



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 874 OF 2017

BETWEEN

MICHAEL MBWAVI LUSINDE.....CLAIMANT

VERSUS

1. FRED OYUGI

2. AMANI Y. KOMORA.

3. KENYA PORTS AUTHORITY.....RESPONDENTS

RULING

1. The Claimant filed his Statement of Claim on 20th November 2017. He states he was employed by the 3rd Respondent State Corporation [KPA], as Principal Risk Management Officer, Grade HM 1 Post No. 120-1002. The position falls within Internal Audit and Risk Management Department, which is headed by the 1st Respondent. The 2nd Respondent is KPA's Head of Human Resources Department.

2. The Claimant avers he was frustrated and harassed by the 1st Respondent. He wrote to the 2nd Respondent, on 16th October 2017, requesting to be transferred from Internal Audit and Risk Management Department to avoid these frustrations and harassment. The letter elicited no response, except that on 16th October 2017, the 1st Respondent wrote to the Claimant, unilaterally deploying the Claimant to the position of Principal Internal Auditor [Operations], which is within Internal Audit and Risk Management Department. The 1st and 2nd Respondents colluded to ratify transfer of the Claimant to the new position. Owing to the actions of the 1st and 2nd Respondents, the Claimant states he has suffered '*untold anguish and psychological suffering.*' He prays for Judgment against the Respondents in the following terms:-

[a]. A declaration that the harassment and frustrations the Claimant is being subjected to, is both illegal and unfair.

[b]. A permanent injunction restraining the Respondents from continued harassment and frustrations of the Claimant in whatever way, and effecting the purported transfer of the Claimant from his job as Principal Risk Management Officer to that of Principal Internal Auditor [Operations].

[c]. A mandatory injunction directing immediate transfer of the Claimant from Internal Audit and Risk Management Department to any other Department within the 3rd Respondent's establishment.

[d]. Costs and any other suitable relief.

3. The Claimant filed an Application by way of Notice of Motion, on the same date he filed the Statement of Claim, seeking the following provisional measures:-

[a]. Temporary injunction restraining the Respondents from the continued harassment, frustration and effecting of the purported intra departmental transfer/redeployment of the Claimant as Principal Risk Management Officer to Principal Internal Auditor [Operations] pending hearing of the Application *inter partes*.

[b]. The same order above, pending hearing and determination of the main Claim.

[c] Costs of the Application be in the Cause.

4. The Respondents filed a Joint Statement of Response on 7th December 2017. They state the Claimant was employed by the 3rd Respondent as Principal Risk Management Officer Grade HM on 13th September 2016. He did so after sitting and passing a job interview conducted by the 3rd Respondent on 16th and 18th November 2015. The Claimant was placed on probation for 6 months, which was extended for a further 6 months by the 3rd Respondent, as the Claimant had not shown good progress. Internal Audit and Risk Department is made up of 5 Sections: Finance; Operations; Risk Management; IT; and Quality Assurance. Principals heading these Sections are normally rotated depending on the nature of work and assignments. Qualifications of the Principals are more or less similar, save for Quality Assurance Section. The Claimant's transfer was recommended by the 1st Respondent, and approved by the KPA Managing Director. This was done alongside transfer of other staff. The action was taken through consultations and in line with KPA HR Manual 2011, Section B.14. The Respondents deny that they have, in any way frustrated or harassed the Claimant.

5. The Respondents filed a Replying Affidavit to the Claimant's Notice of Motion, sworn by Head of Human Resources at KPA, Boaz O. Ouko, on 6th December 2017. He reiterates the averments contained in the Statement of Response, as summarized at paragraph 4 above.

6. It was agreed by the Parties in Court on 14th December 2017, that the Application is considered and determined on the strength of the Pleadings, Affidavits, Documents and Submissions filed by the Parties. Parties confirmed the filing of Submissions on 2nd March 2018.

The Court Finds:-

7. Section B.14 of KPA's Human Resource Manual 2011, allows Management to transfer staff. Transfers within Departments shall be effected by the Head of Department, in consultation with the General Manager, Human Resources and Administration. There is enough material on record to conclude the Respondents acted within their prerogatives, in movement of staff within various Departments. Claimant's transfer was approved by the General Manager Human Resources and Administration, alongside transfer of other staff. There is no suggestion that he was unfairly selected or discriminated against by being transferred. There is no *prima facie* evidence at all of any ill-motive on the part of the Respondents, in requiring the Claimant moves from one Section to another, within the same department, to render work of equal value for equal pay.

8. The Court is satisfied that the Section the Claimant was being asked to move to, is one, in a Department of 5 Sections whose Heads, save for Quality Assurance Section, have similar job qualifications, and are routinely moved depending on the requirements of the day. The Employer must be left to exercise its management prerogative of staff deployment and transfer, without undue interference by the Courts. To grant the prayers sought by the Claimant would result in the Court entering the arena of managing KPA, by determining the role its Employee ought to discharge.

9. There is evidence that another Officer, Samuel Ngumi, has been redeployed to the position of Principal Risk Management Officer. It is not possible to have the Claimant remain in his desired position, while another Officer is already holding that position.

10. Ultimately the Court holds that the Respondents have management prerogative in transfer and deployment of staff, under the Human Resource Manual 2011. Not only is this prerogative discernible under Section B.14 of the Manual cited by the Respondents in their Submissions; the prerogative is similarly expressed under Section A.3, which requires an Employee must serve at such places in Kenya or elsewhere as the 3rd Respondent may determine. The services of an Employee are not limited to work which may be specified in his contract of service; he may be called upon to perform any reasonable duty for which he may be suitable, in connection with the working of the KPA. The Respondents have not been shown to have exercised their prerogative capriciously. ***The Notice of Motion filed by the Claimant on 17th November 2017 has no merit. It is hereby dismissed with no order on the costs.***

Dated and delivered at Mombasa this 8th day of June 2018.

JAMES RIKA

JUDGE