



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

PETITION NO.17 OF 2019

IN THE MATTER OF UNFAIR LABOUR PRACTICE METTED ON NAROK PUBLIC HEALTH OFFICER

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF SECTION 58, 59 AND 72 OF THE COUNTY GOVERNEMENT ACT

AND

IN THE MATTER OF THE REVIED SCHEME OF SERVICE FOR PUBLIC HEALTH ASSISTANTS AND PUBLIC HEALTH OFFICER (2014)

AND

IN THE MATTER OF THE COUNTY PUBLIC SERVICE HUMAN RESOURCE MANUAL

BETWEEN

THE ASSOCIATION OF PUBLIC HEALTH OFFICERS OF KENYA ... PETITIONER

VERSUS

NAROK COUNTY CHIEF OFFICER, MEDICAL SERVICES 1ST RESPONDENT

NAROK COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

NAROK COUNTY GOVERNMENT 3RD RESPONDENT

RULING

The petitioner by application and Notice of Motion dated 27th September, 2019 is seeking for orders that;

The court be pleased to order the stay of the re-designation as effected through the posting order No.59 and referenced NCG/STA/PO/VOL.111/1447 and dispatched by the 1st respondent pending the interparites haring of the petition as the same is in breach of the revised Public Health Officers scheme of service.

The court be pleased to issue restraining orders against the respondents, their agents, servants, authorised officers or anybody claiming under them from transferring, demoting or alternating the terms of service of the claimants or in any other way victimising them for seeking this courts intervention.

The costs of this application be provided for.

The application is supported by the affidavit of Mohamed Bagajo Duba the secretary general of the Association of Public Health Officer, Kenya and that the petitioners are members thereof and the application is made on the grounds that the petitioner association was formed to cater for the welfare of all public health workers in the 47 counties and the national government. The 1st respondent dispatched a posting order No.59 and dispatched by the 2nd respondent posting them to various areas within the county, the 3rd respondent.

Mr Duba also avers that the re-designation did not adhere to the recognised qualifications as required under the Revised Public Health Officers scheme of service as some of the health cadres re-designated did not meet the minimum prescribed qualifications as contained in the scheme of service.

Mr Duba also avers that whereas the 2nd respondent has the prerogative to appoint, re-designate, promote officers within the 3rd respondent of paramount consideration is the prescribed qualifications for holding or acting in the office and the experience and achievements attained by the candidate which was not addressed in this case. That the action of the 1st respondent is ultra vires as the 2nd respondent through the County Government Act, 2012 (the Act) is vested with the mandate of exercising human resource functions and management in the county.

Among the public health officers posted by order No, 59 comprise some who had been posted to different areas No.57 dispatched in March, 2019. This posting order constitute an unfair labour practice on the grounds that it is irregular as officers who had not stayed in their previous posting for a period on 3 years noting the previous posting was in March, 2019; the assignment of preventive health programmes that are within the purview of public health practitioners to other cadres are therefore compromising the quality of services that are offered; and that there is violation of the public health officers scheme of service, 2019 regarding the statutory mandate of public health officers as some of the officers were posted in dispensaries without clearly defined roles and responsibilities and goes against the public health function as provided by the revised public health officer scheme of service.

The posting order No.59 as dispatched by the 1st respondent constitute an unfair labour practice and contains patent illegalities as it contravenes section 72 of the Act which give the power to deploy to the 2nd respondent.

Mr Duba also avers that the petitioner has made efforts to address their grievances to no avail.

In his affidavit, Mr Duba also avers that on 9th August, 2019 a posting Order 59 was issued by the 1st respondent with intent to make changes to the county health management team and sub county health management team and upon various consultations at the executive level it was agreed that the same to take effect immediately. Prior to the issuance of Order 59 to dispatch the petitioner members there was another posting order dated 11th February, 2019 which posted Public health Officers to new stations.

Whereas the previous posting order No.57 originated from the officer of the Chief Officer, Public Health, the latter one posting Order No.59 originated from the Chief Officer – Medical Services which is a different department of the county.

Section 72 of the Act gives the power to deploy to the 2nd respondent and the order by the 1st respondent is in excess of its powers.

Mr Duba also avers that some of the public health officers posted by order no.59 have been posted only 4 months prior against the county public service policy which allow one up to 3 years in a given posting. The Department of Curative Health headed by the 1st respondent is different from the Department of Preventive Health which is headed by the County Chief Officer, Public Health and any inter-departmental deployments ought to have been done by the 2nd respondent through the Head of the County Public Service. The actions of the 1st respondent in posting officers outside of its powers and jurisdiction is unfair labour practice. Posting to other stations other than in Public Health Officers positions in career structure is not a proper deployment. Some of the postings changed designation especially Caroline Saitoti who was posted to head a county public health program despite being a nursing officer ad cannot carry out he allocated duties and Jane Kurao who is a nursing officer and was deployed to head a sub county public health programme despite being a nursing office.

