



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 136 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 2(1), 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 41, 47, 50, 159, 162(2), 165(5)(b), 232, 236 AND 258 OF THE CONSTITUTION OF KENYA, 2010;

AND

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 27, 28, 32, 33, 35, 41, 47, 48, 50, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010;

AND

IN THE MATTER OF: THE ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010;

AND

IN THE MATTER OF: SECTION 5 OF THE EMPLOYMENT ACT 2007;

AND

IN THE MATTER OF: SECTIONS 5, 6, 7, 8, 9 AND 10 OF PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015;

AND

IN THE MATTER OF: SECTIONS 4, 6, 7, 8, 9 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF: RULES 18, 19 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013;

BETWEEN

EUSTACE MURIITHI NJERU.....PETITIONER

VERSUS

ENERGY AND PETROLEUM REGULATORY AUTHORITY...RESPONDENT

JUDGMENT

The Petitioner, Eustace Muriithi Njeru filed this Petition dated 19th July 2019 against the Respondent, Energy Regulatory and Petroleum Authority and further filed a Notice of Motion dated 19th July 2019. The Court directed that both the Petition and Application would be dispensed with together.

The Petitioner avers that on or about 3rd July 2019, he was invited by the Respondent’s Principal Human Resource Officer, Miss. Eunice Ayodo via email to attend a meeting at the Respondent’s head office in Nairobi to be held on 5th July 2019. That on the said 5th July 2019

while at the Respondent's boardroom and after waiting for 2 hours together with Josephine Nambiro and Anthony Karingu, the Senior Office Administrator at the Director General's Office served him with a letter dated 4th July 2019. That the letter was interdicting him for the unauthorized release/transfer of the Respondent's confidential information and official documents from his official email to his personal email, and to third parties' accounts without approval from the Director General. He avers he was not aware of any preliminary investigations being conducted on him and that he is yet to receive any report or brief on the same to date, contrary to the principles of natural justice and the Respondent's Human Resource Policy and Procedures Manual.

That the said interdiction letter does not meet the form set under the Respondent's Human Resource Policy and Procedures Manual and the Discipline Manual as it does not disclose who undertook the purported preliminary investigation, under whose instructions, the dates when it was undertaken, the alleged third parties to whom emails were sent and the documents purported to be confidential. Further, that the Committee that is alleged to have sat and made a resolution for him to be interdicted with immediate effect does not have the jurisdiction at that stage of interdiction as under **Section 11.12.1 of the Human Resource Policy and Procedures Manual**. He contends that the Committee of the Board can only be ceased of the matter when the HRAC recommends to it the particular disciplinary action to be taken against an employee.

He avers that the Respondent's action is unlawful and meant to pre-empt the court's decision and defeat the cause of justice on the following grounds:

- a) The Petitioner had sworn an affidavit in favour of a former employee of the Respondent, one Abdullahi Mohammed Omar, who is facing a criminal charge of causing disturbance in a public place whereby one of the Respondent's senior Management team members, Mr. Cyprian Nyakundi Mongare is the complainant.
- b) The Petitioner had further lodged a Complaint with the Commission on Administrative Justice (Ombudsman) complaining the change of his job description from engineering to energy efficiency enforcement without the Respondent consulting him.
- c) The Respondent has interdicted employees who have referred matters to any government agency or filed a matter before the court against it. The employees who have fallen victims of this malicious scheme of victimization besides the Petitioner are **Josephine Washifutswa Nambiro Petition No. 101 of 2018, John Sigura Otido Cause No. 294 of 2018 and Elizabeth Wanjiku Njau Petition No. 22 of 2019**.

He contends that the Respondent has denied him the right of a fair hearing on the purported preliminary investigation report as guaranteed under **Section 41 of the Employment Act, 2007, Section 4 part 1 of the Fair Administrative Actions Act, the Mwongozo Code of Governance for State Corporations and the Respondent's Human Resource Policy and Procedure Manual 2019**. That his interdiction and the procedure thereto have occasioned irreparable injury and damage to his livelihood and avers that the Respondent has infringed on his constitutional and fundamental rights and freedoms under the following provisions of the Constitution: -

Article 10 (1) which provides that national values and principles of governance binds all State organs, including the Respondent, while applying the Constitution or implementing public policy decisions. The appointments in all cases shall be aligned to clear job descriptions and specifications for various cadres of employees in their respective fields of employment.

Article 20 which states that the Bill of Rights binds all State organs including the Respondent to allow every person to enjoy the rights and fundamental freedoms in the Bill of Rights, which the Petitioner was not accorded as an employee. The decision to interdict him inhibits his ability to be a productive employee.

Article 27 which provides for the right against discrimination which the Respondent has infringed by interdicting the Petitioner after singling him out and conducting some illegal investigations against him and denying him equal treatment and benefit of the law.

Article 41 which provides for the right to fair labour practices which the Respondent infringed as it interdicted the Petitioner without any justifiable reason and by way of victimization.

Article 47 which provides for the right to fair administrative action which the Respondent infringed by failing to accord the Petitioner a fair hearing before taking any adverse decisions against him and further interdicting him knowing well that it was bereft of such power under any written law.

The Petitioner submits that he was instructed by the Respondent to hand over all property in his possession which is only done when an employee is leaving employment of an employer and that this contravened his right under **Article 48 of the Constitution**.

The right to fair hearing before an independent and impartial tribunal or body under **Article 50** as provided for under the Respondent's Human Resource Policy and Procedure Manual was deliberately and arbitrarily breached by the Respondent, to achieve the common end or goal of terminating the Petitioner.

The Petitioner's right to go to court for redress upon violation of his constitutional rights under **Articles 22, 23, 48 and 258 of the Constitution** has been infringed by the Respondent. This is demonstrated by the Respondent amending its Human Resource Practice and Procedure Manual to include a *clause under 6.13* requiring the Respondent's Director General to immediately suspend any of the Respondent's staff who has taken the Respondent to Court. Further, that the said amendment was done without prior consultation of the Respondent's employees and key stakeholders.

The Petitioner prays for the following Orders and Declarations that: -

a) The court do issue an order that articles 10, 27, 28, 41, 47, 50, 73 and 236 of the Constitution have been violated by the Respondent thus the Respondent's action of interdicting the Petitioner is null and void.

b) A declaration that the action of the Respondent is opaque, egregious, clandestine, capricious whimsical and contrary to Articles 10, 27, 28, 41, 47, 50, 73 and 236 of the constitution of Kenya, 2010 hence unconstitutional and consequently null and void.

c) An order to set aside the letter dated 4th July, 2019

d) This Court do issue a Declaration that section 6.13 of the Energy and Petroleum Regulatory Authority's Human Resource Practice and Procedures Manual (2019) be declared unconstitutional as it is inconsistent with articles 22, 48 and 258 of the Constitution and therefore null and void.

e) An order setting aside the letter dated 14th February 2019 purporting to redeploy the Petitioner.

f) This court be pleased to grant an order of Permanent Injunction prohibiting/restraining the Respondent, its servants, officials, representatives, and/or agents from taking any disciplinary action against the Applicant or having so taken be restrained from acting thereupon or otherwise in any other manner.

g) General damages for the constitutional violations of the petitioners' fundamental rights.

h) The Court do issue any other Orders and give such directions as it may deem fit to meet the ends of justice.

i) Costs of the Petition.

j) Interest on the above at court rate.

In the Notice of Motion dated 19th July 2019, the Petitioner/Applicant seeks the following Orders that:

1. Spent.

2. Pending the hearing and determination of this Application interparte, the Court be pleased to issue and hereby issues an order suspending the implementation of the interdiction letter dated 4th July, 2019 written by Mr. Robert Pavel Oimeke, the Director General of the Respondent.

3. Pending the hearing and determination of this Application interparte, this Court be pleased to grant conservatory orders reinstating the Applicant to his office and position.

4. Pending the hearing and determination of this Application interparte, the Court be pleased to issue and hereby issues an order suspending the implementation of the letter redeploying the Petitioner dated 14th February, 2019 written by Mr. Robert Pavel Oimeke, the Director General of the Respondent.

