



**REPUBLIC OF KENYA**

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

**PETITION NO 134 OF 2016**

**IN THE MATTER OF THE UNPROCEDURAL APPOINTMENT AND PROMOTION OF  
PUBLIC HEALTH OFFICERS AT NAIROBI CITY COUNTY GOVERNMENT BY THE  
CHIEF OFFICER-HEALTH SERVICES**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLES 10,19,20,21,22,23,27,30,41,174,175(a),(b),176,236 AND 258(1)  
OF THE CONSTITUTION OF KENYA,2010 AND**

**IN THE MATTER OF THE EMPLOYMENT ACT**

**BETWEEN**

**THE ASSOCIATION OF PUBLIC HEALTH OFFICERS OF KENYA.....  
.....PETITIONER**

**AND**

**NAIROBI CITY CHIEF OFFICER-HEALTH SERVICES.....1<sup>ST</sup>  
RESPONDENT**

**NAIROBI CITY COUNTY SECRETARY.....2<sup>ND</sup>  
RESPONDENT**

**NAIROBI CITY COUNTY PUBLIC SERVICE BOARD.....3<sup>RD</sup>  
RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT.....4<sup>TH</sup>  
RESPONDENT**

**JUDGMENT**

**Introduction**

1. This Petition is brought by the Association of Public Health Officers of Kenya on behalf of its members. The 1<sup>st</sup> Respondent is the Chief Officer - Health Services, Nairobi City County. The 2<sup>nd</sup> Respondent is the County Secretary and the Head of the County Public Service Board. The 3<sup>rd</sup>

Respondent is the County Public Service Board, a body corporate vested with powers relating to staff of the Nairobi City County Government. The 4<sup>th</sup> Respondent is the Nairobi City County Government established under the 1<sup>st</sup> Schedule of the Constitution of Kenya, 2010.

2. The matter first came to Court by way of Notice of Motion under certificate of urgency on 1<sup>st</sup> November 2016 when my brother **Abuodha J** granted interim orders staying a posting order dated 13<sup>th</sup> October 2016. However at the *inter partes* hearing of the application on 15<sup>th</sup> November 2016, the parties chose to abandon the application and proceed with the main Petition. I therefore gave directions for filing of submissions on the Petition.

### **The Petition**

3. The Petitioner states that the posting order dated 13<sup>th</sup> October 2016 circulated to Nairobi City County Public Health workers is unconstitutional on the ground that the 1<sup>st</sup> Respondent acted *ultra vires* by unilaterally promoting some County Public Health Officers in flagrant disregard of the Constitution and the law.

4. According to the Petitioner, the promotions effected by the posting order dated 13<sup>th</sup> October 2016 fly in the face of the principle of fair competition and merit. The Petitioner asserts that the manner in which the appointments have been effected by the 1<sup>st</sup> Respondent has locked out qualified officers. The Petitioner avers that there is evidence of canvassing and favouritism in the appointments.

5. The Petitioner further states that the action by the Respondents amount to unfair labour practices and is an affront to Articles 41,47 and 236 of the Constitution of Kenya.

6. The Petitioner seeks the following prayers:

- a) A declaration that the 1<sup>st</sup> Respondent has no power to make unprocedural appointments as communicated by letter dated 13<sup>th</sup> October 2016;
- b) A declaration that the posting order dated 13<sup>th</sup> October 2016 was in violation of Articles 10,30,41 and 232 of the Constitution of Kenya, 2010;
- c) A declaration that the Respondents have failed to uphold the Constitution in their administrative functions;
- d) An order of certiorari to quash the posting order dated 13<sup>th</sup> October 2016;
- e) An order of mandamus to compel the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to conduct a proper appointment and/or promotion exercise upholding the values espoused in the Constitution, the law and existing scheme of service;
- f) Compensation for violation of the Petitioner's rights and fundamental freedoms;
- g) An order restraining the Respondents from demoting or in any other way victimizing the Petitioner's members; h) Costs of the Petition.

### **The Respondents' Reply**

7. The Respondents' response is contained in a replying affidavit sworn by the County Secretary of the Nairobi City County Government, Dr. Robert Ayisi on 11<sup>th</sup> November 2016. He states that Section 72(1) of the County Governments Act vests upon a County Chief Officer the power to re-deploy a public officer within the Department. The 1<sup>st</sup> Respondent was therefore within the law to issue the posting order dated

13<sup>th</sup> October 2016.

8. Dr. Ayisi further states that under Section 86 of the County Governments Act, the County Public Service Board may delegate any of its functions to any person, including the County Secretary and a County Chief Officer. Pursuant to this provision, the Nairobi County Public Service Board had delegated part of its functions to the County Human Resource Management Advisory Committee.

9. It is further deponed that the County Executive had received complaints from members of the public on deteriorating health services in the County. As a result of these complaints, the County Executive made a decision to restructure the Department with a view to enhancing service delivery to the people of Nairobi.

10. Dr. Ayisi goes on to state that it was on the strength of this decision and the desire to enhance service delivery that the Chief Officer, Health made interim internal postings within his Department by issuing the notice that is the subject of these proceedings.

11. He adds that any person aggrieved by the decision of a Chief Officer has a right of appeal to the County Human Resource Management Advisory Committee and that the Petitioner had come to Court without exhausting the internal administrative mechanisms that have been put in place to address and resolve any complaints that may arise from the actions of a Chief Officer.