The positions held by the public health officers and deployment to new areas is not proper. There is no capacity building to hold the new postings and which ought to have been done by the considering the qualifications of each officer under the revised scheme of service.

Whereas the posting order No.59 was with the purpose to align jobs to skills this was not achieved as it failed to recognise the different roles of the different cadres in curative and preventive health in the County. The orders sought should issue to safeguard the rights of the petitioners to engage in productive work which is an important component of human dignity as well as their economic right.

In reply the respondents filed the Replying Affidavit of Dr Faith Njoki Gachachi the Narok County Chief Officer Medical Services and authorised to reply for the respondents and who avers that the application by the petitioner is bad in law, incompetent as the petitioner lacks *locus standi* to institute these proceedings for the reasons that;

- a. The petitioner is neither a corporate body or a registered trade union with capacity to sue or be sued in own name;
- b. The petitioner purports to institute these proceeding on behalf of 17 person it has alleged to be members but there is no evidence of such membership or evidence that such embers have given it authority to file suit; and
- c. The petitioner purports to enforce the rights of others without showing a nexus between it and the person(s) it purports to represent. There is no capacity to sue.

Dr Gachachi also avers that the petitioner seek to challenge the authority granted to her officer under section 72(1) of the Act and even where

the court finds the petitioner has standing with the court, the petition is filed through misrepresentation of facts and concealment of material facts meant to place gamble and which goes contrary to the principles of equity as he who comes to equity must come with clean hands. Such a litigant should be stripped off all indulgencies by the court.

Pursuant to section 46 of the Act the organisation of the County and its departments is the preserve of the County Executive Committee with the mandate to establish, determine, abolish and change any department and give account to the community for the objects of article 174 of the Constitution to be met. In this regard the 3rd respondent government has set up 8 departments including health and sanitation headed by the County Executive Committee Members and who has 2 chief officers one for Medical – clinical health services and the other Public – curative and preventive health and which comprise other departments for management both at county and sub county levels creating both the County and sub county Health Management Team. Both officers of the 3rd respondent work closely together as functions overlaps and can deploy officers pursuant to section 72(1) of the Act.

From an administrative point, the personnel under the cadres for preventive or promotive health as county of sub county level can be deployed as there is no change to remuneration and for career planning and management of workers, such is addressed on the various schemes of services. The chief officers of the 3rd respondent in consultation with the CEC can inter-change the postings. Such postings were done in Posting Order No.50.

Dr Gachachi also admits that the chief officer public health signed Posting order No.57 on 11th August, 2019 but unlike other postings, the posting order No,57 was affecting public health officers and 4 Nutrition Officers. She signed Posting Order

No.58 dated 2nd July, 2019 that affected different cadres that of medical social workers, public health officers, nursing officer, nutrition officers, health records officers, human resource officers, medical officers, clinical officers, dental officers and staff belonging to a programme named *Afya Nyota Ya Bonde*. In the posting order some officers on whose behalf the petitioner allege to represent had no objections and reported to the new stations of deployment.

The department of Health and Sanitation of the 3rd respondent is still faced with the challenge of having skilled health workers and having notified the CEC proposals were made to address the challenge and hence the posting following a meeting held on 24th June,, 2019. Mr Daniel Sironka on whose behalf the petition is brought on his behalf was present. It was noted there was shortage of staff in the County and the resolution passed to recruit more health workers and the posting/re-deployments within the department be done immediately and thus issued posting order No.59.

The powers of the 2nd respondent have not been usurped by the 1st respondent as alleged and the actions taken by the 1st respondent were done within the mandate of such office and upon consultations to solve the challenges facing the 3rd respondent in the provision of health services. The posted officers have reported to their stations.

The petitioner filed Further Affidavit of Mr Duba and avers that the petitioners has standing before the court as under article 22 and 58 of the Constitution every person has a right to institute proceedings claiming that a right has been violated and *person* is defined under article 260 of the constitution to include *an association* or a body of persons incorporated or unincorporated. The petitioner herein represents its bona fides members who have member certificates.

The 3rd respondent has a CEC for health and sanitation under whom there are 2 chief officers for promotive and preventive health and medical services and only the 2nd respondent has the power to deploy officers of the 3rd respondent under the provisions of section 72 of the Act.

The parties made oral submissions in court.

On the Notice of Motion by the petitioner and the affidavits thereto and the replying affidavit filed by the respondents, the court finds the following issues up for determination;

Whether the petitioner has the proper standing to file the instant petition and seek the orders sought therefrom;

Whether the petitioner has the authority to file the petition for the 17 persons alleged to be its members;

Whether there is any nexus between the petitioner and the respondents' employees to file the petitioner;

Whether the orders sought in the Notice of Motion should issue..

