



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 52 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 17th September, 2020)

OKIYA OMTATAH OKOITI.....PETITIONER/APPLICANT

VERSUS

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

THE PUBLIC SERVICE COMMISS.....2ND RESPONDENT/APPLICANT

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

THE NAIROBI CITY COUNTY PUBLIC SERVICE BOARD.....4TH RESPONDENT/APPLICANT

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

RULING

1. Pending before me for determination is the Notice of Motion Application dated 29th July, 2020. The Application is filed Under Certificate of Urgency under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

2. The Application seeks the following Orders **THAT:-**

1. *The Honourable Court be pleased to certify this Application as urgent to be heard on priority basis. (Spent)*
2. *The Court be pleased to declare that the creation of the Nairobi Metropolitan Services was done in compliance with the law and the Constitution.*
3. *The Court be pleased to declare that the deployment and secondment of the 1st to 9th Interested Parties to the Nairobi Metropolitan Services from the Nairobi City County was done in compliance with the Law and the Constitution.*
4. *The Court be pleased to declare that the deployment and secondment of the 6052 staff to the Nairobi Metropolitan Services from the Nairobi City County was done in compliance with the Law and the Constitution.*
5. *The Honourable Court be pleased to lift the Order of unconstitutionality issued on 18th June, 2020.*
6. *Costs of the Application be provided for.*

3. This Application is premised on the grounds that:-

- a) *The Applicant maintains that the creation of the Nairobi Metropolitan Service, the 1st Respondent/Applicant was lawful and Constitutional and that its establishment was done pursuant to Article 132 (4) (a) of the Constitution of Kenya as an office in Public Service that is domiciled in the Executive Office of the President vide the Executive Order No. 3 of 2020.*
- b) *The provisions of Article 187 of the Constitution of Kenya allows for the transfer of functions of between levels of government via an agreement in this case a Deed of Transfer as executed between the two levels of government.*
- c) *Pursuant to the Provisions of Section 26 of the Intergovernmental Relations Act at Subsection 4 and 5 the National County Assembly was notified of the Deed of Transfer and actively participated contrary to this Honourable Court's decision that it was left out.*
- d) *There was Public Participation and that all the Constitutional and Statutory requirements in relation to the Deed of Transfer were duly complied with.*
- e) *The 1st Respondent is an institution created in the Public Service under the National Government to foster intergovernmental cooperation in accordance with Article 187 of the Constitution hence there is no requirement for creation of a separate legal entity independent from the National Government under the Deed of Transfer.*
- f) *The deployment of the 1st to 9th Interested Parties was done in consultation with the Public Service Board and that there was no need to consult the Nairobi County Public Service Board as neither of this officers was a county public service employee.*
- g) *Consultation of the two bodies was contemplated in the Deed of Transfer under Clause 5.6 and 5.7 and the same was complied with.*
- h) *The secondment of the 6052 County employees cannot be null and void because the Court itself acknowledged that it was done in consultation with the Public Service Commission and the Nairobi County Public Service Board but cited no provisions of any Act of Parliament or the Constitution which had been violated.*
- i) *This matter is one of great Public Interest thus there is need to weigh Public Interest against the Interest of the Petitioner and the 10th Interested Party as it involves seamless delivery of essential public services to the residents of Nairobi which had been hampered due to several constraints being experienced by the County Government of Nairobi.*
- j) *The effect of the declaration of unconstitutionality has the effect of abolishing the Nairobi Metropolitan Services at the expiry of 90 days hence the need to hear and determine the instant Application.*
- k) *No prejudice will be suffered by the Petitioner/Respondent if the Application herein is allowed.*
- l) *The Application ought to be allowed in the interest of Equity and Justice.*

4. The Application is further supported by the Affidavit of **ENOSH MOMANYI ONYANGO**, the Deputy Director General and Accounting Officer of the 1st Respondent/Applicant, in which they reiterates the averments made in the Notice of Motion Application.

5. The Affiant maintains that the creation of the 1st Respondent/Applicant was done in accordance with the law. He further maintains that on 25th February, 2020 the National Government and County Government signed a Deed of Transfer of Functions pursuant to the provisions of Article 187 of the Constitution of Kenya, 2010 as read together with Section 26 of the Intergovernmental Relations Act (No. 2 of 2012).

6. He further averred that the said Deed of Transfer was published in the Kenya Gazette on 25th February, 2020 as Gazette Notice No. 1609 of 2020 and that the residents of Nairobi and the General Public were subsequently invited to participate in the process by submitting their views and comments to the Ministry of Devolution, Nairobi City County or State Department of Devolution.

