



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 52 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 18th June, 2020)

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE NAIROBI METROPOLITAN SERVICE.....1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION2ND RESPONDENT

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

THE NAIROBI CITY COUNTY

PUBLIC SERVICE BOARD.....4TH RESPONDENT

AND

MAJOR GENERAL

MOHAMED ABDALA BADI.....1ST INTERESTED PARTY

DR. FREDRICK OUMA OLUGA.....2ND INTERESTED PARTY

ENG. PETER MUTT MWANIKI.....3RD INTERESTED PARTY

MR. HEMORIKE OMOLO OKUTA.....4TH INTERESTED PARTY

MS. LILLIAN KIENI.....5TH INTERESTED PARTY

MR. JOHN MUYA.....6TH INTERESTED PARTY

MS. MARION RONO.....7TH INTERESTED PARTY

ARCH SAMWEL NDIRITU MUITA.....8TH INTERESTED PARTY

MS. MAUREEN NJERI.....9TH INTERESTED PARTY

HON. GOVERNOR MIKE MBUVI SONKO.....10TH INTERESTED PARTY

JUDGMENT

1. What is before this Honourable is the Petition dated 6/4/2020, in which the Petitioner seeks the following reliefs:-

- i) *A DECLARATION THAT the purported creation of the Nairobi Metropolitan Services was unlawful and unconstitutional*

and, therefore, invalid, null and void ab initio.

ii) A DECLARATION THAT the handpicking and the purported appointment of the 1st to 9th Interested Parties to offices of the Nairobi Metropolitan Services was unlawful and unconstitutional and, therefore, invalid, null and void ab initio.

iii) A DECLARATION THAT the purported arbitrarily secondment by the Public Service Commission of some six thousand and fifty two (6,052) employees from the Nairobi County Government to the Nairobi Metropolitan Services is unlawful and unconstitutional and, therefore, invalid, null and void ab initio.

iv) A DECLARATION THAT the requirement that the six thousand and fifty two (6,052) seconded employees must go by their thousands in only two days to collect their secondment letters from the offices of the Nairobi Metropolitan Services during the current lockdown to fight the spread of the COVID-19 pandemic was a reckless, irrational, unreasonable, unlawful and unconstitutional threat to life and health and, therefore, invalid, null and void ab initio.

v) A DECLARATION THAT the Respondents should bear the costs of the Petition.

vi) AN ORDER:-

a. QUASHING the creation of the Nairobi Metropolitan Services.

b. QUASHING the letter Ref: OP/CAB.6/11A of 23rd March, 2020 which the Head of Public Service, wrote to several Cabinet Secretaries and copied to several Permanent Secretaries purporting to have handpicked and appointed chief officers and other staff of the Nairobi Metropolitan Services.

c. QUASHING the 30-page advertorial published in the Press on 3rd April 2020 by the Public Service Commission purporting to second employees of the Nairobi City County to the Nairobi Metropolitan Services.

d. COMPELLING the respondents to bear the costs of this suit.

vii) Any other relief the court may deem just to grant.

Background

2. The Petitioner avers that the 1st Respondent is an amorphous entity that was arbitrarily and unlawfully created in the Public Service through a declaration by H. E President Uhuru Kenyatta that in effect transferred functions of the County Government to the National Government on 25/2/2020.

3. He further avers that no legal notice was ever published establishing the 1st Respondent and therefore maintained that it is an illegal and unconstitutional entity and that its existence is in gross violation to the provisions of Article 132 (4) (a) of the Constitution of Kenya as read with Sections 27 and 30 of the Public Service Commission Act No. 10 of 2007.

4. He maintains that the 2nd Respondent is a Constitutional Commissions established under Article 233 of the Constitution of Kenya, 2010 and has been sued for allowing the President to irregularly create the 1st Respondent and further allowing it to be staffed through direct appointments in contravention of the law which requires that public offices be filled through a transparent, competitive, inclusive and merit based recruitment process open to public participation.

5. The Petitioner further maintains that the 3rd Respondent has been sued as legal advisor and representative to the Government of Kenya.

6. On the 4th Respondent, he avers that he has been sued herein for allowing its employees to be seconded to the National Government by the Public Service Commission (the 2nd Respondent) in contravention of the law and the Deed of Transfer.

7. He states that the 1st Interested Party is a military officer whom the President irregularly and unlawfully handpicked to head the 1st Respondent contrary to the law that required such an office to be filled through a transparent, competitive, inclusive and merit based recruitment process open to public participation contrary to the provisions of Section 36 and 37 of the Public Service Act, 2017.

