



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 35 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE COUNTY ASSEMBLY SERVICES ACT NO. 24 OF 2017

AND

IN THE MATTER OF THE LAW REPORT ACT, CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PRACTICE) RULES 2016

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND DECLARATIONS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD.....1ST RESPONDENT

THE ACTING CLERK, NAIROBI CITY COUNTY ASSEMBLY.....2ND RESPONDENT

EX PARTE

MONICA MUTHAMI.....1ST APPLICANT

DAISY WAMBUI KARIUKI.....2ND APPLICANT

PAULINE SARAH AKUKU.....	3 RD APPLICANT
SAMMY KIPLIMO KIPTOO.....	4 TH APPLICANT
ROBERT OTIONO.....	5 TH APPLICANT
JENNIFER KORIO.....	6 TH APPLICANT
SHIRLEY GABIELLA ACHIENG.....	7 TH APPLICANT
ASMAN JOHN.....	8 TH APPLICANT

JUDGMENT

The ex parte applicants are employee of the 1st respondent engaged in different capacities. Pursuant to leave granted by this Court through orders issued on 17th December 2018, the 8 Ex parte Applicants filed a Notice of Motion Application dated 29th January 2019 brought under Section 8 of the Law Reform Act (Cap 26), Section 7 of the Fair Administrative Actions Act, Order 53, Rule 3 of the Civil Procedure Rules. The motion is against the Respondents, Nairobi City County Assembly Service Board and The Acting Clerk Nairobi City County Assembly. The Ex parte Applicants seek for orders that:-

1. An Order of Certiorari be and is hereby issued to remove into the High Court and quash the Resolution of the 12th Day of November, 2018 and the decision of the Respondents as communicated vide the letter dated the 6th day of December, 2018.
2. An Order of Prohibition directed to the Respondents be and is hereby issued prohibiting them from seconding the Ex parte Applicants to the liaison office in the County Executive or any other office in the County Executive or either redeploying them to other offices within the County Assembly, or redeploying and/or reappointing any other officers whether permanent or in acting capacity to the current positions held by the Ex parte Applicants.
3. An Order be and is hereby issued declaring the decision of the Respondents to second and/or transfer the Ex parte Applicants to the liaison office as an unfair labour practice.
4. An order be and is hereby issued declaring that the County Assembly Service Board is not properly constituted in the absence of the substantive speaker, and the fourth and the fifth member.
5. An Order be and is hereby issued declaring that the resolutions and directives of the County Assembly Service Board as currently constituted touching on employment issues are null and void.
6. The Court be pleased to give further Orders and directions as it may deem fit and just to grant.
7. The costs for and incidental to this suit be provided for.

The Application is supported by the Affidavit sworn by the 1st Applicant, Monica Muthami who is the Principal Clerk Assistant heading the department of legislative and procedural services in Nairobi City County Assembly. She deposes that she has been duly authorised by her co-applicants to swear the affidavit on her own and their behalf. That on 11th December 2018, they were issued with letters dated 6th December 2018 which stated that the County Executive was establishing a liaison office with the Assembly so as to purportedly achieve effectiveness in its marshalling of the legislative affairs. That the said letter required them to immediately hand over to the Clerk and/or the Deputy Clerk and be forthwith transferred to the Executive Arm of the County government. That this decision to transfer and/or second them to the intended liaison office was reached at the meeting of the 1st Respondent's Board held on 12th November 2018.

She avers that there is a constitutional petition in the High Court on the issue of composition of the County Assembly Service Board (**Petition No. 442/2018**) which is yet to be determined. That the rush to unprocedurally second them is malicious and that it would have been reasonable for the Board as then constituted to await the court's decision on composition before making any substantive resolutions or decisions. That the liaison office or any other office should be established by the County Public Service Board in the County Executive and not the 1st Respondent. That the 1st Respondent as then constituted acted above and beyond its powers, a ground upon which this Court in exercising its supervisory role can quash that decision.

That the County Assembly is supposed to conduct checks and balances on the County Executive and so the said transfer/secondment will invariably lead to their victimization which offends the doctrine of separation of powers. That since they are witnesses in an ongoing corruption case (**ACC 236/2018**) touching on the County Assembly, they believe the proposed secondment is a move to intimidate them for opting to testify in the cases. That their secondment was without notice, consultation and does not confer any additional benefits to them as enshrined in the Public Service Act and that it is open to abuse because there are no terms of reference. That moving them will lead to a deficiency of staff in the County Assembly which is already understaffed as opposed to the County Executive whose workforce is bloated. That the decision did not also consider their different competencies and professional field and fitness for the new job and that the criterion of how they were selected was never disclosed to them.

She continues to aver that the guiding documents are the Public Service Human Resource Manual and the Public Service Commission

guideline on secondment. That the creation of the said liaison office is a duplication of roles of the liaison committee of the County Assembly and is thus wastage of public funds contrary to public policy. That no proposal has been forwarded to the County Assembly for the creation of the purported liaison office and as such, it is irregular and unprocedural and should thus be quashed. She annexes documents marked MM 1 – MM 4 in support of the Applicants' case.

Respondents' Case

The Respondents filed a Replying Affidavit dated 13th February 2019 sworn by the 2nd Respondent, Nancy Mutai who avers that the application is a waste of court's time and that the ex parte orders were obtained through non-disclosure of material facts by the Applicants. That the Applicants being employees of the Nairobi City County Assembly are governed by the HR Policies and Procedural Manual for the County Assembly Service Board, dated May 2016. That the Manual provides for grievance and grievance handling procedure which the Applicants have neglected and/or failed to use but instead rushed to this court.

She avers that on 21st February 2017, the 1st County Assembly adopted a motion urging the County Executive to establish a county liaison office that would be a link between the assembly and the county executive on legislative business. That in furtherance of the said motion and the strict timelines set by the Standing Orders, the County Executive through the office of the County Secretary met and made resolutions on the modalities of setting up the office. That on 16th November 2018, the County Assembly received a formal request from the County Executive for secondment of officers with the said letter providing that the terms and conditions of service would remain under the 1st Respondent for 3 years. That on 5th December 2018, the report was adopted by the Nairobi City County Assembly and the liaison office was immediately set up and that it is worth noting that the lead secretary of the implantation committee was the 4th Ex parte Applicant herein. That the Office of the Clerk forwarded the names of the seconded officers through a letter dated 10th December 2018 and that the secondment of county executive officers to the liaison office was also approved by the 1st Respondent and communicated to the Deputy County Secretary through a letter dated 13th December 2018.

That the Applicants' intention is to mislead this Court into believing that the Board completely violated the County Assembly Services Act and that the injunctive order had already been overtaken by events while the restraining order was partially in futility since at the time of the order, the secondment was in place. That the request calling upon this Court to determine issues in Petition 442 of 2018 should be rejected as the Applicants have failed to attach the responses from the Respondents to enable the court look at both sides. She confirms that she was also a witness in the criminal matters the Applicants refer to and hence the claim that the Applicants are being victimised is farfetched. That because the Applicants' affidavit is full of speculations that do not have any bearing in law, this Court cannot grant orders on fear or speculation and that the liaison office has a budgetary allocation which has been set up according to the law.

She further avers that secondment is not a new creature with various Acts providing for it including the Judiciary and that the Board picked its officers using the most competent criteria from different sectors to second to the liaison office. That the Respondents oppose the Application dated 29th January 2019 and pray for it to be struck out with costs on the grounds that the Applicants have not established sufficient cause to warrant the orders sought among other mentioned reasons. That the interests of the Applicants are not in jeopardy and neither have they been treated unfairly. That they have failed to prove that their right to fair labour practice and administrative action have been violated. That the Respondents should be allowed to finalise their end of the bargain by deploying their officers to the liaison office to fulfil its mandate. She relied on the documents marked NM-1 produced in opposition of the Application.

Applicants' Submissions

The Applicants submit that the 1st Respondent was not properly constituted when making the resolution to second them as the Speaker Hon. Beatrice Elachi was not involved as envisaged under **Section 12(3) of the County Governments Act**. That the 1st Respondent cannot also deal with employment matters as envisaged under section 11 of the County Assembly Service Act. That their secondment should be declared irregular and unprocedural since it failed to comply with section 25 of the County Assembly Service Act. That while the 1st respondent purported to direct the secondment under the scheme provided under Section 25(c) of the said Act, the said scheme has not even been established to date.

That it is trite law that anything done contra-statute is null and void ab initio and so any offices they were to be seconded to was non-existent in law They rely on the case of **Republic -V- Fazul Mohammed and 3 others Ex-Parte Okiya Omtatah Okoiti [2018] eKLR** where the court held that courts have the task to essentially evaluate whether a decision is illegal by construing the content and scope of the statute or Regulations conferring the duty or power upon the decision-maker. The court therein also held that Judicial Review remedies are meant to afford the prejudiced party administrative justice to advance efficient and effective public administration compliant with constitutional precepts and at a broader level, to entrench the Rule of Law.

That their secondment did not also adhere to rules of fair administrative action, rules of natural justice, the values of the Board as envisaged under Section 5 of the County Assemblies Services Act, Article 232 of the Constitution and the public service values enshrined therein including the need for accountability to administrative actions. That some of them are witnesses in an ongoing corruption case (ACC 236/2018) wherein some of their seniors are accused persons thus their reprimand by the Respondents. That it is clear from the foregoing that their secondment was thus arrived at arbitrarily, capriciously or *mala fides* or as a result of unwarranted adherence to a fixed principle.

The Ex-parte Applicants finally submit that they have clearly demonstrated to this Court the illegalities committed by the Respondents to warrant the court's intervention through a grant of the orders as prayed in the JR Application.

Respondents' Submissions

The Respondents submit that under N13.1 of the Human Resource Manual, an officer dissatisfied with the clerk's decision may appeal to the Board and if still dissatisfied, the Officer may apply to the Public Service Commission for review. That the Applicants do not deserve the

exercise of this court's discretion because they did not exhaust the internal dispute mechanism as elaborated in the HR Manual. That **Section 9(2) of the Fair Administrative Action Act** provides that courts shall not review an administrative action or decision under the Act unless the internal mechanisms of appeal/ review and all remedies available under any other written law have first been exhausted. They rely on the case of **Kimani Wanyoike -V- Electoral Commission & Another [1995] eKLR** where the court upheld the proposition advanced in **Speaker of the National Assembly -V- Hon. James Njenga Karume, Civil Application No. 92 of 1992 (2008) 1KLR 425** that "where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

They submit that the 1st Respondent under **Section 25(c) of the County Assembly Services Act** can formulate and disseminate schemes of service setting out the terms and conditions for the appointment of officers and other staff of the service for secondment of staff and transfer of service. That C.3.0 of the HR Manual also provides for Secondment of officers of the County Assembly wherein it states that the same is applicable to pensionable officers for a period not more than 3 years and may be renewable once with the approval of the the County Assembly Service Board. That the issue of setting up a liaison office was urgent and had been pending for too long based on the timelines given by the **Nairobi City County Assembly Standing Order No. 193** which states that:-

"Within sixty days of a resolution of the County Assembly or adoption of a report of a select committee, the relevant Member of the Executive Committee under whose portfolio the implementation of the resolution falls shall provide a report to the relevant committee of the County Assembly in accordance with Article 153(4)(b) of the Constitution."

They submit that **Section 6 of the Second Schedule of the County Assembly Services Act** provides for the quorum for a meeting of the Board to be three members and that the board that deliberated on the issue had 5 members. That the board was thus properly constituted to do its business in terms of **Section 12(1) and (3) of the County Government Act** and that decisions that are arrived at by the county government through its various organs which are within the law and in the best interest of the public need not be interfered with. That the action of the 1st Respondent to move the ex-parte applicants to the liaison office was lawful and followed due process including passing of motions and resolutions and that the challenge is untenable.

It is submitted by the Respondents that the Applicants have not explained how the working conditions would be unreasonable or unfair. They cite the case of **Nancy Anyango Onyango & 4 others -V- Homa Bay County Assembly Board & 3 others [2018] eKLR** where the court stated in paragraph 40 that the interests of the petitioner appeared not to be in jeopardy unless and until the county executive reneged on its obligation to receive them and which had not been proved to be the case. That issuing an order which has the potential to paralyze the County Assembly from exercising its public, statutory and constitutional administrative mandate contrary to public interest and policy principles was addressed by the Supreme Court in **Gatirau Peter Munya -V- Dickson Mwenda Githinji & 2 others [2014] eKLR**. That the 2nd Respondent being an employee of the board is protected by law from any liability resulting from execution of her functions and joining her in these proceedings is untenable because **Section 35** states that proceedings against the Board shall be commenced in the name of the Board.

Besides the Judicial Review application, the Applicants filed a Notice of Motion Application dated 10th May 2019 together with the Affidavit of Robert Otieno for orders that this Court cites 6 members of the 1st Respondent for being in Contempt of a court order and commit the said individuals to civil jail. They also sought for orders of reinstatement of their employment status pending hearing and determination of both the Judicial Review proceedings and the contempt application; restraining orders against the Respondents; a declaration that the abovementioned 6 members are thus unfit to hold public office for being in contempt of court; leave to amend their prayers in the substantive motion filed in the instant proceedings; and for costs of the contempt application to be paid by the Respondents. They rely on the grounds that this Court issued orders staying their secondment on 17th December 2018 which orders the Respondent had blatantly refused to obey. That they were relocated from their offices in their absence which led to some of them loosing personal effects. That they had also been stripped off their duties and the same allocated to their juniors. That the Respondents had resorted to harassing, threatening and intimidating them against the Court's orders. They annexed documents marked RO-1 to RO-9 in support of their application.

This Court issued ex-parte orders on 22nd May 2019 restraining the Respondents and Contemnors from interfering with the Applicants' employment or intimidating or victimizing them pending inter partes hearing of the application.

The Respondents filed their Replying Affidavit dated 10th June 2019 sworn by the Clerk, Jacob Ngwele Muvengi who avers that as far as the Assembly is concerned the Applicants are still in their respective departments where they had been assigned duties because there had been no redeployment. That it is the Applicants who had failed to perform their duties despite being paid salaries and allowances. He denied that the Respondents disobeyed court orders. He stated that no loss of valuables had been reported to the Sergeant at Arms, his office or the 1st Respondent board and that the staff movement was purely administrative pursuant to statutory mandate and board resolution of 30th January 2019. The 1st respondent opposed the application and prayed that it be struck out with costs on grounds that the Respondents had religiously complied with this court's orders. He relied on documents marked JNM-1 in opposing the contempt application.

The Applicants submit in their filed Submissions dated 7th June 2019 that the court in the case of **Cecil Miller -V- Jackson Njeru & Another [2017] eKLR** quoted the case of **Econet Wireless Kenya Limited vs. Minister for Information & Communication of Kenya & Another** where it was held that the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. That they have satisfied the 4 elements to consider in proving Contempt of court as set by the court in the **Cecil Miller case above** and which were espoused in a book titled "**Contempt in Modern New Zealand**" as follows:

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. The defendant had knowledge of or a proper notice of the terms of the order;
- c. The defendant has acted in breach of the terms of the order; and

d. The defendant conduct was deliberate.

That the court's orders have not been discharged and thus the actions of the Respondents constitute the grossest, contemptuous and callous disobedience of a valid Court order. That **Section 5(1) of the Judicature Act** bestows powers upon this court to punish for contempt and further, that **Section 63(c) of the Civil Procedure Act** provides that disobedience of an order of a temporary injunction attracts imprisonment or attachment and sale of the contemnor's property. That Ndolo J observed in the case of **TSC -V- KNUT & 2 Others [2013] eKLR** that the reasons courts will punish for contempt of court is so as to preserve and safeguard the rule of law.

The Respondents submit in their filed Submissions dated 11th June 2019 that the process of the alleged movement of the applicants has been explained in detail in the Clerks Affidavit dated 11th June 2019. That the Applicants have not been discriminated against as alleged and that they have instead been on a go slow and insubordinate after obtaining the orders. That the High Court declared the Contempt of Court Act to be inconsistent with the Constitution in the case of **Kenya Human Rights Commission -V- Attorney General & another [2018] eKLR Constitutional Petition No. 87 of 2017** on the ground that there was no public participation in its enactment as required by Articles 10 and 118(b) of the Constitution and that it encroaches on the independence of the Judiciary. That **Section 5 of the Judicature Act** having been deleted by the Contempt of Court Act which was declared unconstitutional, this court has no legal framework to punish for contempt in this matter.

Issues for Determination

1. Whether County Assembly Service Board was properly constituted in the absence of the substantive Speaker and 4th and 5th Member at the material time.
2. Whether County Assembly Service Board had power to redeploy second or transfer the ex parte applicants and whether the secondment was procedural and lawful redeployment.
3. Whether the application was premature, the applicants not having exhausted internal dispute resolution options.
4. Whether the respondents are in contempt of court.
5. Whether the applicants are entitled to the orders sought.

The applicants have argued that the County Assembly Service Board was not properly constituted and therefore the decision of the County Assembly was null and void. The applicants submitted that at the time that the ex parte Applicants were issued with letters of secondment, the 1st Respondent was not properly constituted as the County Assembly Service Board was not fully constituted in the absence of the substantive speaker, a substantive clerk to the County Assembly, a fourth and fifth member.

That the County Governments Act under Section 12(3) stipulates the composition of the composition of the County Assembly Service Board as follows;

The Board consists of: -

- a. **The speaker of the County Assembly, as the chairperson;**
- b. **A vice-chairperson elected by the Board from the members appointed under paragraph (c);**
- c. **Two members of the county assembly nominated by the political parties represented in the county assembly according to their proportion of members in the county assembly; and**
- d. **One man and one woman appointed by the County Assembly from amongst persons who are experienced in public affairs, but are not members of the County Assembly.**

The respondents on their parte submit that the 2nd respondent is an employee of the 1st respondent and acted in her capacity as the Chief Executive Officer of the 1st respondent and the Administrative Head of the service. That as a member of the 1st Respondent, the 2nd Respondent is protected from the liability for by the dint of Section 42 of the Act which provides as follows –

42. Protection of members and staff of the Board Any act or thing done by any member of the Board or by any officer or servant of the Board shall not, if the act or thing was done in good faith for the purposes of carrying out this Act into effect, subject him or her personally to any liability, action, claim or demand whatsoever.

As was held in the case of **Nancy Anyango Onyango & 4 Others -V- Homa Bay County Assembly Service Board & 3 others (2018) eKLR** the decisions arrived at by the County Government, through its various organs, as long as they are within the law and in the best interest of the public need not be interfered with. Nduma J. stated as follows in that case –

“In the present case, it would appear that the decision was made by the Board chaired by the authorizing officer of the assembly and the clerk of the Assembly. The two are the heads of County Public Service Staff. The two found it in the interest of the County Assembly to second the Petitioners to the County Executive for a period of three years. The secondment was sanctioned by the Executive which received the seconded officers and are willing to deploy them in the executive and give them their respective roles.”

I find nothing unlawful in the action of the 1st Respondent to move the ex parte Applicants to the liaison office.

Section 16 of the County Assembly Service Act provides for the business and affairs of the County Assembly Service Board. Under the Second Schedule, the quorum of the Board is three members and that of a committee of the Board is two members. Clause 8 thereof provides that –

The Board may at notwithstanding a vacancy in its membership or absence of a member, and its proceedings shall not be invalidated by the presence or participation of a person not entitled to be present at or to participate in those proceedings.

Clause 7 further provides that –

The chairperson shall preside at every meeting of the Board and in the absence of the chairperson at a meeting, the vice chairperson shall preside and in the absence of both the chairperson and the vice chairperson, the members present shall elect one of their number to preside and who shall, with respect to that meeting and the business transacted thereat, have all the powers of the chairperson.

The applicants have not submitted any evidence of improper constitution of the Board other than the absence of the Speaker and some members. They did not state that the meeting at which the decision was made did not have a quorum or was not lawfully constituted in any other way. . The absence of the Speaker alone would not invalidate proceedings if there is quorum.

The next issue is whether the County Assembly had power to redeploy the ex parte applicants

The 1st respondent, under Section 25 of the County Assembly Services Act, 2017 has powers to formulate and disseminate to the office holders schemes of service setting out the terms and conditions for the appointment of the officers and other staff of the Service. Under the county assembly scheme of service, the board is in charge of appointment and confirmation of staff, their promotions and secondment among others.

Section 25 of the Act provides that

25. County assembly schemes of service

(1)The Board shall formulate and disseminate to officers of the Service, schemes of service setting out the terms and conditions for the appointment of the officers and other staff of the Service which shall provide for —

(a) the appointment and confirmation in appointment of officers and other staff;

(b) promotions, resignations and termination of appointments;

(c) secondment of staff and transfer of service;

[Emphasis added]

The Human Resource Manual also provides for Secondment of officers of the County Assembly in C.3.0 where it states;

a) Secondments of officers from the county assembly service to other public organisations is applicable to pensionable officers for a period not exceeding three (3) years and may be renewable once.

b) Approval of secondment for officers moving from the county assembly to other public administrations shall be the responsibility of the County assembly service board. This will be subject to receipt of a formal request from the requesting public organization and the availability of the officer.

c) Approval for secondment for officers moving from the other public administrations to the county assembly service shall be granted by the board on recommendation of the management committee. This will be subject to the existence of a need for secondment and formal request from the County Assembly Service

As was stated at Paragraph 11 to 25 of the Replying Affidavit of Nancy Mutai, the secondment of the Applicants and the establishment of the liaison office was done as a result of;

a) The resolution of a motion passed on 21st February 2017 by the County Assembly during the 1st Assembly.

b) The resolution of the County Assembly passed on 5th December 2018 during the 2nd Assembly when adopting the report of the

committee implementation.

c) A joint meeting between the County Assembly Service Board and the County Assembly to discuss the modalities on the implementations of the motions passed by the County Assembly on the establishment of the liaison office.

d) That both the County Executive and the County Assembly through their respective service boards seconded their individual officers to the said liaison office.

e) That the seconding of the Applicants was within the law.

The seconded officers being the applicants together with others who are not in court were from various departments. The County Assembly Service Board as stated in the replying affidavit chose the best of the staff to second to the liaison office and the secondment of the officers involved various stakeholders.

The ex parte applicants have submitted that the scheme of service referred to under Section 25(c) has not been established to date, that the resolution was thus issued in a vacuum and that there is no approved County Assembly Human Resources Manual so that the guiding documents is the Public Service Commission Human Resource Manual which has a clear procedure on secondment. They submit that the secondment was therefore illegal.

They however did not state what is contained in the said Public Service Human Resource Manual. In any event, a matter provided for in substantive legislation cannot be illegal merely because the procedure through which it is to be implemented has not been put in place.

I find that the respondents had powers to second the ex parte applicants and that their secondment did not contravene any law.

The ex parte applicants further stated that the respondent did not comply with the rules of fair administrative action and rules of natural justice as the secondment was done without notice or consultation, and did not confer any additional benefits to the applicants, that the same was a knee-jerk, unprocedural, adhoc and a contravention of Article 48 as it was indefinite and without clear terms of service.

As has been submitted by the respondent the secondment was within the same organization and the terms and conditions of service were to remain the same. The salaries and allowances would not be affected. In any case the ex parte applicants did not bother to explain how the working conditions would be unreasonable or unfair. They did not stand to lose any benefits as a result of the secondment.

In the case of Nancy *Anyango Onyango & 4 Others -V- Homa Bay County Assembly Board & 3 Others [2018] eKLR* in dismissing a similar suit stated as follows:

“To this extend, the interests of the Petitioners appear not to be in jeopardy unless and until the County Executive reneges from its obligation to receive them, which has not been proved to be the case...”

An employee does not need to be consulted before being inferred and/or seconded. It is the employee who is supposed to notify the employer of any reasons why they are unable to comply with any directive on transfer, secondment or redeployment.

The respondents have pleaded that the ex parte applicants came to court prematurely without exhausting available mechanisms for internal resolution of disputes as provided in the Human Resource Manual which provides as follows –

N 13.1 Any officer dissatisfied by the decision of the clerk may decide to appeal to the Board. If an officer is dissatisfied with the decision of the board he/she may apply to the Public service Commission for review of the decision. A right of appeal or review shall be communicated to the concerned officer in the letter containing a decision which may be appealed against or reviewed as the case may be.

N 13.2 provides for an elaborate process of lodging the appeal.

The respondents submit that there is an elaborated internal dispute mechanism provided for by the Human Resource Manual for resolution of such disputes. That the ex parte applicants have neglected and/or failed to use the internal dispute mechanisms as provided for but instead rushed to court, and obtained exparte orders. They aver that the applicants do not deserve the exercise of this court’s discretion because they had not exhausted the internal appeals mechanisms as stipulated in Clause N.13.1 of the Human Resource Manual

Section 9(2), (3) and (4) of the Fair Administrative Action Act which provides as follows:

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies inferred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

The respondents relied on the case of *Speaker of the National Assembly vs Njenga Karume Nairobi CA No. 92 of 1992* where the court stated:

"There is considerable merit in the submission that where there is a clear procedure for redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure."

In the case of *Republic –V- Ministry of Interior and Coordination of National Government and Another Ex Parte ZTE JR 442/2013* the court stated, inter alia:

"...for the court to require the alternative procedure to be exhausted prior to resorting to Judicial Review is in accord with Judicial Review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute."

The Court of Appeal further in *Republic –V- NEMA CA 84/2010* stated:

"...where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in context of the real issue is to be determined and whether the statutory appeal procedure was suitable to determine it. The learned Judge, in our respectful view, considered these strictures and came to the conclusion that the appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute..."

In *Kimani Wanyoike -V- Electoral Commission and Another [1995] eKLR*, this Court upheld the proposition advanced in *Speaker of the National Assembly -V- Hon. James Njenga Karume, Civil Application No. 92 of 1992 (2008) 1KLR 425* that *"where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."*

I however find no fault with the applicants approaching this court.

It is common knowledge that the internal process of resolution of disputes within the public service are very slow and cannot provide the immediate reliefs that an applicant would get if they came to court under certificate of urgency. As stated in the authorities referred to above by the respondent, the internal mechanisms would not have been suitable for the nature of reliefs sought in the instant proceedings.

Were the respondents in contempt of court orders?

The ex parte applicants have submitted that after the Court issued the conservatory orders in question, the Applicants were relocated from the offices that they previously occupied and subsequently bungled into one tiny office which they were forced to share. That the new office was so small that they had to sit in turns.

The respondents on the other hand have submitted that the County Assembly Service Board whose statutory mandate is *inter alia* to supervise the administration of services and facilities of the County Assembly had a meeting, and one of the agenda items was the issue of office space. The Board was made aware that new departments had been created in conformity with the Assembly's organizational structure and the said departments lacked offices, namely Research, Budget Office, Accountability Office, Ward Liaison Office, and Library Services. That the Board approved the reorganization of the various departments and tasked the Clerk to take appropriate measures to reorganize existing office space including relieving pressure from sections most affected, namely Human Resources, Hansard, Sergeants at Arms, Accounts, Administration, and Committee Services.

That as a consequence of the decision of the Board, staff members of various departments had to be moved to occupy the limited space available. It is the respondent's position that the Applicants were however not affected with the said movement of offices, since they retain their Offices within the spaces/room(s) allocated to their respective departments to date. That it is the staff from their departments who had been scattered all over that joined them in their offices.

That with respect to the first, third, fourth, sixth and seventh Applicants, who are domiciled in the Clerk's Chambers, the offices they occupied had staffers from the Hansard Department, which offices were thus relieved of the Officers from the Hansard Department who were moved as part of the re-organization. That the second and fifth applicants retained their offices within the room(s) allocated to their Departments, with the space created from the reorganization of their offices given to the newly created Budget Office, Accountability Office and the Ward Liaison Office which had been rolled out in the Assembly's phased implementation of its organizational structure.

That none of the Applicants was moved to the liaison office as alleged. The Respondents state that they are not in contempt of the court orders as alleged. That what was done process has been explained in detail in the Clerk's Affidavit dated 11th June 2019.

I find no proof of contempt or of discrimination as alleged by the ex parte applicants.

Are the ex parte applicants entitled to the orders sought?

Having found the secondment of the ex parte applicants to have been regular and within the law and having further found no proof of contempt, the applications by the ex parte applicants are without merit and are dismissed.

Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JULY 2019

MAUREEN ONYANGO

JUDGE