



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION NO 2 OF 2018

[FORMERLY MOMBASA HC MISC APP NO JR 49 OF 2018]

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF ARTICLES ,10,19,20,21,22,23,25,27,28,29,40,47,48,50 AND 165, CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT, CAP 21, LAWS OF KENYA

AND THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF STATE CORPORATIONS ACT, CAP 446, LAWS OF KENYA

AND

IN THE MATTER OF THE SCIENCE, TECHNOLOGY & INNOVATION ACT, 2013

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT, 2012

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION OF KENYA DISCIPLINE MANUAL, 2008

AND

IN THE MATTER OF THE KENYA MARINE & FISHERIES RESEARCH INSTITUTE TERMS & CONDITIONS OF SERVICE FOR MANAGEMENT STAFF, 2012

BETWEEN

REPUBLIC.....APPLICANT

VS

KENYA MARINE & FISHERIES INSTITUTE.....RESPONDENT

JUDGMENT

Introduction

1. This application was initially filed in the High Court as Miscellaneous Application No JR 49 of 2018. The matter went before **Njoki Mwangi J** who formed the opinion that the High Court did not have jurisdiction to handle the matter and therefore referred it to this Court for hearing and disposal.

2. The Ex Parte Applicant is an employee of the Kenya Marine & Fisheries Research Institute, the Respondent herein. He holds the position of Senior Internal Auditor.

The Ex Parte Applicant's Plea

3. The Applicant states that he has held the position of Head of Internal Audit within the Respondent's establishment for the last ten (10) years. He adds that in the year 2005, he was transferred to Kisumu yet his position is established in and based at the Headquarters in Mombasa.

4. In the year 2015, the Applicant was transferred back to Mombasa but by letter dated 18th May 2018, he was transferred to Turkana, a station he says has little activity requiring audit inspection.

5. Upon receipt of the transfer letter, the Applicant appealed to the Respondent's Director but by letter dated 21st June 2018, the Applicant was directed to report to the new station by 26th June 2018.

6. The Applicant contends that as a precursor to any transfer, the following mandatory pre-requisites ought to be fulfilled:

- a. The position of the 'transferee' ought to be established at the receiving/ secondary station;
- b. Any transfer ought to be made to a secondary station that has significant workload that can accommodate the 'transferee';
- c. Any two consecutive transfers ought to be well-spaced with considerations made in respect of the well-being of the 'transferee's' family ;
- d. Administratively, all matters pertaining to audit should be channeled through the Chief Internal Auditor (Head of Department) to enhance independence of internal audit;
- e. Any such transfer ought to be made on the final confirmation of the Respondent's Board of Management;
- f. Any such transfer ought to lead to the general improvement in the service of both the potential 'transferee' and the secondary station, and overall, be aimed at accomplishing the Respondent's Vision and Mission Statement.

7. The Applicant maintains that all the foregoing prerequisites were unsatisfied as at 18th May 2018, with the Respondent's Board of Management remaining unconstituted. He avers that the Respondent's intention to transfer him is a manifestation of the Director's whimsical, arbitrary and gross abuse of office.

8. The Applicant states that his transfer from Kisumu to Mombasa was based on volume of work at the Headquarters and for continuity of quality service in the Audit Department. He adds that the current transfer was not motivated by need but is a sign of victimization.

9. The Applicant holds that the Respondent has infringed on his constitutional rights as hereunder:

- a. Equality and freedom from discrimination- Article 27;
- b. Human dignity – Article 28;
- c. Freedom and security of the person – Article 29;
- d. Right to property – Article 40;
- e. Fair Administrative action – Article 47;
- f. Access to justice – Article 48;
- g. Fair hearing – Article 50.

10. The Applicant seeks the following remedies:

- a. An order of certiorari removing to this Court and quashing the decision rendered by the Respondent on 18th May 2018 transferring the Applicant from KMFRI Mombasa Centre to KMFRI Turkana Station;
- b. An order of mandamus compelling the Respondent to unconditionally re-engage the Applicant to his previous portfolio with full remuneration including salary, house allowance and other benefits;
- c. Costs of the proceedings.

The Respondent's Reply

11. The Respondent filed grounds of opposition dated 25th July 2018 stating:

- a. The Applicant has no justifiable dispute before the Court for determination;
- b. The Respondent's employees are supposed to work within the Republic of Kenya and the Applicant is not permanently attached to Mombasa;
- c. The terms of engagement in public service are that public officers like the Applicant can be posted to work in any station with no exception when need arises;
- d. The Applicant is guilty of material non-disclosure. He has neither disclosed the period of time he has stayed in his current work station nor that his contract of employment envisages that he can be transferred at any time when need arises;
- e. The grant of the orders sought would amount to unnecessary interference with the Respondent's prerogative of allocating and distributing work in public service;
- f. The Respondent has the power to transfer the Applicant, which power should not be interfered with as there is no evidence that the Respondent acted arbitrarily;
- g. By the present judicial review application, the Applicant has sought to dictate to the Respondent where he would want to work;
- h. The decision to transfer the Applicant was arrived at with a view to ensuring that the Applicant discharges his duties in public service satisfactorily;
- i. The Applicant has not demonstrated that he has been prejudiced by the decision to transfer him to the new station;
- j. The Applicant was treated reasonably and fairly as legitimately expected hence the decision to transfer him from his current station was proper in law;
- k. The grant of the orders sought would be against public policy and would open floodgates for challenging lawful decisions to transfer employees in public service;
- l. The laid down procedure was followed and valid reasons for the decision were given. The decision to transfer the Applicant did not demote him and he had retained his full benefits;
- m. The application is bad in law and an abuse of the court process.

12. The Respondent also filed a replying affidavit sworn by its Human Resource Manager, Kennedy Ommala on 16th August 2018. He deposes that by letter dated 18th May 2018, the Applicant was transferred from Mombasa Headquarters to Turkana Station. The Applicant was required to report to his new station from 1st June 2018.

13. Upon receipt of the transfer letter, the Applicant appealed to the Respondent's Director on 25th May 2018. The Respondent considered the Applicant's appeal and by letter dated 21st June 2018 informed the Applicant that the decision to transfer him would stand. The decision was also backed by a letter from the Principal Secretary, Ministry of Agriculture, Livestock, Fisheries and Irrigation dated 8th August 2018.

14. It is further deposed that the Respondent has transferred 133 members of staff in the recent past. It was therefore not true that the decision to transfer the Applicant was calculated to prejudice or victimize him.

15. Ommala deposes that the Applicant holds the position of Senior Internal Auditor. He disagrees with the Applicant's averment that the audit function is centralised in Mombasa and that the Applicant has no matching duties in Turkana. Further, there was need to cut down costs incurred by way of Daily Subsistence Allowances payable to visiting internal auditors.

16. Ommala refers to the Code of Governance for State Corporations (*Mwongozo*) particularly Clause 1.19(a) which provides that the Chief Executive Officer is responsible for the day to day operations of the state corporation and Clause 1.19(f) which charges the Chief Executive

Officer to ensure that the corporation has an effective management structure including succession plans.

17. Ommala takes the view that the Board of Directors has no role to play in deciding whether or not to transfer the Applicant. He adds that the decision to transfer an employee is the prerogative of the employer which should not be inhibited.

Determination

18. What falls for determination in this application is whether the Applicant has made out a case for setting aside the decision to transfer him from the Respondent's Headquarters in Mombasa to Turkana Station. In an application such as the current one which seeks prerogative orders, the primary duty of the Court is to examine whether the decision complained of was taken in accordance with the law and due procedure.

19. The Court was referred to several decisions on the import of judicial review applications. In *Maurice Adongo Anyango v Kenyatta International Convention Centre [2018] eKLR* the Court of Appeal reiterated that judicial review remedies are discretionary and will only be granted in the most deserving of cases. The discretion of the Court in this regard is to be exercised on the basis of evidence and sound legal principles.

20. On defining the boundaries of judicial review in *Republic v Commissioner of Custom Services Ex Parte Africa K-Link International [2012] eKLR Githua J* stated the following:

“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and functions or acting outside of their jurisdiction. Judicial review cannot be used to curtail or to stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”

21. The basis of the Applicant's application is that due process leading to the decision to transfer him was not followed, thereby rendering the Respondent's decision ultra vires, null and void. The Applicant further suggests that there is no establishment for his position in Turkana.

22. The Applicant submits that the management of the Respondent as well as its interaction with employees and their conduct generally are governed by the following instruments:

- a. Mwongozo: The Code of Governance for State Corporations, January 2015;
- b. Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, February 2017;
- c. Public Service Commission Discipline Manual for the Public Service, May 2016;
- d. Kenya Marine and Fisheries Research Institute Terms and Conditions of Service for Management Staff, June 2012.

23. The Applicant cites Clause B. 30 of the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service, February 2017 on deployment which provides that:

In carrying out deployment, the following shall be considered:

- a. Optimal staffing level of the directorate/department;
- b. Skills and qualifications possessed by the officer;
- c. The need to rotate staff for their development in terms of added responsibilities and duties;
- d. The authority to deploy an officer within the Commission shall vest in the Secretary/Chief Executive in consultation with the respective heads of directorate;
- e. Deployment decisions shall be conveyed in writing.

24. On its part, the Respondent contends that transfer of employees is a management prerogative which should not be curtailed. This Court (variously constituted) has held that regular transfer of employees is a prerogative of the employer. In *Henry Ochido v NGO Co-ordination Board[2015] eKLR* my sister **Mbaru J** stated the following:

“In this regard therefore, a transfer of an employee is one such prerogative of an employer subject to sufficient notice to enable the subject employee report to the new station of transfer with requisite facilitation. It is therefore not in the choice of an employee to dictate where they wish to work, once work has been created, and in the view of the employer they find that a

particular employee is best placed in a certain location or work station, the duty on the employer is to inform the employee and the employee's role is to ensure their work performance in the allocated station.”

25. The only exception to this general rule is where the transfer is shown to have been effected un-procedurally or where it is done to serve a collateral purpose.

26. The Applicant states that the subject transfer has violated his constitutional rights generally. He also states that his position does not exist in the new station and that proper procedure was not followed in effecting the transfer. The Court has carefully examined the constitutional provisions and legal instruments cited by the Applicant in support of his application and finds nothing to suggest that the subject transfer was in violation of any of the said provisions and instruments.

27. The Court also found no evidence that the Applicant's position does not exist in his new within the Respondent's establishment in Turkana.

28. Overall, the Court finds and holds that the Applicant has failed to establish a case for grant of the prerogative orders of certiorari and mandamus. The result is that his application fails and is dismissed.

29. In light of the subsisting employment relationship between the parties, I direct that each party will bear their own costs.

30. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF OCTOBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Ngonze for the Applicants

Mr. Lagat for the Respondent