



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

PETITION NO. 4 OF 2019

(Before Hon. Justice Mathews N. Nduma)

SILVANUS LUKOKO WERE CLAIMANT

VERSUS

MINISTRY OF LANDS & PHYSICAL PLANNING..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

1. The petition was filed on 26th July, 2020 in which the petitioner prays for judgment in the following terms:-

- a) THAT: a declaration be and is hereby issued that the action of the respondent purporting to transfer and demote the petitioner from Nyando District land office to Vihiga District land office was unfair.
- b) THAT: declaration be issued that the respondent has violated Articles 41, 47 and 236 of the constitution of Kenya 2010
- c) THAT an order for exemplary and punitive damages be and is hereby issued against the 1st respondent on account of their gross violation of the petitioner's fundamental rights and freedom as enumerated in the petition
- d) Cost of the suit

Foundation:

1. The petition is premised on the facts set out in paragraphs 4 to 12 of the petition that maybe summarized as follows:-
2. The petitioner was employed as an Assistant Land Registrar in 1981. The petitioner was promoted to a Senior Assistant lands Registrar and was transferred overtime to different stations. In the year 2009, the petitioner was transferred from Kajiado Land Registry to Nyando Land office as in charge of the station. The petitioner worked at Nyando Lands office until 19th May, 2018 when the 1st Respondent transferred the petitioner to Kisii lands Registry
3. The petitioner was before settling down at Kisii lands Registry having reported on 27th June, 2018, again transferred to Busia via a letter dated 31st August, 2018.
4. The petitioner reported to Busia Land Registry on 17/9/2018 and returned to Nyando to await deployment of another registrar to take over the Nyando station whom the 1st Respondent was yet to deploy.
5. The 1st respondent wrote a show cause letter dated 19th December, 2018 to the petitioner demanding that the petitioner show cause why disciplinary action should not be commenced against him for failure to obey lawful instructions by failing to report to Busia Land Registry
6. On 25th January, 2019, the 1st respondent further transferred the petitioner to Vihiga Land Registry and wrote a letter to that effect dated 19th February, 2019
7. The petitioner reported to Vihiga but found another registrar incharge of the station and was directed to handle clerical work pending communication from the 1st respondent.

8. On 29th April, 2019 the 1st respondent asked the petitioner to surrender his unique stamp which bears the petitioner's official number 105 and his names.

9. The petitioner stated that he was unable to conduct registration work at Vihiga Land Registry where he is now based because his official stamp is required to perform his duties.

10. The petitioner stated that the aforesaid action by the 1st respondent amounted to unlawful and unfair transfer and demotion and a violation of the petitioner's constitutional rights under Article 41, 50, 47 and 236 in that the action was unfair labour practice, unfair Administrative action and a violation of the right to a fair hearing before transferring and demoting him in the said manner. The petitioner seeks for the orders as prayed.

Response

11. The respondents responded to the petition vide a response filed on 13th December 2019 in which they stated as follows:-

12. That the petitioner was employed as a clerical officer in job group D with effect from 1st August, 1981 and not an Assistant Land Registrar as he alleges.

13. The respondents admit the contents of paragraph 5,6 and 7 of the petition that the petitioner was in the year 2009 transferred from Kajiado land Registry to Nyando land office in charge of the station and on 19th May, 2018 he was transferred to Kisii Land Registry where he reported on 27th June, 2018 but was transferred again to Busia Land Registry by a letter dated 31st August, 2018. That the petitioner reported to Busia Land Registry on 17th September, 2018 and returned to Nyando awaiting deployment of another registrar to take over the station .

14. The respondent states that the petitioner was issued a show cause letter for refusal to obey clear instructions to move to another station and for refusing to surrender the office stamp

15. The respondent denies that the petitioner was further transferred to Vihiga by a letter dated 25th January, 2019 despite annexures '9a' and '9b' which are the letters dated 25th January,2019 and a follow up letter dated 1stFebruary, 2019.

16. The respondent further states that the issue of surrender of the official stamp applied to the Senior Assistant Land Registrars and Assistant land registrars and was done in accordance to the Land Registration Act 2012. That issuance of an official stamp was a preserve of land Registrars of which the petitioner was not.

17. The respondent denies having violated the petitioner's constitutional rights under the constitution as averred under paragraph 13,14 and 15 of the petition or at all.

18. That the petitioner's transfer and lack of unique stamp is not a demotion since the petitioner still holds his position as Senior Assistant Land Registrar.

19. The section 10(3) read with section 13 of the Employment Act allows the employer to make organizational changes including transfer and redeployment of employees hence no wrong was done by the respondent.

20. That section 9(2) of The Fair Administrative Actions Act, 2015 require an aggrieved party to exhaust internal mechanism before going to court. That the petition was therefore brought prematurely.

21. That the petition be dismissed with costs.

DETERMINATION

22. The petitioner filed written submission on 5th February 2020 together with a further affidavit joining issues with the respondent. The respondent filed submissions on 13th December, 2019 prior to the filing by the petitioner who had delayed to file in terms of the directions given by the court.

23. The issues for determination are:

a) Whether the transfer of the petitioner to Vihiga Land Registry and taking of his official stamp violated his constitutional rights under Articles 41, 47, 50 and 236 of the constitution of Kenya 2010.

b) Whether the petitioner is entitled to the reliefs sought.