8. He further states that the 2nd to 9th Interested Parties are persons whom the Head of Public Service irregularly and unlawfully appointed to be chief officers of the 1st Respondent contrary to the mandatory provisions of the law on an inclusive and competitive recruitment process that is open to public participation. The 10th Interested Party is the sitting Governor of Nairobi who on 25th February, 2020, together with the Devolution Cabinet Secretary, Eugene Wamalwa signed the Deed of Transfer of functions from the Nairobi City County Government to the National Government at State House Nairobi.

9. The Petitioner avers that on 4th April, 2020 the 10th Interested Party later released a Press Statement in which he condemned the purported secondment by the Public Service of Six Thousand and Fifty Two (6052) employees from the County to the 1st Respondent. He further avers that this act was against the Deed of Transfer agreed and signed between the parties hereto.

10. He further maintained that the alleged transfer of the 6,052 employees was unlawful as the Public Service Commission lacks the capacity to second county staff to the NMS without authority and ascent of the Nairobi County Government through the County Public Service Board and further that it did not comply with the provisions of Section 73 (4) and (5) of the County Governments Act, 2012.

Facts of the case

11. The Petitioner avers that the 10th Interested Party and the Devolution Cabinet Secretary signed an Agreement at State House that handed over functions of the Nairobi County Government to the National Government pursuant to Article 187 of the Constitution of Kenya, 2010.

12. That pursuant to the Deed of Transfer a soft copy of Gazette Notice No. 1609 dated 25th February, 2020 was published in the Special Issue of the Kenya Gazette Vol. CXXII – No. 38 giving details of the Deed of Transfer.

13. The Petitioner further states that the County Government surrendered the following four key functions to the National Government:-

i. County Health Services.

ii. County Transport Service.

iii. County Public Works, Utilities and Ancillary Services.

iv. County Government Planning and Development.

14. He further avers that the President on 18th March, 2020 announced through a Press Statement released at State House Nairobi of the creation of the 1st Respondent and that it would be headed by the 1st Interested Party.

15. The Petitioner maintained that this was done contrary to the provisions of Articles 10, 47(1), 73, 94 (5), 129, 131 (2) (a), 132 (4) (a) and 259 (1) of the Constitution of Kenya, 2010 as read with Sections 27 and 30 of the Public Service Commission Act, 2017 and Sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 22(1) and 23 of the Statutory Instruments Act, 2013.

16. The Petitioner states that the appointment of the 2nd to 9th Interested Parties to the position of chief officers contravenes the provisions of Section 45 (1) and (2) of the County Government Act, 2012 and further that there is no provision in law for chief officers to be appointed in the Nairobi Metropolitan Service by either the Head of Public Service or by any official of the National Government.

17. He further maintains that the said appointments of the 1st to 9th Interested Parties was made in complete disregard to the provisions of Section 55 (2) of the Public Service Commission Act as there is no legal instrument establishing the Nairobi Metropolitan Services and qualifications for all offices on the Nairobi Metropolitan Services.

18. The Petitioner avers that he had legitimate expectation that all appointments into offices in the Public Service will be done professionally meeting the standards set by the Constitution and statutory threshold specifically on the same being conducted in an open, competitive, merit based and inclusive.

19. The Petitioner therefore posits that the purported creation of the Nairobi Metropolitan Services and the appointment/secondment of persons to serve on it was arbitrary and not backed by or anchored in law and is therefore invalid, null and void *ab initio*.

20. He further maintains that the Nairobi Metropolitan Services created in the Public Service contravenes the provisions of Articles 10, 47 (1), 73, 94 (5) & (6), 129, 131 (2) (a), 132 (4) (a) and 259 (1) of the Constitution of Kenya, 2010 as read together with Sections 27 and 30 of the Public Service Commission Act, 2017 and Sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 22(1) and 23 of the Statutory Instruments Act, 2013.

21. He further maintains that the said office of NMS violates the provisions of Articles 1 (2), 10, 47 (1) and 232 of the Constitution of Kenya, 2010 as there was no Public participation prior to its inception and that the failure to issue and gazette a statutory instrument establishing it violates the provisions of Articles 1, 2, 3, 10, 47 (1), 73, 129, 131 (2) (a) and 232 of the Constitution of Kenya, 2010 as read together with the Statutory Instruments Act.

22. In conclusion, the Petitioner urges this Honourable Court to allow his Petition in terms of the reliefs sought therein.

1st to 3rd Respondent's Case

23. The 1st – 3rd Respondents filed a Notice of Preliminary Objection dated 21/4/2020, on grounds that:-

a) The application has been overtaken by events and that this Honourable Court has no jurisdiction to determine the validity of the promulgation and Constitution of Nairobi Metropolitan Service as it is not an employment issue.

b) The 1st Respondent is not a body corporate and is not capable of suing or being sued thus it should be struck out from the proceedings.

c) The transfer of functions and or powers between the levels of Government is purely a political process and the rationale of the

same is not within the purview of the Honourable Court's jurisdiction to question.

d) The effect of the grant of the orders sought by the Petitioner would amount to judicial overreach into the constitutional purview of the National and County Governments and that this court will essentially be substituting its decision with that of the constitutional repository of the function and or power.

e) The transfer of certain functions and/or powers by the Nairobi City County Government to the National Government is prima facie constitutional as it is expressly contemplated and sanctioned under Chapter 11 of the Constitution of Kenya.

f) The transfer of functions is aimed at ensuring the effective and efficient performance of government functions and delivery of services to the public and constitutes a legitimate ground for the invocation of the provisions of Article 187 of the Constitution of Kenya.

g) By dint of the provisions of Article 1 of the Constitution of Kenya, sovereign power is expressly delegated to among other State Organs, the National and County Governments whose decision cannot be challenged on the basis of alternative private views of the Petitioners.

h) The Petitioner does not have the requisite mandate to challenge the merits of the terms of the agreement between the National and County Government of Nairobi City County as they are not directly elected representatives of the people or a State Organ upon who sovereign power is delegated under the Article 1 (3) of the Constitution.

i) By dint of the provisions of Article 179 (4) of the Constitution of Kenya, the Governor Nairobi City County has ostensible authority to execute the Deed of Transfer of certain functions on behalf of the County Government of Nairobi City County.

j) The respondents complied with the process of transfer of functions as provided in the Intergovernmental Relations Act.

k) The Honourable Court lacks jurisdiction to issue conservatory orders with respect to the question of interpretation of the Constitution that is not hinged on violation or threatened violation of fundamental rights.

l) The provisions of Article 22 as read together with Article 23 (3) of the Constitution are not applicable in this matter based on the facts stated in the Petition.

24. In further response to the Petition herein the 2nd Respondent filed a Replying affidavit sworn by Remmy Mulati, it's Deputy Commission Secretary on 23/4/2020.

25. He avers that the seconded employees already picked their letters thus the prayer seeking to quash the advertisement has been overtaken by events. He maintained that the assertion by the Petitioner that the secondment was done without authority or ascent of the 4th Respondent is not true and urged this Court to disregard the allegation.

26. He further avers that the Commission and representatives from the Nairobi City County Government held various meetings which culminated in the County forwarding a list of names of officers who were performing the functions which has been transferred to the Public Service Commission vide the letter dated 25/3/2020.

27. He avers that the Commission pursuant to section 42 of the Public Service Commission Act, 2017 and in line with the powers conferred by the Deed of Transfer and the Instrument of secondment, approved the secondment of officers performing the transferred functions to the Nairobi Metropolitan Service in meetings held on 25/3/2020 and 26/3/2020. The Commission did not generate the list which was published and that the list was provided by the Nairobi City County Government.

28. He avers that under Article 132 (4) (a) of the Constitution, the President may establish an office in the public service in accordance with the recommendation of the Commission. He avers that pursuant to this provision, the President vide a letter dated 13/3/2020 requested for establishment of the Office of the Nairobi Metropolitan Service under the Presidency and not as a separate legal entity.

29. He avers that in the organizational structure of the Nairobi Metropolitan Service ,which was established in the meeting held on 18/3/020, the Commission did not create a position of Chief Officer as such no person can be seconded or deployed as a Chief Officer.

30. With respect to the allegation that the appointments contravened the constitutional principle for fair competition and merit, he avers that the Office of the Nairobi Metropolitan is an interim office established to undertake the transferred services. He avers that the persons deployed by the Central Postings Committee as communicated by the Head of Public Service are serving officers who have already undergone the competitive process. He avers that upon the lapsing of the Deed of Transfers the officers will revert to their respective ministries.

4th Respondent's Case

31. In support of the Petition, the 4th Respondent filed a Replying Affidavit sworn by Lydia Kwamboka, the County Attorney for Nairobi City County Government, on 27/4/2020.

32. She avers that Nairobi City County, in public interest entered into the deed of Transfer of Function for the sole purpose of ensuring that the residents of Nairobi City County continue to enjoy the services that were formerly devolved.

33. She avers that the reasons that informed the Nairobi City County to transfer some of its functions to the National Government was that the principles of Executive Authority set out under Article 129 of the Constitution require that executive authority at both levels of government be exercised in a manner that serves the best interest, well being and aspirations of the people of Kenya.

34. Further, the 2nd Respondent sought and continues to foster its effectiveness in the delivery of the public good and is considering mechanisms of embedding operational enhancements that would make the County Government able to deliver its constitutional mandate.

35. She avers that there have been internal constraints experienced by Nairobi City County, which have affected the discharge of its function considering that under Article 176 (1) of the Constitution of Kenya the County Government consists of the County Assembly and County executive. In addition, Article 179 (2) (a) as read together with Article 36 of the County Governments Act, the County Executive consists of the County Executive.

36. She avers that where the Governor is limited in functional execution of his constitutional mandate and in the absence of the Deputy Governor, the executive authority cannot be exercised rendering the delivery of services to the general public mute. She avers that section 25 (d) of the Intergovernmental Relations Act is clear that transferring or delegating a power, function or competency shall not include a transfer or delegation of constitutional responsibility assigned to that level of government.

37. She avers that in the constitutional framework under the Constitution of Kenya, public officers despite their designation or position held in service are all in public service and are governed by specific applicable constitutional and statutory provisions and lawful policies and practices.

38. She avers that the variance in positions held or designations does not render any of the public or state officers to escape their being servants of the people and employed by the people. She avers that the substantive law applicable to their employment ranging from declaration of vacancy, recruitment and selection procedures, appointment procedure and termination procedure would be the applicable public service constitutional and statutory provisions as held in **Okuya Omtatah Okoiti v Attorney General & 2 others; Francis K. Muthaura (AMB) & 5 others (Interested Parties) [2019] eKLR.**

39. She avers that the appointment of the 1st to 9th Interested Parties did violate the Constitution of Kenya, the Public Service Commission Act and the County Government Act. In respect of secondment of county employees, she avers that the 2nd Respondent's advertisement of 3/4/2020 requiring the affected employees to report to KICC to pick letters of secondment was a violation of Section 73 of County Government Act.

40. She further avers that the secondment of employees was not informed by the national values under Article 10 of the Constitution, was in violation of the employee's right to fair administrative action under Article 47 of the Constitution and undermined the consultation between the levels of government under Article 6 (1) & (2) and 189 of the Constitution of Kenya.

41. She avers that the 4th Respondent maintains that the Transfer of Functions will have greater chance of success if the National Government heeds to constitutional calls and dedicates to service of the public. She urges that the Court should grant the application.

42. The 1st to 9th Interested Parties did not enter appearance or file any response to the Petition filed herein.

10th Interested Party's Case

43. In support of the Petition the 10th Interested Party, who is the Governor of Nairobi City County filed a Supporting Affidavit sworn on 20/4/2020 in which he confirms that by an agreement dated 25/2/2020 the Nairobi City County agreed to transfer some key functions to the National Government and that the said transfer was subject to approval by the County Assembly, Parliament and Public Participation.

44. Hon. Sonko further avers that the Respondents acts of handpicking and appointing various Chief Officers was done without any consultation and was in blatant disregard to the provisions of the law. He further maintained that the purported secondment of some 6,052 Nairobi City County employees was similarly done in breach of the law and is as such illegal and unconstitutional. He therefore urged this Honourable Court to allow the Petition in terms of the reliefs sought therein.

45. Parties agreed to dispose of the Petition by way of written submissions.

Petitioner's Submissions

46. In his submissions, the Petitioner maintains that creation of the 1st Respondent has no legal basis as there is no legal document creating the said office. He therefore submitted that its creation is unlawful and unconstitutional.

47. The Petitioner further submitted that appointment of the 1st to 9th Interested Parties to the 1st Respondent and further secondment of 6,052 members of staff of the Nairobi County Government was unlawful and unconstitutional and that these issues are employment and labour relations disputes that fall under the purview of this Court's jurisdiction.

48. He further submitted that the instant Petition is merited and urged this Honourable Court to allow the same as pleaded.

1st to 3rd Respondents' Submissions

49. Counsel Chesyna for 1st-3rd Respondents submitted that this Court has no jurisdiction to determine the matter and that the matter herein is the subject of proceedings before another Court.

50. It was her submission that the Petitioner has not shown any nexus between him and the parties he seeks to protect. She submitted that the 1st Respondent is established under the Intergovernmental Relations Act and section 24 of the Act allows powers to be transferred from one entity to another. She further submitted that Article 179 of the Constitution of Kenya gives authority to governors to execute a deed of transfer of certain functions and that the 10th Interested Party was involved in.

51. She argued the 4th Respondent submitted that the list of staff who were to be seconded and is therefore estopped from asserting that it was not consulted. She further argued that the Deed of Transfer was executed voluntarily and that the 4th Respondent had no difficulty in executing the same.

52. She argued that the 1st Respondent is an interim office and the 1st to 9th Interested Parties were not appointed rather they were deployed. She argued that no appointment letters were issued.

53. It was her submission that there was public participation as there was an advertisement in the dailies and on the government website. In addition, the purpose of the Gazette Notice was to notify members of the public.

4th Respondent's Submissions

54. Counsel Muga for the 4th Respondent argued that the appointment of the 1st to 9th Interested Parties fell short of the constitutional expectations as the process was not inclusive, competitive or accountable by involving public participation. On the secondment of employees he relied on Articles 5.6 and 5.7 of the Deed of Transfer and further submitted that there was a process to be followed in secondment of employees. He avers that the process included consultation with stakeholders but this was not done. He urged the Court to declare the secondment unconstitutional.

10th Interested Party's Submissions

55. The 10th Interested Party in his submissions associated himself with the submissions filed on behalf of the Petitioner herein. He further submitted that the 1st Respondent has no Constitutional mandate to take over Nairobi County despite the fact that the Deed of Transfer was signed.

56. He further maintained that the actions by the Respondents save for the 4th Respondent are contrary to the provisions of Article 174 of the Constitution of Kenya, 2010. He submitted that the Respondents had no mandate to purportedly second some 6,052 Nairobi City County employees to the Nairobi Metropolitan Service without consulting him in complete disregard to the law.

57. On the Preliminary Objection, the 10th Interested Party submitted that the same is void of merit as this Court is mandated under Article 162 of the Constitution to determine employment and Labour Relations matters as the instant matter. He therefore urged this Honourable Court to dismiss the Preliminary Objection with costs.

58. It is further submitted that the Petition herein has merit and that the same ought to be allowed as prayed. For emphasis the 10th Interested Party cited and relied on the case of **Kimani Waweru & 4 Others Vs Central Bank of Kenya & 7 Others (2018) Eklr.**

Rejoinder by the Petitioner

59. In a brief rejoinder, Mr. Havi submitted that the Petitioner has no issues with the Deed of Transfer but rather the performance of the said deed through the 1st Respondent. He further maintained that the Respondents have failed to establish the Constitutional foundation for the existence of the 1st Respondent.

60. The Petitioner further submitted that he has the requisite locus to institute the instant Petition as the same is a matter of public interest.

61. I have examined all the averments and submissions of the Parties herein. I set down the following as issues for this Court's determination:-

1. Whether this Court has jurisdiction to handle this Petition.

2. Whether the Petitioner has locus-standi to file this Petition.

3. What is the legal status of the 1st Respondent?

4. Whether the appointment of 1st to 9th Interested Parties violated the law.

5. Whether secondment of employees of the County Government to Nairobi Metropolitan Services violated the law.

6. What orders this Court grants in this Petition.

1. Jurisdiction of this Court

62. The jurisdiction of this Court is drawn from Section 162(2)(a) of the Constitution which establishes the Court to deal with employment and labour relations matters.

63. Following the provisions of Article 162(2) of the Constitution, Parliament established the Employment and Labour Relations Court through the Employment and Labour Relations Court Act 2016 which at Section 12 sets out the jurisdiction of this Court as follows:-

1. “The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-

- a) disputes relating to or arising out of employment between an employer and an employee;**
- b) disputes between an employer and a trade union;**
- c) disputes between an employers’ organisation and a trade unions organisation;**
- d) disputes between trade unions;**
- e) disputes between employer organisations;**
- f) disputes between an employers’ organisation and a trade union;**
- g) disputes between a trade union and a member thereof;**
- h) disputes between an employer’s organisation or a federation and a member thereof;**
- i) disputes concerning the registration and election of trade union**
- j) officials; and**
- k) disputes relating to the registration and enforcement of collective agreements.**

64. The issues in this Petition relate to employees who have been appointed or seconded from one Government entity to another. There is also the issue of the legality of the entire process in the of secondment to be examined by this Court. In this Court’s view, the issue of these appointments and/or secondment fall squarely within the jurisdiction of this Court.

65. This issue of the legal status of the 1st Respondent will also affect the employees in question. In determining the status of the 1st Respondent, this Court will also resolve the sticky issue of whether the 1st Respondent is an employee in terms of Section 12 of the Employment and Labour Relations Court Act.

66. I therefore find that this Court has jurisdiction to handle the Petition before me.

2. Locus Standi of the Petitioner

67. The 4th Respondent submitted that the Petitioner has no Locus to file this Petition. The issue of Locus has been resolved in many Petitions before this Court. Article 22(1) of Constitution states as follows:-

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”.

68. The Law is clear that “every person” has the right to institute Court proceedings claiming that a right of fundamental freedom in the bill of rights has been denied.

69. The functions herein fall in the category of “every person” and the insistence by the 4th Respondent that he has no locus falls by the way side. I therefore find that the Petitioner has locus to institute this Petition.

3. Constitutional and Legal Status of the 1st Respondent

70. The Petitioner has submitted that the 1st Respondent has no legal status to purport to have employees seconded to it nor have staff appointed to it’s service. To understand the status of the 1st Respondent this Court goes back to the events and facts leading to the establishment of the 1st Respondent.

71. On 25th February 2020, there was a press statement released to the media houses and posted online at <http://www.president.go.ke/2020/02/25/functions-of-nairobi-county-government-handed-over-for-the-national-government-pursuant-to-article-187-of-the-constitution>.

72. It was announced by the Government Spokesman, Executive Office of the President of Republic of Kenya and Head of President's Strategic Communication Unit (PSCU) that the suspended Nairobi Governor Hon. Mike Mbuvi Sonko and Devolution Cabinet Secretary Hon. Eugene Wamalwa in concurrence with H.E President Uhuru Kenyatta had signed an agreement at State House handing over functions of the Nairobi County Government to the National Government pursuant to Article 187 of the Constitution.

73. The Gazette Notice that led to transfer of the functions above is Gazette Notice No. 1609 in Vol CXX11 – No.38. The Gazette Notice in part indicated that the transfer of functions was made pursuant to the Constitution of Kenya and the Inter-Governmental Relation Act, in particular Article 187 of the Constitution as read with Section 26 of the Inter Government Relation Act 2012.

74. This Deed of Transfer was made on the 25th day of February 2020 and the County Government functions to be transferred to the National Government were Health, Transport, County Planning and Development and Public Works, Utilities and Ancillary Services.

75. This Deed of Transfer was signed in the presence of the Hon. Attorney General by the Cabinet Secretary for Devolution and ASALs Hon. Eugene Wamalwa and Hon. Mike Mbuvi Sonko the Nairobi County Governor and their witnesses.

76. The Petitioner is aggrieved by the fact that these County Government functions were transferred without the involvement of the Nairobi County Assembly, the Cabinet, the County Executive Committee and the Senate.

77. He contends that the transfer was done without any executive paper and without any resolution by Parliament.

78. The Petitioner also contends that the 10th Interested Party having been suspended as Governor of Nairobi City County, he had no capacity to transact any official county business as was held by the Court of Appeal in **Ferdinand Ndungu Waititu Babayao vs Republic (2019) eKLR**.

79. Article 189 of the Constitution provides as follow:-

“Cooperation between National and County Governments

1) Government at either level shall:-

a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;

b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and

c) liaise with government at the other level for the purpose of Constitution of Kenya, 2010 115 exchanging information, coordinating policies and administration and enhancing capacity.

2) Government at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities.

3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

4) National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

80. Indeed the law envisages the cooperation between the National Government and the County Government but this must be done in a manner that respects the functional and institutional integrity of Government at the other level and respect the Constitutional Status and Institution of Government at the other level. Article 176(1) of the Constitution consists of:-

(1) “There shall be a county government for each county, consisting of a county assembly and a county executive”.

81. The County Government in this case consists not only of a Governor but also the County Assembly. In as far as this Deed of Transfer of functions of Nairobi County Government was done between the County Governor without involvement of the County Assembly, the Constitution was breached and the transfer was done without involvement of the entire County Government as envisaged by the Constitution.

82. Other than the fact that the deed of transfer was made without the relevant entities involved the 1st Respondent was thereafter borne out of this Deed of Transfer.

83. The Petitioner avers that there was no legal document creating the Nairobi Metropolitan Services. The 1st Respondent is their replying

affidavit exhibited a gazette notice dated 25th February 2020 in which they claim was the instrument that bore the 1st Respondent.

84. Gazette Notice dated 25th February 2020 as indicated above is the transfer of Functions Deed. There is no indication in this Deed of Transfer that the 1st Respondent had been created or proposed to be created.

85. The 1st Respondent submitted that the Nairobi Metropolitan Services was created by H.E the President pursuant to his power under Article 132(4)(a) of the Constitution.