The questions posed by the respondents in the Replying Affidavit of Dr Gachachi at her paragraph 4 raise serious questions of law and ought to have been addressed instantly as proceeding on this basis and once determined, guidance on the petition should have issued. As all matters were gone into, the court shall address the issues set out above on the merits.

With regard to standing before the court, Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Rules) allow a party to initiate proceedings and claim constitutional rights, judicial review and claims with regard to employment and labour relations disputes.

Rule 7 of the Court Rules read together with section 12 and 22 of the Employment and Labour Relations Court Act, 2011 outline the parties with standing before the Court. The party named as claimant, petitioner, advocate representing the parties, a trade union representing its

member or for a corporate an authorised officer thereof. Under section 12 (1) the employment and labour relations over which the court has jurisdiction must relate to;

- a. disputes relating to or arising out of employment between an employer and an employee;
- b. disputes between an employer and a trade union;
- c. disputes between an employers' organisation and a trade union's organisation;
- d. disputes between trade unions;
- e. disputes between employer organisations;
- f. disputes between an employers' organisation and a trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements.

Does the petitioner fall under any of these categories of employment and labour relations and connected purposes? None apply.

The rationale is that under Article 162 of the Constitution, 2010 the court was established to address employment and labour relations disputes and parliament was given the power to pass legislation to address the jurisdiction of the court.

The petitioner does not claim to have the relations set out under section 12 and 22 of the Employment and Labour Relations Court Act, 2011 and has relied on the provisions of article 22 and 260 of the Constitution, 2010 and on the basis that the petition herein relates to the violation of fundamental freedoms and rights and a party corporate or incorporated. Article 260 defines *person* to mean

“person” includes a company, association or other body of persons whether incorporated or unincorporated;

Under Article 22 of the Constitution, 2010 allow persons seeking to institute court proceedings where fundamental rights and freedoms have been violated to file suit;

1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

Such rights to file proceedings have pre-conditions. The person filing suit for and on behalf of another must be on the basis that that person being represented cannot act on their own; or association acting for and on behalf of its member.

Thus the Court of Appeal in the case of **Nation Media Group Limited versus Cradle - The Children's Foundation Suing Through Geoffrey Maganya [2016] eKLR** held as follows;

.. locus standi was vital despite the relaxed provisions of Article 22 of the Constitution. The appellant maintained that locus standi is derived from the stake or interest held by a person in a matter before court and at the very least the respondent ought to have demonstrated:- ...

Article 3 of the Constitution which obligates every person to respect, uphold and defend the Constitution, locus, hence, bestows standi on anyone to institute proceedings seeking enforcement of the Constitution; **Article 22(1) & (2)** of the Constitution gives every person the right to institute proceedings claiming a right or fundamental freedom has been denied, violated or infringed and to sue in the public interest respectively. It was submitted that locus standi is not contingent upon a personal or direct injury to the party instituting the case. Further by dint of **Articles 22 & 258** of the Constitution any person could institute proceedings under the Bill of Rights on behalf of another person who could not act in their own name, or a member of, or in the interest of a group or class of persons, or in the public interest.

The right to file proceedings should therefore not be applied by a party to agitate a hypothetical case where there is no stake, interest of the issue(s) at hand. The court should not sanction a judicial standard for locus standi that litigation for hypothetical, abstract or is an abuse of the judicial process as held in **Mumo Matemo versus Trusted Society of Human Rights Alliance & 5 Others** and which is reiterated by the in the case of **Humphrey Makokha Nyongesa & another versus Communications Authority of Kenya & 2 others [2018] eKLR** and gave emphasis that;

...where a body established by law engages the employment of any person that employment has statutory underpinning and subject to judicial review. It is important to distinguish between a public body acting in its public capacity and a public body acting in a private capacity. A public body like any other employer, enters into private contracts with its employees. In such cases the rights,

duties and obligations of the public body is no different from any other private entity that has entered into a private contract with its employees.

In the petition the petitioner defines self as follows;

The petitioner is an Association primarily charged with the safeguarding of the welfare and well-being of the entire Public Health worker in all the forty seven counties ... and brings this suit under Article 22(1)(d) of the Constitution of Kenya.

The petitioner thus assigns itself the protection of article 22(1)(d) of the Constitution, 2010. There is no evidence that the *association* has a registration and to change and seek cover under article 260 of the Constitution, 2010 is to avoid taking responsibility and account upon the challenge posed by the respondents. The petitioner either is a registered *association* or not. Recourse cannot be under article 260 of the constitution to avoid account.

The petitioner is also seeking for orders that;

- a. A declaration be issued to declare that the re-designation effected through the posting order no.59 ... was not done in a proper manner and thus violates the provisions of Article 10, 30, 41 and 232 of the Constitution of Kenya, the County Public Service Human Resource manual and the Public Health Officers Scheme of Service.
- b. A declaration that the 1st respondent is an escapist and has abdicated its duty to respect and uphold the constitution of Kenya in their administrative function.
- c. A declaration that the 1st respondent *does not have the power to deploy a County Public Officer from one department to another department without the approval of the 2nd respondent as was done vide posting order...*
- d. An order of Certiorari to bring into this court and quash the re-designation effected through the posting order no.59 and referenced...
- e. Compensation for violation of the petitioners' right and fundamental freedoms.
- f. A restraining order against the respondents, their agents, servants, authorised officers or anybody claiming under them from transferring, demoting or in any other way victimising them for seeking this court's intervention
- g. ...

The petition is supported by the Affidavit of Mr Duba, secretary general to the *association of Public Health Officer – Kenya* and who avers at paragraph 1 as follows;

...the association to which all the petitioners are members thereof. I have knowledge and information deposed to and thus competent to swear this affidavit. I have been duly authorised by the members of this umbrella body of the association of Public Health Officers- Kenya to swear this affidavit.

From these averments under oath, the *association* is not an amorphous body as Mr Duba avers it has members who have given him authority to act. Questioned to it he has only attached the member certificates and no letter of authority to act for and on their behalf. Such certificates are not the authority required by the court.

The rationale is that under the provisions of the Labour Relations Act, 2007 a trade union has direct access to the court under the provisions of section 2 where a secretary general of the union is the automatic authorised officer to act for such trade union.

Equally under section 22 of the Employment and Labour Relations Court Act, 2011 an advocate, the trade union authorised officer and the party/parties to the litigation have direct standing with the court.

It therefore becomes a question of law to question the standing of the petitioner herein. There is no proof of such standing to justify attendance herein and file proceedings for persons undisclosed.

Coupled with the orders sought, In their nature, these are orders/claims/remedies which under Rule 7 of the Court Rules can comprise a Memorandum of Claim. It is not the naming of the pleading that change the nature of prayers/orders which are sought. Whether called a Memorandum of Claim or a petition, the court has to address the same in context of constitutional or statutory foundations.

Is the petitioner thus a proper party under article 22 of the Constitution, 2010 to file suit with the court under the provisions of Rule 7 read together with section 12 and 22 of the Employment and Labour Relations Court Act, 2011?

The nature of orders sought by the petitioner, even with the best application of the constitution and under a petition – have no nexus with the respondent. even where the court were to allow the petitioner the orders prayed, these would only be academic without any casuistic link therefrom.

The petition lack the requisite standing before the court.

Even where the petitioner were to have standing with the court On the other orders sought such relates to the enforcement of unnamed person(s) and who the petitioner seeks to address in the Further Affidavit by attaching the membership details. Such kind of litigation is unknown in our jurisdiction. To allow proceedings to unfold as parties move along would be to sanction ambush and negate the need to having the Court Rules or the very purpose of article 22 of the Constitution, 2010.

Inherently, from the Replying Affidavit of Dr. Gachachi dated 11th October, 2019 at paragraph 29 read with paragraphs 25 and which is not contested by the petitioner, the subject employees and officers who were deployed under the Posting Order No.59 have since reported to their duty stations. I take it as the petitioner is not on the ground, the employees of the respondents have taken the directions issued by the employer for good cause and have since taken up the deployment.

With regard to application of section 72 of the Act, the reading of the court via-a-vies the entire statute and the averments of Dr Gachachi is that under section 46 of the Act, a County Government should organise its various departments so as to respond to the needs of the community so as to bring into effect the very purpose of devolution under article 174 of the Constitution, 2010. This is aptly captured under section 46(2)(e) and (f) as follows;

- e. organise its departments and other structures in a flexible way in order to respond to changing priorities and circumstances;
- f. assign clear responsibilities for the management and coordination of departments and functions;

Therefore, under section 72 of the Act the 2nd respondent in effecting any deployment within the 3rd respondent, context should be given as above. The court therefore finds no conflict in the respondents' application of the law. the response of the 1st respondent for and on behalf of the respondents bring out this purpose and interlinkage of the 3rd respondent's functions to address the needs of its community.

Accordingly, and the analysis above, the petitioner without standing with the court, the orders sought cannot issue. The foundation of the petition by the petitioner before court is equally lost. It cannot stand. The Notice of Motion and the Petition with the petitioner lacking standing are hereby struck out. Each party shall bear own costs.

Delivered at Nakuru this 17th day of December, 2019.

M MBARU

JUDGE

In the presence of: