



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
JR CAUSE NO. 39 OF 2018
IN THE MATTER OF AN APPLICATION BY SHANDA UMURO
FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC.....APPLICANT

v

COUNTY GOVERNMENT OF MARSABIT, DEPARTMENT OF AGRICULTURE,

LIVESTOCK AND FISHERIES DEVELOPMENT.....1st RESPONDENT

MINISTRY OF AGRICULTURE, LIVESTOCK, FISHERIES AND IRRIGATION,

STATE DEPARTMENT OF LIVESTOCK.....2nd RESPONDENT

ATTORNEY GENERAL.....3rd RESPONDENT

AND

WATO DENGE HALAKE.....INTERESTED PARTY

AND

GUYO SHANDA UMURO.....EX-PARTE APPLICANT

JUDGMENT

1. Guyo Shanda Umuro (*ex-parte* applicant) was offered employment as a Veterinary Officer by the Public Service Commission through the Principal Secretary, Ministry of Agriculture, Livestock & Fisheries (2nd Respondent) through a letter dated 9 October 2002.

2. The *ex-parte* applicant was then posted to Marsabit District
3. On 19 February 2015, the 2nd Respondent offered the *ex-parte* applicant the position of County Project Team Leader in the Regional Pastoral Livelihood – Resilience Project, Marsabit. The *ex-parte* applicant was to report to the Project Team Leader.
4. On 30 November 2018, the Team Leader, under the 2nd Respondent notified the Chief Officer, Ministry of Agriculture, County Government of Marsabit that he had approved a request for change of leadership at the Regional Pastoral Livelihood – Resilience Project in order to improve service delivery.
5. The *ex-parte* applicant was therefore requested to hand-over to a new County Project Team Leader, Regional Pastoral Livelihood – Resilience Project.
6. The *ex-parte* applicant was not happy with the changes and on 7 December 2018, he wrote to the Project Team Leader/National Coordinator appealing against the change and asking for a copy of a complaint which purportedly led to the changes. The appeal was copied to other offices.
7. On 18 December 2018, Chief Officer – Livestock, County Government of Marsabit notified the *ex-parte* applicant that he had been deployed to the Department of Veterinary Services, and instructed him to finalise the handing over process.
8. The *ex-parte* applicant replied to the letter the same day stating that the deployment was invalid, and in a response on 19 December 2018, the Chief Officer-Livestock warned him of disciplinary action if he did not comply.
9. The Project Team Leader responded to the *ex-parte* applicant’s appeal on 20 December 2018 and notified him that the 2nd Respondent had declined the appeal.
10. The letter instructed the *ex-parte* applicant to hand over immediately.
11. It is under these circumstances that the *ex-parte* applicant moved Court seeking leave to commence judicial review proceedings on 9 January 2019. The leave was granted on 28 June 2019, and the instant motion was filed on 2 July 2019.
12. Upon directions, the *ex-parte* applicant filed his submissions on 2 July 2019, the 1st Respondent filed its submissions and replying affidavit sworn by its Chief Officer, Department of Agriculture on 19 July 2019, and the 2nd and 3rd Respondents filed their submissions on 12 July 2019.

***Ex-parte* applicant’s case**

13. The *ex-parte* applicant contended that he was appointed as County Project Team Leader after a competitive recruitment process and that his removal was without due process, and therefore illegal and unlawful.
14. The *ex-parte* applicant also contended that he should have been afforded an opportunity to be heard before removal and that in any case, his replacement should have been through a competitive process.
15. According to the *ex-parte* applicant, his purported removal was therefore in breach of his right to fair administrative action, irrational and unreasonable. He asserted that he was denied natural justice.

1st Respondent’s contentions

16. The replying affidavit sworn on behalf of the 1st Respondent deposed that the *ex-parte* applicant was a permanent employee of the County Government of Marsabit as Chief Veterinary Officer after secondment by the National Government through a letter dated 31 March 2014. It was further deposed that the *ex-parte* applicant was not earning an additional salary as County Project Team Leader.
17. The Chief Officer further deposed that he had the requisite authority to deploy and assign staff within his department in terms of powers delegated to him by the County Public Service Board and that the staff changes were after recommendations by the 12th National Steering Committee and did not only affect the *ex-parte* applicant but other Regional Pastoral Livelihoods Resilience Projects staff, in the whole country.
18. On what led to the *ex parte* applicant being removed, it was sworn that an evaluation of his performance by the 2nd Respondent’s Monitoring and Evaluation Officer had shown underperformance.
19. In support of the removal of the *ex-parte* applicant, the 1st Respondent submitted that the Chief Officer was acting lawfully and pursuant to section 72(a) of the County Governments Act.
20. In the view of the 1st Respondent, the deployment of the *ex-parte* applicant did not implicate the right to fair administrative action or the right to be heard.

2nd and 3rd Respondents submissions

21. These Respondents did not file any affidavits but relied on a *Notice of Preliminary Objection* filed in Court on 14 February 2019 in response to the application for leave, and submissions in response to the motion.

22. In sum, the position of the 2nd and 3rd Respondents was that a County Government was a distinct and separate entity capable of being sued, and therefore they should not have been joined into the dispute between the *ex-parte* applicant and his employer.

23. Consequently, these Respondents urged the Court to strike out the suit against them.

Evaluation

24. The *ex-parte* applicant is seeking judicial review orders.

25. Halsbury's Law of England 4th Ed Vol II page 805 para 1505, says of the order of certiorari certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

26. Judicial Review orders being discretionary remedies will therefore only issue if they will serve some purpose.

27. It is not and cannot be disputed that the *ex-parte* applicant is a substantive employee of the County Government of Marsabit as Chief Veterinary Officer, who was assigned or seconded to the Regional Pastoral Livelihoods - Resilience Project.

28. The *ex-parte* applicant, therefore, remained subject to the terms and conditions of service set by the County Public Service Board of Marsabit and the applicable statutes.

29. Section 72(a) of the County Governments Act empowers a Chief Officer to assign or deploy an officer within his department.

30. A power to deploy, in the view of the Court, entails the power to recall a deployment.

31. What happened in the case at hand was a recall of deployment or assignment of the *ex-parte* applicant from a specific project to his substantive mandate.

32. The question then that begs is whether the *ex-parte* applicant was entitled to be afforded an opportunity to be heard before the recall of deployment.

33. The *ex-parte* applicant did not controvert the assertions that he was evaluated and that his performance as County Project Team Leader was found wanting. Was the 1st Respondent expected to keep him as a team leader in such circumstances?

34. An employer must be allowed a certain latitude to run its business, whether in the public or private sector. It would not be proper for the Court to micromanage an employer.

35. The call on the question, in the view of the Court, was at the discretion of the employer, and it would not be appropriate for the Court to intervene under the guise of judicial review.

36. For whatever academic value it would be worth, the *ex-parte* applicant did not demonstrate that he was entitled to a hearing before the recall from the Project or that the failure to hear him out breached any of his constitutional rights and freedoms.

37. The motion dated 1 July 2019 is dismissed with no order on costs.

38. In light of the conclusion, it is not necessary for the Court to consider the objections on joinder raised by the 2nd and 3rd Respondents.

Delivered, dated and signed in Nairobi on this 7th day of February 2020.

Radido Stephen

Judge

Appearances

For *ex-parte* applicant Mr. Lesaigor instructed by Hashim & Lesaigor Associates Advocates

For 1st Respondent Mr. Minishi instructed by Minishi & Associates Advocates

For 2nd and 3rd Respondents Ms. Akuno, Litigation Counsel, Office of the Attorney General

