



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 1 OF 2018

(Before Hon. Justice Mathews N. Nduma)

STEPHEN OLAGO.....1ST PETITIONER

NANCY ANYANGO ONYANGO2ND PETITIONER

SIMON OMONDI OYINDO3RD PETITIONER

VINCENT NYAMACHE4TH PETITIONER

DERRICK OTIENO OMORO.....5TH PETITIONER

VERSUS

HOMA BAY COUNTY ASSEMBLY SERVICE BOARD1ST RESPONDENT

COUNTY ASSEMBLY OF HOMA BAY.....2ND RESPONDENT

HOMA BAY COUNTY GOVERNMENT PUBLIC SERVICE BOARD.....3RD RESPONDENT

HOMA BAY COUNTY GOVERNMENT.....4TH RESPONDENT

J U D G M E N T

1. This is a simple claim brought by way of constitutional petition to resist a transfer of Petitioners from the County Assembly of Homa Bay to the services of Executive Arm of the Homa Bay County Government on secondment.
2. The Transfer was done by the 3rd Respondent the Homa Bay County Public Service Board vide letter dated 3rd January, 2018 attached to the Petition.
3. The Petitioners were appointed vide letter dated 19th May, 2014 in respect of Nancy Anyango Onyango the 1st petitioner and 26th May 2014 in respect of the other Petitioners. The appointments were to various positions being, Senior Internal Auditor for 1st Petitioner, Senior Human Resource Officer in respect of the 2nd Petitioner. Senior Fiscal Analyst/Budget Officer for 2nd petitioner, Assistant Hansard Editor in respect of 4th Petitioner and Accountant II in respect of 5th Petitioner.
4. The secondments done on 3rd January 2018 were for a period of three (3) years renewable to the County Executive.
5. The officers were required to report to the County Director, Human Resource Management for assignment of duties and hand over their offices on the said date.
6. The letters of transfer are similar in every respect and do not provide the reason for the transfers by the County Assembly Clerk on behalf of the Homa Bay County Assembly.
7. The Petitioners are aggrieved by the transfers stating that they were arbitrary and in breach of the governing statutes.
8. That the Petitioners had worked and headed their various departments diligently as employees of the 2nd Respondent until the 1st and 2nd

Respondents forcefully ejected them from their offices on the 5th January, 2018.

9. That this followed election of the Petitioners as new staff welfare Association officials and the clerk and secretary of 1st Respondent directed the Equity Bank not to effect change of signatories to the welfare accounts and Petitioners and other employees sought redress in court.

10. The Petitioners state that the meeting of the County Assembly Public Service Board that decided on the transfer of the Petitioners was irregular as no minutes are attached to the letters and the speaker had not yet tabled motion of election of majority and Ministry leaders.

11. That guidelines on secondment of employees in the Public Service require approval of the employees to be seconded and no formal request to the Petitioners was made. That the Petitioners who are permanent and pensionable employees stand to lose their benefits as the terms of new engagement have not been communicated to them.

12. That the action by the Respondents violate provisions of the constitution not stated specifically in the body of the petition and section 73 (1) (4) and (5) of the County Government Act, Guidelines on secondment in the public service and section 3.3.5(g) of the National Treasury Guidelines.

13. The Petitioners conclude that due process having not been followed, the secondments were unlawful null and void and the court to declare the same a such and grant executive order of certiorari to quash the orders and direct reinstatement of the Petitioners to their respective positions, inter alia.

Response

14. The 1st and 2nd Respondents filed response to the Petition on 16th February, 2018 in which they deny that the secondment of the Petitioners was malicious and state that it was not at all linked to the election of staff welfare association officers. They too deny that the clerk and secretary to the 1st and 2nd Respondent directed the bank not to change signatories to the account. The Respondents admit that the Petitioners filed a case in court to allow them access the Staff Welfare Association Accounts and the court allowed them access to the account and the result was massive defalcation of the said account.

15. The Respondents state that the 1st Respondent has quorum to conduct its business in terms of section 12(1)(3) of the County Government Act.

16. The 1st and 2nd Respondents aver that the decision to transfer the Petitioners was reached upon request by the office of the 3rd Respondent to Homa Bay County Public Service Board. The Board of 1st Respondent considered the request at a meeting and approved the same. That minutes of that meeting are available.

17. The 1st and 2nd Respondents deny that the Petitioners stand to lose their benefits. That the new role of the Petitioners will be communicated by the County Government, the 4th Respondent.

18. The 1st and 2nd Respondents also deny that the Petitioners were heads of departments. The purported violation of National Treasury guidelines on secondment are denied and the Petitioners put to strict proof thereof. Violation of constitutional rights of the Petitioners is equally denied and they are also put to strict proof thereof.

19. The Petitioners state due process was fully followed in the transfer of the Petitioners.

20. The 1st and 2nd Respondents pray that the Petition be dismissed with costs.

21. The advocates for the Petitioners recorded a consent in court on 9th February, 2018 in terms of which the application dated 18th January, 2018 seeking interim orders was dispensed with.

22. The parties agreed that the status quo be maintained which is to say that the Petitioners continue to report at the offices of the Homa Bay County Assembly Service Board pending the outcome of the Petition.

23. That the Petitioners receive the salaries from December, 2017 going forward. That the Petitioner to report to the offices they were transferred to by the letter dated 3rd January, 2018.

24. The Petition was then to be disposed of by way of written submissions.

25. The Petitioners filed written submissions on 7th March, 2018 and the 1st and 2nd Respondents' filed on 27th March, 2018.

Determination

26. The issues for determination are as follows:-

- i. Were the transfers/secondment of the Petitioners from the service of the County Assembly to that of the County Executive lawful?

ii. Were any rights of the Petitioners violated by the Respondents?

iii. What reliefs if any are the Petitioners entitled to?

Issue (i) & (ii)

27. The court will deal with issues (i) and (ii) together. From the outset, the court notes that the Petitioners set out in part 'B' of the Petition many articles of the constitution without specifying how the same are related to the suit before court.

28. In part 'C' of the Petition titled '**The Facts of the Petition**' the Petitioners did not demonstrate how any of the said constitutional provisions were violated by the Respondents. Indeed the constitutional provisions are not cited at all, let alone an explanation made as to how the provisions were violated.

29. The Petitioners appear to rely only on violation of section 73(1) (4) and (5) of the County Government Act, Guidelines on secondment in the public service and section 3.3.5 (g) of the National Treasury guidelines. Again these provisions are only mentioned in passing without specifying in what respects these provisions were violated.

30. In part 'D' of the petition, titled '**violations of the Petitioners**' constitutional rights and fundamental freedoms, not a single provision of the constitution is cited and no mention at all is made in which respect the constitution was violated.

31. The Petitioners then closed, the Petition with prayers, seeking declarations that the Petitioners violated guidelines of secondment in Public Service, Treasury guidelines and Articles 10, 41 and 236 of the constitution and that an order of certiorari be issued quashing the transfer on the basis that they contravened sections 75(1), (4) and (5) of the County Government Act, 2012 as read with Articles 47 and 236 of the constitution as well as section 4, 5, 15 and 16 of the Employment Act. That the Petitioners be reinstated without loss of salary or benefits and they be compensated for the said violations.

32. As was stated in Anarita Karimi case, A Petitioner who wishes to succeed must state with precision the specific constitutional provisions that have been violated and the manner of alleged violation. In the present case, the Petitioners have flatly failed to cite with precision the manner in which specific provisions of the constitution of Kenya 2010 have been violated or how their constitutional rights have been threatened or violated by the Respondents. Just like in any Civil matter, a petitioner in a constitutional petition has the primary onus of proving their case on a balance of probabilities in terms of sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya.

33. Notwithstanding filing of a constitutional petition, the Petitioners fell back to alleged violation of section 73(1) (4) and (5) of the County Government Act.

34. The provisions of section 73(1) (4) & (5) provides:-

“(4) The County Public Service Board shall not allow a Public Officer to proceed on secondment if it is not in the interest of the Public Officer or the concerned County Public Service.

(5) The County Public Service Board making a decision on secondment shall not allow the secondment unless it has considered the representations by the concerned authorized officer or head of department.”

35. With respect to the Petitioners, they were appointed by the County Assembly Public Service Board whose chairperson is the speaker and the clerk its secretary in terms of section 12(7) (a) of the County Government Act.

36. Deployment of a Public officer serving a County assembly to the County Executive is not a normal transfer but a secondment and falls within the provisions of section 73 of the Act.

37. Section 73(4) provides that the interest of the public officer is to be taken into account before the board seconds the officer. Establishing of the interest of the Public Officer implies that the opinion of the officer is to be sought and taken into account together with the interest of the concerned county public service.

38. The Board in making that decision in terms of sub-section (5) is to seek representations from the concerned authorized officer, which in this case, is the speaker of the County Assembly or the head of the specific department.

39. In the present case, it would appear that the decision was made by the Board chaired by the authorizing officer of the assembly and the clerk of the Assembly. The two are the heads of County Public Service Staff. The two found it in the interest of the County Assembly to second the Petitioners to the County Executive for a period of three years. The secondment was sanctioned by the Executive which received the seconded officers and are willing to deploy them in the executive and give them their respective roles.

40. To this extend, the interests of the Petitioners appear not to be in jeopardy unless and until the County Executive reneges from its obligation to receive them, which has not been proved to be the case.

41. Accordingly, the Petitioners, who have already reported to their new offices have failed to prove that they have been treated unfairly nor have they proved that their right to fair labour practice and administrative action have been threatened or violated.

42. The County Executive is obliged to finalize its end of the bargain by properly deploying the Petitioners to appropriate and relevant

offices without loss of status, salary or benefits. This is the finding by the court.

Issue (iii)

43. What reliefs commend themselves to the court given the finding and observation by the court? The court upon taking all circumstances into account enters judgment in favour of the Respondents as against the Petitioners as follows:-

a. The Petition lacks merit and is dismissed with no orders as to costs.

b. The 4th Respondent is directed to receive the Petitioners, and provide them appropriate and relevant offices with effect from 3rd January, 2018 without loss of status, salary or benefits.

Dated and Signed in Kisumu this 6th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Mr. Obach for Petitioners

Mr. Siganga for 1st and 2nd Respondent

Chrispo – Court Clerk