



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 31 OF 2018**

**REPUBLIC**

**- VERSUS -**

**THE CEO, YOUTH ENTERPRISE**

**DEVELOPMENT FUND.....1<sup>ST</sup> RESPONDENT**

**THE BOARD OF DIRECTORS, YOUTH**

**ENTERPRISE DEVELOPMENT FUND....2<sup>ND</sup> RESPONDENT**

**EX-PARTE ENTONE WASONGA.....APPLICANT**

(Before Hon. Justice Byram Ongaya on Friday 11<sup>th</sup> May, 2018)

**JUDGMENT**

The applicant filed the notice of motion on 19.03.2018 through Sang & Langat Advocates. The application was under Order 53 Rule 1(3), Order 51 rule 1 of the Civil Procedure Rules, 2010, sections 8 and 9 of the Law Reform Act, and all enabling laws. The applicant prayed for an order of certiorari to be granted by the Honourable Court removing into the Employment and Labour Relations Court and quashing the decision of the respondents contained in the letters dated 05.03.2018 and 09.03.2018 directing the applicant to proceed on transfer from Audit office Headquarters as the Internal Auditor to South Rift Regional Coordinator in charge of Loan portfolio with effect from 04.04.2018. The applicant further prayed that the costs be borne by the respondents. The applicant's case is based upon his supporting affidavit attached on the application and the application was made pursuant to leave given by the Court on 16.03.2018.

The respondents opposed the application by filing, through Okenyo Omwansa & Company Advocates, the replying affidavit of Moriasi Arabu Josiah, the 1<sup>st</sup> respondent in the proceedings.

The claimant joined the respondents' service in October 2011 as an intern following his successful completion of the Certified Public Accountant final examinations (CPA – Section 6). In March 2012 he was employed by the respondents as an Accounts Assistant and after obtaining the Bachelor of Commerce (Finance Option), he was promoted to the position of Accountant. He was later promoted to the position of Internal Auditor. It is the applicant's case that he has performed his duties professionally, skilfully, diligently, and efficiently.

By the letter dated 05.03.2018, the 1<sup>st</sup> respondent notified the applicant that following the recent staff reorganisation and in a bid to ensure efficiency in service delivery, the applicant had been transferred from his current work station Audit office Headquarters to South Rift region as the Regional Coordinator effective 04.04.2018. The letter stated that the current Regional Coordinator – South Rift would handover to the applicant the loan portfolio and related duties prior to the transfer taking effect. The applicant would be paid a transfer allowance equivalent to his monthly basic salary and a baggage allowance to facilitate the transfer. Other terms and conditions of service would remain the same.

The applicant appealed against the transfer decision by the letter dated 07.03.2018. The appeal was in line with the right to appeal against a transfer decision per section 2.3 (g) (iv) of the respondents' Human Resource Policy thus, **“The employee being transferred shall have the right to lodge an appeal in writing to the HHRA, stating reasons s/he should not be transferred.”**The applicant's ground of appeal was that the transfer was not as per the organisational policies and was not fair to his professional specialization. The further reasons for appeal were as follows:

- a. Section 2.3 (g) (vi) of the respondent's human resource policy had been violated. The section provides that regular transfer shall not be effected before three (3) years of service after the previous transfer. The applicant had last been transferred to Audit

Department on 15.06.2016 so that the prescribed 3 years had not lapsed.

b. The transfer was inconsistent with his professional qualifications and it was in contravention of section 2.1 of the respondents' human resource manual thus, **“Transfer of staff across departments and regions shall be institutionalised to address issues of staff balancing, skills gaps, optimum utilisation of human capital, and for promotion.”**

By the letter dated 09.03.2018, the 1<sup>st</sup> respondent conveyed to the applicant that in line with the Fund's transfer policy, an officer can be transferred without notice, depending on exigencies of work. The transfers were also in line with the Board's recommendations in relation to reorganisation of staff. Accordingly, the applicant was notified that his appeal had been disallowed and he was wished well in his new appointment.

The applicant has urged his case before the court upon the statutory statement of facts and reliefs. The grounds as stated in the statement are as follows:

- a. Article 41(1) of the Constitution confers every person a right to fair labour relations and reasonable working conditions
- b. Article 47(1) of the Constitution provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- c. Article 47 (2) of the Constitution provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- d. The cited constitutional provisions applied to the transfer decision in issue but were not adhered to by the respondents.
- e. The transfer decision in issue contravened the Public Service Commission Human Resource Policies and Procedures Manual for Public Service which provides for the transfer policy. Under the policy transfers are made only upon a request by the affected officer or upon needs of the service. In the instant case it was not shown that the applicant's services, in view of his qualifications and experience, were needed, as transferred – the applicant having not applied to be so transferred.
- f. Section 7(2) of the Fair Administrative Action Act, 2015 provides that the court may review an administrative action or decision if the action or decision is unfair. The decision being arbitrary and in contravention of the respondents' human resource policies, it is amenable to be reviewed. In particular, section 7 (2) (f) of the Act provides that the court may review an administrative action or decision if the administrator failed to take into account the relevant considerations. In the instant case the transfer decision had failed to accord to the human resource policies and was inconsistent with the claimant's qualifications, skills and experience.

As per the replying affidavit, the respondents' case is as follows:

- a. The respondents' human resource policies are a mere guideline and the actors enjoy wide discretion in decision making.
- b. At paragraph 6 of the supporting affidavit the applicant states that the transfer came immediately after the Audit Report dated 27.02.2018 and received by the 1<sup>st</sup> respondent on 28.02.2018 and the report implicated the 1<sup>st</sup> respondent. At paragraph 7 of the supporting affidavit the applicant stated that he was in the process of concluding another Audit Report that was likely to implicate the 1<sup>st</sup> respondent thus, the hurried transfer from the department the applicant was qualified to serve, to the one he was not qualified to serve. The respondents denied the two paragraphs of the supporting affidavit and in particular stated that the applicant's averments were mere conjectures, suppositions and unsubstantiated suspicions as the audit report did not implicate the 1<sup>st</sup> respondent. The respondents have in that regard filed minutes of the 17<sup>th</sup> special meeting of the Board at which the audit report was considered to show that the 1<sup>st</sup> respondent had not been adversely implicated. The Court considers that to that extent the respondents have established that the report did not implicate the 1<sup>st</sup> respondent. Further, the report having not been filed and the report the applicant says he was working on having remained at large, the Court returns that there is no established connection between the Audit Reports and the transfer decision. Thus the Court will not return to that issue in its final analysis.
- c. The respondents admit the contents of the correspondence between the parties relating to the transfer decision.
- d. Is true that the respondents' human resource policy provides that a transfer must address issues of staff balancing, skills gaps, optimum utilization of human capital, organisational requirements, individual potential, employees professional; training and experience, and for promotional purpose. The transfer must also be in consultation with the person or persons accountable for a task.
- e. The applicant had worked at the credit department as an assistant regional co-ordinator and he was competent to work as deployed.
- f. The reason for transfer was per decision by the 2<sup>nd</sup> respondent at the 17<sup>th</sup> special meeting of 02.03.2018 at page 5 of the minutes thus, **“(v) Reorganize the internal audit unit to enhance efficiency and to carry out regular, continuous and structured internal audits to make the audit function more preventive than reactive.”**
- g. The transfer decision complied with the transfer policy and the reasons for the transfer were stated.

The court has considered the material on record.

The 1<sup>st</sup> issue for determination is whether the transfer complied with the respondents' internal transfer policy. It is submitted for respondents that the policy was complied with as the respondents had a wide discretion to make the decision because the policy was a guideline and not binding. By the respondents' own submission and as stated in the foreword to the human resource policy and manual procedures, the manual intends to inform, guide, and provide an objective way of handling issues between the employer and employees. The court has considered the submission. The manual's clause on purpose states that it is a policy document and deviations from its provisions will be allowed if there is a conflict with the employment laws of Kenya and whose consequence will be to necessitate a review of the policies. It further states that a wide range of factors can be considered for deviation from the normal policies (as provided in the manual). The manual then states that the following circumstances are generally considered supportive of requests for deviation:

- a. The administrative costs of compliance with policy are substantial.
- b. Industry – unique practices conflict with a policy.
- c. Local conditions warrant a practice other than that specified.

The manual further states that the following are not considered supportive of a deviation request:

- a. Historical or political practices differing from new policy.
- b. Complying with policy causes, a budget difference or impacts on results.

The manual again states that a request to deviate from the policy shall be in writing and should indicate:

- a. The policy involved.
- b. Reason for deviation request.
- c. Alternative methods to be used and their benefits.
- d. Approximate impact (if any) on annual profit and loss, and year-end balance sheet.

The Head of Human Resource and Administration (HHRA) should ensure that any approved deviation supports the organisation's goals and objectives.

In the present case, the Court returns that there was no request made for a deviation from the prescribed transfer policy and thus any deviation would be outside the manual's clear provisions on deviations. Accordingly, the Court returns that the respondents' transfer policy strictly applied and it was binding. The respondents had no wide discretion to deviate from the manual's provisions and the respondents' submission in that regard will fail.

The Court has considered the transfer policy and returns that in effecting the transfer the respondents, and in particular the 1<sup>st</sup> respondent, breached the policy in the following respects:

- a. It has not been shown that the transfer which was across departments and regions addressed issues of staff balancing, skills gaps, optimum utilisation of human capital, and promotion. The respondents provided no analysis on the parameters and it remains unknown how the transfer affected other officers and the general performance of the Fund. If there was any such deliberation, the minutes or documentation was not exhibited in Court.
- b. It was not shown how the transfer was based on organisational requirements, individual potential, and, employee's professional training and experiences. What was clear was that the applicant was an accountant by profession, a Certified Public Accountant of Kenya, with wide training and experience as an Internal Auditor. The respondents failed to show why the applicant should be moved from his hard earned professional undertaking as an Internal Auditor. The respondents did not show that the requirements and qualifications of the Regional Coordinator were similar to those held by the applicant. On the other hand, the applicant's professional training and experience as an Internal Auditor was established and was not disputed. Thus, the Court finds that there is no reason to doubt the applicant's submission and case that the transfer would undermine his professional undertaking. In the same line, the Court returns that the applicant was entitled to lament that the position he had been transferred to may not have been equal in status to the position of Internal Auditor or a promotion to a higher level. The Court holds that it is unfair labour practice in violation of Article 41 of the Constitution for an employer to deploy a professional employee, whose work is governed by a statute or well established practices and conventions, to a position which is not shown to be consistent with the employee's professional qualification.
- c. It was not shown that the respondents had consulted the applicant and the applicant's immediate supervisors prior to the transfer decision and that was contrary to the policy.
- d. Finally, the respondents failed to uphold the policy provision that regular transfers shall not take place before lapsing of 3 years of service after the previous transfer.

The Court has considered the Board resolution at the 17<sup>th</sup> special meeting of 02.03.2018 that the internal audit function was to be reorganised to enhance efficiency and to carry out regular, continuous and structured internal audits thereby making the audit function more preventive than reactive. It was submitted that the same amounted to a Board decision that the applicant be transferred. The Court returns that as

submitted for the applicant, there was no such mention of the transfer and the Court further returns that the resolution clearly did not amount to an approval for a deviation from the transfer policy within the meaning of deviations as envisaged under the manual. Further, the Court returns that the Board's resolution was systemic impacting on operational systems, processes and procedures in the undertaking of the audit function and it fell short of suggesting that the human resource or staff be specifically affected one way or the other.

To answer the 1<sup>st</sup> issue for determination the Court returns that the transfer decision failed to comply with the respondents' internal transfer policy.

To answer the 2<sup>nd</sup> issue for determination, the court returns that the transfer decision amounted to unfair administrative decision in contravention of Article 47 (1) and (2) and is amenable to review in terms of section 7 of the Fair Administrative Action Act, 2015 as cited for the applicant. First, the decision was unreasonable for failure to comply with the transfer policy. Second, the decision failed to take into account the applicant's professional qualifications, training and experience. Thirdly, the decision was founded upon the respondent's imagined wide discretion which did not exist and the discretion was clearly chained by the provisions of the transfer policy as well as the manual's provisions on requesting for deviations and approvals thereof. Fourthly, the Court has particularly considered the administrative decision made consequential to the applicant's administrative appeal against the transfer. The respondents did not file minutes or other documentation to establish that the appeal was deliberated upon or considered. But more important, the letter conveying the decision did not address the applicant's grounds of appeal. Instead, the letter stated that the applicant had been given sufficient notice prior to the transfer taking effect but which was not a ground about which the claimant had appealed. The Court returns that it was such unreasonableness for the respondents to have justified their decision on appeal upon a ground which was not one of the applicant's stated grounds of appeal against the transfer. The Court finds that in making the transfer decision the respondents failed to take into account the transfer policy which they were bound to consider and in deciding the applicant's administrative appeal, the respondents while not addressing the stated grounds of appeal, opted to consider a ground of appeal which was imaginary and therefore which ought not to have been considered at all.

The Court returns that even if the respondents had a limited discretion within their transfer policy to transfer the applicant, the discretion had to be exercised reasonably. The Court finds that the respondents' impugned transfer decision was unreasonable **per Lord Greene in Associated Provincial Picture Houses Limited –Versus- Wednesbury Corporation (1947) 2ALL ER 680 at 682-683** thus, **“It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word ‘unreasonableness’ in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with 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 his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these 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 lay within the powers of the authority. Warrington L.J., I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head.”**

The 3<sup>rd</sup> issue for determination is whether the Court can interfere with the respondents' human resource power and function to transfer the applicant as the applicant's employers. As submitted for the respondents, the Court can interfere and only sparingly so. Thus the Court upholds the holding in **Guvvara –Versus- Traffic Safety Council of Zimbabwe (73/07) ((73/07)) [2009]ZWSC 5 (26 January 2009)** where Cheda JA stated thus, **“It must be accepted that the right to transfer an employee from one place to another is the prerogative of the employer. It is the employer who knows better where the services of an employee are required. The employer's discretion in determining which employee should be transferred and to which point of the employer's operations is not to be readily interfered with except for good cause shown.**

**Good cause in the circumstances, while not easy to define, would include such matters as unfounded allegations, victimization of the employee and any action taken to disadvantage the employee.”** To the list of the envisaged **“good cause in the circumstance”**, Counsel for the respondent Okenyo Omwansa Advocate added where the employee's close relative such as a spouse or child requires specialized treatment and the transfer would affect the necessary personal attention, or, where the employee's child is due to attend to important educational step such as sitting for a final examination. Counsel further submitted that in such circumstances, the decision to transfer the employee would only be postponed and not declined all together.

Counsel for the applicant Obat Advocate submitted that in the instant case, the applicant has shown that he will be disadvantaged because the transfer undermines his professional undertaking in view of his professional qualifications and the experience and training as an Internal Auditor. The Court returns that the applicant's concern as submitted amounts to a good cause in the circumstances of the present case. The Court follows the opinion in the case cited for the respondent above and returns that the applicant has established that the transfer decision is an action by the employer which will disadvantage the applicant as an employee.

In such cases seeking to interfere with the employer's powers, the court follows its opinion in the ruling in **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, **“The principles are clear.**

**The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process.”**

In the present case, the applicant has established that he exhausted the internal appeals procedure and there is nothing left that the respondents can do internally towards purging the applicant's grievance against the transfer. Further, the applicant has established that the respondents are proceeding in breach of the internal transfer policy which was incorporated in the applicant's contract of service and, the transfer when implemented will injure the applicant's professional endeavor as is a disadvantageous decision. Accordingly, to answer the 3<sup>rd</sup>

issue for determination the Court returns that the respondents' human resource power and function to transfer the applicant as the applicant's employers is therefore amenable to be interfered with in exercise of the court's judicial review jurisdiction.

The Court answers the **4th and final issue** for determination in the affirmative, that is, that the applicant is entitled to remedies as prayed for in view of the findings as stated in earlier in this judgment.

In conclusion, judgment is hereby entered for the applicant against the respondent for:

1. The judicial review order of certiorari which is hereby granted by the Honourable Court quashing the decision of the respondents contained in the letters dated 05.03.2018 and 09.03.2018 directing the applicant to proceed on transfer from Audit Office Headquarters as the Internal Auditor to South Rift Regional Coordinator in charge of Loan portfolio with effect from 04.04.2018.
2. The respondents to pay costs of the proceedings.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 11<sup>th</sup> May, 2018**.

**BYRAM ONGAYA**

**JUDGE**