24. In answer to issue (a above, it cannot be gain said that the manner in which the respondent transferred the petitioner from Kajiado to Nyando, from Nyando to Kisii and from Kisii to Busia and then from Busia to Vihiga in quick succession and on no notice at all was at best haphazard and disruptive to the life of the petitioner.

25. The substantive position of the petitioner being Senior Assistant Land Registrar did not change in those transfers except that at Vihiga the

final station where he was transferred, he was serving under another head of station whereas at Nyando Land Registry office where he had served from the year 2009 to 19th May, 2018 a period of about nine(9) years, as in charge of station.

26. It is apparent that the final transfer to Vihiga was preceded by a show cause letter for insubordination for failure to report to Busia land registry despite being requested to do so with immediate effect and that even after being transferred to Kisii Land Registry he was still working in Nyando Land Registry.

27. The petitioner was informed that his dismissal from service for failure to obey the instructions was contemplated but he was first to show cause within 21 days why this action should not be taken against him.

28. The petitioner responded to the show cause letter by a letter dated 18th February, 2019 in which he stated that he had already reported to Kisii and to Busia but he had on both occasions returned to Nyando to prepare handing over reports.

29. The petitioner stated that he was then based in Busia but pleaded that he be spared that transfer since he was due to retire in a short time.

30. The 1st respondent did not follow on the disciplinary action but instead wrote a letter dated 25th January, 2019, stating that it had been decided that the petitioner be transferred from Nyando Lands office to Vihiga lands office due to service need. He was report to the officer in charge of Vihiga land office.

31. It is the court's considered finding that the respondent did not proceed on the threatened disciplinary action against petitioner for disobeying lawful instructions but opted to only transfer the petitioner to Vihiga where he retained his substantive post but was no longer in charge of station.

32. The ordinary English meaning of the word 'demotion' is "reduction in rank or status". The meaning of the word 'rank' on the other hand is "place within a grading system". Furthermore, the ordinary meaning of the word 'status' is "person's social standing".

33. From the afore going, the petitioner's rank within the Ministry of Land and Physical Planning System was not changed at all in the several transfers made. The petitioner also kept the status of being in charge of station while at Nyando, Kisii and Busia. However the status changed at the last station of Vihiga since he was no longer in charge of station.

34. In employment terms in the civil service, being in charge of station is a status that is earned and gained in service over time. It is a status given to a person as opposed to colleagues who while serving under him as the in charge of station become his subordinate and he becomes their automatic immediate supervisor.

35. That status is immediately lost once the position of "incharge" is removed from that person notwithstanding that the substantive rank of the person has not changed.

36. It therefore follows that even if a transfer is not a disciplinary or punitive action, where a transfer includes a reduction in status at the new station such as was experienced by the petitioner, the employer is obliged to explain to the employee why the action leading to diminution of status has been meted on him and also give opportunity to the affected employee opportunity to explain why the employer should not take the intended action.

37. This is what due process under Fair administrative Actions Act 2015 contemplates and failure by an employer to do so then makes the action unfair administrative action against the employee in violation of section 4(1) of the Act and Article 47 of the Constitution. Furthermore, the action also constitutes unfair Labour practice in violation of Article 41 of the constitution.

38. It is therefore the conclusion by the court that the respondent violated Articles 41 and 47 of the Constitution of Kenya 2010 in the action taken against the petitioner by transferring him to a position less of status and responsibility to that he held from 2009 up to the date of this transfer on 25th January, 2019

39. The petitioner stated that he was about to retire without stating when the retirement date was due. The petitioner did not also establish or plead if the change in his employment status led to any financial loss at all in the remaining term of his employment. The petitioner did not therefore prove any financial or material loss as a result of the action taken against him by the 1st respondent.

40. The petitioner did not establish any basis for the Court to award him any special, punitive or general damages as a result of damage or loss suffered by him pursuant to the transfer and reduction in status.

41. In prayer (a) to (f) set out in the petition, that the petitioner did not pray that the court do quash the decision by the 1st respondent to transfer him to Vihiga on diminished Status while holding the same rank.

42. The petitioner only sought a declaration that the said action by the 1st respondent be declared unfair and a violation of his reputation under Articles 41, 47, 50 and 236 of the constitution and the Court to award damages.

43. In the final analysis the court makes a finding that the 1st respondent violated the right of the petitioner to a fair administrative action under Article 47 of the constitution and the action by the 1st respondent to transfer the petitioner in the same rank but in a diminished status without any opportunity for him to engage the 1st respondent on the matter amounted to unfair labour practice in violation of Article 41 of the constitution 2010.

44. **The transfer of the petitioner to Vihiga Land Registry dated 25th January, 2019 is declared unlawful and unfair and the petitioner is not obliged to abide to it.**

45. However, the petitioner having not proved any financial loss and or damage occasioned to him as a result of said action by the 1st respondent the court makes no orders as to any special or general damages.

46. The respondents to pay to the petitioner cost of the petition

Judgment Dated, Signed and delivered at Nairobi this 11th day of June, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Were for Petitioner

Mr. Tarus for Attorney General

Chrispo – Court Clerk