



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

JUDICIAL REVIEW NO. 5 OF 2019

JUDICIAL REVIEW APPLICATION FOR CERTIORARI AND INJUNCTION BY LOISE MUTHONI KATHENYA

AND

IN THE MATTER OF THE DECISION BY THARAKA NITHI COUNTY GOVERNMENT DATED 1ST OCTOBER 2019

AND

IN THE MATTER OF THE EMPLOYMENT ACT

AND

IN THE MATTER OF THE FAIR ADMINSTRATIVE ACTIONS ACT

BETWEEN

LOISE MUTHONI GATHENYA.....APPLICANT

VERSUS

DIRECTOR, THARAKA NITHI PUBLIC SERVICE BOARD.....1ST RESPONDENT

THARAKA NITHI PUBLIC SERVICE BOARD.....2ND RESPONDENT

COUNTY GOVERNMENT OF THARAKA NITHI.....3RD RESPONDENT

RULING

1. The Applicant is an employee of the 2nd Respondent and she seeks judicial review orders suspending the effect and application of the 1st Respondent's redeployment letter of 1st October 2019; an order of certiorari to quash the 1st Respondent's redeployment letter of 1st October 2019; judicial review orders permanent injunction restraining the Respondents or their servants and/or agents from re-issuing the *Ex parte* Applicant's letter, directive or any other form of communication seeking to implement the content and intention of the 1st Respondent's letter of 1st October 2019. The *Ex parte* Applicant sought to be exempted from pursuing internal review and appeal with the Respondents since the Respondents have demonstrated their unwillingness to reasonably and impartially address the *Ex parte* Applicant's appeal on redeployment.

2. The application was argued on 29th January 2020 and Ruling reserved for today. Counsel for the Applicant argued that she was a HR practitioner who had been transferred to the position of livestock clerical officer at Gatunga, Tharaka North with immediate effect vide the letter of 1st October 2019. She argued that the re-deployment to the livestock department of the 2nd Respondent was done without notice or giving her an opportunity to be heard. It was argued that the re-deployment was unreasonable, unfair, unlawful, vindictive and had failed to consider relevant factors as it was an attempt to remove the Claimant from her area of professional specialization as a human resource practitioner to a different and unrelated field as a Livestock Clerical Officer. The *Ex parte* Applicant asserts that she had a legitimate expectation that having applied for employment as a human resource management officer I and the offer of employment in that position, her employment and engagement with the 3rd and 4th Respondent would be in line with the same speciality of professional qualifications. She argues that the Respondents have not established a human resource policy or guidelines to resolve disputes and therefore the *Ex parte* Applicant's appeal will not be impartially heard. She asserts that in order not to lose her employment, to continue with her studies and to continue nursing her infant child she had applied for annual leave. Her counsel submitted that if the re-deployment is upheld the *Ex parte*

Applicant's career will be irretrievably damaged as she will not be able to conform to the licencing regime of a practitioner in HR. She is said to have raised an appeal on 7th October 2019 and that it was only after a reminder that on 13th November 2019 that she received a letter advising her to direct her appeal to HR director and chief officer livestock. Her advocate submitted that under Article 41 of the Constitution and Article 47 she was entitled to fair labour practices and fair administrative process. It was argued that she had a right to approach the court under Section 7 of the Fair Administrative Actions Act and that the only exception is that she had not exhausted the internal dispute mechanisms.

3. The Respondents' position is that the Applicant was employed of HR management officer and was initially deployed to the department of agriculture and that she was transferred in September 2016 in the same capacity to the department of veterinary service. The Respondents assert that the *Ex parte* Applicant was not deployed as a livestock officer but had been deployed as a clerical officer in the livestock office and that she had been working in that department in he second transfer. It was argued that the transfer was in keeping with the County Government's policy of making use of the employee in the best way. It was argued that there is no reduction in salary as this was a simple parallel transfer. The Respondents argue that though the *Ex parte* Applicant had a degree in HR from Chuka University she was yet to be certified as a HR practitioner as she merely passed the examination. The Respondents assert the Applicant argues that her career will be irretrievably damaged and in answer they counter that an employee's career cannot be irretrievably damaged by a single transfer in her employment. The Respondent submits that it is difficult for the employer to consult each employee before effecting a transfer or change in title. It was argued that her transfer was not made in bad faith or instigated by ill motive. It was said to be a normal transfer in the operations of her employer. The Respondents argue that the *Ex parte* Applicant had not exhausted the dispute mechanism under the law as provided for under Section 77 of the County Governments Act 2012. It was the Respondents position that the *Ex parte* Applicant should first exhaust the internal dispute resolution mechanism and if dissatisfied appeal to Public Service Commission as provided for. The Respondents thus urged the dismissal of the *Ex parte* Applicant's review application.

4. In a brief rejoinder counsel for the *Ex parte* Applicant submitted that Section 77 related to persons in the public service board or persons in exercise of disciplinary control. He submitted that the author of the deployment letter is not a member of the County Public Service Board as provided for under Section 58(1) of the County Governments Act and that the issue in question does not relate to disciplinary control and the PSC has no jurisdiction. He argued that the provision uses the word may which is not a mandatory obligation. Counsel argued that the appearance or request to Public Service Commission is discretionary as the PSC has no power to grant the order of certiorari. It was submitted that the right to approach the court is permitted under Article 48 and 47 on access to justice and fair administration. He submitted that Section 77 is restrictive as it does not permit an appeal outside of the Public Service Commission and that the said section was restrictive to the rights of the *Ex parte* Applicant. Finally, he submitted that the Respondents do not have a HR policy as that was non-existent and there is no mention of an appeal to PSC. He submitted that the *Ex parte* Applicant's motion was rightly before the court.

5. The *Ex parte* Applicant's motion is against her re-deployment to the ministry of livestock. She argues that as a HR practitioner her career will be irretrievably damaged by this transfer as the transfer is to an area where she has no expertise or where her skill set will not be brought to bear. The Respondents on their part argue that the *Ex parte* Applicant's approach to court is premature as she has not exhausted the internal mechanisms available to her. In answer to that she asserts the Respondents do not have a HR policy or procedures in place. Whereas there may be an argument to be made in regard to the frequent transfers, the *Ex parte* Applicant herself admits that she has not exhausted the internal dispute mechanisms in place at the 3rd Respondent. She has preferred an appeal and it would seem this action was to forestall the appeal process which she surmised would not be fair. It is improper for parties to invoke the Constitution and the Fair Administrative Actions Act to frustrate internal dispute resolution mechanisms. Since she is not being sent to the gallows she should abide the outcome of the internal dispute resolution mechanism before approaching court. This action is misguided and I hereby strike out the Judicial Review brought by the *Ex parte* Applicant as it lacks merit on account of being filed prematurely. There shall be no order as to costs.

It is so ordered.

Dated and delivered at Meru this 3rd day of March 2020

Nzioki wa Makau

JUDGE