



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.132 OF 2016

JOHN KURIA KANYINGI.....1ST PETITIONER

JOHN GITHINJI2ND PETITIONER

VERSUS

NATIONAL TRANSPORT AND

SAFETY AUTHORITY.....1ST RESPONDENT

MINISTRY OF TRANSPORT, INFRASTRUCTURE

HOUSING & URBAN DEVELOPMENT...2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The Petitioners by application and Notice of Motion dated 27th October, 20116 and brought under the provisions of Article 25, 41, 43, 47 and 50 of the constitution, section 41, 43, 45, 47 and 49 of the Employment Act and seeking for orders that;

Pending the hearing and final determination of the Claimant herein a preservative order do issue against the Respondent directing it to reinstate, reintegrate and or accept the claimants [petitioners] into their craft or trade as motor vehicle inspectors.

Pending the hearing and determination of the claim he court do grant an order of reinstating the claimants to the position they occupied before they were released to the 2nd respondent.

A conservatory order do issue against the 2nd Respondent directing it to gazette the claimants as motor vehicle inspector in the Kenya gazette.

2. The application is support by the affidavits of the Petitioners and on the grounds that the Respondents have acted in an arbitrary manner and reassigned the petitioners' duties which they are not rained for and which their expertise and skills will not be utilised and amounts to misallocation of human resource and which shall cost the tax payer. Such reassignment and reallocation is discriminatory and capricious which amounts to being unlawful and unconstitutional.

3. By reasons of the action of the Respondent the Petitioners have suffered extreme agony and hardship

due to the attendant uncertainties. The Petitioners have suffered loss of legitimate expectation that they will practice their craft and acquire promotion through incremental credits and upward mobility in their chosen area of expertise. The decision to reassign or allocate the Petitioners with new duties without training is discriminatory in that their colleagues allocated duties commonly done by the Petitioner is in violation of the constitution an fair administrative action and such amount to taking adverse action without due process..

4. In his affidavit, the 1st Petitioner avers that he has been a government employee for over 30 years and been involved in motor vehicle inspections certification and tendering evidence in courts on matters touching on motor vehicle accidents. For one to perform such duties, one has to be gazetted by the Ministry in charge of transport under section 3(3) of the Traffic Act.

5. Before enactment of the National Safety Authority Act, the Petitioners worked in the Motor Inspection Department of the 2nd respondent. After the enactment in 2012, the functions of motor vehicle inspection caused the transfer of the Petitioner tot eh 1st Respondent where he has served diligently and been promoted as Mechanic Grade 1 in 1989 to Superintendent Mechanical Job Group K. the Petitioner was released from the Ministry to the 1st Respondent to undertake the duties of motor vehicle inspection.

6. By Gazette Notice dated 27th September, 2013 the Petitioner was de-gazetted by the Minister without any lawful reasons and without notice. The minister reversed the same by Gazette Notice No.1468 of 6th March 2015.

7. By a letter dated 5th April, 2015 the Petitioner was released from the Ministry of Transport and Infrastructure to the motor Vehicle Inspection Unit of the 1st respondent. By letter dated 23rd July, 2015 the 1st Respondent released the Petitioner back to the 2nd Respondent on the basis that he was not among the 49 officers who had been seconded to the 1st Respondent from the 2nd respondent. This position was not correct as the Petitioner was among the person listed by the notice of the 2nd respondent. The 1st Respondent went ahead to take another officer to replace the Petitioner and caused to be published in **Gazette Notice No.943** of 19th February, 2016 which name was not part of **Gazette Notice No.1468** of 6th February, 2015. The exclusion of the Petitioner was not procedural and was unprocedural and unlawful and contrary to letter of deployment and **Gazette Notice No.146** of 6th February, 2015.

8. By letter dated 1st August, 2016 the 2nd Respondent deployed the Petitioner to the chief mechanical and transport engineer. This was in violation of the petitioner's legitimate expectation that he would practice his craft based on his training. As a gazetted officer he had definite career progression based on length of service and the action of the Respondents exposes him to stunted growth in the area of expertise and shall suffer loss of promotion and career enhancement.