7. He further avers that indeed Public Participation was held in all Seventeen (17) Sub Counties within Nairobi County between 4th and 6th March, 2020 through the Ward based consultative forums and that all parties were duly afforded an opportunity to state their views concerning the transfer of functions.

8. He contended that the Nairobi County Assembly was on 26/2/2020 duly notified of the decision to transfer the County Government Functions to the National Government in compliance with the provisions of Section 26 (5) of the Intergovernmental Relations Act who did proceed to discuss the said Deed of Transfer before proceeding with its adoption as defined under Article 176 (1) of the Constitution of Kenya, 2010.

9. He maintains that the establishment of the office of the 1st Respondent and other offices is backed by and anchored in law under Article 234 (2) (a)(i) of the Constitution of Kenya and Section 30 of the Public Service Commission Act.

10. He contended that the 1st to 9th Interested Parties were duly seconded by the Public Service Commission from various National Government entities and that the 1st Respondent is an interim office established to undertake the transferred services.

11. He further contended that the said officers will upon the lapse of the Deed of Transfer, revert to their respective ministries.

12. It is on the basis of the reasons stated in the Motion and the Supporting Affidavit that the Applicant maintains that it has demonstrated compliance with the law and the Constitution and urged this Honourable Court to set aside its earlier declaration that the creation of the 1st Respondent/Applicant was in violation of the law and the Constitution, and the deployment of the 1st to 9th Interested Parties was done in contravention of the law and the Constitution and declaring that the secondment of 6052 employees of the 1st Applicant was in contravention of the County Government Act.

13. In conclusion, the Applicants urged this Court to allow its Application in terms of the reliefs sought therein.

14. In response to the Application the 10th Interested Party through his Advocates on record filed his grounds of opposition dated 7th September, 2020 in which he raises the following grounds:-

1. The said Application is a gross abuse of the Court Process, incompetent, frivolous, vexatious, lacks merits and is fatally defective.

2. The said Application offends the functus officio doctrine which prevents re-opening of a matter before a court that rendered the final decision thereon.

3. This Honourable Court rendered its final judgment in this matter on 18th June, 2020. The only remedy available to the Applicants is to exercise his right to appeal under Article 164 (3) (b) of the Constitution.

4. The Application offends the provisions of Order 45, Rule 1 which provides that a person considering himself aggrieved by a decree or order from which an appeal allowed BUT from which no appeal has been preferred may apply for review. The Applicants have appealed pursuant to a Notice of Appeal and application in the Court of Appeal CIVIL APPLICATION NO. 192 OF 2020 (Nairobi) seeking stay of the judgment hereof. This said application is awaiting a ruling thereof.

5. The Applicants are abusing the Court Process by simultaneously seeking the same orders in the Court of Appeal and before this Honourable Court hereof.

6. This Honourable Court lacks jurisdiction to grant the orders sought in this Application pursuant to the provisions of Article 162 (2) (a) of the Constitution.

7. The Applicants have failed to appreciate that a County consists of the County Executive and the County Assembly.

8. The purported transfer of functions from the Nairobi City County to the National Government was subject to approval by the County Assembly, Parliament and public participation under Article 10 of the Constitution.

9. The Applicants have acted contrary to the law and the constitution by purporting to hand pick and appoint various Chief Officers without consulting the 10th Interested Party and in blatant contravention of the law thereof.

10. The Applicants have acted contrary to the law and the constitution by purporting to second to the Nairobi Metropolitan Service about 6,052 Nairobi City County employees without consulting the 10th Interested Party and in blatant contravention of the law thereof.

11. The Application is seeking orders that cannot be reasonably granted in a judicial process.

12. The 10th Interested Party persuades this Honourable Court to dismiss the said application with costs to be assessed by this Honourable Court to be payable forthwith.

15. The Application proceeded orally on 8th September, 2020.

Submissions by the Parties

16. Mr. Eredi, Counsel on record for the Applicants submitted that it has demonstrated by way of evidence that the Applicants have complied with this Court's Judgment of 18/6/2020 in particular it has shown steps taken by the National Government to establish the 1st Respondent within the law.

17. The Applicants further submitted that they have established that the County Government was involved in the process and maintain its legality. It is on this basis that Mr. Eredi urged this Honourable Court in the circumstances to lift the Order of illegality issued on 18/6/2020.

18. On the issue of filing an appeal, the Applicants maintained that they are entitled by law to appeal this Court's decision and that the instant Application is only aimed at confirming to this Court that they have complied with the Court Orders.

