



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION NO 1 OF 2018

[FORMERLY MOMBASA HC MISC APP NO JR 48 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

EX PARTE

DIXON OTIENO ODONGO

CHARLES NYANJONG'

JUDGMENT

Introduction

1. This application was initially filed in the High Court as Miscellaneous Application No JR 48 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 Applicants are employees of the Kenya Marine & Fisheries Research Institute, the Respondent herein. The 1st Applicant holds the position of Laboratory Technologist in the Fisheries Program and the 2nd Applicant holds the position of 2nd Mate in the Maritime Department.

The Ex Parte Applicants' Plea

3. The Applicants state that in the month of June 2017, they were randomly selected as Member and Chairman respectively of an ad hoc tender opening committee for purposes of opening and evaluating tender quotations strictly on the price quoted.

4. The ad hoc committee comprised of the following:

- a) Charles Nyanjong' – Chairman
- b) Paul Obura – Secretary
- c) Dixon Otiemo Odongo – Member
- d) Dixon Aloyo – Member
- e) Melolyne Ochieng - Member

5. The mandate of the said committee was to open tender quotations in respect of *KMFRI Quotation No. 156/6/2016-2017*, countersign against all respective leaflets to confirm safe, uncompromised receipt thereof, evaluate the quotations strictly on the basis of price quoted and forward the entire set without any alteration through the Committee Secretary to the Technical Evaluation Committee for evaluation and subsequent approval.

6. The ad hoc committee sat on 27th June 2017 in the explained absence of Melolyne Ochieng and discharged its mandate whereupon it stood automatically dissolved.

7. On 1st November 2017, the Applicants learnt that the Respondent intended to issue them with suspension letters on account of unspecified allegations. On 2nd November 2017, the Applicants' Advocate wrote to the Respondent's Director demanding strict adherence to the law in respect of the Respondent's dealings with them.

8. By letter dated 3rd November 2017, the Respondent's Legal Officer assured the Applicants of the Respondent's commitment to the law and the rules of natural justice.

9. On 4th November 2017, the Applicants were issued with suspension letters. Aggrieved by the decision of the Respondent to suspend them, the Applicants lodged ***Mombasa High Court Misc Application No JR 63 of 2017***.

10. In its ruling delivered on 3rd May 2018, the High Court granted an order of certiorari quashing the Applicants' suspension and an order of mandamus compelling the Respondent to unconditionally readmit the Applicants to their respective portfolio.

11. The Applicants state that they had been subjected to another disciplinary process and exclusion from a scheduled *Fisheries Observers Training* in Cape Town, South Africa on account of the aforementioned Judicial Review proceedings.

12. Further, by letter dated 14th June 2018, the Respondent through its Director, had transferred the Applicants from its Headquarters in Mombasa to KMFRI Naivasha Station. The Applicants term this transfer as further irregular disciplinary action against them.

13. The Applicants contend that as a precursor to any transfer, the following mandatory prerequisites ought to be fulfilled:

- a) The station of transfer (secondary station) identifies a vacancy and sends communication to the Headquarters in respect of filling

any such vacancy;

b) The Director, upon receipt of the communication from the secondary station notifies the relevant department to search for and identify a potential 'transferee';

c) The relevant department then identifies the potential 'transferee' and communicates the intention to transfer any such individual to the position as requested by the secondary station, which communication between the department and the potential 'transferee' is logged as a notice, giving the latter a period of thirty (30) days to either accept the transfer notice/request or challenge the same vide communication to the Director;

d) Any such transfer ought to be made on the final confirmation of the Respondent's Board of Management;

e) 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.

14. The Applicants maintain that all the foregoing prerequisites were unsatisfied as at 14th June 2018, with the Respondent's Board of Management remaining unconstituted. They aver that the Respondent's intention to transfer them is a manifestation of the Director's whimsical, arbitrary and gross abuse of office.

15. The Applicants hold that the Respondent has infringed on their 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.

16. The Applicants seek the following remedies:

a) An order of certiorari removing to this Court and quashing the proceedings taken before and decision rendered by the Respondent on 14th June 2018 transferring the Applicants from KMFRI Mombasa Centre to KMFRI Naivasha Station;

b) An order of mandamus compelling the Respondent to unconditionally re-admit the Applicants to their previous respective portfolio and station with full remuneration including salary, house allowance and other benefits;

c) Costs of the proceedings.

The Respondent's Reply

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

a) The Applicants have no justifiable dispute before the Court for determination;

b) The Respondent's employees are supposed to work within the Republic of Kenya and the Applicants are not permanently attached to Mombasa;

c) The terms of engagement in public service are that public officers like the Applicants can be posted to work in any station with no exception when need arises;

d) The Applicants are guilty of material non-disclosure. They have neither disclosed the period of time they have stayed in their current work station nor that their contracts of employment envisage that they 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 Applicants, 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 Applicants have sought to dictate to the Respondent where they would want to work;
- h) The decision to transfer the Applicants was arrived at with a view to ensuring that the Applicants discharge their duties in public service satisfactorily;
- i) The Applicants have not demonstrated that they have been prejudiced by the decision to transfer them to the new station;
- j) The Applicants were treated reasonably and fairly as legitimately expected hence the decision to transfer them from their 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 Applicants did not demote them and they had retained their full benefits;
- m) The application is bad in law and an abuse of the court process.

18. The Respondent also filed a replying affidavit sworn by its Human Resource Manager, Kennedy Ommala on 16th August 2018. While admitting that the Applicants had instituted **High Court Judicial Review Application No 63 of 2017** to challenge the decision to suspend them from employment, Ommala states that the Respondent was not aware of the proceedings leading to the ruling delivered by the High Court on 3rd May 2018, allowing the Applicant's prayers. The Respondent had since applied to the High Court for setting aside of the said ruling.

19. Ommala seeks to make a distinction between the orders given in **High Court Judicial Review Application No 63 of 2017** from the prayers sought in the current application as the issue of the Applicants' transfer was not a matter in the proceedings before the High Court.

20. Ommala depones that the Applicants were notified of their transfers by letters dated 14th June 2018. They were required to report to Naivasha Station on 1st July 2018. Upon receipt of the transfer letters, the Applicants appealed against the transfer to the Respondent's Director by letters dated 20th June 2018 and 25th June 2018 respectively. By letters dated 11th July 2018 and 13th July 2018, the Applicants were notified that the decision to transfer them would stand.

21. It is further deponed that the Respondent has transferred 133 members of staff in the recent past. It was therefore not true that the decision to transfer the Applicants was calculated to prejudice or victimize them. In any case, they had retained their full benefits upon reporting to their new station.

22. 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.

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

Determination

24. What falls for determination in this application is whether the Applicants have made out a case for setting aside the decision to transfer them from the Respondent's Headquarters in Mombasa to Naivasha 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.

25. 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.

26. 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.”

27. The basis of the Applicants' application is that due process leading to the decision to transfer them was not followed, thereby rendering the Respondent's decision ultra vires, null and void.

28. The Applicants submit 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.

29. The Applicants cite 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.*

30. 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.”

31. 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.

32. The Applicants state that the subject transfers have violated their constitutional rights generally. They also state that proper procedure was not followed and that the Respondent's Director had no mandate to transfer them.

33. The Court has carefully examined the constitutional provisions and legal instruments cited by the Applicants in support of their application and finds nothing to suggest that the subject transfers were in violation of any of the said provisions and instruments.

34. The Applicants also give extensive details regarding **High Court Judicial Review Application No 63 of 2017** involving the same parties. It seems to me that by doing so, the Applicants suggest that their transfers are somehow connected to the application pending in the High Court. They however did not adduce any evidence to support this proposition.

35. Overall, the Court finds and holds that the Applicants have failed to establish a case for grant of the prerogative orders of certiorari and mandamus. The result is that their application fails and is dismissed.

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

37. 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