9. The 2nd Petitioner also avers that he has worked for the government for the last 30 years and his duties involved motor vehicle inspections certification and tendering evidence in court on any matters touching on motor vehicle accidents. For one to undertaken such duties, the minister has to gazette him under section 3(3) of the Traffic Act. Before the enactment of the Motor Vehicle Inspection the Petitioner was transferred to the NTSA and the functions of motor vehicle inspection also were transferred to NTSA.

10. The claimants have served under the Ministry and NTSA rising through the ranks to Mechanic Grade 1 to a Superintendent Mechanical Job Group K. upon the formation of NTSA he was released by the Ministry to serve under the NTSA. By Gazette Notice of 27th September, 2013 the Petitioner was de-gazetted by the minister without any reasonable cause or notice. This was reversed vide Gazette Notice No.1468 of 6th March, 2015 as a Motor Vehicle Inspector for a period of one year from 1st January, 2015.

11. By letter dated 5th April, 2015 the Petitioner was released from the ministry to NTSA.

12. By letter dated 23rd July, 2015 the NTSA released the Petitioner back to the Ministry on the basis that

he was not among the 29 officers who had been seconded to the NTSA from the Ministry.

13. By letter dated 23rd July, 2015 the information therein was erroneous as the Petitioner was one of the seconded to the NTSA by the Minister and was gazetted as and Motor Vehicle Inspector. The NTSA took another officer and did a gazette Notice to replace the petitioner. The exclusion of the Petitioner was not procedural and was in violation of his legitimate expectation that he would practice his trade for which he was trained to undertake for the government. Unless the orders sought are issued he stands to suffer loss and damage.

14. The 1st Respondent filed **Replying Affidavit sworn by Francis Meja**, the Director General. He avers that the NTSA is a state corporation established pursuant to NTSA Act, 2012 and with the mandate to advise and make recommendations to the Cabinet Secretary on matters relating to road transport safety, implement policy relating to road transport and safety and conduct motor vehicle inspections and certification.

15. Before the amendment of section 3(3) of the Traffic Act as contained in section 62(b) of the NTSA Act, it was a requirement that for once to become a motor vehicle inspector the person had to be gazetted. Following the amendment, the requirement was dispensed with.

16. Following this amendment, Gazette Notices dated 27th September, 2013 and 6th March, 2015 and the basis of the petitioners' application and petition have no legal effect as they are made with regard to a non-existent provision of the Traffic Act.

17. By virtue of section 19 of the NTSA Act, the NTSA has power to employ its own motor vehicle inspectors which function was previously with the Minister. As the NTSA had no inspectors before, by letter dated 2nd June, 2015 it requested the Minister for secondment of officers as it organised of own recruitment. By letter dated 15th July, 2015 the Minister seconded 49 officers for a period of 2 years. The Petitioners were not part of the 49 officers on secondment. The Petitioner were directed vide letter dated 23rd July, 2015 to report to the Chief Mechanical & Transport Engineers as they were not among officers on the list of seconded officers.

18. Mr Meja also avers that the Petitioners have no prima facie case to warrant the orders sought. They have misled the court that they had been seconded to the NTSA which is not true. The prayers of reinstatement cannot issue in the interim as this is a substantive remedy. The Petitioners have not demonstrated what damage and loss they stand to suffer and which cannot be compensated by way of damages if the orders are not issued. The application should be dismissed.

19. In reply, the 3rd Respondent filed **Grounds of Opposition** and avers that the application and petition are without merit and should be dismissed, there are no constitutional issues raised to warrant the filing of the petition. The Petitioners have not demonstrated a prima facie case to warrant the grant of the orders sought.

20. The Petitioners and 1st Respondent filed written submissions.

21. The Rules of the Court, Employment and Labour Relations Court (Procedure) Rules allow a party to move the court by way of petition, judicial review application or by a Memorandum of Claim. The orders sought in whichever mode of commencing suit is made are what is relevant. On the Grounds filed by the 3rd respondent, the petition as it stand and the Notice of Motion therein is well before this court. The merits of the Petition shall not be gone into at this instance.

22. The substratum of the Petitioners' application is whether pending hearing of the petition a conservatory order should issue against the Respondent to reinstate, reintegrate and or accept them into their craft and trade as motor vehicle inspectors and whether the 2nd Respondent should gazette the Petitioners as motor vehicle inspectors.

23. First, the requirement to gazette motor vehicle inspector to serve under the NTSA is dealt with under NTSA Act which allow the Authority to hire its own staff. Such staff are to be appointed as is necessary for the proper and efficient discharge of the functions of the 1st Respondent Authority.

