



**REPUBLIC OF KENYA**

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

**PETITION NO. 31 OF 2018**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ARTICLES 10, 22, 23, 41, 73, 75, 159, AND 232 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 22, 23, 41, 73, 75, 232, AND 236 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT, 2017**

**IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT CAP 183**

**IN THE MATTER OF THE HUMAN RESOURCE POLICIES AND PROCEDURES MANUAL FOR PUBLIC SERVICE, 2016**

**BETWEEN**

**SANDY MOKEIRA MORARA.....PETITIONER**

**- VERSUS -**

**PRINCIPAL SECRETARY MINISTRY OF LANDS &**

**PHYSICAL PLANNING.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY MINISTRY OF SPORTS,**

**CULTURE AND ARTS.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> November, 2018)

**JUDGMENT**

The petitioner is at all material times a Senior Assistant Director of Records, JG “P” deployed at the Ministry of Lands and Physical Planning as Head of Records. The petitioner received a copy of the letter dated 08.03.2018 Ref. No. 1993021702/51 signed by Dr. Nicholas Muraguri, Principal Secretary, Ministry of Lands and Physical Planning. The letter was addressed to the Principal Secretary, State Department of Culture & the Arts, Ministry of Sports, Culture & the Arts. The letter was titled “**Posting of Records Management Officers**” and listed the claimant, and another officer, one Rachel M. Nyaga, Chief Records Management Officer. The letter proceeded to state, “**This Ministry is in the process of implementing changes in the Land Sector. Some of the necessary interventions identified include staff re-deployments. In this connection, this is to request that the above named officers be posted to other Ministries/State Departments. The two (2) officers are therefore hereby released to you for deployment.**”

The petitioner felt aggrieved and appealed against the decision to the Public Service Commission by the letter dated 05.04.2018. The petitioner explained her grievance that the reason for her deployment as per the letter was to improve effectiveness in service delivery and the inclination was therefore that her performance was wanting but which was contrary to work plans and duties which she had performed at the ministry. She had written to the Principal Secretary to know the circumstances surrounding her movement by the letter dated 26.03.2018 but not received a reply. She stated, “**This development has left me feeling demotivated, intimidated and treated unfairly having worked for the government for such a span of twenty four (24) years devotedly with no record of indiscipline or any adverse report. I stand to be guided whether I was involved in improper activities that would have led to misconduct during my performance of duty.**”The petitioner requested the Commission to intervene because she felt that her rights had been violated.

The petitioner then filed her petition on 13.04.2018 through Osundwa & Company Advocates. She prayed for:

- a) A declaration that the 1<sup>st</sup> respondent has violated Article 10, 73, 75, 232, and 236 of the Constitution.
- b) A declaration that the decision by the 1<sup>st</sup> respondent to have the petitioner transferred is unconstitutional and or illegal and disregarded due process of the laid down laws and regulations.
- c) An order quashing the transfer of the petitioner by the 1<sup>st</sup> respondent and retaining her in her current position and assignment.
- d) Any other order the Court may deem fit towards the ends of justice.

The respondents filed the replying affidavit of John Waiganjo , the Principal Human Resource Management Officer at the Ministry of Lands and Physical Planning, through L.Odhiambo, Litigation Counsel, for the Attorney General . The grounds of reply are as follows:

- a) The 1<sup>st</sup> respondent issued the letter dated 08.03.2018.
- b) The 2<sup>nd</sup> respondent is the administrator of the scheme of service for Records Management Officers. The 2<sup>nd</sup> respondent is therefore mandated to deploy and post records management officers across civil service.
- c) The letter of 08.03.2018 should not be construed to have the effect of a transfer or posting but a request of redeployment of the petitioner to another state department. The request that the petitioner be redeployed is aimed at improving effectiveness in service delivery to the public.
- d) The 2<sup>nd</sup> respondent had not replied to the letter of 08.03.2018 and the reply would form the basis of a recommendation to the Commission per sections 43 (1) and (43) (4) (b) of the Public Service Commission Act, 2017 prescribing the procedure for inter-ministerial transfers.
- e) The petition is premature as the letter dated 08.03.2018 does not amount to a transfer. Further a transfer does not infringe upon the petitioner's rights in any manner. In any event the petitioner's salary will not be affected by the transfer.
- f) If prayer (c) in the petition is granted then the Court will have usurped the human resource powers of the respondents.
- g) The petitioner has not come with clean hands for failure to disclose material facts.

