



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATION COURT**

**AT NAIROBI**

**PETITION 66 OF 2020**

**(Before Hon. Justice Hellen S. Wasilwa on 29<sup>th</sup> October, 2020)**

**KENYA COUNTY GOVERNMENT WORKERS UNION.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARYMINISTRY OF DEVOLUTION**

**AND PLANNING.....2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**NAIROBI COUNTY GOVERNMENT.....4<sup>TH</sup> RESPONDENT**

**NAIROBI CITY COUNTY PUBLIC SERVICE BOARD.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Application before Court is the Notice of Motion dated 24/4/2020 seeking the following orders:-

**1. Spent.**

**2. Pending the hearing and determination of this Application, the Honourable Court be pleased to issue an order restraining the Respondents whether by themselves agents and servants and whomsoever acting under their authority or instruction from terminating, harassing , intimidating , apprehension of the Applicant’s members who attended but lacked the necessary documentation and those who may have failed to attend the secondment exercise of the 3<sup>rd</sup> Respondent which took place on 6<sup>th</sup> and 7<sup>th</sup> April 2020 on any matter concerning the Applicant’s members national Identity Cards and/or staff identification cards or any matters documentation thereto.**

**3. Pending the hearing and determination of this Petition, the Honourable Court be pleased to issue an order restraining the Respondents whether by themselves agents and servants and whomsoever acting under their authority or instruction from terminating, harassing, intimidating , apprehension of the Applicant’s members who attended but lacked the necessary documentation and those who may have failed to attend the secondment exercise of the 3<sup>rd</sup> Respondent which took place on 6<sup>th</sup> and 7<sup>th</sup> April, 2020 on any matter concerning the Applicant’s members National Identity Cards and or Staff Identification Cards or any matters documentation thereto.**

**4. An order of Certiorari to bring to this Court for purpose of quashing the decision of the 3<sup>rd</sup> Respondent directing secondment of the 4<sup>th</sup> Respondent’s staff to the National Government’s Nairobi Metropolitan Services as advertised by the 3<sup>rd</sup> Respondent on 3<sup>rd</sup> April, 2020 in the Daily Nation Newspaper and any other similar advertisement made before on the same subject.**

**5. An order of prohibition prohibiting the Respondents from in anyway proceeding with the secondment process of the subject staff/ employees of the 3<sup>rd</sup> Respondent until consultations among and participation of the Petitioner and all stakeholders is done, and the thorny issues ironed out.**

6. *THAT such other or further orders be issued to facilitate the just, expeditious and fair determination of this application and Petition.*

7. *THAT the costs of the application be provided for.*

2. The application is premised on the following grounds:

1. *Pursuant to Gazette Notice No. 1609 of 25<sup>th</sup> February, 2020 the Nairobi City County Government transferred the functions of county health services, county transport services, county public service works, utilities and ancillary services and county government planning and development to the national government.*

2. *Subsequently, the Kenya Revenue Authority went on to issue 2 notices which on its appointment as the Principal Revenue Collector for Nairobi County Government. These notices made reference to Articles 5.5 and 5.6 of the Deed of Transfer but the said articles are silent on who is to carry out secondment.*

3. *Article 5.7 of the Deed of Transfer provides that the 5<sup>th</sup> Respondent (County Public Service Board) shall in consultation with the 3<sup>rd</sup> Respondent (the Public Service Commission) formulate the necessary instruments to facilitate the secondment and/or deployment of the necessary human resources.*

4. *On 18/3/2020, the 3<sup>rd</sup> and 5<sup>th</sup> Respondents purportedly executed an instrument to facilitate secondment and/or deployment of officers from the 4<sup>th</sup> Respondent to the Nairobi Metropolitan Service (NMS).*

5. *The said instrument is ambiguous in respect of the Applicant's participation in matters of labour relations such as recognition and negotiation of Collective Bargaining Agreement, is silent on the nature of the binding relationship of the terms and conditions of the Applicant's members and the role of the union.*

6. *On 3/4/2020, the 3<sup>rd</sup> Respondent through a notice/advertisement in the Daily Nation Newspaper and in part implementation of the said decision, the 3<sup>rd</sup> Respondent carried out a secondment of the staff of the 4<sup>th</sup> Respondent to the National Government scheduled for 6/4/2020 and 7/4/2020 which required the employees to report to the NMS Offices at Kenyatta International Convention Centre for documentation and collection of letters of secondment and that all staff were required to carry their original national identity cards and staff identification cards.*

7. *The Applicant's members who failed to attend the secondment exercise on the said dates based on lack of said documents and other genuine reasons are at a risk of losing their employment arbitrarily.*

8. *The secondment of the Applicant's members/4<sup>th</sup> Respondent's employees has automatically altered their terms and conditions of service by virtue of being seconded by a body which is not their employer to a new employer being the NMS.*

9. *The 3<sup>rd</sup> Respondent's exercise imposes irrational conditions as some of the Applicant's members may/lack the required documents which may lead to their automatic termination for failure to produce the same during the exercise.*

10. *The Applicant, on 2/3/2020, wrote to the Respondents voicing its concerns on the purported transfer, correspondence of which was duly served amongst all the Respondents, however the Respondents ignored or refused to address its concerns.*

11. *Questions arise on the effect of the purported transfer of functions of the Nairobi City County Government to the National Government and that the Applicant and its members play a vital role in the employment of the 4<sup>th</sup> Respondent by virtue of its members being employees of the 4<sup>th</sup> Respondent. The Applicant further has a role in ensuring that the labour rights of its members are taken care of and legally protected.*

12. *The Applicant's relationship with the 4<sup>th</sup> Respondent is drawn and/or based on the fact that there is a Collective Bargaining Agreement in force since the year 1953 which governs and regulates the terms and conditions of service of its members in respect of their employment with the 4<sup>th</sup> Respondent.*

13. *The terms of the Collective Bargaining Agreement bind and are incorporated into the contract of all union members and unionisable employees and that it has Recognition Agreement with the Applicant and concluded a Collective Bargaining Agreement in 2018.*

14. *The process leading to the execution of the Deed of Transfer between the 2<sup>nd</sup> and 4<sup>th</sup> Respondents is devoid of procedural requirements and the constitutional principle of public participation and section 29 of the Intergovernmental Relations Act.*

15. *The secondment exercise in its current form and its attendant requirement is grossly unreasonable as original identity cards and staff identification cards may have been lost and yet to be replaced.*

16. *The Applicant is apprehensive that if the Court does not intervene in time the Respondents will proceed with the implementation of the Deed of Transfer and Instrument its members rights and freedoms may be contravened and abrogated.*

3. The application is supported by the affidavit of Roba Duba the Applicant's Secretary General sworn on 24/4/2020 in which he reiterates the grounds set out in the application.

4. Only the 3<sup>rd</sup> Respondent filed a response to the Application. The matter was canvassed by way of written submissions, which were only filed by the Applicant and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

### **3<sup>rd</sup> Respondent's case**

5. In response to the Application, the 3<sup>rd</sup> Respondent filed a Replying Affidavit sworn by Simon K. Rotich its acting Secretary/Chief Executive Officer. The affiant deposes that the Notice of Motion and the Petition have been overtaken by events since save for total of 112 employees all other staff seconded by the 5<sup>th</sup> Respondent to the national government reported and were deployed accordingly.

6. The affiant deposes that the secondment and deployment exercise was completed on 9/4/2020 whereby 6,731 staff out of 6,843 collected their letters of secondment to NMS, were issued with deployment letters and reported to their places of work. He avers that the 112 employees are at liberty to collect their secondment letters from the 3<sup>rd</sup> Respondent.

7. He avers that there is nothing excessively difficult in the requirement for staff to report for deployment by the national government to perform the legally transferred functions as employees work station and duties remain the same and the exercise was only meant to formalize secondment from the 4<sup>th</sup> Respondent to the national government.

8. He avers that public participation was held in all 17 sub counties within Nairobi County on 4/3/2020 and the said sessions were held in the listed areas where the public presented their views orally and in writing. The Applicant and its members failed to give their views and raise objections during the opportunity given for public participation.

9. He avers that this Court has no jurisdiction to determine the legality or otherwise of the Deed of Transfer or the transfer of services from the 4<sup>th</sup> Respondent to the national government as the same falls within the jurisdiction of the High Court. He contends that the deed of transfer did not have to state who was to carry out the secondment of the staff undertaking the transferred services.

10. He contends that the 5<sup>th</sup> Respondent who is the employer seconded the staff and forwarded the list of names of seconded staff to the 3<sup>rd</sup> Respondent. In addition, that the Instrument to Facilitate Secondment and/or Deployment of Officers from the Nairobi City County Government to the NMS was executed between the 3<sup>rd</sup> and 5<sup>th</sup> Respondent on 18/3/2020 and made provisions safeguarding the terms and conditions of the seconded staff.

### **Applicant's submissions**

11. The Applicant relied on Article 23 (3) of the Constitution, section 12 (3) of the Employment and Labour Relations Court Act and Rule 28 of the Employment and Labour Relations Court (Procedure) Rules 2016 and submitted that this Court can grant injunctive orders where it finds that there is a breach or violation of a constitutional or statutory provision.

12. It further submitted that the principles for the grant of injunctions were laid down in **Giella v Cassman Brown [1973] EA 358**. With respect to what entails a prima facie case, the Applicant relied on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** that a prima facie case includes but is not confined to a genuine and arguable case. It submitted that it is an important stakeholder whose input ought to have been taken into consideration by the Respondents before the 3<sup>rd</sup> Respondent commenced to undertake the secondment of the 4<sup>th</sup> Respondent's staff to the NMS.

13. It argued that it has a recognition agreement and has negotiated a CBA with the 4<sup>th</sup> Respondent and thus it had a binding relationship with the 4<sup>th</sup> Respondent. It submitted that its members attended but lacked necessary documentation and that its members who failed to attend the secondment exercise of the 3<sup>rd</sup> Respondent are apprehensive that they may be at risk of losing their employment. It was its submission that it had established a prima facie case and presented a serious question for determination.

14. It submitted that the executed instrument was ambiguous and vague thus the secondment and deployment letters given to its members remain ambiguous in respect of terms and conditions of service, disciplinary proceedings and the role of the union. It submitted that this has caused anxiety to its members and unless clarified its members will work under pressure and fear of the unknown. It argued that owing to the fact that it has 17,000 members it cannot be sufficiently compensated by an award of costs only.

15. It submitted that the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** stated that in an interlocutory injunction application an applicant has to satisfy all requirements. It submitted that having established a prima facie case and that it will suffer irreparable injury, the balance of probability tilts in its favour as it is likely to suffer and be inconvenienced if the injunction is not granted.

16. The Applicant submitted that Article 5.7 of the Deed of Transfer provided that the County Public Service Board in consultation with the Public Service Commission was to formulate the necessary instruments to facilitate the secondment and/or deployment of the necessary human resources. This is directly in line with Section 59 of the County Government Act which provides for the functions of the County Public Service Board.

17. It is however, its submission that the instrument executed on 18/3/2020 stipulated that pursuant to the provisions of the Deed of Transfer, the 3<sup>rd</sup> Respondent in consultation the 5<sup>th</sup> Respondent had made guidelines for secondment and/or deployment of public officers from the

Nairobi City County Government to the NMS.

18. It therefore argued that the instruments to facilitate the secondment emanated from the 3<sup>rd</sup> Respondent and that the secondment letters received by staff of the 4<sup>th</sup> Respondent were issued by the 3<sup>rd</sup> Respondent. It was its submission that the 3<sup>rd</sup> Respondent acted unlawfully and outside its administrative powers to purport to second and/or deploy public officers from the 4<sup>th</sup> Respondent to the NMS.

19. It referred to the definition of secondment as stated in the Oxford Dictionary 2017, that it is the temporary transfer of an official or worker to another position or employment. It further referred the definition of secondment under the Public Service Commission Guidelines on Secondment of Public Officers, 2016 as a temporary movement or 'loan' of an employee to a different organization.

20. It submitted that Article 234 (3) of the Constitution provides that the offices in the service of the county governments are not under the ambit of the Public Service Commission. It further relied on Article 235 of the Constitution and section 57 of the County Government Act and submitted that the 3<sup>rd</sup> Respondent has no mandate to purport to carry out or second the staff of the 4<sup>th</sup> Respondent to NMS. It was its submission that the secondment exercise ought to have been carried out by the 5<sup>th</sup> Respondent as it is the body mandated under section 59 of the County Government Act.

21. It relied on the case of **David Barasa v British Peace Support Team & another [2016] eKLR** and **Rev. John Mungania v Kenya Methodist University & Prof. Mutuma Mugambi** both on the nature of secondment. Therefore, its submission was that since secondment involves leaving the service of a principal employer to a secondary one, the 3<sup>rd</sup> Respondent did not have such powers and it was only functions which were transferred but not human resource component.

22. It further relied on the cases of **Chang'orok Komolng'ole Erick v county Government of West Pokot & 3 Others [2016] eKLR** and **Kenya National Union of Nurses v Nairobi County Government & 5 Others** on the powers and functions of the County Public Service Board.

23. It submitted that the Court has repository power to grant judicial review orders of mandamus, certiorari and prohibition. It argued that its Application and Petition disclose a cause of action against the Respondents as the 3<sup>rd</sup> Respondent's purported exercise imposed irrational conditions as some of its members who lacked the requisite documentation may be arbitrarily terminated.

24. In addition to the argument that the instrument is ambiguous, the Applicant submitted that Clause 9 of the instrument gives disciplinary power/control of the seconded officers in the NMS to the 3<sup>rd</sup> Respondent leaving the officers with existing disciplinary cases to be retained by the 4<sup>th</sup> Respondent until the disciplinary process is concluded.

25. It submitted that the nature of the order of certiorari and the scope of this remedy was summarized in **Captain Geoffrey Kujoga v Attorney General Misc. Application No. 293 of 1993** and **Republic v Kenya National Examinations Council ex parte Geoffrey Githinji and 9 Others Civil Appeal No.266 of 1996.**

26. It further relied on the case of **Joaninah Wanjiku Maina v County Government of Nairobi & 2 Others [2017] eKLR** that the Court in granting a writ of certiorari does not exercise the powers of an appellate tribunal and that it demolishes an order or decision which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the tribunal.

27. It argued that the effect of the order of certiorari is to restore status quo. It submitted that the 3<sup>rd</sup> Respondent therefore did not have the necessary power to second the said employees as they were not in its employment thus the actions and omissions of the Respondents are contrary to the law. It urged the Court to find in its favour and allow the application as prayed.

#### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' submissions**

28. They submitted that it is an established principle of law that one who wishes the Court to grant a relief for a violation of a right or fundamental freedom must plead in a precise manner the constitutional provisions said to have been violated or infringed. They relied on the cases of **Anarita Karimi Njeru v Republic (1979) KLR 154** and **Mumo Matemu b Trusted Society of Human Rights Alliance [2014] eKLR.**

29. They argued that the Applicant has failed to set out with reasonable degree of precision that which it complains as the Petition is poorly pleaded. They argued that the lack of precision in showing how the Respondents violated the Petitioner's right hints the existence of a frivolous matter as the Petition has no substance thus putting up a defense would be a waste of time.

30. They relied on the decision in **Mercy Nduta Mwangi t/a Mwangi Kangara & Co. Advocates v Invesco Assurance Company Limited [2019] eKLR** that a matter is frivolous inter alia if it has no substance, is fanciful or when to put a defense would be a waste of the Court's time or is not capable of reasoned argument.

31. They submitted that the transfer of power from the 4<sup>th</sup> Respondent to the national government was based on Article 187 of the Constitution as read together with the Intergovernmental Relations Act.

32. They submitted that the Deed of Transfer did not have to state who was to carry out the secondment and that the 5<sup>th</sup> Respondent who is the employer seconded the staff and forwarded the list to the 3<sup>rd</sup> Respondent vide the letter dated 25/3/2020.

33. They submitted that the process undertaken by the 3<sup>rd</sup> Respondent was facilitated by the 2<sup>nd</sup> Respondent who placed advertisements in

the daily newspapers on 25/2/2020 inviting the public to submit views from 28/2/2020 to 6/3/2020 with a view of being held in all 17 sub counties on 4/3/2020 as required by Article 10 and 232 of the Constitution.

34. They therefore argued that the Applicant and the public were afforded an opportunity to participate in the process but failed to raise their objections or give views. They relied on the case of **Law Society of Kenya v Attorney General & 2 Others [2013] eKLR.**

35. They submitted that the Instrument to Facilitate Secondment and/or deployment of Officers from the Nairobi City County Government to Nairobi Metropolitan Service was executed between the 3<sup>rd</sup> and 5<sup>th</sup> Respondents on 18/3/2020 and made provisions for safeguarding the terms and conditions of the service of the seconded officers and specifically provided for labor relations and collective bargaining agreements at Clause 12.

36. They further submitted that the preamble of the recognition agreement between the Applicant and the 4<sup>th</sup> Respondent makes reference to County Government together with its assignees and successors. Therefore, the 3<sup>rd</sup> Respondent and NMS are assignees of the 4<sup>th</sup> Respondent after the transfer and thus the agreement is still applicable to the seconded staff.

37. They reiterated that the 112 who are yet to collect the letters are at liberty to collect the said letters from the 3<sup>rd</sup> Respondent at any time at the NMS offices in KICC. They stated that due to the current Covid-19 travel restrictions, the 3<sup>rd</sup> Respondent and Nairobi Metropolitan Services have not taken any action against any employee and are engaging them through their supervisors.

38. They submitted that the Petition fails to meet the threshold required of a constitutional case and is deprived of merit. They urged the Court not to award the Applicant costs. In conclusion, they submitted that they followed due process in the secondment of staff.

39. I have examined the averments of the Parties herein. The main issue for this Court's determination is whether to allow the application to prevent the 3<sup>rd</sup> and 4<sup>th</sup> Respondents from terminating the services of the Claimant's members for failing to be present during secondment.

40. The 3<sup>rd</sup> Respondent contend that the application has been overtaken by events as all save for 112 employees seconded by the County Public Service Board to the National Government have reported and deployed.

41. In view of this position taken by the 3<sup>rd</sup> Respondent, the only problem will relate to the 112 employees who I also find should not be termination if at all pending the hearing and determination of this Petition.

42. Costs in the Petition.

Dated and delivered in Chambers via zoom this **29<sup>th</sup> day of October, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mango for Brian Otieno for Petitioner – Present

Oyugi for Respondent – Present