12. The Respondents contend that by the internal deployment, no officer has been demoted, promoted or in any way confirmed to these positions since the deployed officers have retained their respective Job Groups.

13. In this regard, Dr. Ayisi confirms that the deployments complained of are on a temporary and interim basis and are meant to enhance service delivery to the people of Nairobi. Filling of the vacancies would be done competitively and would take into account the scheme of service.

### **Findings and Determination**

14. From the pleadings and submissions filed by the parties, the following issues have emerged for determination by the Court:

- a) Whether the posting order issued by the 1<sup>st</sup> Respondent on 13<sup>th</sup> October 2016 was in violation of the Constitution and the law;
- b) Whether the Petitioner has come to Court prematurely;
- c) Whether the Petitioner is entitled to the remedies sought.

### **The Posting Order**

15. The posting order dated 13<sup>th</sup> October 2016 which is the subject matter of this Petition states as follows:

*“All concerned*

### **RE: POSTING ORDER**

*The following postings have been discussed, agreed upon and should take immediate effect*

1. *Kenneth Maina Mando 2006000820 Deputy Chief Public Health Public Health Officer NCD Unit-County Director of Health*

2. *Jairus Musumba 1988075241 SPHO Interim County Chief Public Health Officer*

3. *Wilson Langat 1985056531 SPHO Deputy County Chief Public Health Officer*

4. *Jared Ochieng 1984061525 SPHO Deputy County Chief Public Health Officer*

**DR. S. OCHOLA**

**AG. CHIEF OFFICER HEALTH SERVICES”**

16. In its submissions filed on 23<sup>rd</sup> November 2016, the Petitioner made reference to the decision in ***Robert Muriithi Ndegwa v Minister for Tourism [2012] eKLR*** where the learned Judge cited the principles of public service as set out in Article 232 of the Constitution which include fair competition and merit as the basis of appointments and promotions.

17. The Court was also referred to Section 64(1) of the County Governments Act which provides that a person shall not be appointed to act in a public office for which they are not qualified as well as the Collective Bargaining Agreement between the 1<sup>st</sup> Respondent and the Kenya County Government Workers Union which provides that an officer can only act in the immediate higher position.

18. On their part, the Respondents submit that in issuing the impugned posting order, they relied on Section 72(1) of the County Governments Act which empowers a County Chief Officer to make deployment within the respective Department. In this regard and in response to public complaints on poor service delivery, the Department of Health had been split into two segments being; Curative and Preventive Services.

19. The question the Court must ask is whether the appointments made by the posting order dated 13<sup>th</sup> October 2016 were departmental deployments as contemplated under Section 72(1) of the County Governments Act.

20. In the replying affidavit sworn by the County Secretary, Dr. Robert Ayisi it is deponed that the appointments in issue are on a temporary and interim basis. However, from the face of the interim order itself, it appears that only the appointment of Jairus Musumba to the position of County Chief Public Health Officer is on an interim basis.

21. Further, from the evidence on record it seems to me that these positions are new within the 4<sup>th</sup> Respondent's establishment. I do not think that appointments to such new positions can be said to be departmental deployments falling within the mandate of the Chief Officer under Section 72(1) of the County Governments Act.

22. The Applicant's complaint is that the effect of these appointments has been to bypass senior officers in favour of their juniors. The Applicant even contends that some of the persons appointed do not qualify for the positions to which they have been appointed.

23. It is my view that although the County Human Resource Management Advisory Committee and the Chief Officer, Health Services may have had good intentions to address genuine shortcomings in the Health Services Department, they not only overstepped their mandate but also breached the principles of fair competition and merit required of every public institution. It would also appear that the County Public Service Board which is has the responsibility for human resource management issues in the County either abdicated its responsibility or was outmaneuvered.

**Premature Petition?**

24. Before giving the final disposition in this Petition I need to answer the question whether the Petitioner rushed to Court without exhausting the internal grievance handing mechanisms within the County Government. On this account the Respondents state that the Petitioner ought to have first lodged its complaint with the County Government Human Resource Management Advisory Committee before

coming to Court.

25. This Court agrees with the holding in *James Tinai Murete & others v County Government of Kajiado & 22 others [2015] eKLR* to the effect that the internal dispute resolution mechanisms provided for County Government should be affirmed and in appropriate cases the Court will decline to assume jurisdiction until such mechanisms are exhausted.

26. Nevertheless where the internal organs provided for dispute resolution are themselves involved in violating the law, then the Court being the bastion of justice must intervene. In this regard I am persuaded by the decision in *Geoffrey Mworio v Water Resources Management Authority and 2 others (K) [2015] eKLR* where it was held that the Court will intervene in cases where it can be shown that the internal dispute procedure is incapable of delivering a just verdict.

### **Disposition**

27. In their final submissions, the Respondents hazard the argument that this Court has no jurisdiction to grant the prayers sought. I will say two things on this; first the limitation of the jurisdiction of the Employment and Labour Relations Court is on the subject matter of the case not the remedies prayed for. Second, the suggestion that judicial review remedies cannot be granted in a constitutional petition belongs to yesteryears and cannot withstand the constitutional glare of our time.

28. In light of the foregoing I proceed to quash the posting order dated 13<sup>th</sup> October 2016 and revoke all the ensuing appointments.

29. The Respondents are at liberty to fill the positions in issue in accordance with the law and existing scheme of service

30. I award costs to the Petitioner.

31. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Odhiambo for the Petitioner

Mr. Otieno for the Respondents