



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

PETITION NO. 8 OF 2017

SIMEON KIPROTICH LANGAT.....PETITIONER

VERSUS

KENYA PORTS AUTHORITY .....RESPONDENT

THE COMMISSION ON THE

ADMINISTRATION OF JUSTICE (OFFICE

OF THE OMBUDSMAN).....INTERESTED PARTY

R U L I N G

INTRODUCTION

1. The application before me is the Notice of Motion dated 18/5/2017. It is brought under rule 4,3,19 and 23 of the Constitution of Kenya (Protection of Rights and Fundamentals Freedoms) Practice and Procedure Rules 2013 and all the other enabling provisions of the law. It seeks the following orders:

(a) That pending the hearing of this instant application *inter partes*, the honourable court do issue a temporary injunction restraining the respondent either by himself through his agents and/or servants from recalling/redeploying/releasing the petitioner from the Department of Security to any other Department of the respondent.

(b) That in the alternative pending the hearing of the application *inter partes* the honourable court do issue conservatory order restraining the respondent either by himself through his agents and/or servants from recalling/redeploying/releasing the petitioner from the department of Security to any other Department of the respondent.

(c) That pending the hearing of this application *inter partes*, the honourable court do issue a conservatory order restraining and/or preventing the respondent either by itself or through its agents and/or servants from withholding any payments and/or allocations properly due and owing and/or payable to the petitioner.

(d) That pending the hearing and final determination of the Constitutional Petition filed herein, this court do issue conservatory order restraining and/or prerogative of prohibition do issue restraining the respondent either by himself through his agents and/or servants from recalling/redeploying/releasing the petitioner from the department of Security to any other

Department of the respondent.

(e) That pending the hearing and determination of the Constitutional Petition filed herein this honourable court do issue a conservatory order restraining and/or preventing the respondent either by itself or through its agents and/or servants from withholding any payments and/or allocations properly due and owing and/or payable to the petitioner.

2. The motion is supported by the affidavits sworn by the petitioner on 18.6.2017 and 9.6.2017. The respondent has however opposed the motion through the replying affidavit and further affidavit worn by Mr. Boaz Ouko on 19/6/2017. The interested party never filed any response to the motion but opted to file written submissions in support of the motion after the parties agreed to dispose of the motion by written submissions.

### **APPLICANT'S CASE**

3. The applicant submitted that he joined the service of the respondent on 4.9.1987 and rose through the ranks to the position of Port Security officer Grade HM3. That during his service, he has undergone training and has acquired alot of experience. On 21.4.2017, without prior notice or consultation, he received the letter dated 18/4/2017 redeploying him from his Security Services Department to the Human Resource Department for no reason at all. On 3.5.2017, he received another letter titled "TRANSFER OF THE SECURITY SERVICES DEPARTMENT" informing him that the respondent's Board had approved the restructuring of the Security services and translation of the staff. The said letter also informed him that the board had approved his transfer out of the security department as part of the ongoing departmental reform because he had integrity issues recorded against him. The letter also directed him to report to the Principal Safety officer who was to submit his performance report after six months. He faulted the action by the employer because he was not consulted before the redeployment as required under Section 10(5) of the Employment Act.

4. The claimant further contends that he has never sought employment in the HR Department of the respondent or any other but in the Security Services Department where he has acquired wide experience and specialized training at the expense of the employer. That although initially he got letter dated 18/4/2012 transferring him to the HR Department, on 3/5/2017, he received yet another letter directing him to the principal Safety Officer in the Safety Branch.

5. In view of the foregoing matters, the applicant submits that the said redeployment/transfer to a different department from the department where he was appointed to serve is unfair, unlawful and an affront to his rights to fair Administrative Action, fair hearing and fair Labour practice as enshrined under Article 41, 47 and 50 of the Constitution. According to him the transfer smacks of malice, bad faith, unfair labour practice and discriminatory intended to create vacancy for new recruits to replace him discreetly. He therefore prayed for the conservatory orders to issue as prayed pending the hearing and determination of his Petition. In his view he had made out a prima facie case with probability of success by demonstrating that he was never consulted before the said redeployment/ transfer. He relied on this court's decision in ***Severine Luyali vs The Ministry of Foreign Affairs and International Trade & 2 others [2014] eKLR*** to support his case.

6. The applicant further submitted that if the injunction is denied, he will suffer irreparable harm because he has invested in training for over 30 years as a security officer and the deployment/ transfer will curtail his career parogression. Finally he submitted that the balance of convenience favours him because if the order is denied, new persons will be recruited to take over his position which he will not be able to recover if his petition succeeds.

