



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO 101 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: ARTICLES 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 41, 47, 50, 159, 162(2), 165(5)(b), 232, 236, 258 & 260 OF THE CONSTITUTION OF KENYA, 2010;

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 20, 27, 28, 41, 47, 48, 50, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010;

AND

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

AND

IN THE MATTER OF: SECTIONS 5 AND 10 OF THE EMPLOYMENT ACT, 2007;

AND

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

AND

IN THE MATTER OF: SECTIONS 9, 10, 11 & 12 OF PUBLIC OFFICER ETHICS ACT CAP 183 OF 2003;

AND

IN THE MATTER OF: SECTIONS 8, 9, 10, 11 & 15 OF LEADERSHIP & INTEGRITY ACT CAP 182 OF 2012;

AND

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

IN THE MATTER OF: RULES 4, 10, 11, 22, 23, AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

JOSEPHINE WASHIFUTSWA NAMBIRO.....PETITIONER

VERSUS

ENERGY REGULATORY COMMISSION.....RESPONDENT

RULING

The Applicant was to be transferred to the Respondent's Nyanza and Western Region office in Kisumu, effective 1st August 2018 but

objected to the transfer hence this application where she seeks the following orders:

- a. Spent.
- b. That pending the hearing and determination of this Application *inter partes* the Court do issue an order of injunction restraining the Respondent either by itself, its employees, servants and/or agents from, transferring the Petitioner from Nairobi to the Respondent's Nyanza and Western region office in Kisumu.
- c. That pending the hearing and determination of this application *inter partes* the Court issues a conservatory order to suspend/stay the letter of transfer dated 27th July 2018, and/or any further disciplinary process by the Respondent against the Applicant.
- d. That pending the hearing and determination of the Petition the court issues a conservatory order restraining the Respondent either by itself, employees, servants and/or agents from, transferring the Petitioner from Nairobi to the Respondent's Nyanza and Western Region Office located in Kisumu.
- e. That pending the hearing and determination of the Petition, this Court be pleased to grant a conservatory order prohibiting/restraining the Respondent, its servants, officials, representatives, and/or agents from transferring the Applicant to its office in Kisumu or otherwise in any other manner replacing the Applicant in her position as the Administrative assistant in the electricity department of the Respondent.

The Application is supported by the grounds set out on the face thereof and the Applicant's Affidavit.

It is the Applicant's case that the office location in Kisumu poses a health risk to her and further that the transfer completely alters her job description without her consent. She avers that the transfer is not a promotion as the terms and conditions of her employment, her salary and allowances remain unchanged. On the contrary, she has been demoted to job group ERC 7 and not ERC 6 as had been indicated in her letter. She avers that her transfer is aimed at frustrating her from undertaking her duties as a trustee in the Trustee Fund.

The Respondent has opposed the Application vide the Replying Affidavit of Elizabeth Njau.

The Respondent's case is that in signing her employment contract, the Petitioner became bound by the Respondent's Human Resource Manual which outlines the administrative procedures. It is a provision of the manual that an employee may be transferred to work in any station for commencement of service provision in these stations. Further, that the transfer of an employee does not amount to a disciplinary action. That the Respondent elected to transfer some of its best qualified staff, amongst them the Petitioner, to the Kisumu Regional Office. The Respondent avers that despite having two meetings to address emerging issues regarding the transfer, the Applicant did not raise any objection or communicate any discontentment regarding the same. To date, there has been no formal complaint regarding the same.

The Respondent avers that the consultation of the Petitioner before the transfer was not necessary. It is also the Respondent's case that the Applicant was to retain her job group ERC 6 even after her transfer. The Respondent further avers that the duties the Applicant was to undertake would have been similar to the ones she undertook while at the Head Office.

The Respondent contends that it was not aware nor does it possess records of the Applicant's health condition that would inhibit her from working at the Kisumu regional station.

The Respondent further contends that a recommendation for promotion is not binding upon it as it is merely a suggestion rather than a directive. It further contends that the Kenya Institute of Supplies Management has no authority to interfere with the Respondent's management process.

The application was disposed of by way of written submissions.

Petitioner's Submissions

In her affidavit, the applicant states that although she is a professional procurement practitioner, she was by internal memo dated 25th August 2017 allocated new duties as Administrative Assistant, Procurement, altering her job description without consulting her. That she was placed under one Mr. Michael Mwangi who was her junior in professional career. That on 29th August 2017 she was deployed to the position of Administrative Assistant, Job Group 6 in the Electricity Department, again without consulting her or giving her reasons. She appealed against the deployment by letter dated 25th September 2017 as in her opinion the deployment was a demotion. She requested that the deployment be reviewed to be in line with the respondent's Human Resource Policy Procurement Manual, 2017. That on 4th October she received a response declining her request.

The petitioner avers that her demotion and redeployment was prompted by an audit report pointing out irregularities in procurement of e-tickets but for which she was never issued with a show cause letter or a hearing.

The petitioner further avers that the intervention by Kenya Institute of Supplies Management against her removal from supplies duties did not elicit any positive response for the respondent.

The petitioner avers that in July 2018 she raised the matter of the Managing Director joining the respondent's pension scheme and getting the respondent to contribute to his account when he was not eligible as he was entitled to gratuity of 31% under his contract.

It is the petitioner's averment that these are the reasons that prompted her demotion and transfer to Kisumu, which is therefore malicious and discriminatory.

Respondent's Submissions

The Respondent submitted that the Applicant has not proved her case to warrant the issuance of conservatory orders. She has not provided medical documents to prove that she is indeed of ill health and neither has she provided an impact assessment or preliminary analysis of the conditions at the Nyanza Regional Offices to demonstrate the risk it poses. It is the respondent's position that the Applicant stands to suffer no loss as she has not lost rank, benefits and/or emoluments by reason of the transfer. That the petitioner is estopped from contesting her transfer as she had already accepted the same. They maintain that the Application is frivolous and vexatious.

Determination

Article 23(3) of the Constitution gives this Court the power to grant conservatory orders where an individual has instituted proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.

In the Applicant's letter of 27th July 2018, she was informed that her job title would be that of Senior Office Administration. At page 140 of the Applicant's bundle of Documents, being ERC Career Guidelines, the position of senior office administrator is in ERC Grade 7. Her transfer on Job Group ERC 7 on the face of it was therefore a demotion as the Applicant was in ERC Grade 6, a fact which has not been denied. There ought to have been evidence adduced to show that the Applicant was granted a fair hearing before she was demoted or some other valid reason for the apparent demotion. The Respondent did not adduce such evidence. I have noted that the Applicant had previously disputed a deployment communicated vide the letter dated 24th August 2017 arguing that it constituted a demotion.

The Applicant has not proved on a balance of probability that the transfer will affect her health conditions for reasons that she did not provide evidence of the alleged asthma treatment that she has been receiving from her personal doctor or an impact assessment or other evidence demonstrating that the conditions at the Kisumu station posed a health risk to her.

The foregoing notwithstanding, the court must consider the principles set out in the case of **Giella vs. Cassman Brown**, being whether the Application will be rendered nugatory if the conservatory orders are not granted. The court in **Muslim for Human Rights (MUHURI) & 2 Others vs. Attorney General & 2 Others [2011] eKLR** the stated as follows:

"... I propose to call this the degree of irretrievability. In other words, if the conservatory order is not granted, would it be possible that at the end of the trial of the Petition it will be possible that the subject matter is not lost and is capable of being retrieved. Here we cannot speak about whether a person has suffered irreparably that he cannot be compensated by damages or not. This is because there are many Constitutional and fundamental freedoms and rights if violated, stricto sensu, are not capable of being given back and are also in themselves not capable of being compensated. For instance, a violation of Constitutional provisions there are not matters for compensation but there are matters of retrievability. Also, there are certain violations that involve the action/and public interest that one cannot speak of compensability of a single claimant. It is not a private right per se and belongs to all and therefore non-negotiable."

Although the claimant has not proved her ill health or the unhealthy environment where the Kisumu office is located she has raised serious allegations of malice and discrimination against her and demotion. These have not been responded to by the respondent. It is important that these issues are addressed by the court.

It is evident that if the conservatory orders are not granted, the Applicant will be transferred and will be consequently demoted. The Applicant stands to suffer more if the orders are not issued as opposed to the Respondent who has not demonstrated it will suffer any prejudice.

I find that the balance of convenience tilts in favour of granting the orders. I therefore make the following orders –

That pending the hearing and determination of this Petition the court issues a conservatory order restraining the Respondent either by itself, employees, servants and/or agents from, transferring the Petitioner from Nairobi to the Respondent's Nyanza and Western Region Office located in Kisumu.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE