



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

AT NAIROBI

PETITION NO. 11 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 14th February, 2019)

MARGARET WANJA MUTHUI.....PETITIONER/APPLICANT

VERSUS

MINISTRY OF TRANSPORT, INFRASTRUCTURE,

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

KENYA RURAL ROADS AUTHORITY (KERRA).....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. The Petition before the Court is dated 22nd February, 2017, where the Petitioner prays for:-

a. A declaration that the act of the 1st Respondent directing the 2nd Respondent to deploy the Petitioner to the Office of Performance Management and Coordination under the presidency is a breach of the latter's Constitutional Rights under Article 27(1), (2) and (3), 28, 41, 48 and 50 of the Constitution of Kenya and that the same is null and void for all intent and purposes.

b. An Order for Judicial Review of Certiorari to quash the decision of the Respondents made by letters dated 8th February, 2017 and 13th February, 2017, deploying the Petitioner to an office to undertake duties on which she has no expertise.

c. An order of Judicial Review of Prohibition to prohibit the Respondent from deploying the Petitioner to any other office without following the right procedure with the same being actuated with malice.

d. That the perpetual mandatory injunction and/or the prerogative of prohibition do issue restraining the 1st and 2nd Respondents either by themselves or through their agents and/or servants from recalling /deploying/releasing the Petitioner from the Kenya Rural Roads Authority Headquarters to any other department without just cause.

e. That the Respondent be condemned to pay the costs of this petition and

f. Any other relief or Order that this Honourable Court may deem fit to grant.

Facts

2. The Petitioner avers that for a period of more than 7 years she has worked in the Procurement department of the 2nd Respondent. Within this period she states that she worked diligently and rose from the position of Procurement Officer to that of Procurement Manager a position which she has held since 2014 up until 13th February, 2017, when she received a directive from the 2nd Respondent deploying her to the Office of Performance Management and Coordination under the Presidency.

3. That the deployment was as a result of a directive that the 2nd Respondent had received from the 1st Respondent vide the letter dated 8th February, 2017, directing the 2nd Respondent to deploy her to the aforesaid office.

4. She avers that the whole debacle happened against the backdrop of a tender wherein the 2nd Respondent on 28.4.2016 invited eligible firms to bid for the works through an advertisement in the local dailies. The engineer's estimate was Kshs. 4,961,928,131.77.
5. That five firms submitted bids for this tender and four of them were found to be non-responsive and the Tender Evaluation Committee therefore did not subject their bids to detailed evaluation. The remaining bidder who was found to have fulfilled the requirement was awarded a tender at their tender sum of Ksh. 6,081,865,936.29 for being the lowest bidder.
6. Subsequently Ms. Muthui did an opinion under Sections 7 and 84 of the Public Procurement and Asset Disposal Act (PPADA, 2015) and rendered this opinion upon assessment of the Budget for the Financial Year 2016-2017, Annual Procurement Plan, the Advert, Tender Documents, Minutes of the Tender Committee and the Joint Tender Evaluation Report.
7. She however noted that the Company that the Tender Evaluation Committee had recommended for the award of the tender had overpriced the tender by over 1 Billion. That her opinion as rendered had the effect of the tender not being awarded and caused a lot of problems for the Contractor who was involved due to the amount of money involved.
8. That subsequent to her opinion she received communication from the Permanent Secretary of the 1st Respondent on her phone requesting her to provide him with a full report on the tender and options that cure the anomalies and allow the tender to be awarded to the aforesaid Company. She responded by stating that she had already rendered her opinion to the Director General of the 2nd Respondent and that he was best placed to give the Permanent Secretary that advice. That the Permanent Secretary then informed her he would make the decision as the Accounting Officer.
9. That barely two weeks later, the 2nd Respondent received the directive from the 1st Respondent to deploy her to the Office of Performance Management and Coordination under the Presidency under the guise that she is an expert on low volume seal roads contracts. That the letter of deployment does not indicate the range of her duties at the office of Performance Management and Coordination under the Presidency. She avers that she has no idea of the function of her purported deployment.
10. She contends that she had legitimate expectation that she would work for the 2nd Respondent and that she would not be deployed to another line of work which she does not have the requisite expertise. That in the event the 1st Respondent had the powers to deploy her which it doesn't, then the same ought to have been done in such a manner that is commensurate to the norms and practices of inter-departmental deployment which would involve her making an application to be deployed with the belief that she has the requisite expertise.
11. That the 1st Respondent did not follow the laid down principles on deployment, and the fact that the deployment was not done lawfully, the 1st Respondent acted both procedurally and substantively ultra vires.
12. That the 1st Respondent has further acted ultra-vires by appointing one Catherine Waithera Kangangi who does not have the requisite qualifications of a Procurement Manager at National level as she is still a Procurement Officer based in Kiambu. That her deployment is nothing short of a witch hunt by the powers that be as she is being victimised for doing her duties as set out in her appointment letter. That she is yet to hand over duties to the said Catherine Waithera Kangangi.
13. She avers that the office of Performance Management and Coordination under the Presidency does not have a department of procurement, as the only departments in the said office are Legal and Economics departments. That if the orders sought are not granted there is a very high likelihood that she will not have any duties to perform and consequently be declared redundant.
14. That the Respondents have in violation of the listed provisions of the Constitution of Kenya, the Employment Act, the Fair Administrative Actions Act and other written laws by deploying her to an office to conduct functions that are not within the range of her expertise, being deployed as punishment for upholding the rule of law and as a result of her diligence performance of her duties, being deployed unprocedurally. That the Deployment breached the separation of functionalities between the 2nd Respondent and the 1st Respondent.
15. That the 1st Respondent in directing the 2nd Respondent to deploy the Petitioner violated Article 41(1) and 47 of the Constitution. She prays for the Petition to be allowed.
16. The Respondents have filed a Replying Affidavit sworn by one Judith Yamo the Human Resource and Administration Manager of the 2nd Respondent. She states that the Petitioner was employed by the 2nd Respondent as a Procurement Officer vide a letter dated 7th October, 2009. That the Petitioner was subsequently promoted to the position of Senior Procurement Officer in the year 2011 vide a letter dated 29th December, 2011.
17. She avers that on 15th June, 2015, the Petitioner was appointed to the position of Procurement Manager which position she held until 8th February, 2017 when she was deployed to the office of Performance Management and Coordination, under the Presidency vide a letter dated 8th February, 2017. She avers that they notified the Petitioner of the deployment and released her to report to the office of Performance Management and Coordination under the Presidency.
18. That the deployment was procedurally notified to the Board of Directors of the 2nd Respondent. She states that subsequent to the deployment the 2nd Respondent appointed another officer to undertake the duties of the procurement function and which officer is currently undertaking the duties of the office despite the fact that the Petitioner has not availed herself for substantive handing over on grounds of illness.

19. It is the Respondent's position that the Petitioner's terms of service are governed by the Human Resource Management and Administration Policies and Procedures Manual and Human Resource Policies and Procedures Management for the Public Service. According to the manual officers employed as public servants are subject to transfer from one government ministry, state department, agency and or entity from time to time in accordance to Section B31 of the manual.

20. The Respondent states that the Petitioner was deployed to the Office of Performance Management and Coordination, under the Presidency to undertake specific duties due to her expertise.

21. That the allegations by the Petitioner do not warrant the Orders sought as the deployment was done lawfully within the powers of the Cabinet Secretary without any bad faith, biasness and unreasonableness. Further, that the Petitioner has not exhausted all the dispute resolution mechanism provided for in the relevant Human Resources Policy document. That if the Orders sought are granted, the Court would be usurping the Human Resource powers of the 1st and 2nd Respondent.

22. In a rejoinder to the Replying Affidavit she avers that initially when she obtained Orders given by the Court on 17th May, 2017, she resumed her duties as Procurement Manager at the 2nd Respondent where she continues to work to date. She avers that by the time the Orders were made no one had been appointed to take over her office and she therefore resumed work without any problem.

23. That she is not a Civil Servant and even Clause B31 of the Public Service Commission Manual stipulates that employees who wish to move from one ministry to another have to apply for vacant positions as and when advertised. That the said deployment was unlawful as it is not within the powers of the Minister to deploy her from her employment with the 2nd Respondent to another government department and Clause B31 clearly spell out the procedure to be followed.

Petitioner's submissions

24. The Petitioner is an employee of a statutory body created by Parliament, a parastatal and cannot be transferred to government ministry, as she is not a civil servant perse.

25. That the Respondents are in blatant violation of the Constitution of Kenya, the Employment Act, the Fair Administrative Action Act and other written laws. In the process thereof the Respondent's out rightly violated the constitutional and statutory rights and freedoms of the Petitioner particularised as:-

a The Petitioner's right to a fair hearing, fair administrative action and more importantly fair labour practices as provided for under Article 41 (1) of the Constitution of Kenya was gross violated.

b. By not providing valid reasons for the said deployment, the respondents breached Article 47 of the Constitution on fair administrative action.

26. The Petitioner urges the Court to allow the Petition as drawn.

Respondents' submissions

27. The Respondent submits that the Principal Secretary Ministry of Transport, Infrastructure Housing and Development had the powers to issue the letter dated 8th February, 2018. That pursuant to Article 153 of the Constitution of Kenya 2010, Cabinet Secretaries are accountable to the President and by virtue of the same, the Cabinet Secretary was supplying resource needed at the office of the President under his mandate and authority.

28. It is submitted that the Petitioner has failed to prove to the Court how the 1st Respondent acted in excess of his authority and powers.

29. They rely on the Uganda case of **Pastoli vs. Kabale Distict Local Government Council and Others (2008) 2EA 300** the Court citing the case of **Council of Civil Unions Vs Minister for the Civil Service (1985)AC 2** and **An Application by Bukoba Gymkhana Club (1963)EA 478 at 479** where it was held:-

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of the law or its principles are instances of illegality ... Procedural impropriety may 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."

30. It is further submitted that the Court cannot substitute its judgment for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly as stated in the case of **East African Railways Corp Vs Anthony Sefu Dar-Es-Salaam HCCA No. 10 of 1971 (1973)EA 327.**

31. The Respondents submit that the Order to quash the Petitioner's transfer should not be issued for the reason that to do so would amount to the Court interfering with the human resource management by the 1st and 2nd Respondent which will cause a crisis in all government institutions. That the principles were set out in **Geoffrey Moria Vs Water Resources Management Authority and 2 Others (2015)eKLR:-**

“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 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”.

32. That it is not enough for an Applicant in Judicial Review Proceedings to claim that a Public body or officer has acted illegally, unreasonably or in breach of the rules of natural justice. The actual sins of a public body must be demonstrated for Judicial Review remedies to be granted. That in this case, the Petitioner has not proved any injustice suffered.

33. That an Order of prohibition cannot be issued against the 1st and 2nd Respondents as the Petitioner’s accusations do not warrant the issuance of the Order. They rely on the case of Mwenda Guantai Vs The Chief Magistrate Nairobi (2007)2EA 170 where the Court of Appeal held:-

“It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to discontinue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however lie to correct the course, practice or procedure of an inferior tribunal or wrong decision on the merits of the proceedings – equity so the High Court has inherent jurisdiction to grant an Order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the Court and it is oppressive and vexatious, the judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before Court or to a subordinate Court to prevent abuse of the process of the Court.”

34. That the Petitioner is prematurely before the Court and ought to have appealed to the Public Service Commission and as such the suit should be dismissed.

35. I have examined all the averments and submissions of the parties. From the Respondent’s own submissions, the Petitioner was employed by the 2nd Respondent as Procurement Officer vide a letter dated 7.10.2009 and she rose through the ranks to become a Procurement Manager from 2014.

36. The 2nd Respondent is a State Corporation under the 1st Respondent Ministry. Infact the 2nd Respondent was established under Section 6(1) of the Kenya Roads Act 2007 which states that:-

“There is established an Authority to be known as the Kenya Rural Roads Authority, which shall be a body corporate with perpetual succession and a common seal, and which shall, subject to this Act, be capable in its corporate name of:-

a) suing and being sued.....”

37. The 2nd Respondent therefore operates under its own head and with its own seal and is capable of suing and being sued. In the letter of appointment given to the Petitioner dated 7.10.2009, the appointing authority is Kenya Roads Authority. All the promotions the Petitioner received were also made by the Kenya Rural Roads Authority. There was no cross reference to the 1st Respondent, the Ministry of Transport, Infrastructure Housing and Urban Development.

38. Section 10(5) of Employment Act states as follows:-

“(5) 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”.

39. The import of this provision is that a term of an employment contract can only change in consultation with the employee. The term of an employment contract does not however extend to deployment to duties that are not commensurate with the qualification and training of an employee as in this case.

40. In the case of CA 55/2015 (Court of Appeal Kisumu) the learned Judges of Appeal were faced with a situation similar to the current case rendered themselves as follows:-

“In the circumstances that gave rise to the case before the trial Court, we find and hold that the Appellants’ action of unilaterally assigning the Respondent new duties amounted to significant breach that went to the root of the employment contract. The Respondent was right in treating herself as discharged from any further performance of her duties as a cateress. She cannot be said to have absconded duty. This was a classic case of constructive dismissal by the Respondent by the Appellants. The Respondent was rightly entitled to damages for unfair termination of her employment under Section 49 of Employment Act 2007”.

41. Section 4 of the Fair Administrative Action Act also state as follows:-

1) “Every persons has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2) Every person has the right to be given written reasons for any administrative action that is taken against him.

3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-

- a) Prior and adequate notice of the nature and reasons for the proposed administrative action;
- b) An opportunity to be heard and to make representations in that regard;
- c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d) A statement of reasons pursuant to Section 6;
- e) Notice of the right to legal representation, where applicable;
- f) Notice of the right to cross-examine or where applicable; or
- g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

4) The administrator shall accord the person against whom administrative action is taken an opportunity to:-

- a) attend proceedings, in person or in the company of an expert of his choice;
- b) be heard;
- c) cross-examine persons who give adverse evidence against him; and
- d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6) Where the administrator is empowered by any written law to follow a procedure which confirms to the principles set out in Article 47 of the constitution, the administrator may act in accordance with that different procedure”.

42. The key principles of Fair Administrative Action Act are found in Section 7 of the Fair Administrative Action Act, which provide instances where the Court can review administrative decision that are made. These includes the principle of illegality, unreasonableness and illogical.

43. Section 7 states as follows:-

1) “Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to:-

- a) a court in accordance with section 8; or
- b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

2) A Court or tribunal under subsection (1) may review an administrative action or decision, if:-

a) the person who made the decision:-

- i) was not authorized to do so by the empowering provision;
- ii) acted in excess of jurisdiction or power conferred under any written law;
- iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
- iv) was biased or may reasonably be suspected of bias; or

v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

- c) *the action or decision was procedurally unfair;*
- d) *the action or decision was materially influenced by an error of law;*
- e) *the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;*
- f) *the administrator failed to take into account relevant considerations;*
- g) *the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;*
- h) *the administrative action or decision was made in bad faith;*
 - i) *the administrative action or decision is not rationally connected to:-*
 - ii) *the purpose for which it was taken;*
 - iii) *the purpose of the empowering provision;*
 - iv) *the information before the administrator; or*
 - v) *the reasons given for it by the administrator;*
- j) *there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;*
- k) *the administrative action or decision is unreasonable;*
- l) *the administrative action or decision is not proportionate to the interests or rights affected;*
- m) *the administrative action or decision violates the legitimate expectations of the person to whom it relates;*
- n) *the administrative action or decision is unfair; or*
- o) *the administrative action or decision is taken or made in abuse of power.*

44. In the case before me, the 1st Respondent had no business in directing the 2nd Respondent to deploy the Petitioner to the Ministry. Indeed the decision was illogical because the employer of the Petitioner is the 2nd Respondent and not the 1st Respondent. The 1st Respondent acted without jurisdiction and definitely this was a case of abuse of authority which is against the express provisions of Section 7 above.

45. It is my finding that indeed the orders made transferring the Petitioner to the 1st Respondent was made illegally, unreasonably and without authority. I therefore allow the Petition and make the following orders:-

1. *A declaration that the act of the 1st Respondent directing the 2nd Respondent to deploy the Petitioner to the office of Performance Management and Co-ordination under the presidency is a breach of the latter's constitutional rights under Articles 47, 41, and 50 of the Constitution.*
2. *An order of Judicial Review of certiorari to quash the decision of the Respondents made by letters dated 8th February 2017 and 13th February 2017 deploying the Petitioner to an office to undertake duties on which she has no expertise.*
3. *An order of Judicial Review of prohibition to prohibit the Respondents from deploying the Petitioner to any other office without following the right procedure.*
4. *The 1st and 2nd Respondents will pay costs of this suit.*

Dated and delivered in open Court this 14th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Sumba for Petitioner – Present

Respondent – Absent