5. Spent.

6. The costs of this application be provided for.

UPON INTER PARTES HEARING

7. Pending the hearing and determination of this Petition, the Court be pleased to issue and hereby issues an order suspending the implementation of the interdiction letter dated 4th July, 2019 written by Mr. Robert Pavel Oimeke, the Director General of the Respondent.

8. Pending the hearing and determination of this Petition interparte, the Court be pleased to issue and hereby issues an order suspending the implementation of the letter redeploying the Petitioner dated 14th February, 2019 written by Mr. Robert Pavel Oimeke, the Director General of the Respondent.

9. Pending the hearing and determination of this Petition, this Court be pleased to grant conservatory orders reinstating the Applicant to his position.

10. Spent.

11. The costs of this application be provided for.

Respondent's Case

The Respondent filed two Replying Affidavits dated 28th August 2019 sworn by its Principal Human Resource Officer, Eunice Ayodo who

avers that the Petitioner has not exhausted the disciplinary procedure and processes provided under the Respondent's Human Resources Policies and Procedures Manual and that this Court should review an administrative action or decision unless all the remedies available are first exhausted. She avers that in the interdiction, the Petitioner was duly informed of the provisions of the Human Resource Manual that he had breached and was further informed of having breached **Paragraph 8 of his letter of appointment dated 14th December 2009**. That the Petitioner's conduct of sharing confidential information without approval from the DG amounts to gross misconduct that justifies dismissal without any warning, pursuant to **paragraph 11.9.9 of the Human Resource Policy and Manual**. That the Respondent however opted to interdict the Petitioner to pave way for further investigations and that the Petitioner was entitled to half of his basic salary, full house allowance and medical benefits while under interdiction.

She avers that this Petition is an attempt by the Petitioner to drag this Court to the internal affairs of the Respondent and that initiation of disciplinary processes at work is presumed to be management prerogatives. That the Respondent is consequently within its mandate pursuant to its Human Resource Policy and Manual and has the prerogative to interrogate whether information sent to third parties by the Petitioner is prejudicial to it. She avers the Petition herein is premature and an abuse of the court process and that none of the Petitioner's rights have been infringed as alleged or at all. She urges this Court to dismiss the Petition together with the Application herein with costs.

Petitioner's Submissions

The Petitioner submits that **Article 27 of the Constitution** and **Section 5 of the Employment Act** prohibit discrimination. That **Article 50(1)** confirms that bias and prejudice have no room in the administration of justice. That the test for bias was set out by the Court of Appeal in **Phillip K. Tunoi & Another v Judicial Service Commission & Another [2016] eKLR** that the question is whether a fair minded observer, who has considered the facts, would conclude there was a real possibility that the tribunal was biased.

He submits that the Respondent's failure to inform him that he was under investigations is against **Section 11.4.1(a) of the Respondent's HR Policy and Procedures Manual 2018** which provides that in handling disciplinary matters, the EPRA shall be guided by the rules of natural justice. On his interdiction being unprocedural, the Petitioner relies on the case of **Republic v Kenya School of Law & 2 Others ex-parte Juliet Wanjiru Njoroge [2014] eKLR** where the court stated:

*"In the Uganda case of **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300**, it was held:*

"...It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

It is submitted by the Petitioner that he is entitled to the Court's intervention through remedies as prayed and he relies on the case of **Geoffrey Mworira v Water Resources Management Authority [2015] eKLR** where the court stated:

"The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

The Petitioner submits that he could not be re-designated and redeployed on account of incompetence and that if it were so, the employer is required to remedy the situation but not re-designate and redeploy and that the Court in the **Benedict Mtoto Mwabili** case held that section 10(5) of the Employment Act provides in mandatory terms that the employer can only vary/revise terms of contract of service after consultations with the employee. He submits that his academic and professional qualifications did not fulfill those required for appointment as Senior Surveillance and Compliance officer and the redeployment is thus contrary to statutes and the Constitution.

On the remedies available to him following the Respondent's constitutional violations, the Petitioner relies on the case **Miriam Wambui Thiriku v Bomas of Kenya [2017] eKLR** where the Court awarded the claimant Kshs.500,000 for unfair labour practice in violation of Article 41 of the Constitution. He further cites the case of **Esther W. Kiege v Kenya Forest Service and Another [2018] eKLR** where the court awarded the petitioners Kshs.2 Million each for violation of their constitutional rights to fair labour practices by the respondent. The Petitioner in the present Petition submits that he deserves to be paid constitutional damages of Kshs.5 Million in view of the court's previous decisions such as in **Mundia Njeru Gateria v Embu County Government and 5 others [2015] eKLR**.

Respondent's Submissions

The Respondent submits that as set out in the case of **Anarita Karimi Njeru v Republic** followed by the case of **Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 others [2019] eKLR**, the Petitioner has not demonstrated with a reasonable degree the provisions of the Constitution which have been violated and the manner of such violation.

It submits that contrary to the Petitioner's submissions, the Respondent's HR Policy and Procedures Manual does not envisage a hearing before interdiction and that interdiction is not a form of punishment under the said manual. It contends that this Petition is premature and

calculated to rob it of its disciplinary control over the Petitioner. It cites the case of **George Wekesa v Multimedia University of Kenya [2016] eKLR** where the court held that the Employment Act and Industrial Court Act seek to protect the weakness of the two parties in an employment relationship and not to deprive the employer of the management prerogative.

The Respondent submits that the dispute between the Petitioner and the Respondent is not a dispute to be determined by this Court under Article 23(1) of the Constitution and urges this Court to dismiss the Petition with costs to the Respondent.

Determination

I have considered the pleadings, submissions made both orally and in writing and the authorities cited by both parties. The issues arising for determination are the following: -

1. Whether the interdiction complied with the respondent's Human Resource Policy and Procedures Manual.
2. Whether Applicant was justified to move to court by way of a petition.
3. Whether the redesignation of the Petitioner was lawful.
4. Whether Section 6.13 of the respondents Human Resource Practice and Procedures Manual (2019) is unconstitutional.
5. Whether the Petitioner is entitled to the prayers sought.

Petitioner's impugned letter of interdiction dated 4th July 2019 and which was issued to him on 5th July 2019 after being summoned from his workstation by email to attend a meeting at the respondent's boardroom is reproduce below –

EPRA/PF/071

4th July 2019

Eustace Njeru

Energy and Petroleum Regulatory Authority

P. O. Box 42681 – 00100

NAIROBI

RE: INTERDICTION

The above subject matter refers.

A review of the end users' activities within the Energy and Petroleum Regulatory Authority's ICT systems and equipment established that there has been unauthorized release/transfer of the Authority's confidential information and official documents from your official email account to your personal email account and to third parties' accounts without approval from the Director General.

The Energy and Petroleum Regulatory Authority (EPRA), formerly Energy Regulatory Commission (ERC), Human Resources Policy and Procedures Manual, 2018 provisions for safeguarding information within the Authority state that;

1. Section 10.19.1

An employee shall not directly or indirectly use or allow any person under his authority to use any information obtained through or in connection with the office, which is not available in the public domain, for the furthering of any private interest, whether financial or otherwise.

2. Section 10.30.1

An Employee shall ensure that confidential or secret information or documents entrusted to his care are adequately protected from improper or inadvertent disclosure.

3. Section 10.30.2

An Employee shall;

- a) *Comply with Official Secrets Act, Cap. 187;*
- b) *Adhere to EPRA's procedures and directives for safeguarding Information and documents;*

c) Not disclose any information to any unauthorized person or in contravention of such procedures and directives.

4. Section 10.38.1

While in the course of their duties, employees will be exposed to confidential information. In such cases, they will be expected to uphold strict standards in regard to confidentiality of information.

5. Section 10.38.2

Disciplinary action will be taken against any employee proven to have divulged confidential information without the permission of EPRA.

6. In addition, you assented to Code of Conduct, 2018 confidentiality clause in your contract dated 14th December 2009 which states that:

“You are required to consider confidential all information regarding the Commission that comes to your knowledge by virtue of your employment. Such information shall not be conveyed to a third party without express permission from the Director General. A breach of confidentiality will be regarded as gross misconduct and may result in summary dismissal”.

