



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

PETITION NO. 1 OF 2019

IN THE MATTER OF ARTICLE 22 AND ARTICLE 258(1) & (2) (C) OF

THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF ALLEGED THREAT OF VIOLATION OF ARTICLES 3 AND 10 OF THE CONSTITUTION OF KENYA,
2010**

AND

**IN THE MATTER OF ALLEGED THREAT AND CONTRAVENTION OF ARTICLES 19, 20, 21, 22, 23, 24, 25 (C), 27, 35, 41, 50,
51, 232 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

BETWEEN

PAUL JALLA ELEMA.....1ST PETITIONER

ANDREW ADANO SALESA.....2ND PETITIONER

ADUKAN RAPHAELA.....3RD PETITIONER

ADUB ISSACKO UMURU.....4TH PETITIONER

STEPHENE SIGINITE TIMBOR.....5TH PETITIONER

ADAN ATAN SATAWA.....6TH PETITIONER

MATHEW NEEPE.....7TH PETITIONER

GUYO GURACHA FIGA8TH PETITIONER

DANIEL LARDAGOS DOKHLE.....9TH PETITIONER

MOHAMED ISSACK NYUKO.....10TH PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF MARSABIT.....1ST RESPONDENT

THE COUNTY SECRETARY COUNTY GOVERNMENT OF MARSABIT.....2ND RESPONDENT

THE COUNTY SECRETARY COUNTY GOVERNMENT OF MARSABIT.....3RD RESPONDENT

THE COUNTY EXECUTIVE, PUBLIC ADMINISTRATION &

ICT COUNTY GOVERNMENT OF MARSABIT.....4TH RESPONDENT

MARSABIT COUNTY GOVERNMENT SERVICE BOARD.....INTERESTED PARTY

RULING

1. Before me is the Petitioners/Applicants' notice of motion application dated 8th April 2019 seeking vacation of the orders of the court granted upon the Petitioners motion of 13th March 2019 which orders stopped intended transfers of the Petitioners. The motion is supported by the affidavit of Malicha Boru Wario sworn on 8th April 2019. The Respondents/Applicants challenge the orders granted on the basis that the Petitioners/Respondents obtained the orders by material non-disclosure. The Respondents/Applicants assert that by the time the Petitioners came to court the transfers had taken and the appointees transitioned to their workstations. The Respondents/Applicants urge the court that the Petitioners/Respondents are mocking the court by seeking orders that have already been spent. In reply to this motion, the 1st Petitioner's affidavit was filed and in it, it was deposed that the Respondents/Applicants motion is misconceived, incompetent, abuse of the court process and ought to be dismissed with costs. It was deposed that the Respondents/Applicants have not denied being served with the orders granted on 13th March 2019 and no irregularity on the face of the orders had been cited to warrant a variation, discharge or setting aside. The deponent also asserts that it is not disputed that the Marsabit County Public Service Board revoked the transfer orders a fact that is acknowledged by Malicha Boru Wario the deponent of the Respondents/Applicants supporting affidavit. In the replying affidavit the 1st Petitioner deposed that the transfers could not have taken place because the Executive Committee members, Chief Officers and sub-county administrators attended official meetings between 25th February 2019 and 1st March 2019 and thereafter proceeded to the Sixth Annual Devolution Conference in Kirinyaga County between 4th March to 8th March 2019. Paul Jalla Elema further that the 9th and 10th March 2019 fell on a weekend thus the transfers could not be effected nor any other lawful process could have taken place between 25th February 2019 and 13th March 2019. He deposed that it was not true that the orders were overtaken by events as the Petitioners were only evicted upon service of the court orders on 14th March 2019 as demonstrated by OB reports made in various Police Stations in Marsabit County.

2. The motion was urged on 24th July 2017 and the Respondents/Applicants' lawyer Mr. Muganda submitted that the orders obtained were through material non-disclosure by the Petitioners/Respondents. He argued that the transfer letter stated the transfers were with immediate effect and that therefore the transfers had taken place by the time the Petitioners/Respondents approached the court for the stay of the transfer. The Respondents/Applicants assert that the Petitioners/Respondents did not comply and sought an appeal against the transfers to the Interested Party and in the appeal failed to copy the 1st, 2nd and 3rd Respondents. The Respondents/Applicants thus seek the vacation of the orders issued on the grounds of material non-disclosure as held in the case of **Peter Ng'ang'a Muiruri v F. M. Gikanga (t/a Expeditious General Merchants) & Another [2014] eKLR** the gravamen of which is that the party coming to court *ex parte* is under an obligation to make a full and frank disclosure of the material facts pertinent to the matter. He submitted that this reasoning was reiterated in the case of **Aviation & Airport Services Workers Union (K) v Kenya Airport Authority & Another [2014] eKLR** where the Court held that the duty is to make full and fair disclosure of all material facts, the material facts being those which are material for the judge to know in dealing with the application as made. He submitted that failure to make full disclosure is fatal and the orders ought to be vacated.

3. The Petitioners/Respondents lawyer Mr. Laisagor argued in their opposition to the grant of the motion that the same did not meet the threshold for the grant of orders varying or setting aside the *ex parte* orders. He submitted that the orders had not taken effect because they were only served on 26th February 2019 and that the 1st Petitioner had received his transfer on 12th March 2019. He argued that how could the transfers be immediate if the appointees were to report to persons who were not in office at the time from 1st March to 5th March 2019 and thereafter proceeded to the Devolution Conference in Kirinyaga county. He submitted that there was no record on the dates the transfers were served nor did the notices to show cause indicate the date of receipt of the said notices. He submitted that the authority of **Peter Ng'ang'a Muiruri v F. M. Gikanga (t/a Expeditious General Merchants) & Another (supra)** was distinguishable as the parties in that case had failed to disclose the existence of other cases before court. He thus urged the court to disallow the motion as the threshold for grant was not reached. In a brief reply, Mr. Muganda submitted that the Petitioners do not deny receipt of the transfer notices on 26th February 2019 which was before the 13th March 2019 and that this was evidence that there was material non-disclosure. He submitted that the transfer is not to a person but an office. He thus urged the court to allow the motion.

4. The law on *ex parte* motions is clear as crystal. When a party is seeking the orders *ex parte* there is a duty to make full and frank disclosure as the court hears one party in the absence of the other. As stated in precedents, *ex parte* orders are made by the judge on the basis of the evidence and submissions emanating from one side only and despite that fact, the applicant is under a duty to make full disclosure of all relevant information in his/her possession. In the motion the Petitioners revealed there were transfers which they sought to vacate through court action. They annexed copies of the transfer letters as well as their appeals against the transfers. That was making a full and frank disclosure. They did not conceal the letters as alleged by the Respondents/Applicants. That being the bone of contention in the motion, it is superfluous for the court to delve into matters of the attempted disciplining of the officers for non-compliance with the transfers which in effect were vacated by the Court in its orders of 13th March 2019 and further reinforced by the County Public Service Board upholding of the appeals against the transfer. The motion by the Respondents/Applicants is devoid of any merit and is dismissed with costs to the Petitioners/Respondents.

It is so ordered.

Dated and delivered at Nyeri this 23th day of September 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar