



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO. 1 OF 2019

IN THE MATTER OF ARTICLE 22 AND ARTICLE 258(1) & (2) (C) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF ALLEGED THREAT OF VIOLATION OF ARTICLES 3 AND 10 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED THREAT AND CONTRAVENTION OF ARTICLES 19, 20, 21, 22, 23, 24, 25 (C), 27, 35, 41, 50, 51, 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

BETWEEN

PAUL JALLA ELEMA.....1ST PETITIONER

ANDREW ADANO SALESA.....2ND PETITIONER

ADUKAN RAPHAELA.....3RD PETITIONER

ADUB ISSACKO UMURU.....4TH PETITIONER

STEPHENE SIGINITE TIMBOR.....5TH PETITIONER

ADAN ATAN SATAWA.....6TH PETITIONER

MATHEW NEEPE.....7TH PETITIONER

GUYO GURACHA FIGA.....8TH PETITIONER

DANIEL LARDAGOS DOKHLE.....9TH PETITIONER

MOHAMED ISSACK NYUKO.....10TH PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MARSABIT.....1ST RESPONDENT

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF MARSABIT.....2ND RESPONDENT

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF MARSABIT.....3RD RESPONDENT

THE COUNTY EXECUTIVE, PUBLIC ADMINISTRATION & ICT,

COUNTY GOVERNMENT OF MARSABIT.....4TH RESPONDENT

MARSABIT COUNTY PUBLIC SERVICE BOARD.....INTERESTED PARTY

RULING

1. The Petitioners seek through the Petition for declarations to be issued that the Petitioners' enjoyment of their rights and fundamental freedoms secured in the bill of rights have been threatened by the Respondents by failing, neglecting and refusing to give the Petitioners a hearing before the adverse administrative action of a transfer and/or demotion; that the transfers of the Petitioners by the 1st, 2nd and 3rd Respondents contained in the various letters and all the processes flowing from the said letters were un-procedural, illegal, null and void; that the Petitioners continue in the Respondents' service in their various positions as set out and in line with their various letters of appointment of the year 2014 and 2017 respectively and for that purpose the Petitioners report to their current offices and perform all those functions and duties allocated to them pursuant to their various letters of appointment and to continue in the service of the County Public Service in accordance with the law' an order of permanent injunction do issue restraining the Respondents jointly and severally, either acting on their own and/or through their agents, employees, servants and/or orders from implementing and enforcing the impugned transfer letters dated 15th February 2019 relating to the Petitioners herein and further restraining the Respondents from directing the Petitioners to prepare handover reports to the incoming Ward Administrator. The Petitioners also sought that the Court finds that they are entitled to damages for the violation of their constitutional rights as well as costs of the Petition. The Petition was supported by the affidavit of Paul Jalla Elema, the 1st Petitioner herein sworn in support of the Petition as well as his further affidavit sworn on 30th October 2019.

2. The Respondents filed a response to the Petition on 4th May 2019 alongside a replying affidavit sworn by Malicha Boru Wario the County Secretary Marsabit County, the 2nd Respondent herein and a further affidavit on 21st November 2019 sworn by Amina Challa the County Executive Committee Member Department of Public Administration and ICT, the 3rd Respondent herein. The Respondents in the main assert that the transfers were recommended by Amina Challa under whom the Petitioners were working and that the transfers were effected by the 2nd Respondent, the head of the Marsabit County Public Service as required by Section 72(2) of the County Governments Act. The Respondents assert the transfers were effected through letters of transfer issued in respect to the Petitioners and that these transfer were procedural and in keeping with the right to fair labour practices. The Respondents assert that the Petitioners have never reported to their new posts and therefore they cannot argue that they have been demoted since had they reported to duty they would then authoritatively know whether the transfers had resulted in demotions as alleged or transferred to non-existent work stations as argued by the Petitioners. The Respondents assert the allegations in this regard by the Petitioners are unfounded and untrue. The Respondents argue that the transfers were properly sanctioned and were with due regard to the Petitioners contracts of service. The Respondents assert that the Petitioners were required to prepare handover reports but failed to do so and since they did not report to their work-stations they were issued with notices to show cause why disciplinary action should not be taken against them for failing to adhere to the instructions issued. The Respondents assert that the Interested Party did not have any authority to unilaterally veto a legal decision on transfer in respect of the Petitioners made pursuant to Section 72(2) of the County Governments Act and that the Respondents did not participate in the proceedings and were not notified of the appeals contrary to the rules of natural justice. The Respondents assert that the Petitioners have never raised their grievances to the Respondents regarding their transfers.

3. In the matter, copious amounts of material were filed by each side and the main issue for determination is really whether the transfers effected were lawful or not and whether the Petitioners are entitled to any of the remedies sought if the transfers were unlawful. It is not disputed that the Petitioners serve the County Government of Marsabit in various capacities. They were transferred by the Respondents and promptly challenged the transfers arguing that they were being demoted and were being posted to non-existent offices. To counter this, the Respondents assert that if the Petitioners had reported to the offices as expected they would have authoritatively known whether indeed they were demoted or transferred to non-existent offices as asserted in the Petition. The Petitioners are employees of the County Government of Marsabit County and the County Governments Act applies to them. Section 72(1) and (2) of the Act allows for transfer or deployment of officers in the following terms:-

72.(1) The power to deploy a county public officer within a department shall vest in the relevant county chief officer.

(2) The power to deploy a county public officer from one department to another shall vest in the head of the county public service.

The Petitioners were thus transferred in line with the rubric of the parent Act superintending their service. The tension that ensued was because the Interested Party overstepped its mandate by not making any reference to the departmental heads being the relevant County Chief Officer and the head of the County Public Service who are the 2nd and 3rd Respondents herein. The law is clear, the County Public Service Board handles certain aspects of the employment such as hiring and appointment but transfers are to be executed in line with Section 72 which permits the 2nd and 3rd Respondents to transfer the staff. However, the transfers must be either lateral or within the same department

except for promotions which must of necessity follow laid down procedures. Umbrage was taken by the Petitioners that they were transferred to non-existent offices. If indeed this was so, one would have had to make the move and go to the new office. If the effect of the transfer was a demotion then the Petitioners would have had recourse in an appeal to the Interested Party and the Public Service Commission as the Respondents can only abolish offices in line with the County Governments Act. In the

Petitioners case, the transfers were made by competent officers and whether the Petitioners were not consulted the transfers were legitimate and in keeping with the contracts the Petitioners held. In the final analysis the Petitioners petition lacks merit and is accordingly dismissed. However, as the parties are still in an employee-employer relationship there shall be no order as to costs. Petition dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 28th day of May 2020

Nzioki wa Makau

JUDGE