



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 56 OF 2019**

**BETWEEN**

**RAPHAEL KIHARA RUTHUKU.....CLAIMANT**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Gachiri Kariuki & Company Advocates, for the Claimant*

*Faith Onyango Advocate, for the Respondent*

**RULING**

1. In his Notice of Motion filed on 26<sup>th</sup> August 2019, the Claimant seeks an Order of Injunction, restraining the Respondent from transferring him from his current Station in Mombasa, to Nairobi.
2. He explains in his Supporting Affidavit sworn on 23<sup>rd</sup> August 2019, that he works at Respondent's ICT department at Kenya School of Revenue Administration (KESRA), in Mombasa. He is a Supervisor.
3. He was issued a letter of transfer dated 9<sup>th</sup> May 2019. He was one among many Employees of the Respondent, involved in massive routine transfer.
4. The Claimant appealed against transfer, through a letter dated 27<sup>th</sup> May 2019, addressed to the Deputy Commissioner, Human Resources.
5. His appeal was on the ground that he suffers respiratory condition. He was treated at Mombasa Hospital and advised to live in humid weather condition, and avoid cold weather. The respiratory condition triggered severe headaches.
6. The appeal was based on Respondent's Transfer Policy, a copy of which is exhibited by the Claimant.
7. The Claimant states, he cannot lead a good quality life at Nairobi, which generally is an area of cold weather. He asks the Court to take judicial notice of the fact.
8. The Respondent did not hear out the Claimant. He complains that his appeal was dismissed casually, through a letter dated 16<sup>th</sup> August 2019. He was instructed to report to KESRA Westlands, at Nairobi. If he failed to do so, disciplinary action would be taken against him.
9. In light of this, the Claimant seeks the protection of the Court in terms stated in his Notice of Motion.
10. The Respondent opposes the Notice of Motion, through an Affidavit sworn on 17<sup>th</sup> September 2019, by Human Resource Manager Grace Mwangi.
11. She states, the Claimant previously worked in Nairobi for the Respondent, from the year 2005 to 2009. He did not have any medical

complaints, and did not request transfer from Nairobi to Mombasa.

12. Transfer either way was in accordance with Transfer Policy, which states, under clause 6.0 (6.2), that:

*“The transfer shall be carried out by the Authority to address staffing needs...”*

13. The Claimant declined transfer saying he has a respiratory condition, which does not allow him to work in cold areas. He did not notify the Respondent of his condition in accordance with Section 34 of the Employment Act.

14. He appealed against transfer. The appeal was rejected, and Claimant advised his condition could be properly managed at Nairobi.

15. He was paid transfer allowance, which he pocketed, while declining transfer.

16. Eventually, the Respondent reviewed its position, and transferred the Claimant to Kajiado. It was felt that Kajiado is not a cold area, and would suit Claimant’s medical condition. He did not accept transfer to Kajiado.

17. The Respondent states, the Claimant has been working in Mombasa for 10 years contrary to Respondent’s Transfer Policy.

18. The Respondent also relies on a Notice of Preliminary Objection filed on 18<sup>th</sup> September 2019. It is the view of the Respondent that the Claim offends mandatory provisions of Article 162 (2) (a) of the Constitution and Section 9 (2) (1) of Fair Administrative Action Act. The Claimant has not exhausted Respondent’s Code of Conduct on Conflict Resolution and Grievance Handling. The Court lacks jurisdiction.

19. Parties were, on 17<sup>th</sup> October 2019 directed to file Submissions and give their highlights on 21<sup>st</sup> November 2019. The Respondent filed its Submissions on 21<sup>st</sup> November 2019. The Claimant had not by this time filed his Submissions. The Court granted the Claimant 7 more days to file his Submissions, dispensed with highlighting, and scheduled the Ruling for 13<sup>th</sup> December 2019.

***The Court Finds: -***

20. The Claimant was transferred from Mombasa to Nairobi, through a letter dated 9<sup>th</sup> May 2019.

21. Transfer was based on Respondent’s Transfer Policy.

22. He was dissatisfied, and lodged an appeal, based on clause 9.0 of the Policy. His appeal is dated 27<sup>th</sup> May 2019.

23. He availed to the Respondent medical records showing he suffers respiratory condition, which is triggered by cold weather.

24. The Respondent considered his appeal, and formed the view that the appeal had no merit. The Claimant’s medical condition could be managed at health facilities in Nairobi.

25. From a procedural viewpoint, the Court is satisfied that the Claimant has exhausted the internal dispute resolution mechanism specific to transfer. It would not make sense to require the Claimant to invoke the Conflict and Grievance Handling Mechanism, as submitted by the Respondent, when he already had invoked Transfer Policy, and exhausted the appellate mechanism under that Policy.

26. The Preliminary Objection on non-exhaustion of mandatory dispute resolution mechanisms, holds no water.

27. Reference by the Respondent, to the Constitution of Kenya, and Fair Administrative Action Act is in the circumstances, misplaced.

28. The Court has jurisdiction.

29. The Respondent reviewed its transfer of the Claimant to Nairobi, and directed him to move to Kajiado.

30. He has been accommodated reasonably by the Respondent. If he has a respiratory condition making it difficult to work in Nairobi, he has not said why Kajiado cannot host him. And if Kajiado cannot host him, why does not the Claimant propose another area instead of hanging on to Mombasa and resist transfer? The Respondent may perhaps listen to such a proposal.

31. This Court’s position as held in ***Alfred Nyungu Kimungui v. Bomas of Kenya (2013) e-KLR***, is that Courts ought not to interfere with exercise of managerial prerogatives unreasonably.

32. Transfer of an Employee is a managerial prerogative. In the current dispute, it is not shown to have been exercised unreasonably, to warrant intervention of the Court.

33. The initial transfer to Nairobi, has been changed, with the Claimant directed to Kajiado. His medical condition has been taken into consideration. He has been in Mombasa for 10 years. He was paid, and accepted, transfer allowance. He concedes, at paragraph 7 of his Statement of Claim, that his transfer is only one, amongst many routine transfers.

34. Recommended stay in stations, under clause 8.0 of Respondent's Transfer Policy is:

*i) Sensitive stations/sections – Not more than 2 years.*

*ii) Hardship areas (Gazetted) – Not more than 2 years.*

*iii) All other areas – Not more than 4 years.*

35. The Claimant has been at Mombasa for 10 years, far in excess of the maximum number of years given, under any of the categories above.

36. The Court is satisfied that the Respondent has exercised its managerial prerogative reasonably, in its handling of the Claimant's transfer.

IT IS ORDERED: -

*a) The Notice of Motion filed by the Claimant on 26<sup>th</sup> august 2019 is declined.*

*b) No order on the costs.*

**Dated and delivered at Mombasa this 13<sup>th</sup> day of December 2019.**

**James Rika**

**Judge**