19. Mr. Eredi further contended that the 10th Interested Party being a party to the Deed of Transfer as well as the Proceedings in this matter cannot oppose the instant Application.

20. The Applicants maintained that the 1st Respondent/Applicant is not a statutory body but is a service body established by the Public Service Commission in accordance with the law. He therefore urged this Honourable Court to find merit in the instant Application and allow it as prayed.

Petitioner's Submissions

21. Mr. Havi, counsel on record for the Petition in opposition to the Application filed submitted that prayers 2, 3, 4 and 5 of the Application are requests to this Court to overturn the Orders of this Court which is not tenable in law.

22. He further submitted that the instant Application seems to have been clothed as an Application for review but fails to meet the threshold for grant of such Orders as provided under Order 45 of the Civil Procedure Rules and further that the Applicant has also proceeded to file an appeal to the Judgment of 18/6/2020.

23. He further maintained that the instant Application seeks to have this Court re-open its case after delivery of Judgment, which is defeated by the doctrine of res-judicata. He further argued that there must be an end to litigation and therefore the matter is to be left to rest.

24. Mr. Havi argued that there has been no compliance with the decree of 18/6/2020 and that at the lapse of the 90 days period they shall approach the Court as directed.

25. In conclusion, Counsel urged this Honourable Court to dismiss the Application with costs.

Submissions by the 10th Interested Party

26. The 10th Interested Party through his Counsel on record, Mr. Kurauka relied on the grounds of Opposition dated 7/9/2020 and associated himself with Submission made by Mr. Havi.

27. He further argued that the Applicant through its Application seeks to have this Court re-write its Judgment and that this goes against the principle of res- judicata.

28. He further submitted that the Applicant has not brought before this Court any new evidence that was not previously placed before this Court at the time of Judgment.

29. He averred that the Applicant elected to prefer an Appeal to the Court's Judgment and that the same remains pending before the Court of Appeal. He urged this Court to find the Application is devoid of merit and to dismiss the same.

4th Respondent's Submissions

30. Mr. Muga, on behalf of the 4th Respondent denied the contents of the Affidavit in support of the Application pending before this Court. He further argued that the particulars of compliance given by the Applicant therein are not known to the 4th Respondent.

31. He further associated himself with the submissions by Mr. Havi and Mr. Kurauka and urged this Court to dismiss the Application with costs.

Rejoinder by Applicants

32. In his brief rejoinder, Mr. Eredi submitted that this matter being a constitutional petition no provisions of the Civil Procedure Act would apply. He further contended that the issues of review and appeal as raised do not apply as well.

33. He relied on the provisions of Article 159 of the Constitution of Kenya, 2010 urging this Court not have undue regard to procedural technicalities and allow the Application as filed. To buttress this argument the Applicant cited and relied on the case of [Mitu-Bell Welfare Society vs Attorney General & 2 Others \[2013\] eKLR](#).

34. On the issue of the matter, being res-judicata the Applicant maintained that the same is not the case. The Applicant urged this Honourable Court to look at the merits of its Application and proceed to exercise its discretion by allowing it as prayed.

35. I have considered this application and averments and submissions of the Parties. The issues for this Court's determination are as follows:-

- a. *Whether this Court is functus officio in this matter.*
- b. *Whether the Applicants are properly before this Court.*
- c. *Whether this Court has jurisdiction to handle this matter.*
- d. *What orders this Court can grant.*

Functus Officio

36. In **Telecom (K) Limited vs John Ochanda suing on his own behalf and on behalf of 996 of former employees of Telecom (K) Limited (2014)**, the Court of Appeal held that:-

“The principle of functus officio is a principle of law that prevents the re-opening of a matter before a Court that rendered the final decision.”

37. This principle envisages that this Court cannot revisit a matter to reopen the case once it has rendered a final decision on the same.

38. In the Telecom (K) case above the Court further held that:-

“The doctrine is not to be understood to bar any engagement by a Court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions...”

39. My understanding of the law is that I cannot as a matter of principle reopen this case once I have pronounced my judgement. This Court can however re-engage with this case but not to redo the judgement or make other merit-based decisions.

40. On 18/6/2020, I rendered a judgement in this Petition. Paragraph 129 of the Judgment, I suspended the declaration of illegality from taking effect for a period of 90 days and also issued certain directions giving a roadmap of what should be done in the intervening period.

41. I allowed a window for the Parties to come back to Court at paragraph 131 in order to review the implementation of the directions given. The import of paragraph 131 of the judgement is that the Court was still holding onto the matter not to reopen the case but to check implementation of directions given within the 90 days window period.

42. In the current application, the Applicants have not indicated that they are not coming to Court for review. They however indicated in their affidavit that they wanted to demonstrate compliance with the directions given by Court in its judgement of 18/6/2020.

43. Indeed any Party is free as per the judgement to seek details or clarity on the judgement and even to demonstrate compliance thereof as was ordered in the judgement.

44. This Court remains seized of this matter in order to give effect to its judgement and the contention that this Court is functus officio is not true. This Court will not be rewriting its judgement or sitting on appeal thereto.

Whether Applicants are properly before Court and whether this Court has jurisdiction to handle this application

45. The Respondents have submitted that the Applicants are wrongly before this Court because they have filed an application before the Court of Appeal in Civil Application No.192 of 2020 (Nairobi) seeking stay of this Court's judgement therefore and the application is awaiting a ruling thereof.

46. The Applicants on their part submitted that this is not an application for review as provided for under Order 45 rule 1. They aver that their application get credence from this Court judgement of 18/6/2020 at paragraph 131 which entitled any party to apply.

47. The Applicants also aver that they only seek to demonstrate compliance with the Court's directions in the said judgement.

48. As discussed in issue No.1 above, the Court is still seized of this matter in form of checking compliance of directions and not reviewing the judgement to change it.

49. In the circumstances, any party is free to apply and the Applicants exercised their right to approach this Court. It is my finding that the Applicants are therefore properly before Court.

50. The Respondents submitted that the same Applicants filed an application before the Court of Appeal which is also still pending. There being no order from the Court of Appeal barring this Court from proceedings in any way, I find that this Court still has jurisdiction to entertain the application filed herein.

Order

51. Having established that this Court is not functus officio and so has jurisdiction to handle the application before it, I now examine the prayers sought by the Applicants.

52. The Applicants have indicated that they just wanted to demonstrate their compliance of orders granted by Court in its judgement so that the declaration of illegality can be lifted before the 90 days window period.

53. In order to determine whether the application has merit or not, I will revisit the directions I gave which were as follows:-

1. “The Nairobi Metropolitan Services should be established by law and the instrument of its establishment made.

2. The issue of secondment and deployment of staff should also be addressed and the authority responsible to action proper secondment/deployment letters.”

Established of Nairobi Metropolitan Service

54. On the issue of Nairobi Metropolitan Services establishment the Applicant has indicated that they wished to submit information and documents to the effect that the creation of Nairobi Metropolitan Services was lawful and constitutional as the County Assembly was involved in the exercise.

55. At paragraph 81 of my judgement, I made a finding that in as far as the Deed of Transfer of Functions of Nairobi County Government was done by the County Government 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.

56. The Applicant in this application has submitted that they have documents to prove that the establishment of Nairobi Metropolitan Services was lawful and constitutional owing to the fact that the County Assembly was involved in the transfer of functions. They attached schedule EOM 3 as proof of this fact.

57. The Applicant also attached Annexure EOM 2 to show that there were consultative forums in different wards to discuss the issue of transfer of functions from the County Government to the Nairobi Metropolitan Services. Annex EOM 2 is a schedule of meetings to be held in different Wards for the purpose of getting public participation.

58. The Applicant further annexed annexure EOM 5 from the Attorney General’s office which is a letter notifying the Nairobi County Assembly of the decision to transfer the foretasted County functions to the National Government.

59. Annexure EOM 5 is a letter of 25/6/2020 notifying the County Assembly of the judgement of this Court and sought information relating to the process the Assembly had undertaken with regard to Deed of Transfer of functions.

60. In response the County Assembly wrote a letter of 10/7/2020 explaining actions the Assembly had undertaken since February 2020 and forwarded a copy of the order paper, Hansard Report and Motions related thereto.

61. I have looked at the said documents as annexed and I note that on 27/2/2020 the Speaker of the County Assembly notified the County Assembly of the decision by the County Government to transfer 4 (four) functions to the National Government and also established an adhoc committee to study and report on the Deed of Transfer of functions (EOM 7A and B).

62. On the 12/3/2020, the adhoc committee on Transfer of Functions submitted its report that established that on 4/3/2020 there was public participation in all 17 sub counties where members of public submitted their views on Transfer of Functions. The report was tabled in the Assembly on the said date. The Assembly considered and adopted the report and the Deed of Transfer of functions.

63. The 4th Respondents did not respond to this issue but only indicated that they were not aware of the particulars of compliance given by the Applicants.