86. Article 132(4)(a) of the Constitution provides as follows:-

4) *"The President may:-*

a) perform any other executive function provided for in this Constitution or in national legislation and, except as otherwise provided for in this Constitution, may establish an office in the public service in accordance with the recommendation of the Public Service Commission"

87. Indeed the President has power to establish an office in the Public Service in accordance with the recommendation of the Public Service Commission.

88. The establishment of such an office must follow the law. There is no evidence that the 1st Respondent was established by the President if at all as no instrument of its establishment has been presented before this Court.

89. It is therefore my finding that the legal status of the 1st Respondent as at the time of filing this Petition was not yet established as per the law as there was no instrument of its establishment presented before this Court.

4. Appointments of 1st to 9th Interested Parties

90. The 1st to 9th Interested Parties are said to have been appointed to serve in different capacities in the service of the 1st Respondent vide a letter from the Head of Public Service dated 23rd March 2020.

91. The letter indicated that the listed Interested Parties amongst others indicated that the Interested Parties had been identified for posting/deployment from both the National and County Governments to the newly established Nairobi Metropolitan Services under the Presidency.

92. The Petitioner has submitted that this deployment was in contravention of Article 232(1)(g) of the Constitution which requires transparency, fair competition and merit as the basis of appointment and promotions.

93. They also submit that Article 10 of the Constitution and Article 36 and 27 of the Constitution was flouted.

94. The 4th Respondents submitted that the 2nd Respondent has no capacity to deploy or second County Staff to the National Government.

95. The 4th Respondent referred to Section 59 of the County Government Act which provides that all matters relating to staffing (appointment, demotion, deployment, secondment) in County Governments are assigned to the respective County Public Service Boards which are under Section 57 (a).

96. The 2nd Respondent therefore has no capacity in law to deploy and/or second county workers to the National Government. This was the holding by the Court of Appeal in **Kenya County Government Workers Union vs Kisumu County Public Service Board and Another (2019) eKLR**.

97. The 4th Respondent further submitted that the appointment of the 1st to 9th Interested Parties violated the law and the Constitution. I however note that the 1st to 9th Interested Parties were not appointed but were deployed or seconded. This means they were serving under the County Public Service Board or under the Public Service Commission. It was therefore either of the 2 bodies that should have deployed them stating the terms and conditions of their secondment/deployment status.

98. This process was overlooked and was done in contravention of the law and the Constitution.

5. Whether secondment of employees of the Nairobi County Government to Nairobi Metropolitan Services violated the law.

99. On this issue, the Petitioner submitted that 6052 employees of the County Government of Nairobi were seconded to the Nairobi Metropolitan Services by the Publication made by the Public Service Commission on 3rd April 2020.

100. The Petitioner submitted that the secondment was in violation of the law as it was made to a nonexistent entity and also was done without the authority of the Nairobi County Public Service Board.

101. The 4th Respondent submitted that the Deed of Transfer of functions contemplated secondment of employees but the secondment was to be done within the law.

102. Article 5.6 of the Deed of Transfer states that:-

“The relevant human resources for the implementation of this agreement shall be seconded from the County Government to the National Government”.

The Deed further provides that “the County Public Service Board shall, in consultation with the Public Service Commission formulate the necessary instruments to facilitate the secondment and/or deployment of the necessary human resources”.

103. The 4th Respondent submitted that the secondment was not done by the Nairobi County Public Service Board nor was it as a result of consultation with the Public Service Commission but was a decision made and advertised unilaterally by the Public Service Commission.

104. The 2nd Respondent in reply contend that they had various meeting with the representatives from the Nairobi City County Government which culminated in the later forwarding a list of names of officers who were performing the functions which had been transferred to the Public Service Commission vide a letter dated 25th March 2020.

105. They aver that the Public Service Commission approved the secondment of the officers performing the transferred functions to the Nairobi Metropolitan Services. They deny that the Nairobi County Government was not involved.

106. On this, this Court notes that there is a letter from the Nairobi City County signed by Acting Secretary of County Public Service Board one Susan Waweru requesting the Cabinet Secretary for devolution to advice on the engagement mechanism to ensure execution of the transfer of functions to the National Government.

107. On 18/3/2020, the instrument to facilitate secondment and/or deployment of officers from the Nairobi City County to the Nairobi Metropolitan Services was signed between the Chairman Public Service Commission and the Chairman Nairobi County Public Service Board.

108. Earlier on, a list of the staff to be seconded was issued on 5th March 2020 by the Acting County Secretary and Head of County Public Service Mr. Justus Kathenge.

109. It is therefore evident that there was consultation between the County Public Service and the Public Service Commission before staff from the County Public Service Board were seconded to the Public Service Commission.

110. The 10th Interested Party submitted that the Respondents acted in contravention of the law and the Constitution by seconding 6052 staff to the Nairobi Metropolitan Services without consulting him. This I find not tenable because the body to be consulted was the County Public Service Board and not the 10th Interested Party as an individual.

111. I have not been asked in this Petition to decide whether the seconded staff were consulted or not before the secondment was done and I will therefore not address that issue.

112. I find that the secondment was done with consultation between the Public Service Commission and the County Public Service Board as envisaged under the Deed of Transfer. However, the secondment having been done by the 2nd Respondent is illegal and null and void as the secondment was to be carried out by the Interested Parties employer who was the respective County Public Service Board.

6. Remedies

113. From the analysis above, I render the following remedies:-

1. A declaration that the creation of the Nairobi Metropolitan Services was done in violation of the Law and the Constitution.

2. The deployment and secondment of the 1st to 9th Interested Parties was done in contravention of the Law and the Constitution.

3. A declaration that secondment of the 6052 staff to the Nairobi Metropolitan Services from the Nairobi City County was done with consultation between the Public Service Commission and the County Public Service Board but the reasons were noble but in contravention of the law – the County Government Act.

114. I have made a determination that the 1st Respondent was established in contravention of the Law.

115. The Court however has jurisdiction in interpreting the Constitution to not only give effect to the letter and spirit of the Law but also to ensure that the rights and freedoms of the citizenry are protected.

116. I have looked at comparative jurisprudence from other jurisdictions dealing with illegalities committed against the Constitution whilst balancing the rights of the citizens especially from Canadian and S. African Courts.

117. The South African Constitution contemplates at its Section 172(1)(b)(ii), that a Court can make an order suspending the declaration of invalidity for any period and on any conditions to allow a competent authority to correct the defect.

118. The Canadian Supreme Court in **Schachter vs Canada (1992) 2SCR 679, 199 CanLII 72(SCC)** also relied on this principle and allowed the operation of invalidity to be suspended to allow Parliament to cure a defect.

119. Hon. J. Mativo applied this principle in **Milimani Constitutional Petition No. 39 of 2017** and applied the above principle allowing the impugned provisions of the Income Tax Act to be suspended.

120. As stated by Hon. J. Mativo in the above petition, before the Court applies this principle, the Court must be cautious and must ensure that the supremacy of the Constitution is not eroded. The Court must also be guided by the need to prevent undue hardship to the Parties.

121. This was also the holding in the **Suleiman Shabhal vs IEBC and 3 others case (2014) eKLR** where the Hon. Court also found that the principle can be applied in mitigating the time span effect of the declaration and where the matters in question are complex and where the declaration of invalidity would disrupt law enforcement

122. I wish however to consider the reason behind the said establishment which is drawn from the Deed of Transfer and which shows that the County Government recognized its internal constraints in the effective discharge of its functions.

123. The County Government was also aware of the fact that some of its functions currently vested by the constitution would be more effectively performed and exercised by the National Government.

124. The parties also realized that Nairobi City is the seat of the Government of Kenya and also the capital city also the largest commercial hub in Central and East Africa and home of over 4 million people.

125. It was also felt that of necessity, in order to give its residents better services, the transfer of services envisaged under the Deed be effected.

126. In the instant Petition, I take note of the fact that following the transfer of functions, parliament has expended its budget and allocated funds to the 1st Respondent. The residents of the city are already benefiting from the functions so far transferred. The 1st Respondent already have staff who have been seconded or deployed to the its establishment through the impugned process.

127. The life of these employees hang in the balance if disturbed at the moment.

128. Given that money has been expended and staff deployed, services are being rendered, the effect of this judgement if allowed to take effect today is to cause confusion and pandemonium which will lead to lack of services to the residents of Nairobi.

129. In the circumstances, I exercise my discretion, I suspend the declaration of illegality above from taking effect for a period of 90 days in which period the 1st Respondent should be established by law and the instrument of its establishment made. The Nairobi County Assembly, 4th Respondent and the 10th Interested Party are all very important parties in this exercise and should be part of the process.

130. The issue of secondment and deployment of staff should also be addressed and the authority responsible in this exercise to action proper secondment/deployment letters.

131. In default of the actions above within 90 days, any Party is free to apply.

132. There will be no orders as to costs.

Dated and delivered in Chambers via zoom this **18th day of June, 2020**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kioko holding brief Eredi and Chesiyana for 1st and 2nd Respondents – Present

Muga for 4th Respondents – Present

Kurauka for 10th Interested Party – Present

Petitioner – Absent