24. The NTSA Act also saw the amendment of various parts and provisions of the Traffic Act. Section 62 of the NTSA Act provides that;

62. Amendment to Cap. 403

(a) The Traffic Act (Cap. 403) is amended ...

...

(b) by deleting section 3 and substituting therefor the following new section—

(1) The Authority shall be responsible for the registration and licensing of motor vehicles and trailers and for the licensing of drivers, and for the keeping of such records in relation thereto as are required by this Act.

(2) The Authority shall appoint such licensing officers as may be necessary for the carrying out of the provisions of this Act.

25. The deleted parts of the Traffic Act as above and relating to section 3 thereof, read as follows;

(3) The Minister shall, by notice in the Gazette, appoint –

(a) a certifying officer, who shall perform such duties under this Act and any rules made thereunder in relation to the examination of vehicles as the Minister may direct, and for the purpose of performing such duties the certifying officer shall have and may exercise the powers of an inspector under this Act; and

(b) such inspectors and driving test examiners as may be necessary for carrying out the provisions of this Act.

26. By dint of NTSA Act section 19 and 62 read together, the provisions of section 3 of the Traffic Act at section 3 thus amended the hiring of NTSA staff and the functions of such officers became the mandate of the NTSA.

27. The Petitioners case is that they were seconded to the NTSA by the Minister and gazetted as Motor Vehicle Inspectors and have undertaken their duties as such and have legitimate expectation that they should serve as such so as to put their training in this industry into good use. The Petitioners also admit they started as employee of the Ministry before the release to the NTSA. The NTSA has since released the Petitioners back to the Ministry.

28. The NTSA Act became operational as of 1st December, 2012.

29. The Petitioners were gazetted as Motor Vehicle Inspectors vide Gazette Notice of 27th September, 2013.

30. The Minister also published Gazette Notice No.1468 on 6th March, 2015 with regard to Motor Vehicle Inspectors. Such appointments which included the Petitioners was for one (1) year.

31. This Gazette Notice is followed by letter dated 5th April, 2015 from the Chief Mechanical and Transport Engineer, Ministry of Transport and Infrastructure which direct the 1st Petitioner to;

RELEASE

Following your gazettelement as Motor Vehicle Inspector ... by the Cabinet Secretary ..., you are hereby released to Motor Vehicle Inspection, Nairobi.

Therefore, you are asked to hand over your duties And report to the Director Motor Vehicle Inspection for further instruction.

32. By letter dated 23rd July, 2015, the 1st Respondent wrote to the 1st Petitioner reiterating what the minister representative had communicated.

33. By letter dated 1st August, 2016 the 2nd Respondent deployed the petitioners.

34. The Petitioners remain in the employment of the government under the 2nd respondent. they have not lost employment. They are Superintendent Mechanical and Chief Superintendent Mechanical respectively.

35. By seeking for an order to be reinstated, reintegrated or be accepted into their trade as Motor Vehicle Inspectors is to lose sight of the fact that they are senior members in government serving in distinct and specific duties/roles as Superintendent Mechanical and Chief Superintendent Mechanical. The Petitioners have not lost employment so as to seek reinstatement. The Petitioners seek reintegration which is secured by being deployed back to the 2nd respondent. as senior officers in government, the Petitioners are already accepted into their craft and trade. See **Paul Nyadewo Onyangoh versus Parliamentary Service Commission and Clerk of the Senate and the Secretary, Parliamentary Service Commission, Cause No.2292 of 2016** where the court held that;

The remedy of reinstatement or re-engagement is available under section 49 of the Employment Act upon the Court hearing both parties on the merits of each case. Such remedies are available to put back an employee in a position that he ought to have been and remained so as to effectively address any unfair labour practice.

36. At this instance and noting the matters set out in the Petition, I find no good case to order for a reinstatement; reintegration or acceptance of the Petitioners by the 1st Respondent in a specific roe as Motor Vehicle Inspectors. Their employment is secured with the 2nd respondent.

Application dated 27th October, 2016 is hereby dismissed. The Respondents shall reply to the Petition and parties be allocated a hearing date from the registry. Costs in the Petition.

Delivered in open court and dated this 29th day of June, 2017.

M. MBARU

JUDGE

In the presence of:

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