### **RESPONDENT'S CASE**

7. The respondent submitted that the Applicant has not met the principles for granting interlocutory injunction as enunciated in the ***Giella vs Caseman Brown case [1973] E.A 358*** which was cited with approval the Court of Appeal decision in ***Mrao ltd vs First American Bank of Kenya ltd & 2 others***

[2003]KLR 125. to wit:

- a) the applicant has established a prima facie case with probability of success.
- b) The applicant has demonstrated that he will suffer irreparable loss that cannot be adequately compensated by award of damages.
- c) In case of doubt, then the court will decide on a balance of convenience.

8. She submitted that under Section 10(3) (d) of the Employment Act read together with section 13 of the Act, the employer has a right to vary the terms of a contract of employment provided that she notifies the employee of the variation in writing. That the Act and the constitution grants the employer the prerogative to make organizational changes. According to her, the respondent complied with the Section 10(3) (d) of the Act by seeking the redeployment/transfer letters on the applicant and therefore she denied that the applicant's constitutional rights were breached through the action of transfer/redeployment. She relied on this court's decision in **James Sande Amuyeka & 6 others vs Super Foam limited [2015] eKLR** where Mbaru J held that employers can vary, review or change employment contract provided they give reason in writing and provide training where the employees are incapacitated to attend to the new roles. The court went ahead to find that failure by an employee to report to duty on apprehension that he is incapacitated was unfounded and lacking any rationale, basis and merit.

9. On the other hand the respondent submitted that under Clause H.6 of the respondent's Disciplinary Handbook, the applicant ought to have appealed against the transfer and not rush to the court as he did. She urged that the suit is prematurely before the court because it was brought before the claimant fully exhausted the internal dispute resolution mechanisms. She further urged that the Motion is also overtaken by events because the transfer letter took effect immediately it was communicated and before the filing of the suit and obtaining the interim orders. She therefore submitted that the order sought has the effect of reversing the transfer and ordering Specific performance which is highly discouraged under Section 49(4) of the Employment Act except where there exists special circumstances. According to the counsel, the applicant has not demonstrated any special circumstances to warrant the order of specific performance.

10. Turning to the second element for grant of interlocutory injunction, the defence counsel submitted that the applicant will not suffer irreparable harm if the order is denied because he has not lost his rank, benefits and emoluments as a result of the transfer. That even if his suit eventually succeeds, any loss proved during trial, will be determinable and an award of damages will be adequate.

11. Finally, the respondent submitted that the balance of convenience favours the respondent because her statutory and constitutional prerogative to transfer her employees cannot be defeated. She urged the court to uphold its decision in **Petition No.6 of 2017 Ken T Sungu v Kenya Ports Authority** I held that the balance of convenience favoured the employer because she enjoys the managerial prerogative in managing her affairs and her resources.

#### **SUBMISSIONS BY THE INTERESTED PARTY.**

12. The interested party submitted that it is a commission established pursuant to Article 59(4) of the Constitution and the Commission on Administration of Justice Act cap 102A laws of Kenya with mandate to inter alia investigate any conduct in state affairs or any act or omission in the administration in any sphere of government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. It supported the application by the applicant in its entirety and relied on the same authorities cited by the applicant. It submitted that the redeployment/transfer of the applicant from the security department breached the constitutional provisions and section 4(3) of the Fair Administrative Action Act on fair administrative action and as such the applicant has proved a prima facie case. It relied on the definition of prima facie case by the **Mrao case, supra**, that is, evidence of infringement of a right and the probability of success of the applicant's case upon trial. It is therefore its case that the applicants has an arguable case and not a frivolous one

13. On the other hand the interested party submitted that the applicant has acquired competence and satisfaction from his security services job which he has done for over 30 years. It therefore submitted that the transfer/ redeployment to another department will occasion irreparable loss to the applicant because it will curtail his career progression and it is unjust because it will require him to begin another journey of training in his new field of work at his advanced age.

### **ANALYSIS AND DETERMINATION**

14. There is no dispute that the applicant herein applied for the job as a security officer and that he was recruited as such in 1987 and has since then acquired a lot of training and experience in that field. There is also no dispute that the respondent in exercise of her managerial prerogative has transferred or redeployed the claimant from the Security Services Department to the HR department on 18/4/2017. The main issue for determination herein is whether the applicant has met the threshold for granting interlocutory injunction as laid down by the ***Giella vs Caseman Brown*** namely:

- a. Has established a prima facie case with probability of success.
- b. Has demonstrated the likelihood of suffering an irreparable harm if the order is denied.
- c. Has demonstrated that the balance of probability favours him.