64. I have considered the information provided by the Applicant – the Hansard report submitted and it is evident that the Nairobi County Assembly was actually consulted and was involved in the process leading to the establishment of the 1st Respondent.

65. Having established that the County Assembly was involved in the transfer of functions of the Nairobi County Government to the National Government, it is also true then the provision of the Constitution at Article 176(1) was not breached.

66. The next issue is about the instruments leading to the establishment of the Nairobi Metropolitan Services.

67. The Applicants have averred that on 18/3/2020 pursuant to Article 132(4)(a) of the Constitution, the President of the Republic of Kenya established the Nairobi Metropolitan Services as an office in the Public Service domiciled in the Executive Office of the President vide

Executive Order No. 3 of 2020.

68. They aver that this was done upon and in accordance with the recommendation of the Public Service Commission. The Applicants annexed EOM 8 the Executive No. 3 of 2020 as an Exhibit.
69. The Applicants have averred that the Nairobi Metropolitan Service was established as the Institutional Framework envisaged in Article 7.1 of the Deed of Transfer functions to execute Deed of Transfer of Functions on behalf of the National Government.
70. The Applicants aver that the office of the Nairobi Metropolitan Service and other offices is backed by and anchored in law under Article 234 (2)(a)(1) of the Constitution and Section 30 of the Public Service Commission.
71. Article 234 of the Constitution provides the functions and powers of the Public Service Commission. Under Article 234(2)(a)(i), the Public Service Commission can establish and abolish offices in the Public Service.
72. The Applicants aver that the President established the Nairobi Metropolitan Services on recommendation of the Public Service Commission, which has the mandate to do so. It is indeed true the Public Service Commission has the power to establish and abolish offices in the Public Service Commission.
73. I have looked at the Deed of Transfer exhibited before Court. I had already alluded to the presence in my judgement of 18/6/2020 but added that at the time of filing the current Petition, the Deed of Transfer was not in existence.
74. At the moment, the Gazette Notice establishing the 1st Respondent has been exhibited in Court which I believe was used to establish the 1st Respondent by the President under powers conferred upon him under Article 132(4)(a) of the Constitution.
75. It is therefore my finding that the Applicants have demonstrated before this Court by exhibiting evidence of the involvement of the County Assembly in the transfer of functions to the National Government and also by exhibiting the instrument that established the 1st Respondent.

Secondment and deployment of staff

76. On this issue, in my judgement of 18/6/2020, I indicated at paragraph 130 that the issue of secondment and deployment of staff should be addressed and the authority responsible in this exercise to action proper secondment/deployment letters.
77. In regard to this issue, the Applicant submitted that the deployment of the 1st to 9th Interested Parties was done in consultation with the Public Service Commission and that there was no need to consult the Nairobi County Service Board as neither of these officers was a County Public Service employee. The Applicant avers that the consultation of the two bodies was contemplated in the Deed of Transfer under Clause 5.6 and 5.7 and the same was complied with.
78. With respect to secondment of 6052 County employees, he avers that this was in consultation with Public Service Commission and Nairobi County Public Service Board.
79. On this issue, the 4th Respondent did not put in any response but only indicated that he was a stranger to the allegations by the Applicant.
80. The 10th Interested Party indicated that he was not consulted in the secondment of the staff seconded to the 1st Respondent.
81. The Petitioner did not respond to this issue of secondment and deployment of staff to the 1st Respondent.
82. I take note that indeed in my judgement I acknowledged that the County Public Service Board was consulted before the staff in question were either deployed or seconded. The status of the 1st to 9th Interested Parties as being officers from the Public Service Commission was not explained in the initial proceedings. I will not revisit it. If however they were redeployed by the Public Service Commission who is said to be their employer then that would be in order.
83. However, for the 6052 employees of the Nairobi County Public Service Board, the issue of consultation with the Nairobi County Public Service Board was acknowledged.

Remedies

84. Having found as above, I therefore find that the declaration of illegality of the Nairobi Metropolitan Services as created is now lifted.
85. I also find that the deployment and secondment of the 1st to 9th Interested Parties was done within the correct framework of the law.
86. On issue of secondment of the 6052 staff from the Nairobi County Public Service Board to the 1st Respondent, it has been demonstrated that the secondment was done with the approval of the Nairobi County Public Service Board as indicated in my judgement. The letter for secondment were not annexed to this application but if not written should be actioned.
87. Those are the orders of this Court. There will be no order of costs.

Dated and delivered in Chambers via zoom this 17th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Eredi for the Applicant – Present

Nelson Havi for Petitioner/Respondents – Present