.6.2019 posting Dr. Charles Kandie as the new Director/Head of NQCL to replace the 1st Petitioner, while Dr. Josephat Mbuva was posted there as Deputy.

5. On 4.7.2019, the Board of Management rejected the appointment of Dr. Charles Kandie as Director of NQCL and advised the respondents that under section 35H of the Pharmacy and Poisons Act (PPA) the power to appoint Director of NQCL belonged to her and she had already exercised that power in 2018 by appointing the 1st Petitioner for a period of 3 years.

Petitioners' Case

6. The Petitioners averred that their transfer/deployment was arbitrary and a violation of the fundamental rights and freedom of individuals inherent dignity, freedom from discrimination and degrading treatment. They further averred that seniority of public servants in the public service is paramount and accounts for order in government as recognised in the Public Service Code of Regulation and the HR Policies and Procedures Manuals May, 2016.

7. The Petitioners contended that their transfers and that of Dr. Kandie breached protocol by subjecting Senior Officers to supervision by their juniors. They further contended that the respondent acted ultra vires to subject Senior Officers to their juniors in the profession. They contended that after 1st Petitioner, the 2nd Petitioner was the Senior most at NQCL and it was violation of the constitution to subject him, (Job Group "R") to Dr. Charles Kandie, (Job Group "P"), who is his junior in the service.

8. The Petitioners further averred that they are Senior and Specialist Pharmacists in the Ministry of Health and their transfer to hospitals like Mathari Hospital is malicious and abuse of discretion by the respondents. According to the petitioners, the respondents have violated their right to fair Labour Practices and section 46 of the Employment Act, which provides that lodging a complaint by an employee does not constitute a fair reason for dismissal or imposition of disciplinary penalty.

9. The Petitioners therefore contended that the respondents have violated their fundamental Rights and Freedoms in the Bill of Rights by: -

(a) Failing to approach their contract of service in accordance with the National values of good governance, integrity, transparency and accountability as enshrined in Article 10 of the Constitution;

(b) discriminating against them by treating them whimsically and transferring them from one office to another contrary to Article 27 of the Constitution;

(c) failing to protect their right to dignity as professionals and specialized public officers contrary to Article 20 and 28 of the constitution and instead subjecting them to public ridicule and odium by placing them under the supervision of their juniors;

- (d) failing to respect their rights to fair labour practices as required under Article 41 of the constitution by terminating the contract of the 1st Petitioner at the NQCL abruptly and without following due process;
- (e) Depriving them the right to fair administrative action and breaching their legitimate expectation contrary to the letter and spirit of the constitution by breaching court orders issued on 5.4.2012 and 14.10.2011;
- (f) Contravening their legitimate expectation of being deployed to positions where their specialized training would be applied;
- (g) Subjecting them to in human and degrading conditions by requiring them to report to their juniors contrary to Public Service Commission Act, Code of Regulations and the HR Policies and Procedure Manual for May 2016.

10. The Petitioners further contended that the actions and omissions by the respondents are unfair; unjust, contrary to national values and breach the constitution and more so violates Article 236 of the constitution which governs the principles and values of public service by: -

- (a) Exposing public funds to inefficient, ineffective and uneconomical resources;
- (b) Failing to observe high standard of professional ethics;
- (c) Lack of accountability and transparency in promotion and posting
- (d) Failing to afford them equal opportunity for advancement in their professional career.

Respondents' case

11. The respondents averred that the petition lacks merits and it ought to be dismissed because it is band in law, lacks merits and it discloses no constitutions violations against the petitioners. The respondents admit that the 1st Petitioner was the Chief Executive/Director of NQCL and has been transferred to Mathari National Teaching and Referral Hospital, the 2nd Petitioner has been transferred to Kenya Health Professional Oversight Authority (KHPOA) while the 3rd Petitioner has been transferred to the National Public Health Laboratories. They however contended that the 2nd Petitioner cannot be deployed because he is enjoying court orders issued on 14.10.2012 in HC Misc. App. 131 of 2011 and Pet. 124A of 2012 respectively which ordered the said petitioner to remain in Job Group R at the NQCL.