### **Prima facie case with probability of success**

15. In the ***Mrao Case***, the court of appeal defined a prima facie case as follows;

***“I would say that in Civil Cases it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

16. To determine whether the claimant has established a prima facie case with probability of success herein the following questions beg for answers in my view:

- a. Whether the employer has legal as well as contractual prerogative to redeploy/ transfer her employees at will.
- b. Whether the transfer of the applicant herein varied the particulars of his contract of employment.
- c. Whether the claimant was entitled to consultation before his redeployment/ transfer to the new department.

### **Employer’s prerogative to redeploy/ transfer her employees**

17. The claimant faults his transfer/redeployment from his security department to a new department because it was done without his consultations as required under Section 10(5) of the Employment Act. Section 10(5) of the Employment Act provides as follows:

***“Where any matter stipulated in subsection (1) changes, the employer shall in consultation with the employee, revise the contract to reflect the change and notify the employee of the changes in writing.”***

18. The respondent has however contended that she has the prerogative to transfer/redeploy her employees to other departments under Clause B.14 of her HR Manual Section 10 (5) of the Act and the Constitution of Kenya. I have carefully considered the said HR Manual and the law. Clause B.14 partly states as follows:

***“(a) ....***

**(b) Interdepartmental transfer in respect of employees in Grades HM3 and below shall be approved by the GM-HRA.**

**(c) ...**

**(d) Notwithstanding the above provisions, in all cases of inter-departmental transfers, consultations shall be made with their respective Divisional/Department Heads."**

19. The respondent's HR Manual forms part of the contract between the applicant and the respondent. By dint of the excerpt of the HR Manual, the respondent enjoys unfettered prerogative of transferring her staff members from one Division/Department to another. All what is required is that such transfers be preceded by consultations between the respective Divisions, Departmental Heads. Consequently, I find that no contractual right has been breached by the transfer of the claimant from the security services department to HR Department or any other. I agree with the decision by Mbaru J in **James Sande Amuyeka & 6 others vs Super Foam limited [2015] eKLR** when she held as follows:

***"I therefore find, the respondent have the power to transfer their employees and the case of the claimants it was done in a lawful manner and not be arbitrary. The claimants' employment contract could be varied, reviewed or changed on reasons given in writing which was done in this case... I find the existing business needs of the respondent for such changes being to ensure better productivity as good performance as reasonable measures that warrant the effected transfers. Where the claimants were not capacitated to attend to any new role given, the responsibility was on the respondent to ensure training, induction or any other measures that was necessary to support their employees. To refuse to report to duty on the apprehension that the claimants were incapacitated I find to be unfounded and lacking any rationale, basis or merit."***

#### **Whether the transfer varied the contract of employment**

20. In the present case the respondent explained to the claimant the basis upon which he was deployed / transferred out of the security services department by the letter dated 3.5.2017. the letter stated:

**"RE: TRANSFER OF THE SECURITY SERVICES DEPARTMENT**

***The Board at its 327th Regular meeting held on 4th November, 2016 approved the new Security services Structure and the subsequent translation of the staff.***

***The board approved your transfer out of the security services department as part of the ongoing departmental reforms. The transfer has been effected due to integrity issues recorded against you.***

***In view of the foregoing, therefore, you are hereby transferred to Safety Branch to work on the same Grade with immediate effect.***

***It is expected that the Principal Safety Officer will forward a progress report on your performance after six months."***

21. The defence counsel submitted that the applicant has not lost his rank, benefits and emoluments as a result of the transfer. The applicant contended that he was specifically appointed to serve as a security and he has invested in training for over 30 years as a security officer and the deployment/ transfer will curtail his career progression. In addition he interpreted the transfer to amount to a disciplinary action for the alleged integrity issues. After careful consideration of the contents of the foregoing transfer letter by the respondent, I find on a balance of probability that it had the effect of varying the terms of the applicant's contract of service. The reason for the foregoing is that the letter indicated that the board approved the restructuring and subsequent translation of the staff. The second effect of the transfer was condemning the applicant as unfit to serve in the security department on ground that he lacked integrity. The foregoing is

what the applicant termed disciplinary action through transfer.

**Whether the claimant was entitled to consultation before redeployment/ transfer to the new department.**

22. The applicant's case is anchored the provision of section 10(5) of the Employment Act which:

***"Where any matter stipulated in subsection 1 changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing."***

Some of the matters contemplated by subsection (1) include job description, duration of the contract, place and hours of work and remuneration. In this case the applicant has proved on a balance of probability that, some of the said matters stipulated in his contract of service will be changed by dint of the transfer/deployment because the letter states that the Board has approved his translation. I, however leave that for determination at the trial.

23. After careful consideration of the contents of the foregoing letter by the respondent, I do not doubt that the restructuring of the security services department was necessary because it is very sensitive and requires people of high integrity who can be trusted with safety and security of personnel and the respondent's facility. According to the respondent, the applicant had record of indiscipline and lack of integrity for which he had been warned severally and as such his transfer was in the best interest of the organization in transforming the security services department.

24. However the respondent is not above the law and more so section 10(5) of the Employment Act which required that the employer should consult with the employee before varying the matters stipulated in his contract of service and thereafter notify the changes to the employee in writing. In this case the employer has acted arbitrarily by deploying/ transferring the applicant to a new department which has the effect of varying the stipulations of his contract without prior consultations.

25. The matter were made more worse by the disclosure that the transfer was due to integrity issues recorded against the applicant of which he was not accorded hearing to defend himself. If the intention was to penalize the applicant for his misconduct, the contract of service and the law provides the avenues to follow which does not include arbitrary and unilateral deployments/transfers whose effect is to vary the terms of the contract of service. Consequently I find that the applicant has proved a prima facie case as defined by ***Mrao ltd vs. First American Bank of Kenya ltd & 2 others [2003] KLR 125***, that is to say, there exist a right in this case which has apparently been infringed by the respondent and which calls for an explanation or rebuttal from her.

**Irreparable harm**

26. Irreparable harm basically refers to an injury which cannot be adequately compensated by an award of damages. The respondent contended that no irreparable harm has been demonstrated by the applicant. That this being an employment dispute, if the applicant will prove any injury, the same will be determinable and therefore will not suffer irreparable loss. The claimant has deposed in his supporting affidavit that the impugned transfer will extremely prejudice him because his career as a security officer will be prematurely ended and his investment in security related studies will be rendered a waste. In addition the applicant contended that the personal satisfaction and gratification derived from performing the security duties will be taken away from him.

27. After considering the rival submissions by the two parties, I agree with the respondent that the applicant has not demonstrated any irreparable harm. He is still in his job Grade III and his benefits and emoluments are intact. He will also have a chance of career progression in the new department. If any loss will be suffered by the applicant due to the transfer, including loss of value of the experience and knowledge acquired by the applicant through training and long service in the security department and the loss of his personal satisfaction and gratification which he derives from performing security duties, will

be adequately compensated by damages.

### **Balance of convenience**

28. The balance of convenience favours the respondent because who prima facie enjoys managerial prerogative in managing her affairs as well as her resources and she is better placed to be judge matters at the shop floor level than the court. The applicant will not lose his rank, benefits or emoluments. Although the applicant alleges that his transfer was malicious and intended to create vacancy for new recruits, it has been demonstrated by the respondent that the transfer was part of the restructuring exercise cutting across the security services department for the best interest of the organization. The applicant has therefore not proved bad faith on the part of the employer in transferring him and as such the court will not restrain the employer from exercising her lawful mandate in good faith.

29. As a parting shot, I wish to point out that this suit did not need to be brought as a constitutional petition. It is purely an employment dispute founded on contract of service between the applicant and the respondent and could adequately have been resolved under the Employment Act. Like in *Petition No.6 of 2017 Ken T Sungu v Kenya Ports Authority*, I found challenge in trying to determine the application without going to the merits of the main suit because the orders sought by motion are similar to the ones sought in the Petition. Finally, I did not quite clearly understand the interest of the interested party in this suit nor did I benefit from its role in the suit because it never filed any pleadings or affidavits and its submission were on all fours with the applicant's. Whereas the court appreciates the constitutional and statutory mandate bestowed upon the interested party, I find its joinder in this suit a bit novel.

### **DISPOSITION**

30. For the reason that no irreparable loss has been demonstrated by the applicant, and that the balance of convenience is tilted in favour of the respondent, the Notice of Motion dated 18/5/2017 is dismissed. Costs shall be in the cause.

**Dated and delivered at Mombasa this 17<sup>th</sup> November 2017**

**O. N. Makau**

**Judge**