7. Preliminary internal investigations have revealed that you have breached all the above stated clauses. Consequently, as provided for in Clause 7.7.2.7 of the Human Resources Policy and Procedures Manual (HRP&PM 2018) the FAC at its 22nd Special meeting held on 3rd July, 2019 resolved that you be interdicted with immediate effect to pave way for further investigations.

8. During the period of interdiction, you shall:

a. Be paid half (½) of your basic salary and full house allowance and medical benefits pursuant to Clause 11.12.2 (HRP&PM, 2018).

b. Report to the Ag. Director Enforcement, Consumer Awareness & Protection once a month, by 5th of every calendar month starting August 2019, until the investigations are complete. Refer to clause 11.12.3 (HRP&PM, 2018).

You are therefore required to hand over all Authority's property in your possession to your supervisor as you proceed on interdiction.

Yours Sincerely

SIGNED

Robert Pavel Oimeke

Director General”

The respondent's Human Resource Policy and Procedures Manual (the HR Manual) provides for employee discipline at Section 11. Section 11.4 provides for the guiding principles as follows –

“11.4 Guiding Principles

11.4.1 EPRA shall be guided by the following principles in handling disciplinary matters:

a) The rules of natural justice:

b) Procedural fairness, where an officer must be allowed adequate opportunity to prepare and present his/her case;

c) The determining authority must be unbiased when hearing and making decisions;

d) Decisions must be based upon logical proof or evidential material.

e) Fair administrative action, which is expeditious, efficient, lawful, reasonable and procedurally fair.

f) Every officer to whom disciplinary action is taken has a right to:

i. Written reasons for any disciplinary action that is taken against him;

ii. Prior and adequate notice of the nature and reasons for the intended disciplinary action;

- g) An opportunity to be heard and to make representations in that regard;
- h) An opportunity to attend proceedings in person or in the company of an expert of his choice, cross examine persons who give adverse evidence against him and request for adjournment of proceedings where necessary;
- i) Notice of the right to legal representation, where applicable;
- j) Notice of a right to an appeal or review against a disciplinary decision;
- k) Information, materials and evidence to be relied upon in making a decision or taking a disciplinary action.”

Section 11.9.9 of the HR Manual provides for the procedure for dealing with major offences or gross misconduct as follows –

“11.9.9 In event of major offence or gross misconduct, the misconduct might be serious enough to justify dismissal without any warning. In such a case, the HRAC may direct that the culprit be required to show cause why a severe disciplinary action should not be meted against him.

11.9.9.1 The Head of HR&A shall issue the officer with a show cause letter stating the particulars of the alleged misconduct and invite him/her to respond in writing to the allegations and the grounds, if any, on which he/ she relies to exonerate himself/herself;

11.9.9.2 Where an employee deserts duty or his whereabouts are unknown, the show cause letter will be addressed to the employee's last known contact address by registered mail and he will be given at least seven days to respond.

11.9.9.3 An officer shall be given reasonable opportunity to respond to the charges against him/her and requested to respond within seven days (7) days;

11.9.9.4 On expiry of the period specified above, whether or not the officer has responded, the case shall be presented to the EPRA's HRAC to deliberate, conduct disciplinary hearing and make recommendations.

11.9.9.5 If in the opinion of HRAC there is need for investigation prior to the hearing, the DG will constitute a committee to investigate the matter.

11.9.9.6 While constituting a team the DG shall observe the following conditions: -

- a) Constitute a team of not less than three (3) officers to investigate the matter (where the team is more than three members, the team shall consist of an odd number).
- b) The officers conducting the investigation shall be senior to the accused officer and should not have dealt with the case before.

11.9.9.7 The disciplinary hearing shall be conducted expeditiously, efficiently, lawfully, reasonably and in a procedurally fair manner in accordance with Article 47 of the constitution and the Fair Administrative Action Act No 4 of 2015.

11.9.9.8 The HRAC after hearing the matter shall prepare a report consisting of the following:

- a) Background information leading to the relevant incident;
- b) Input from the witness or witnesses;
- c) The employee's response to the allegation(s);
- d) An analysis of the facts;
- e) A statement that all the entitlement of employee facing the disciplinary action have been observed and
- f) Recommendations.

Of relevance to this petition, the HR Manual provides that the employee be issued with a notice to show cause. It is only where an employee does not exonerate himself in the response to the notice to show cause that the case would progress to either a hearing or further investigations, where necessary.

Interdiction as provided for under Section 11.12 is necessary only where investigations are to be carried out and there is need for the employee to stop carrying out his duties during the investigations. This is only necessary where the employee is likely to interfere with the investigations or in circumstances where the employee's presence would embarrass or prejudice such investigations.

Section 11.12.11 specifically provides that –

“an employee may be interdicted to allow investigations to be conducted in a case where proceedings may lead to dismissal.”

In the instant case, the letter of interdiction does not require the employee to respond to the charges against him. It is further evident from the letter of interdiction that the petitioner had no clue that he was under investigation. The letter further does not state the time frame within which the petitioner was required to be on interdiction and therefore leaves it open for the employees to be an indefinite interdiction.

Interdiction is punishment to an employee as in the first place, the employee is placed on half of his basic pay. This invariably causes financial strain to an employee. The employee is further removed from exercising the duties of his office hence is subjected to both psychological and financial embarrassment. Interdiction should therefore not be resorted to unless it is necessary as it exerts punishment on an employee who has not been proved to be guilty of misconduct. That is why it should only be resorted to after giving the employee an opportunity to respond to the charges against him through a notice to show cause, or where investigations have been carried out and the employee has already been engaged and has responded to the charges during investigations.

The respondent's manual provides that the disciplinary process should comply with Article 47 of the Constitution, the Fair Administrative Act and Public Service Regulations. Article 236 of the Constitution prohibits the dismissal, removal from office, demotion in rank or otherwise subjecting a public officer to disciplinary action without due process.

From the foregoing, I find that the interdiction of the Petitioner was in violation of both the Respondent's HR Manual and Articles 47 and 236 of the Constitution. It was therefore unconstitutional.

The 2nd issue for determination is whether the applicant was justified in moving to court. This court has time and again held that it is not for the court to interfere with management prerogatives or internal management. The court will however interfere where the employer has failed to comply with its own procedures, the law or where the actions of the respondent are intended to achieve a predetermined outcome. As was stated in the case of **Geoffrey Mworira** (supra), for the court to intervene and the internal disciplinary process the applicant must show that the employee is proceeding in a manner that is in contravention of the Constitution or legislation, or in breach of the agreement between the parties, or in a manner manifestly unfair in the circumstances of the case. That the employer must further prove that he has either exhausted the internal dispute resolution machinery or that the manner in which the employer is proceeding makes it impossible to deal with the breach through the employer's internal process.

This Court in the case of **Judith Mbaya Tsisiga versus Teachers Service Commission [2017] eKLR** held that –

*“This Court has rendered its opinion regarding intervention in disciplinary cases in numerous decisions among them those cited by the Claimant. These include the case of **Alfred Nyungu, Gladys Boss Shollei, George Wekesa v Multimedia University and Rose W. Kiragu v Teachers Service Commission**. In all these cases the court declined to interfere with the disciplinary process, on the basis that this is a function of the employer, as was stated in **Frederic Saundu Amolo's** case, the courts will not intervene in any employer's internal disciplinary proceedings until it has run its course. The only circumstances when the court will interfere are in exceptional circumstances where great injustice might result or where justice might not by any other means be attained.”*

In the case **George Wekesa versus Multimedia University of Kenya [2016] eKLR**, the Court further held that –

“The prerogative of the employer in managing its business and administration of its staff should not be unduly stifled by judicial intervention through issue of provisional injunctive measures such as those sought by the Claimant. The Employment Act and Industrial Court Act seek to protect the weakness of the two parties in an employment relationship, not to deprive the employer of the management prerogative altogether.”

The Court went on further to hold that *“Courts of law should be very slow to interfere in the internal disciplinary process at work place unless it is manifestly clear that the action by the Employer derogates materially from the internal disciplinary process and the law.”*

In the instant suit, as I have already set out above, the respondent had violated its own HR Manual in the manner in which the Petitioner was interdicted.

The Petitioner further expressed fears that he was being victimised because he had sworn an affidavit in support of a former colleague who was facing criminal charges, had filed a complaint with Ombudsman over his redesignation and that the respondent had previously victimised employees who filed complaints or court cases against it. These fears were not allayed by the respondent.

I thus find that there was sufficient and legitimate justification for the Petitioner to seek this court's protection to prevent any further violation of his rights as an employee.

The next issue for determination is whether the petitioner's redesignation and redeployment by the respondent was justified.

Redesignation is defined in Section 2 of the Public Service Commission Act No. 10 of 2017 as follows –

“redesignation” means the movement of a public officer from one career path or cadre to another at a grade equal to or substantially equal to the one held before the movement, to facilitate the public officer's horizontal mobility; Provided that the posting, deployment or secondment of a public officer from one duty station to another in the same grade in the public service shall not be regarded as a redesignation

The court in the case of **Benedict Mtoto Mwabili v County Public Service Board and Taita Taveta County [2018] eKLR** at paragraph

27 of the judgement, stated that:

“Having made the foregoing observations, I wish to look at the meaning of the word 'Redesignation' as contemplated in the County Governments Act Section 2 of the defines redesignation as: "the conferment upon a person, of a county public office at a grade equal to or substantially equal to the one previously held by that person and whose major consequence is to change from one cadre to the other to facilitate that person's horizontal mobility characterized with the change in career path. ”

It further stated at paragraph 28 of the judgement, that:

“The foregoing meaning of redesignation is not akin to what was done to the Claimant, in my view and I agree with him that he was just demoted to a junior office as a punishment for not completing his CPA course within the time agreed between him and the respondent. It was therefore not valid and fair reason to warrant the action taken against him and procedure followed was also not fair. Consequently, it is hereby held that the alleged redesignation of the claimant was unfair unconstitutional and unlawful and it amounted to mere demotion.”

The respondent’s HR Manual provides guidelines for redesignation at Section 2.22 as follows –

“2.22 Redesignation

2.22.1 ERC may, from-time to time review and reorganize the employee establishment: This may necessitate the redesignation of titles and job descriptions. Redesignation of an employee may require redeployment.

2.22.2 In selecting employees for redesignation, the criteria for appointment shall apply. If an employee is re-designated, the employee shall not in any way suffer reduction in remuneration.

2.22.3 Redesignation shall be subject, to existence of vacancies.”

[Emphasis added]

The respondent does not contest re-designating and redeploying the Petitioner from the position of Technical Officer, Energy Efficiency and Conservation to the position of Senior Consumer Protection Officer by letter dated 27th July 2018. The Petitioner was thereafter transferred to Kisumu by letter dated 3rd August 2018. In February 2019, his designation was again changed to Senior Surveillance and Compliance Officer based in Kisumu. This was after he complained to the Ombudsman about his redesignation and redeployment which also demoted him from Grade 5 to 6 as explained in the Petitioner’s letter dated 6th March at page 247 of his bundle. These averments are not contested by the respondent.

The Petitioner was not consulted as is required under 10(5) of the Employment Act and its HR Manual. In the case of **Benedict Mtoto Mwabili v County Public Service Board and Taita Taveta County** (supra) the Court held that section 10(5) of the Employment Act provides in mandatory terms that the employer can only vary or revise the terms of the contract of service after consultations with the employee.

It further stated at paragraph 19 of the judgement, that:

“It is now a settled law under section 10(5), and 41 of the Employment Act, Article 47 of the Constitution and a plethora of decisions of this court that, before taking any action to the detriment of an employee, the employer must accord the employee a prior fair hearing. In this case, the contract of service of the claimant was varied to his detriment by the respondent before according any fair hearing.”

In the case of **Antoinette Bonita Kamau & another v Energy Regulatory Commission [2019] eKLR**, this court in a similar case held that:

“Since the decision had adverse impact on the Petitioners they ought to have been informed of the reasons for such decision and given an opportunity to present their case before the decision was taken. This was not done. Instead, the respondent camouflaged this action as a redesignation based on the National Government’s directive to open registry offices.

“Further, they ought to have been notified that their job grade, job description and duties would change and consulted, before the terms were changed. Again, this was not done. Section 10(5) of Employment Act provides that:”

“Where any matter stipulated in subsection (1) changes, the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing.”

I find that the redesignation of the petitioner was in violation of the respondent’s own policy as set out in the HR Manual and the Employment Act. Further, that the same was done without reference to the petitioner’s qualifications and without consulting him. It was further in violation of Article 232 of the Constitution which provides for values and principles of public service to include *inter alia* –

232. Values and principles of public service.

(1) The values and principles of public service include—

- (a) high standards of professional ethics;**
- (b) efficient, effective and economic use of resources;**
- (c) responsive, prompt, effective, impartial and equitable provision of services;**
- (d) involvement of the people in the process of policy making;**
- (e) accountability for administrative acts;**
- (f) transparency and provision to the public of timely, accurate information;**
- (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;**
- (h) representation of Kenya's diverse communities; and**
- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—**
 - (i) men and women;**
 - (ii) the members of all ethnic groups; and**
 - (iii) persons with disabilities.**

It was clearly not professional, efficient, effective or economical use of resources to redesignate the petitioner to a position he was not qualified for, and as alleged by the Petitioner, appoint another person to his former position where he had undergone a lot of training and gathered a lot of experience. The redesignation was further not transparent and was clearly in violation of the values and principles of public service.

Whether Section 6.13 of the respondent's Human Resources Practice and Procedures Manual is unconstitutional

The respondent's Human Resource Practice and Procedures Manual provides as follows at Section 6.13-

"6.13 Compulsory Leave

An employee with a litigation court case against the Authority shall be sent on compulsory leave by the DG until the matter is concluded at the courts. The compulsory leave shall not affect employee's terms of employment."

The petitioner prayed that the Section be declared unconstitutional as it is inconsistent with Article 22, 48 and 258. The said Articles provide for enforcement of Bill of Rights (Article 22(1), Access to justice (Article 48), and enforcement of the Constitution (Article 258(1) which provides that –

22. Enforcement of Bill of Rights.

(1) 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.

48. Access to justice.

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

258. Enforcement of this Constitution.

(2) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

Requiring an employee to go on compulsory leave because of filing litigation against the employer is not only stifling the rights of the employees from enjoyment of their rights under the Constitution but also victimisation and unfair labour practice, which are in violation of Articles 27 and 41 of the Constitution. The Employment Act expressly provides at Section 46 that an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer does not constitute a fair reason for dismissal or imposition of a disciplinary measure against an employee, except where it is shown to be irresponsible and without foundation. Threatening an employee with compulsory leave for filing a suit or complaint against an employer is a manifestation of intolerance to criticism and has no place in a

free and democratic society like Kenya. As provided under Article 19, such rights are an integral part of Kenya's democratic framework for social, economic and cultural policies. The rights can only be limited as contemplated in the Constitution.

I thus find Section 6.13 of the respondent's Human Resource Practice and Procedures Manual unconstitutional.

Remedies

Having made the findings above, I make the following orders –

1. I declare the interdiction of the petitioner by letter dated 4th July 2019, unconstitutional and therefore null and void.
2. I declare the redesignation of the claimant unconstitutional for want of transparency and consultation.
3. I order that any salary withheld during the Petitioner's interdiction be released to the Petitioner.
4. I declare Section 6.13 of the respondent's Human Resource Practice and Procedures Manual unconstitutional.
5. For the avoidance of doubt, the nullification of the letter of interdiction is not a bar to disciplinary action being taken against the Petitioner provided the same is in compliance with the law and the respondent's Human Resource Procedures and Policies Manual.
6. In view of the relationship between the Petitioner and the respondent, which is still subsisting, the court declines to award damages for the breach of the Petitioner's rights in addition to declaring the letter of interdiction null and void.
7. The Respondent shall bear the Petitioner's costs of this petition.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JULY 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE