



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**ELRC NO. 1 OF 2018**

**(Before Hon. Justice Hellen S. Wasilwa on 29<sup>th</sup> January, 2019)**

**FREDRICK J. MUGAMBI.....CLAIMANT**

**VERSUS**

**INSPECTOR GENERAL,**

**NATIONAL POLICE SERVICE.....1<sup>ST</sup> RESPONDENT**

**DEPUTY INSPECTOR GENERAL,**

**KENYA POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**CHAIRMAN, NATIONAL POLICE SERVICE COMMISSION...3<sup>RD</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Claimant, Fredrick Mugambi filed a Notice of Motion Application dated 2<sup>nd</sup> January 2018 brought under *Rule 3 of the Court Vacation Rules, Article 159 of the Constitution, Section 12 and 16 of the Employment & Labour Act, Rule 32 of the Industrial Court (procedure rules of 2010), Order 40 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act* against the Inspector General of the National Police Service, Deputy Inspector General of the Kenya Police Service, Chairman of the National Police Service Commission and the Attorney General.

2. He sought to be heard during the vacation period and for the Court to order the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to immediately and unconditionally reinstate his name to the salary payroll pending the interparties hearing and he also seeks a temporary injunction restraining the 2<sup>nd</sup> Respondent or its agents from transferring him to the department of broadcasting and telecommunication or any other department outside the police service pending the hearing and final determination of this application and/or suit together with costs of the Application. That the application is based on the grounds that:-

***1. The 2<sup>nd</sup> Respondent has intentionally, illegally, maliciously and without any reasonable cause, refused to deploy the Claimant to the National Police Service and has further unlawfully withdrawn and/or removed the Claimant from the salary pay roll since September, 2017 to date.***

***2. Continual withdrawal of the Claimant's name from the salary payroll has hindered the Claimant from receiving his salary and this is likely to hinder the Claimant from servicing various loans advanced to him and even apply for further loans and further hinder him from paying school fees for his children when schools open in January 2018 hence locking the said children out of school for want of fees and school related expenses.***

***3. It is therefore in the best interest of justice that this application is allowed.***

3. In his supporting affidavit, the Claimant avers that he has worked as a civil servant for over 30 years without facing any disciplinary action having been employed first from 11<sup>th</sup> January 1988 as a Personnel Officer II at the then office of the Vice President and the Ministry of Finance. That he was in employment at various state departments including the Electoral Commission of Kenya (ECK) where he worked from 2006 to December 2008 as Human Resource Manager and left when the commission was dissolved. That his other posts include:-

*a) March 2009 to August 2011 - Assistant Director Human Resource, Ministry of Water and Irrigation;*

*b) 2011 to December 2012 - Transferred to the Kenya Police Force as Assistant Director Human Resource;*

*c) 10<sup>th</sup> December 2012 - Deployed to the National Police Service Commission as an Assistant Director Human Resource and got appointed to the position of Director, Human Capital Management effectively from 08/10/2013; and*

*d) 01/01/2014 to 30/06/2017 - Seconded to the National Police Service where he worked until the secondment expired and was subsequently released back to the Kenya Police Service.*

4. That upon him reporting back to the Kenya Police Service, the 2<sup>nd</sup> Respondent refused to deploy him to the service but he still remained in the payroll for July and August 2017 and that on 18/08/2017, he received a letter transferring him to the Ministry of State Department of Broadcasting and Telecommunications where he was to report not later than 25/08/2017.

5. That he complained to his employer, the 3<sup>rd</sup> Respondent against the said transfer on the ground that the 2<sup>nd</sup> Respondent had usurped the powers of the 3<sup>rd</sup> Respondent who was the only one authorised to transfer and post him. That the 3<sup>rd</sup> Respondent then revoked the transfer by the 2<sup>nd</sup> Respondent and directed the 1<sup>st</sup> Respondent to employ him to the specific departments of Kenya Police Service, Administration Police Service or Directorate Criminal Investigation within the Police Service.

6. That the 2<sup>nd</sup> Respondent however went on to withdraw his salary from the payroll for September 2017 despite being severally directed by the 3<sup>rd</sup> Respondent to reinstate him to the payroll. He further avers that his removal from the payroll and failure to be deployed to the service has caused him untold mental torture and suffering and that he ought to be compensated by way of general damages. That the Respondents' actions are illegal, irregular and malicious and that this Court should come to his rescue.

7. Hon. Lady Justice Maureen hearing the application ex-parte on 02/01/2018 ordered that interparties hearing be fixed on 16/01/2018 before any Judge and that the Applicant serves the Respondents for them to file their responses within 5 days before the said hearing date. On 16/01/2018, the Hon. Judge further ordered that pending the hearing of the application, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are to reinstate the Applicant to the payroll with immediate effect while the Respondents were also granted leave to file their response to the application within 14 days.

### **Respondents' Case**

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Replying Affidavit dated 27/02/2018 sworn by Simon Rotich, the Deputy Commission's Secretary at the Public Service Commission who avers that the Public Service Commission has delegated to the Ministry of Public Service, Youth and Gender Affairs the functions to transfer, deploy and second Human Resource Management staff within the public service.

9. That after the dissolution of the ECK, the Claimant was absolved and via a letter dated 24/07/2012, appointed into the civil service and placed under the Ministry of State for Public Service as Principal Human Resource Management Officer. That the Claimant was not seconded by the Kenya Police Service but by the Public Service Commission and that when his secondment period expired, he was to report back to the Ministry of Interior & Co-ordination of National Government where he was when he was seconded to the National Police Service Commission.

10. That on 24/07/2017, the 2<sup>nd</sup> Respondent wrote to the PS Ministry of Public Service, Youth and Gender Affairs informing them that the 3<sup>rd</sup> Respondent had recruited its own staff to fill positions including that of the Claimant and would subsequently be redeploying the Claimant back to them. That the Claimant is employed under the Public Service Commission and has never been an employee of the National Police Service and that the 3<sup>rd</sup> Respondent did not therefore have the mandate to transfer him or revoke the transfer by the Ministry of Public Service, Youth and Gender Affairs. That this is confirmed when the Claimant wanted to further his education to Ph.D, his course approval was approved by the Ministry of State for Public Service and that the Claimant also remitted the requisite 31% of his basic salary towards his pension for the period he was at the National Police Service Commission.

11. The 3<sup>rd</sup> Respondent filed his Replying Affidavit sworn on 20/02/2018 by Johnston Kavuludi wherein he avers that the Applicant, who at the conception of the Commission was an employee of the Kenya Police Service, later became an employee of the National Police Service Commission by operation of the law. That they received his complaints on his non-deployment, removal from payroll and the alleged transfer and after deliberating on the same, advised the 1<sup>st</sup> Respondent accordingly as averred by the Applicant in his supporting affidavit. That the same was however not implemented and that the applicant is still validly its employee having not ratified his transfer to any other government agency. That **Article 234(3) (c) (iv) of the Constitution** limits the mandate of the Public Service Commission in human resource issues relating to the National Police Service Commission.

12. In a Further Affidavit dated 09/03/2018, the Claimant responds to the affidavit sworn by Simon Rotich by averring that he together with other officers remained as employees of the National Police Service until the National Police Service Commission was established. That his contribution towards his pension is in order since he was seconded from the Kenya Police Service to an independent Commission just as it is applicable to employees seconded from other government ministries and/or department to independent bodies.

13. He avers in a second Further Affidavit dated 09/03/2018 in response to the affidavit sworn by Benson Githua that though the National Police Service Commission initiated the process of recruiting staff under **Article 246(3) of the Constitution**, he was retained as a Director Human Capital Management under the same article as seen in exhibits marked 1(a) and 1(b).

14. That in exhibit 3(b), the 3<sup>rd</sup> Respondent wrote to the Directorate of Public Service Management to delink all civilian staff working with the 3<sup>rd</sup> Respondent and transferred from the Public Service Commission to the 3<sup>rd</sup> Respondent. That his name does not appear in the 2<sup>nd</sup> Respondent's list of civilian staff who opted out of employment of the 3<sup>rd</sup> Respondent and chose to be deployed back to the Public Service Commission.

15. He also avers that the 2<sup>nd</sup> Respondent has not complied with the court's order of 18/01/2018 for the reinstatement of his salary as they have only paid salary for February 2018 and left out arrears from September 2017 to January 2018. That his employer through the affidavit sworn by Johnston Kavuludi, has confirmed that he was deployed while working with the Kenya Police Service and where he should be released to and which is not the Ministry of State Department of Broadcasting and Telecommunications. Further, that exhibits 6(c) and 6(d) show that they are deploying him as Assistant Director Human Capital Management while his position is that of Director Human Capital Management.

### **Claimant's Submissions**

16. The Claimant submits that since prayers 1, 2 and 3 have been spent, he currently seeks prayers 4 and 5 of the application and that the main issue for determination is who between the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents has the legal capacity to determine where he is to be deployed.

17. He submits that he is an employee of the 3<sup>rd</sup> Respondent by virtue of **Section 7(1) of the National Police Service Act, 2011** which provides for the transition of both civilian and uniformed members of the service from the Kenya Police Force and Criminal Investigation Department to the National Police Service and Section 2 of the National Police Service Act which defines the word 'member' to include civilian members of staff of the service. That Section 7(1) stipulates as follows:-

**“All persons who were immediately before the commencement of the Act, Officers or employees of the Kenya Police Force and Administration Police Force, established under the Police Act and the Administration Police Act respectively, including Officers working with the Criminal Investigation Department, shall upon commencement of this Act become members of the service in accordance with the Constitution and this Act.”**

18. He submits that the 2<sup>nd</sup> Respondent was misleading when he informed the Ministry of Public Service, Youth & Gender Affairs that the directive to deploy him back to the Police Service was not possible on the reason that there was no vacancy for Director, Human Capital Management at the Police Service.

19. That with regards to the issue of delinking, the Honourable Attorney General advised the Permanent Secretary, Ministry of Interior & Co-ordination of National Government that the preserve of transferring civilian staff already in employment with the 3<sup>rd</sup> Respondent is with the National Police Service Commission and not the said Ministry; advice that was applied in Petition No. 75 of 2015, Joel Okero Makori - Vs - National Police Service Commission & Others. That the Court in that case ordered a deployment of the petitioner back to the Kenya Police Service due to the said advice by the 4<sup>th</sup> Respondent and that the same also applies to this instant case as it cuts across the board.

20. Further, that on 14/05/2018, the Board of the National Police Service Commission held a meeting and arrived at a decision to deploy him back to the National Police Service and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents having been part of the decision of the board should mark the end of where he should be deployed.

21. He submits that Benson Githua and Simon Rotich have no locus standi to depone affidavits on behalf of the Ministry of Interior & Co-ordination of National Government and the Public Service Commission respectively since the two bodies have not sought leave to be enjoined as parties to this suit.

22. That he therefore urges the court to expunge the two affidavits from the court record and that if the same are not expunged, the Court should be guided by the Claimant's submissions. He further submitted that he fully adopts the 3<sup>rd</sup> Respondent's written submissions and invites the court to be guided by the decided cases quoted by the 3<sup>rd</sup> Respondent.

23. He insists that he ceased being an employer of the Public Service Commission once the National Police Service Act came into operation and that he was seconded from the police department to the National Police Service Commission. That the 4<sup>th</sup> Respondent is not opposing his application since he has not filed a replying affidavit, written submissions or even grounds of opposition and that his application should be allowed with costs.

### **Respondents' Submissions**

24. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the Claimant was employed by the Public Service Commission and that his first entry into the National Police Service Commission was through a posting by the Public Service Commission and that even his secondment had to be approved by the said Public Service Commission.

25. That the 3<sup>rd</sup> Respondent has at all times also recognized the Claimant as an employee of the said commission and always done correspondence regarding the Claimant through the Kenya Police Service to the Ministry of Public Service, Youth and Gender Affairs.

26. That no regulations have been formulated under **Section 7(1) of the National Police Service Act** read together with **Sections 10(1) (b), (e) and 28 of the National Police Service Commission**, which sections intended that regulations were to be in place before the absorption of the alleged civilian staff. That the Claimant did not write to communicate whether he wished to remain in the National Police Service Commission as was required of all civilian staff and that he therefore remained an employee of the Public Service Commission.

27. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny that the 2<sup>nd</sup> Respondent transferred the Claimant stating that since communication used to be done through the office of the National Police Service, the deployment was done by the Ministry of Public Service, Youth and Gender Affairs vide posting order **Ref. MPYG/DP3M/1/1/1A Vol XL1(139)** dated 14/08/2017 and that the 2<sup>nd</sup> Respondent was merely communicating the same to the Claimant.

28. That the Affidavits they relied upon in their response are properly before this court because the 4<sup>th</sup> Respondent had to seek information from the Public Service Commission and the parent Ministry and that they need not be part of the suit. They finally submit that the application is incompetent and pray that the same be struck out with costs to the Respondents.

29. The 3<sup>rd</sup> Respondent submits that the Claimant was a civilian member of the Service at the conception of the National Police Service Commission and an employee of the Kenya Police Service and that he could not be lawfully transferred from the Service without authority of the Commission.

30. That the transfer of officers or staff is an exclusive mandate of the Commission by virtue of **Article 246(3) of the Constitution** as provided for under **Regulation 4 of the Transfer and Deployment Regulations 2015**. He cites the cases of ***Republic v Deputy Inspector General of National Police & 32 others [2013]eKLR*** and ***International Centre For Policy and Conflict v Attorney General & 2 others [2014] eKLR*** and that the court should declare that the purported transfer of the Claimant was unprocedural, illegal and of no legal effect.

31. I have considered the averments of both parties. I note that the orders being sought in this application are similar to the others sought in the main claim. In order not to determine the claim without hearing the parties, I will confirm the interim orders given by J. Onyango pending the hearing and determination of this claim.

32. The parties to set down the case for hearing on priority basis. Costs in the cause.

**Dated and delivered in open Court this 29<sup>th</sup> day of January, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Amati for Claimant – Present

Wangechi for 1<sup>st</sup> and 2<sup>nd</sup> Respondents – Present

Odinga holding brief Ojwang for 3<sup>rd</sup> Respondent – Present