



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**ELRC JR CAUSE NO. 1 OF 2019**

**IN THE MATTER FOR AN APPLICATION FOR JUDICIAL REVIEW**

**IN THE MATTER OF TRANSFER**

**AND IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF OFFICER, HEALTH AND SANITATION DPT**

**BUSIA COUNTY.....1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY**

**BUSIA COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**BUSIA COUNTY GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**EX-PARTE APPLICANT.....AINEAHK. MASINDE**

**J U D G M E N T**

The Ex-parte applicant prays for orders;

1. That an order of certiorari be and is hereby issued bringing into this court and quashing the decision by the respondents to transfer the Exparte applicant from Busia County referral hospital to Alupe sub-county Hospital pending his retirement.
2. That an order of Mandamus be and is hereby issued questioning by what authority did the Respondents seek to transfer the Exparte applicant from Busia County Referral Hospital to Alupe Sub-county Hospital pending his retirement.
3. That an order of prohibition be and is hereby issued prohibiting the Respondents from transferring the Exparte applicant from Busia County Referral Hospital to Alupe Sub-county Hospital pending his retirement.

The application is based on reasons (a) to (d) set out on the Notice of Motion to wit:-

- (a) That the applicant is soon retiring and the transfer is punitive.
- (b) That the transfer is unprocedural and calculated to injure the character of the Ex-parte applicant.

(c) That the transfer was being done without approval of his immediate supervisor who is required to sanction exit and departure of his staff.

(d) That the Ex-parte applicant cannot access the office and necessary documents as the same have been locked up in the office.

The applicant has sworn a Supporting Affidavit on 18.2.2019 in which is reiterated the aforesaid grounds.

The application is opposed by a replying affidavit sworn to by Dr. Isaac Omeni, the Chief Officer Health and Sanitation Department of Busia County Government.

He deposes that he is authorized by both the constitution of Kenya 2010 and the County Government Act Number 17 of 2012 to re-organize the departments for effective delivery of service to the people of Busia County. That he is authorized and empowered to transfer, deploy employees within the department and outside the Department thus the applicants claim that there was procedural impropriety is unfounded and baseless.

That before the transfer, the applicant was heard and given an opportunity to show cause why he has declined to comply with the transfer directions issued pursuant to the letter dated 4<sup>th</sup> June 2018 but refused to respond to the letter to show cause.

That the posting order dated 4<sup>th</sup> June, 2018 was never intended to punish the applicant in anyway and indeed the applicant has not put forward any evidence to show that he was targeted unfairly. That the said posting affected fifteen (15) employees including accountants, clerical officers and SCMA IV among others thus the claim by the applicant that he was unfairly targeted is untenable.

That despite various requests that the applicant do comply with the posting order of 4<sup>th</sup> June, 2018 he refused to do so forcing the respondent to issue a further reminder on 7<sup>th</sup> January, 2019 and to date the applicant has never complied with the said posting order.

That it is not true that the Claimant is being transferred to create room for malpractice in the Department.

That the application discloses no cause of action and it ought to be dismissed.

That in any event, the applicant ought to have appealed the decision to transfer him if he was genuinely aggrieved to the Public Service Commission under Section 77(1) of the County Governments Act Number 17 of 2012.

That this suit was brought prematurely having not exhausted the internal machinery provided in the Act. That no exceptional circumstances have been advanced by the applicant to warrant him to avoid the mandatory internal procedure before coming to court.

That the court lacks jurisdiction therefore to entertain a suit that has been filed in violation of mandatory provisions of the County Governments Act.

That the suit be struck out for want of jurisdiction.

### **Submissions:**

Applicant filed submissions on 17<sup>th</sup> April, 2019 in which he states that the judicial review order of certiorario, Mandamus and Prohibition could not be granted under the Appeal provisions under Section 77 (1) of the County Governments Act 2012 hence the filing of the suit.

That order 53 rule 3 enables the applicant to file the application when aggrieved by administrative orders as happened in this case. That the application has merit.

The Respondent on the other hand filed submissions on 24<sup>th</sup> May 2019 in which it states that the provisions of Section 77(1) of the County Governments Act are mandatory. That the court therefore lacks jurisdiction to entertain a suit filed prematurely in disregard of this provision.

That the ex-parte applicant has not made out a case to warrant judicial review in that no particulars of bias have been demonstrated. That there are no allegations that the Respondent has violated the law or exceeded its authority in transferring the Ex-parte Applicant to another health institution within the county.

That following the case of the **owners of motor vehicle Lilian "S" –V- Caltex oil Kenya Ltd (1989) KLR** the issue of jurisdiction should be determined at the outset and once the court finds that it has no jurisdiction it ought not to move a step further to consider the merits.

That in any event there are no allegations of breach of rules of natural justice nor was violation of the rules been proved by the Ex-parte Applicant.

Respondent further relies on the case of **Speaker of National Assembly –vs- Njenga Karume (2000) KLR 425** where it was held

“In our view there is considerable merit...that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed.”

The Respondent further relies on the Court of Appeal case of **secretary, county public service Board & Another –vs- Huibahai Gedi Abdille (2017) eKLR** in which the court while considering Section 77 of the County Government Act No 1 of 2012 held:-

*“Time and against it has been said that where there exists either sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt within the other forum. Such party ought to seek redress under the other regime”.*

The Court of Appeal further held in the case.

*“there is no doubt that the respondent initiated the judicial Review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the Act. The section provides not only a forum through which the respondent could agitate her grievance at the first instance, but that jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the Respondent’s. It is our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.”*

It is apparent that appeals to the Public Service Commission by aggrieved employees is only applicable from the decisions of the County Public Service Board and not from decisions of the executive.

The particular decision to transfer was by the Chief Officer Health and Sanitation Department for Busia County Government who is part of the County Executive.

The provisions of Section 77(1) are not applicable to the decision. The preliminary objection fails on this score alone.

On the merits of the case, the applicant has not in the application itself or the supporting affidavit disclosed any procedural violations that are amenable to judicial review. The applicant has not demonstrated that the Chief Officer exceeded his authority in transferring him to another medical facility within the county of Busia; that the administrative action by the Chief Officer was malicious and effected out of bias and/or discrimination against the Claimant nor has he demonstrated that any breach of the rules of natural justice occurred in the decision to transfer him.

The applicant did not file a supplementary affidavit to rebut the facts set out by the Chief Officer in the replying affidavit deposed to on 20<sup>th</sup> May 2019. Those facts remain unrebutted and the court finds that 15 officers were affected by the transfer and the transfer was not actuated by any malice or ill will but was bona fide administration action within the mandate of the Chief Officer of health in the county. The Claimant was given opportunity to be heard and show cause why he had declined to comply with the transfer directive issued vide a letter dated 4<sup>th</sup> June 2018 but he refused to respond to the show cause letter and came to court.

Indeed the conduct by the applicant amounts to insubordination, which if condoned would lead to disorder in the general administration of the county government.

The employer has the mandate to transfer employees and only in exceptional circumstances and after exhausting internal grievance procedures and mechanisms should the transfer be challenged in court.

This is not such an exceptional case. The applicant was about to retire and there was nothing untoward in moving him to a smaller health facility pending his retirement.

Accordingly, the application lacks merit and is dismissed with no order as to costs.

**DATED, SIGNED and DELIVERED at BUNGOMA this 26<sup>Th</sup> day of SEPTEMBER, 2019.**

**HON. M. N. NDUMA, JUDGE**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**BUNGOMA**

**Appearance**

Mr. Opiyo for Exparte Applicant

Mr. Lesaignon for Respondent.

Joy: Court Assistant