12. The respondents further averred that the petitioners are Civil Servants in the Ministry of Health and they are bound by the Constitution, Employment Act and the Public Service Regulations, and especially the prerogative of the employer to deploy and transfer them anywhere in the Republic of Kenya. They further contended that the petitioners bound themselves to the terms of contract including transfer to any workstation within the Republic by signing the appointment letter.

13. They further averred that Article 155(2) of the constitution vests all the administrative functions to the 2nd Respondent including deployment of officers in the Ministry/State Department. They further averred that the impugned transfers were done after recommendation by MHRMAC following a legal opinion to have NQCL restructured and a further report by a Technical Committee.

14. The respondents further averred that the 1st Petitioner accepted the transfer by his letter dated 8.7.2019 and Mathari Hospital confirmed by letter dated 10.7.2019 that the 1st Petitioner had reported on duty. It is the respondents' case that the petition by the 1st Petitioner is an afterthought. As regards the 2nd petitioner, the respondents' contended that his petition is premature because he has not yet been deployed.

15. The respondents maintained that the employer has a prerogative to transfer employees upon reasonable notice and for sufficient reasons and the employee has no right to dictate how and where he will work. They contended that it is the Ministry of Health that pays the petitioners salary and as such, they remain their employer and can exercise control over them.

16. The respondents argued that the interim orders in HC Misc. Appl. 131 of 2011 and 124A of 2012 have since lapsed due to delay in prosecuting the respective suits. They contended that it is abuse of court process for a party to have interim orders perpetually and always to run to court stop the employer from exercising its prerogative powers. They further contended that the said orders related to different issues and they cannot insulate the employee from promotion, disciplinary process and transfers among others.

17. As regards the 3rd Petitioner, the respondents contended that his deployment letter referred to the MHRMAC meeting on 19.6.2019 which recommended for his transfer. They therefore contended that the petitioner cannot impugn the decision to deploy or transfer him.

18. They prayed for the conservatory orders to be set aside because the reasons upon which they were granted were not valid and the Public interest in this matter outweighs the personal interest of the petitioners. They further contended that the Petitioners have not demonstrated with precision how their fundamental rights and freedoms were violated or threatened.

19. Finally, the respondents contended that the court has no jurisdiction to micro manage the HR functions of the ministry of Health or at all and if the petitioners are aggrieved by the transfers to new work stations they ought to have sought review of the decision internally and not rush to court to gag the respondents. They also denied that they have usurped the powers of the NQCL. They further accused the 2nd Petitioner of running a private law firm as a partner in the law firm acting for the petitioners herein and other matters in various court stations. In their view the petitioners are treating NQCL as personal property and as such, there is need for remedial action to bring sanity in the industry.

Petitioners' Submissions

20. The petitioners submitted that the respondents have acted *ultra vires* by usurping the power to appoint Director/Chief Executive for the NQCL which under section 35H of the PPA is reserved to the Board of Management of NQCL only. They therefore urged that the appointment of Dr. Charles Kandie and Dr. Josphat Mbuva as Director, and Deputy Director of NQCL was done contrary to section 35H of the PPA and is null and void.

21. The petitioners further submitted that the respondents are bound by the court orders in HC MISC Appl. 131 OF 2011 and Pet. 124A of 2012 which barred the 1st and 2nd Respondent from transferring the 2nd Petitioner from NQCL. They therefore submitted that the purported transfer of the 2nd petitioner was null and void *ab initio*. As regards to the 3rd Petitioner, it was submitted that his name was fraudulently inserted in the 1st Respondent's list of transfer and it was not part of the list recommended by the MHRMAC and approved by the 1st Respondent. They consequently contended that the purported transfer of the 3rd Petitioner was also null and void.

22. The petitioners further submitted that they were the senior most pharmacists in the Ministry of Health and they were specialized in their work unlike Dr. Charles Kandie and Dr. Josphat Mbuva who are neither specialized nor experienced in any functions at NQCL. According to the petitioners, it is impossible for Dr. Kandie and Dr. Mbuva to examine and test drugs and materials or substance as required to determine compliance with the standards. They further submitted that the said doctors were fairly junior in the Ministry.

23. The Petitioners further urged that the report of the technical Committee and the opinion from the third Respondent did not recommend for any restructuring of the NQCL or her personnel. The petitioners further urged that the 1st and 2nd respondents acted contrary to the advice of the 3rd Respondent.

24. The Petitioners further submitted that despite the fact that an employer has the prerogative to transfer its employees the said prerogative is not unfettered discretion. To buttress this argument, the Petitioners relied on **Henry Ochido Vs NGO Co-ordination Board (2015) eKLR** where it was held: -

“The basic standard as set out in the Severine Luyali case is that;

The respondents have the power to transfer the Petitioner but the same must be exercised in a lawful manner and not be arbitrary. The petitioner's tour of duty had been granted and when this was varied, no reasons were given even when she expressed her reasons for seeking for such extension.”

25. The Petitioners further contended that, being Public Servants, the body that has the mandate to employ and/or transfer them is the Public Service Commission (PSC) and not the Principal Secretaries of the respective Ministries as alleged by the Respondents. For emphasis, they relied on Article 234 (5) of the Constitution of Kenya as read with Section 31 of the Public Service Commission Act. They further submitted that, the PSC has conditionally delegated its transfer powers to the 1st Respondent vide various instruments the latest being Delegation of Public Service Commission Human Resource Powers and Functions Policy – Ref. No. PSC/SEC/93/37 NOL. IV/ (37: 30th July, 2018).

26. The Petitioners further contended that in exercising the delegated transfer powers the Respondents are bound by Articles 10, 41, 47, 73 and 232 of the Constitution of Kenya, Section 43 (3) of the Public Service Commission Act, Section 4.9.2 of the Policy on Norms and Standards for Management of Human Resource in the Public Service and Section B.31 of the Human Resource Policies and Procedures Manual for Public Service May, 2016.

27. In conclusion the Petitioners urged this Honourable Court to find merit in the Petition herein and to allow the same as prayed.

Respondents Submissions

28. The Respondents on the other hand submitted that the Petition as filed is frivolous and an abuse to the Court process. It is further contended that the same ought to be dismissed. To buttress this argument, the Respondents relied on **East Africa Portland Cement Company Ltd. Vs Attorney General & Another (2013) eKLR**.

29. The Respondent further submitted that the Petitioners have failed to meet the threshold to be met in a petition alleging violation of constitutional rights as highlighted in the cases of **Mumo Matemu Vs Trusted Society of Human Rights** and the **Anarita Karimi Njeru** case.

30. The Respondents further submitted that the Petitioners have not discharged the burden of proof bestowed upon them. It is further the Respondents contention that the deployment of over 113 employees within the Ministry of Health was legal and is presumed to have been done legally. For emphasis the Respondents cited **Raila Odinga Vs IEBC & 3 Others, Supreme Court Election Petition No. 5 of 2013, Kiambu County Tenants Welfare Association Vs Attorney General & Another (2017) eKLR** and **Susan Mumbi Vs. Kefala Grebedhin Nairobi HCCC No. 332 of 1993**.

31. The Respondents further submitted that deployment/transfer of the petitioners was legal and in compliance with the relevant provisions of the law. To fortify this argument, the Respondents relied on **Anne Wairimu Kimani Vs Kenya Agricultural Livestock Research Organization (KALRO) (2017) eKLR** and **Simeon Kiprotich Lagat Vs Kenya Ports Authority & Another (2017) eKLR**.

32. It is further submitted that the Petitioners have failed to show that the Respondents in carrying out their mandate of deployment/transfer did so in a manner that was in contravention with the provisions of the law. To buttress this argument, the Respondents relied on **Geoffrey Mworira Vs Water Resources Management Authority & 2 Others** and **Alfred Nyungu Kimungui Vs Bomas of Kenya (2013) eKLR**.

33. The Respondents further submitted that the Petitioners deployment is based on their individual contracts with the Ministry of Health and therefore it is within its mandate to allocate work to the Petitioners as the employer (the Ministry) so wishes. The Respondents equated this prerogative to that of a private entity with its employees.

34. In conclusion the Respondent submitted that this Honourable Court proceeds to dismiss the instant Petition with costs the Petitioners having failed to discharge the burden of proof required to warrant the granting of the Orders sought therein.

Issues for determination

35. After careful consideration of the Petition, the Affidavits filed hereto and the Submissions filed herein by the Parties, it is a fact that the petitioners are public officers employed by the PSC and deployed to the Ministry of Health, specifically serving in the NQCL. It is also a fact that the petitioners among other officers in the Ministry of Health were transferred/deployed to various workstations across the country. The issues for determination are: -

a) Whether the Respondents acted *ultra vires* and in breach of the Constitution when they transferred/deployed the Petitioners from NQCL to other workstations.

b) Whether the Petitioners Constitutional Rights have been violated by the said transfers/deployment.

c) Whether the Petitioners are entitled to the reliefs sought in their Petition.

Analysis and Determination

(a) Whether the Respondents in deploying the Petitioners acted *ultra vires* of what is within their mandate.

38. The relevant law on transfers/deployments in Public Service is provided under Section 43 of the Public Service Commission Act, 2017 as read together with Section B.31 of the Human Resource Policies and Procedures Manual for the Public Service May, 2016 which provides as follows:

“...deployment of officers in their substantive capacity within a ministry will be undertaken by the respective Authorized Officer on recommendation of Ministerial Human Resource Management Advisory Committee (MHRMAC).”

39. From the foregoing provision, it is clear that only the Public Service Commission or the authorized officer of the respective ministries has the mandate to transfer and/or deploy employees in the civil service. According to the material presented herein, the PSC has delegated the said powers to the 1st Respondent (Cabinet Secretary) and not the Principal Secretary, vide various documents the latest being Delegation of Public Service Commission Human Resource Powers and Functions Policy – Ref. No. PSC/SEC/93/37 NOL. IV (37: 30th July 2018). It follows therefore that the 2nd Respondent has no authority to transfer/deploy staff under her docket without recommendations by the MHRMAC and approval from the 1st respondent.

40. The Petitioners' case is that by a Memo dated 21st June, 2019 the 1st Respondent, Authorized Officer, informed the 2nd Respondent that she had approved the recommendation to transfer/deploy 112 officers across the country including the Petitioners herein, which was made by the Ministerial Human Resource Management Advisory Committee (MHRMAC) during its meeting held on 20th June, 2019. The 1st respondent's memo set out the names of the officers affected and their new workstation and directed the 2nd respondent to execute the approved recommendation.

41. However, the petitioners have faulted the said transfers/ deployments on grounds that the replacement of the 1st petitioner with Dr. Kandie as the Director of NQCL was *ultra vires* and tantamount to usurpation of power donated to the NQCL Board of management by a statute; transferring the 2nd petitioner was in contempt of court; transferring of the 3rd petitioner by the 2nd respondent without recommendation by the MHRMAC and approval from the 1st respondent was *ultra vires*; that the transfer of the petitioners to workstations where their expertise is not applicable and replacing them with their juniors who lack the expertise required at the NQCL is unconstitutional and a mockery to the protocol in the public service; and finally the averred that placing them under their juniors in the public service is also a breach of the protocol in the public service and the constitution.

42. The Respondents, however, submitted that the administrative action taken to deploy 113 employees was lawful and in exercise of the prerogative power bestowed upon them by the law. They relied on **James Sande Amuyeka & 6 Others Vs Super Foam Limited (2015) eKLR** where the court expressed itself as follows: -

“I therefore find, the respondents have the power to transfer their employees and the case of the claimants it was done in a lawful manner and not be arbitrary. The claimants' employment contracts could be varied, reviewed or changed on reasons given in writing which was done in this case and as held in Severine Luyali versus Minister Foreign Affairs and Trade and Others, Petition No. 23 of 2014. I find the existing business needs of the respondent for such changes being to ensure better productivity and good work performance as reasonable measures that warranted the effected transfers. Where the claimants were not capacitated to attend to any new role given, the responsibility was on the respondent to ensure training, induction or any other measure that was necessary to support their employees. To refuse to report to duty on an apprehension that the claimants were incapacitated I find to be unfounded and lacking any rationale, basis or merit.”

43. I also hold the same view that the employer enjoys managerial prerogative to transfer, restructure, reorganize and/or deploy his /her

labour force to suit the employer's objectives and operational requirements provided that in so doing, the employee's terms of service under the contract of employment are not altered to his detriment, and that the employee is not exposed to unbearable hardship. It must however be noted that unlike the private sector where the terms of service are regulated purely by the contract of service between the parties involved, in the public sector the contract of service is regulated by both the contract of service signed between the parties in addition to the Human Resource Policies and Procedures Manual for the Public Service, and a mosaic of public law which includes the Constitution, statutes, subsidiary legislations, Government Circulars, and Legal Notices among others. It follows therefore that where there is an express provision in the constitution or legislation, subsidiary legislation or the Human Resource Policies and Procedures Manual for the Public Service about the procedure for transfers/deployments of public officers, such procedure must be strictly complied with by the concerned Agency or Authorized officer of the government or else it may amount to a breach of contract and/or violation of the Constitution.

44. As regards the 1st petitioner's case, the provision of the law cited is section 35H of the Pharmacy and Poisons Act which provides that:

“The Board Management shall appoint a Director who shall be the Chief Executive of the Laboratory responsible to the Board of Management for the day to day management of the Laboratory and that the Director shall hold office on such terms and conditions of service as may be specified by in the instrument of his appointment.”

45. The foregoing provision is clear that the power to appoint the Director of the NQCL is only given to the NQCL Board of Management and not the respondents. It follows that, any purported replacement, by he respondents, of the person appointed by the said Board as the NQCL Director would be *ultra vires*, illegal and invalid by dint of section 35H of the Pharmacy and Poisons Act. It is also a violation of Article 10(2) of the Constitution which provides that:

“The national values and principles of governance include-

(a)...

(c) good governance, integrity, transparency, and

accountability; ...”

46. It is not good governance where a Cabinet Secretary and her officers recommend and approve termination of appointment of the Director of NQCL and replace him with another person contrary to express provision of a statute and without consulting with the officer and appointing authority. In my view that amounts to interference and mismanagement. Consequently, I find and hold that the decision by respondents replace the 1st petitioner with Dr. Kandie as the Director of the NQCL was an affront to the express provision of section 35H of the said Act and as such the purported transfer/deployment of the 1st petitioner or his replacement by Dr. Kandie was invalid for being done *ultra vires*.

47. Again regarding the 1st petitioner, a further violation was done by the 2nd respondent when without authority in law or Section B.31 of the Human Resource Policies and Procedures Manual for the Public Service, 2016, she interfered with the approved recommendation to transfer the 1st petitioner to the Division of Health Products and Medical Technologies and unilaterally redirected his transfer to Mathari Hospital. The said transfer of the 1st petitioner by the 2nd respondent vide the letter dated 24.6.2019 was illegal and done *ultra vires* her mandate.

48. As regards the 2nd petitioner's case, it is clear from the Memo dated 21.6.2019 by the 1st respondent to the 2nd respondent that she approved the recommendations by MHRMAC to post/deploy 112 officers in her docket including the 2nd petitioner herein. The said recommendation by MHRMAC for the transfer/deployment of the 2nd petitioner from NQCL to KHPOA and the approval by the 1st respondent was done in breach of court orders in **HC MISC Appl. 131 OF 2011 and Pet. 124A of 2012**. Accordingly, I return that the said recommendation and the approval was and remains invalid for being made in contempt of court orders made by the High Court in the said suits. It requires no emphasis to observe that disobedience to court orders is an affront to the rule of law which is the pillar of a civilized society. It follows therefore that a government officer or entity that makes a decision in disobedience of a court order should be treated as catalyst for chaos and disorder in the society and his/her decision should be deemed invalid and of no consequence.

49. As regards the 3rd petitioners' case, it clear that there was no recommendation for his transfer/ deployment by from the MHRMAC and subsequent approval by the 1st respondent. The name of the 3rd petitioner was not in the Memo by the 1st respondent dated 21.6.2019 which had only 112 names. His name was however added conspicuously by hand as number 113, in a subsequent memo but with no new workstation being shown unlike all the other 112 officers. His new workstation is only indicated in his posting/deployment letter dated 24.6.2019 as the National Public Health Laboratory. Considering the material presented to the court, I find that the 3rd petitioner has proved by evidence that his purported transfer from NQCL to the NPHL was procedurally flawed and done *ultra vires* the respondents' powers under Section B.31 of the Human Resource Policies and Procedures Manual for the Public Service, 2016.

(b) Whether the petitioners' constitutional rights were violated by respondents' decision to transfer/deployment them.

50. Violation of a Fundamental right, in my view, occurs when there is breach of a right envisaged under Bill of Rights in the Constitution. I have already made a finding herein above that, the impugned decisions and actions by the respondents, being in breach of section 35 H of the Pharmacy and Poisons Act and court orders, were indeed unconstitutional. The question that begs for answer is whether the petitioners have proved that the said unconstitutional decisions and actions by the respondents *per se* violated their Fundamental rights as individuals.

51. As regards the 1st petitioner, I agree that his right to fair administrative action as provided under Article 47 of the constitution was

violated when his 3 years contract as the Director NQCL was terminated or threatened with dismissal by the respondents without consulting him and the NQCL Board of Management. Article 47 provides that:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or Fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

52. The foregoing Article is amplified by section 4 of the Fair Administrative Actions Act that requires that any person whose right or fundamental freedom is likely to be affected by an administrative action, shall be entitled to a hearing before the action is done.

53. However, as regards the 2nd and 3rd petitioners, I find that they have not demonstrated that their rights under the Bill of Rights were violated by the purported transfers/deployment by the respondents. What appears clearly is that save for the disobedience with the said court orders prohibiting transfer of the 2nd petitioner, all what the respondents have done was breach of the petitioners’ contract of service regarding the procedure and mandate to transfer/ deploy them as laid down by the Human Resource Policies and Procedures Manual for the Public Service, 2016.

(c) Whether the petitioners are entitled to the reliefs sought

54. In view of the material presented to the court and the circumstances of the case, namely the open violation of express provision of Constitution statute and the Human Resource Policies and Procedures Manual for the Public Service, 2016, and also their disobedience to court orders, by the respondents, I return that the Petitioners are entitled to the following reliefs:

a) **A DECLARATION THAT** at all times material the Petitioners herein were and are entitled as against the Respondents and all persons to the protection of their Fundamental Rights and Freedoms enshrined in the Bill of Rights which applies to all and binds all State Organs including but not limited to fair labour practices, freedom from discrimination, equal protection and benefit of the law and that in the relationship between the parties herein the Respondents were and remain under a duty to observe the National values enshrined in Article 10 of the Constitution;

b) An Order that the decision of the 1st and 2nd Respondents conveyed vide the 1st Respondent’s Memo list and subsequent letters of deployment dated 24th June, 2019 touching on the 1st, 3rd Petitioners, Dr. Charles Kandie and Dr. Josephat Mbuva contravenes the Constitution of Kenya, 2010 and are therefore null and void *ab initio* and to no effect;

c) A declaration that the posting of the 1st Petitioner by the Respondents was made in contravention to the principles of National Values as enshrined under Article 10 of the Constitution of Kenya, 2010.

d) For avoidance of doubt, the Petitioners maintain their current service and positions at the National Quality Control Laboratory without loss benefits and status until any intended deployment is done in compliance with the Constitution, statute law and the Human Resource Policies and Procedures Manual for the Public Service in force.

e) The 1st petitioner is awarded kshs. 500,000 as compensatory damages for the violation of his right to fair administrative action by the respondents.

55. I make no order as to costs because of the special circumstances of the Petition.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January, 2020

ONESMUS N. MAKAU

JUDGE