



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

MISC. APPLICATION NO. 10 OF 2016

IN THE MATTER OF: ARTICLE 20(1) AND (2) OF THE CONSTITUTION OF KENYA

2010

AND

IN THE MATTER OF: ARTICLE 22(1), 41 & 47(1) OF THE CONSTITUTION OF KENYA

2010

AND

IN THE MATTER OF: THE JUDICIAL SERVICE ACT CHAPTER 185B LAWS OF KENYA

AND

IN THE MATTER OF: THE JUDICIARY HUMAN RESOURCE

POLICIES AND PROCEDURES MANUAL, SEPTEMBER 2014

PETER KURIA NGURU.....APPLICANT

VERSUS

JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT

THE CHIEF REGISTRAR OF JUDICIARY.....2ND RESPONDENT

THE DIRECTOR HUMAN RESOURCE AND

ADMINISTRATION JUDICIARY.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

AND

CABINET SECRETARY MINISTRY OF HEALTH.....INTERESTED PARTY

JUDGMENT

1. The Applicant had filed the motion seeking judicial review when the spectre of a transfer was looming. In a Ruling delivered on 12th July 2018, the Court disposed of the other aspects in the claim and permitted parties to resolve the remainder of the dispute through written submissions. That took a long time to resolve as further documents were sought to be filed and the final submissions were filed on 11th June 2019.

2. In his submissions, the Applicant asserts that the medical condition which caused the 1st – 3rd Respondent to recant his transfer is one which brings into play Section 8(1) of the Occupational Safety and Health Act which provides that an occupier shall not dismiss an employee, injure the employee or discriminate against or disadvantage an employee in respect of the employee's employment, or alter the employee's position to the detriment of the employee by reason only that the employee makes a complaint about a matter which the employee considers is not safe or is a risk to his health. He argues that the 1st – 3rd Respondent being his employer have been aware of the medical condition for which permission was even given for him to seek treatment abroad and led to the provision of an orthopaedic chair for use at work. He thus impugns the attempted transfer from Othaya Law Courts to Hamisi Law Courts. He cited the preamble to the Judiciary Human Resource Policies and Procedures Manual, 2014 which provides that the Judiciary is committed to providing its employees with a working environment that is fair, consistent, caring and supportive of professional and individual growth. The Judiciary is also committed to protecting the rights of its employees to engage in dialogue and express ideas in an environment which is free from harassment, discrimination, victimization and exploitation. From the foregoing he surmises that the attempt to transfer him to Hamisi Law Courts was therefore discriminatory, unfair and in complete disregard to his rights as guaranteed by the Constitution.

3. The 1st – 3rd Respondents submitted that the Applicant's appointment letter dated 28th March 2001 was clear that he was liable to be posted to any station within Kenya to discharge the normal duties of his office. The Respondents submitted that the Applicant consented to be transferred to Malindi Law Courts in place of one John Gichohi after discussions with the said John Gichohi and that indeed the Applicant was transferred to Malindi in place of his colleague and commenced work at Malindi on 2nd August 2004. He however sought a retransfer to Nyeri or Othaya on 22nd September 2004 as he stated that he had been involved in a road accident along the Nairobi-Nyeri Road on 20th August 2004. The Respondents submit that after request was made he continued to serve at Malindi and renewed his request for transfer on 24th December 2004 for a period of 9 months to enable him fully recover. Subsequently by letter dated 12th February 2007 the Applicant was transferred from Malindi Law Courts and he reported to the new station on 3rd March 2008. After a capacity and staff rationalisation audit, the Respondents found that 33% of employees had served in the same station for between 5 and 30 years. The Chief Justice therefore issued an internal memo on staff transfers directing that all members of staff who had served at least 5 years in their current stations be transferred. The Respondents therefore issued the letter of transfer that was impugned in these proceedings. The Respondents assert that the Applicant's letters relating to his condition may not all be genuine as the Spine Clinic in Ahmedabad, India denied treating the Applicant at the hospital and Outspan Hospital declined to respond to a letter from the 2nd Respondent seeking information about the Applicant's treatment there. The Respondents submit that the mandate of the 1st Respondent is well set out in the law and permits the 1st Respondent to review and make recommendations on the conditions of the staff of the judiciary *inter alia*. The Respondents submit that Judicial Review concerns itself not with the merits of the decision but in respect of the decision making process. The Respondents cite **Halisbury's Laws of England 4th Ed. 2001 Reissue** Volume 1(1) on the issue of the remit of judicial review. The Respondents rely on Section 10(1) of the Judicial Service Act and Regulation 14 of Part IV of the Third Schedule of the Act whose provisions *inter alia* permit the Respondents to select candidates for appointment, promotion and transfer with consideration for the efficiency of the Judiciary as well as making the decision that is the most appropriate in the circumstances. The Respondents rely on the case of **Andrew Ogola Makomere v Agro Industrial Tools Limited [2017] eKLR** where the court held that *the law with regard to an employee receiving treatment and being absent from work due to illness and in need of treatment is most generous. Such time is allowed to be absent for the employee to receive treatment. The only requirement of the employee is to inform the employer within a reasonable time of such illness and upon resumption of duty to submit a Medical Certificate from a Medical practitioner. The employee is allowed to be away for up to 30 days subject to letting the employer know the circumstances of the illness or sickness and such information can be communicated through a third party.* The Respondents thus submit that the Applicant's absence from work without justification and the fact that the hospitals that had allegedly treated the Applicant had disowned treatment or been uncooperative the Respondents thus sought that the Applicant be subjected to a medical board review of his condition. The Respondents submitted that on the basis of the decision in **Kenya National Examinations Council v Geoffrey Gathegi & 9 Others [1997] eKLR** where the Court of Appeal held that *only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.* The Respondents thus argue that the decision by the Respondents was not illegal as it was made well within its mandate under Article 172 of the Constitution and pursuant to Regulation 14 of Part IV of the Third Schedule to the Judicial Service Act. The Respondents submit that the decision is neither irrational nor reached unfairly. The Respondents urge the dismissal of the judicial review motion and deny the Applicant the reliefs he seeks in his Judicial Review.

4. The Applicant was challenging through the motion the attempted transfer. The impugned transfer was attacked for allegedly being discriminatory and in contravention of various Articles of the Constitution and the provisions of the Judiciary Human Resources Procedure Manual 2014. The Respondents correctly point out that the essence of judicial review is a challenge on procedure and not the merits of the decision. In this case, the Respondents assert that due process and procedure were followed in the transfer that they sought to effect. The Applicant on his part asserts the transfer was without consideration of Section 8(1) of the Occupational Safety and Health Act as his health did not permit the Respondents carte blanche in the transfer as he was in need of special consideration. The Applicant is a public servant serving one of the arms of Government. The Judiciary as employer is mandated to transfer staff as appropriate following the guidelines of the transfer policy which permits the employer to transfer the staff serving in the Judiciary to rationalise services and fill gaps as well as ensure an officer does not serve in one station for more than 5 years. The process employed to effect the transfer was explained by the Respondents thus: *After a capacity and staff rationalisation audit, the Respondents found that 33% of employees had served in the same station for between 5 and 30 years.* The Respondents were required to select the staff for transfer having regard to efficiency as well as making the decision that is the most appropriate in the circumstances. I find that the decision by the Respondents was not contra-statute as it was made well within the Respondents' mandate under Article 172 of the Constitution and pursuant to Regulation 14 of Part IV of the Third Schedule to the Judicial Service Act. The Applicant has not demonstrated what error the Respondents committed in sending him on transfer as the proper course was followed since the Applicant met the criteria of staff due for a transfer using the matrix above. He had served at the station for 5 years fulfilling one of the conditions of the policy for transfer. As no evidence was led that he was discriminated against, the challenge was at best misplaced and a shot in the dark. He would not therefore be immune from a transfer well planned and executed by the Respondents within their mandate under the law and in line with the policy and procedures in place regarding transfer of staff of the Judiciary. Since this was the singular issue for determination and it is resolved in favour of the Respondents, there is liberty to effect a transfer bearing in mind the peculiar circumstances of the employee. Applicant's motion is therefore unmerited and only fit for dismissal. As this is a matter involving parties who are still engaged in an employee-employer relationship I will make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 10th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar