



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

JUDICIAL REVIEW NO. 26 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 9th March, 2018)

APAMO A. BONIFACE.....APPLICANT

-VERSUS-

PRINCIPAL SECRETARY, MINISTRY OF HEALTH...1ST RESPONDENT

MINISTRY OF HEALTH.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. The Application before Court is the Notice of Motion application filed under Articles 10, 19, 20, 28, 43, 73, 232 and 234 of the Constitution of Kenya 2010, Order 53 rule 3(1) of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act, Cap 26 and all the enabling Statutes and Law.

2. The Applicant seeks the follows orders:-

A) “..An order of CERTIORARI to remove to this Honourable Court and quash the posting order Ref: MOH/ADM/HRMD/03 (126) dated 26th September, 2017 by the 1st Respondent, purporting to arbitrarily deploy doctors to various departments;

B) An Order of PROHIBITION, prohibiting the 1st Respondent from usurping and then abusing the conjunctive statutory powers and functions of the cabinet Secretary and the Ministerial Human Resource Management Committee (MHRMAC) of deployment of officers upon the recommendation of MHRMAC;

C) An Order of MANDAMUS, compelling the 1st Respondent to reinstate the affected doctors in their exact current positions in the respective departments;

D) THAT the costs of this Application be provided for.

3. The Application is based on the grounds set out in the Statement filed in Court on 6/10/2017. The Application is also supported by the verifying affidavit of Apamo A. Boniface dated 6/10/2017 the Exparte Applicant herein.

4. The Applicant has deponed that he is as Advocate of the High Court of Kenya and has brought this Application pursuant to Article 22(2) (a to c) of the Constitution in his personal capacity and public capacity and interest and for and on behalf of some doctors and many Kenyans engaged in the discharge of their duties in the public service who are exposed to a culture of whimsical, discriminatory and unprincipled hiring and firing, interdiction and malicious and arbitrary transfers/posting by their superiors.

5. The Applicant avers that the Constitution of Kenya 2010 bestowed upon every holder of public office the obligation to respect, uphold and defend the Constitution with a view of preserving the dignity of individuals and communities and promoting social justice and the realization of the potential of all human beings.

6. He contends that in the civil service, the authorized officer to effect transfers is the Cabinet secretary to respective ministries to whom the Public Service Commission delegates power to transfer and deploy officers within the concerned ministry.

7. The Applicant contends that the decision on 26.9.2017 by the 1st Respondent of unilateral deployment of doctors to various departments was preceded by a mandatory recommendation by the Ministerial Human Resource Management Advisory Committee (MHRMAC) as set out in the revised code of Regulations termed Human Resource Policies and Procedures Manual for the Public Service May, 2016.

8. It is contended by the Applicant that on 3.10.2017, contrary to the Constitution, the Human Resource Policies and Procedures Manual for the Public Service May, 2016 and the Collective Bargaining Agreement, the 1st Respondent unilaterally, issued a posting Order Ref: MOH/ADM/HRMD/03(126) dated 26.9.2017 deploying 26 officers to different departments in the Ministry of Health.

9. He avers that it is within his knowledge that the impugned deployment decision was never placed before the Ministerial human Resource Management Committee for consideration and recommendation to the authorized officer nor approved by the authorized officer, the Cabinet Secretary as required by the regulations and statute.

10. Further that the impugned posting contained a host of serious violations of fundamental rights of the general public and the affected doctors particularly:

(a) Dr. Pacifica Kerubo Onyancha, Senior Deputy Director of Medical Services at Job group "S" shall be assigned duties and supervised by her Juniors namely: Dr. Joseph E. Jumba, Deputy Director of Medical Services Job group "R", and in turn the said Dr. Joseph E. Jumba will report to Dr. I. Odongo, Deputy Director of Medical Services job group "R" essentially supervising Dr. Pacifica.

(b) A very junior officer, Dr. Maureen K. Kimenye, Assistant Director of Medical Services, Job Group "p" shall supervise and assign duties to her senior two grades higher in job groups R-DDMS and Q-ADDMS;

(c) The salaries of some of the doctors, including Dr. Julius Ogato, shall be slashed downwards by Shs. 80,000/= per month, on the basis of deployment to new work station in line with the Salaries and Remuneration Circular; Ref. SRC/TS/OGOVT/3/61 Vol III/(136) of 14.9.2015 on payment of emergency call allowance.

(d) Dr. Kipkoech Cherutich and Dr. Kigen Barmasai, who share the same ethnicity with the Principal Secretary, are posted to the most influential and heavily funded dockets at the expense of those that have been removed.

(e) Already, the Directors/Chief Executive Officers of Kenyatta National Hospital, Moi Teaching and Referral Hospital, Kenya Medical Training College, Pharmacy and Poisons Board, National Quality Control Laboratory among others share the same ethnicity as the 1st Respondent, the Principal Secretary.

11. The Applicant states that seniority in the Public Service is so important for the smooth running of operations and activities that when officers in the same grade-job group, the regulations and statute attempt to distinguish them on relative seniority for purposes of supervision and disciplinary control. On the above grounds, the Applicant prays for the Application to be allowed as prayed.

12. The Respondents have opposed the Application and have filed a Replying affidavit sworn by one Julius Korir who was the Principal Secretary of the Ministry of Health as at 31.10.2017 wherein he states that the Applicant's affidavit is based on factual errors, omissions and distortion of facts. He states that Article 155(1) of the Constitution of Kenya 2010 establishes the office of the Principal Secretary and stipulates that each Principal Secretary shall be responsible for administration of the state department.

13. Further that the Public Service Commission Human Resource Policies and Procedure Manual in paragraph A7 (1)(ii) provides that one of the roles of the Principal Secretaries is the administration and management of Human Resource functions in the Department which does not exclude deployment of officers.

14. That Paragraph A7 (1) (VII) of the Public Service Commission Human Resource Policies and Procedure Manual also provides that the Principal Secretary can perform any other Human Resource function as directed by the Cabinet Secretary. That the deployment of the staff as per the memo dated 26.9.2017 was done within the powers and authority of the Principal Secretary to enhance effectiveness and execution of programs and service delivery and was not done in bad faith, bias or unreasonableness as alleged by the Applicant.

15. It is also his contention that the memo was not individually made by the Principal Secretary as all the necessary offices were consulted and involved in the redeployment process as indicated on the said memo.

16. That the allegations that some officers were demoted are unfounded as the said officers have not lost anything in terms of seniority in their designated positions. He contends that the position of medical superintendent is not a designated position but an administrative position meant to provide administrative duties and hence no correlation with the designated position.

17. He contends that the Respondents have not received any complaints from the affected officers and most of the officers have complied with the directive without any resistance and that if the Orders sought are granted it will undermine the administrative role of principal secretaries. They pray for the Application to be dismissed with costs.

18. The Respondent also filed Grounds of Opposition wherein they raise the grounds that the Applicant has not demonstrated any case as to why an order of certiorari should be issued. That the ex parte Applicant has no locus for judicial review orders as he is not in any way affected by the directive he seeks to quash. Further that the Application is not within the purview of Judicial Review neither does it meet the basic tenets of Judicial Review Application as Judicial Review deals with the procedure of decision making and not the merit or substance. That as such the Application should be dismissed with costs.

Submissions

19. The Applicant submits that the scope of judicial review powers has been well articulated in various case law and the *locus classicus* is the case of Associated Provincial Picture Limited Vs Wednesbury Corporation (1947)2ALL ER 680; (1948)1 KB 223 where it was held:

“If, in the statute conferring discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; they must disregard these matters... unreasonable, attention given to extraneous circumstances, disregard of public policy and things like that has all been referred to as being matters which are relevant for consideration... For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”... Similarly, you may have something so absurd that no sensible person could ever dream that it would lay within the powers of the authority.

20. Further that the holding in Republic vs Deputy Inspector General of National Police & 32 Others (2013) eKLR, citing the case of Re Bivac International SA (Bureau Veritas) (2005) 2 EA 43, affirmed that judicial review stems from the doctrine of *ultra vires* and rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. Judicial Review plays an important role in our society, which is to check excesses, omnipotence, arbitrariness, abuse of power and also accountability and maintenance of constitutionalism and the rule of law.

21. It is submitted that the Applicant has locus standi as he, pursuant to Article 22 of the Constitution, moved the Honourable Court on behalf of adversely affected doctors who feared further victimization, as well as of his own and that of the general public right, by virtue of the provisions of articles 41 and 43 of the constitution, respectively.

22. It is also submitted that the 1st Respondent usurped the statutory mandate for the Cabinet Secretary and Ministerial Human Resource Management Advisory Committee and refer to averments by the 1st Respondent:-

“...as the Principal Secretary I have the mandate to make changes and deploy staff... the deployment of the staff as per the memo dated 26.9.2017 was done with the powers and authority of the principal secretary... All the necessary offices were consulted and involved in the redeployment process. Adequate consultations were done as set out in the human Resource policies and procedural manual for the public service.”

are at variance with provisions of the law since authority belongs to the Cabinet secretary on recommendation of MHRMAC. They cite the case of Seventh Day Adventist Church (East Africa)Limited Vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another (2014) eKLR which discussed the grounds upon which the Court grants judicial review orders.

23. The Applicant submits that while the law only permits MHRMAC as the forum for consultation on deployments, which consultation results into recommendation reached either by consensus or voting, the 1st Respondent did not disclose the forum in which the “consultation” took place nor the minutes of the said consultation. As such the Respondent has not proved this assertion and it should be disregarded. They cite the case of Republic vs Public Procurement Administrative Review Board & 2 Others Team Engineering Spa ex parte (2014) eKLR to buttress the position that the onus of proof lies upon the party asserting the affirmative issue.

24. That the decision to deploy senior doctors to be supervised by junior doctors is absurd and no sensible person could ever dream that it lay within the 1st Respondent’s authority to do so. They cite the case of Seventh Day Adventist Church (East Africa)Limited Vs Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another (supra) where it was held:-

“Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...”

25. On procedural fairness protected interest and legitimate expectation it submitted that Article III (d) (2) of the 2017 registered CBA between Kenya Medical Practitioners, Pharmacists and Dentists’ Union (KMPDU) and 2nd Respondent, the Ministry of Health provides that:-

“all transfers or postings of doctors shall be recommended by relevant posting committee and approved by the authorised officer (Cabinet secretary)”.

26. That the affected doctors are members of KMPDU and were thus expectant that the Respondents would oblige by having MHRMAC recommending any deployments to the Cabinet Secretary.

27. They cite the case of Republic Vs Attorney General and Another ex parte Waswa & 2 Others (2005) KLR 280 where the Court stated thus:-

“a principle which justifies the imposition of procedural protection has come to be known as legitimate expectation. Such

expectation arises where a person responsible for taking a decision is induced by someone who may be affected by the decision that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken. In such cases, courts have held that the expectation ought not to be summarily disappointed...

28. The Applicant also submits that there was a violation of the principles of natural justice of the doctors' right to be heard. That certain work stations such as the National Cancer Control Program do not attract payment of call allowance. The reduction in wages of some of the doctors was contrary to the principle of being condemned unheard and cite the case of **Ridge vs Baldwin (1063) 2ALL ER 66** in support of this assertion.

29. It is also submitted that the 1st Respondent took into account irrelevant considerations in the redeployments. That the allegations by the 1st Respondent that he consulted all the necessary offices and adequate consultations were done are irrelevant factors. That the 1st Respondent should have paid attention to procedure and as such the absurd impugned decision would not have happened of deploying junior officers who share his ethnicity. The Applicant prays for the Application to be allowed as drawn.

30. On behalf of the Respondents it is submitted that the 1st Respondent did not act ultravires as he exercised his powers as envisaged under Article 155(2) of the constitution. That the Applicant has failed to prove how the 1st Respondent acted in excess of his authority and powers as the administrator of the Ministry of Health. They cite the case of **Pastoli Vs Kabale District Local Government Council and Others (2008) EA 300** where it was held:-

“in order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality ... procedural impropriety... may... involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”.

31. It is further submitted that the Applicant has no locus to institute judicial review proceedings as his affidavit only alleges that he is in court on behalf of affected officers but fails to prove and or list the alleged officers he purports to represent thus rendering his allegations baseless and vexatious. That of importance to note is that none of the alleged affected officers has appealed against the memo and or complained at the ministry level.

32. That the impugned memo is a private and confidential document only addressed to specific officers of the Ministry of Health. That the Applicant fails to prove the source of the document and does not reveal the officers who approached him for representation. It is the Counsel for the Respondent's view that in lieu of this the Applicant has failed to prove illegality and unreasonableness occasioned by the document.

33. Counsel for the Respondents submits that the Applicant is not entitled to the prayers sought and the Application should be dismissed with costs.

34. I have examined all the averments and submissions of both parties. Indeed it is within the purview of this Court to review administrative decisions if exercised without jurisdiction, if irrational, and if done without following due process. This is the basis upon which Judicial Review decisions can be reviewed as provided for in the Fair Administrative Actions Act – Section (4) which provide as follows:-

- 1) ***“Every persons has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***
- 2) ***Every person has the right to be given written reasons for any administrative action that is taken against him.***
- 3) ***Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision:-***
 - a) ***Prior and adequate notice of the nature and reasons for the proposed administrative action;***
 - b) ***An opportunity to be heard and to make representations in that regard;***
 - c) ***Notice of a right to a review or internal appeal against an administrative decision, where applicable;***
 - d) ***A statement of reasons pursuant to Section 6;***
 - e) ***Notice of the right to legal representation, where applicable;***
 - f) ***Notice of the right to cross-examine or where applicable; or***
 - g) ***Information, materials and evidence to be relied upon in making the decision or taking the administrative action.***
- 4) ***The administrator shall accord the person against whom administrative action is taken an opportunity to:-***
 - a) ***attend proceedings, in person or in the company of an expert of his choice;***

b) be heard;

c) cross-examine persons who give adverse evidence against him; and

d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

5) Nothing in this Section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

6) Where the administrator is empowered by any written law to follow a procedure which confirms to the principles set out in Article 47 of the constitution, the administrator may act in accordance with that different procedure”.

35. The Applicant has submitted that the Principal Secretary acted without jurisdiction. In determining whether the Principal Secretary had authority to act or not, I refer to Article 155 of the Constitution which established the office of the Principal Secretary and which provides that a Principal Secretary is an office in the Public Service. The Principal Secretary is an office in the State Department whose duties under the Public Service (Delegation of Public Service Commission Human Resource Functions to the Cabinet Secretary (Revised August 2015) Rules include Human Resource Functions.

36. Article 2.1.5 states as follows:-

“The Principal Secretary shall be responsible to the Cabinet Secretary for:-

- 1) The day to day operations of the Ministry/State Department.**
- 2) The administration of Human Resource functions in the department.**
- 3) Coordination of the Ministry/department’s performance management.**
- 4) Advising the Cabinet Secretary on the Human Resource matters.**
- 5) Chairing MHRMAC.**
- 6) Overseeing implementation of programmes.**
- 7) Performing any other Human Resource functions as directed by the Cabinet Secretary.**

37. From the above position, I do find that part of the duties of the Principal Secretary is to deploy and post doctors which is the Human Resource functions of the Principal Secretary. In this case, I find that the Principal Secretary acted within his jurisdiction and the contention by the Applicant is therefore unfounded.

38. On the issue of the decision made by the Permanent Secretary, the scope of Judicial Review does not lie in the merits of the decision. The irrationalism of a decision is however within the scope of Judicial Review.

39. The Applicant has submitted that the decision made by the Permanent Secretary was irrational in that junior doctors were made bosses of their superiors and salaries reduced. The Applicant has a duty to submit these facts before Court but in the case of the Applicant no data was availed before Court to show demotion of certain doctors. The doctors in question never complained of their being demoted. In essence the allegations by the Applicant remain just mere allegations.

40. The 1st Respondent is also in-charge of the Performance Management of the Ministry and it is within this docket that he has authority to deploy officers from one position to another. To insist that the Principal Secretary must hear every doctor he wishes to deploy would be to fetter his discretion in ensuring proper performance management. The responsibility of Performance Management rests with the Principal Secretary and therefore he must ensure proper officers are in proper offices.

41. I find that the action by the 1st Respondent was not without jurisdiction nor was it done irrationally and without following due process. In any case, the action complained of was done against private citizens who have not complained of the actions by the Principal Secretary.

42. I find that the application has no merit and I dismiss it accordingly.

43. Each party will bear its own costs.

Dated and delivered in open Court this 9th day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Koima holding brief for Attorney General – Present

Masika holding brief for Oruenjo for Applicant – Present