The Court has considered the parties respective cases and all material on record. The Court makes findings on the matters for determination as follows.

**First**, the parties are in agreement that the transfer of the petitioner is regulated by section 43 of the Public Service Commission Act, 2017. Under the section, where an authorized officer intends to transfer a public officer from the ministry or department where such a public officer is currently deployed to another ministry or department without a change of designation or grading, the recommendations and commends of the authorized officer concerned shall be sent to the Commission, which shall decide whether the transfer should be approved. The section further provides that in effecting a transfer, the matters to be taken into account shall include that the transfer shall lead to improved service delivery; the interest of the children, if any, of the affected public officer; and the transfer shall not be arbitrary. The Court returns that the provision applied to the petitioner in event of her desired transfer as appears to have been desired that she is transferred.

**Second**, the Court returns that the letter of 08.03. 2018 failed to comply with section 43 of the Public Service Commission Act, 2017. In particular the request that the petitioner be posted to other ministry was not directed to the Commission as provided for in the section. Second, the 1<sup>st</sup> respondent made the decision to release the petitioner to the 2<sup>nd</sup> respondent for deployment and such release was clearly in contravention of the provisions of section 43 of the Act vesting such decision on approval of transfers in the Commission. The 1<sup>st</sup> respondent's duty under the section was to make recommendations and comments and to request the Commission to consider the case and make a decision approving or not approving the transfer. Finally, the petitioner appears to have a valid grievance that she appears targeted and without explanation whereas, the section frowns at arbitrariness in transfer decisions – that there should be no subjectivity effecting the transfer. The Court considers that it was not enough for the letter to merely state that the transfer or deployment aimed at improving effectiveness in service delivery but, the same ought to have been demonstrated with clear explanations and circumstances justifying the transfer.

While making the findings, the Court returns that the submission that the 2<sup>nd</sup> respondent as the administrator of the scheme of service for Records Management Officers had the mandate to transfer or deploy the petitioner was clearly *ultra vires* the provisions of section 43 of the Act and would amount to usurpation of the Commission's statutory powers under the section. The respondents did not provide evidence that the Commission had delegated its powers under the section and the safeguards that may have accompanied such alleged delegation to preserve the tenets or statutory shields of fairness in effecting transfers as provided for in the section.

Needless to state, the offensive letter amounted to a unlawful “transfer” within the meaning of the word under the Public Service Commission Act, 2017 thus, “**Transfer means the deployment of an officer from one ministry to another or from one duty station to another**” That was the effect of the decision in the impugned letter when it stated that the officer had been released to the 2<sup>nd</sup> respondent for deployment. It was not a suggestion or proposal or recommendation that the petitioner be considered for deployment but, the Court finds that it was the decision that she is so deployed. Clearly, the decision was without the relevant statutory or other authority.

**Third**, the Court returns that the offensive letter amounted to violation of the petitioner's right to fair labour practices as protected in Article 41 of the Constitution because it was in contravention of the clear provisions of section 43 of the Public Service Commission Act, 2017. A declaration would issue to that extent in terms of prayer (b) in the petition. The Court returns that the petitioner has otherwise failed to establish and justify prayer (a). The letter has been found to have been *ultra vires* section 43 of the Act and is liable to quashing as per prayer (c).

**Finally**, the Court returns that the petitioner has satisfied the test for the Court's intervention in the respondents' exercise of employers' human resource function to transfer the petitioner as per the opinion 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 it has been shown that the respondents are proceeding in clear contravention of the applicable statutory provision and the respondents have not shown internal grievance management system. The petitioner appealed to the Commission but she had not received a response at all. It is the Court's opinion that the petitioner was entitled to move to the Court in view of the apparent illegality in the offensive letter.

In conclusion judgment is hereby entered for the petitioner jointly and severally against the respondents for:

- a) The declaration that the letter by the 1<sup>st</sup> respondent dated 08.03.2018 and Ref. No. 1993021702/51 was unconstitutional and illegal because it amounted to violation of the petitioner's right to fair labour practices as protected in Article 41 of the Constitution because it was in contravention of the clear provisions of section 43 of the Public Service Commission Act, 2017.
- b) Quashing of the the letter by the 1<sup>st</sup> respondent dated 08.03.2018 and Ref. No. 1993021702/51 and the petitioner to be retained in her current position and assignment as deployed unless lawfully transferred or deployed.
- c) Costs of the petition awarded to the petitioner.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 16<sup>th</sup> November, 2018**.

**BYRAM ONGAYA**

**JUDGE**