



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**JUDICIAL REVIEW NO. 5 OF 2016**

**(Formerly Judicial Review 202 of 2016 Milimani Law Courts)**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 30<sup>th</sup> June, 2016)**

**REPUBLIC ..... CLAIMANT**

**VERSUS**

**KENYA WILDLIFE SERVICE ..... RESPONDENT**

**AND**

**SIMON MWERI WANYOIKE .....EX PARTE APPLICANT**

**RULING**

1. The Application before Court is the Notice of Motion dated 12<sup>th</sup> May 2016 and filed in Court on 13<sup>th</sup> May 2016. The Motion was filed under Article 23 (3)(f), 41 & 159 (1) of the Constitution, Section 8 & 9 of Law Reform Act, Order 53, Rule 1(2) of the Civil Procedure Rules and all other enabling powers and provisions of law.
2. The Applicant seeks orders:
  1. ***That this Court be pleased to issue an order of Mandamus directed to the Respondent, the Kenya Wildlife Service, restraining the Respondent from unprocedurally and unlawfully transferring the Ex-parte Applicant Simon Mweri Wanyoike from Kenya Wildlife Service Headquarters in Nairobi to Kitale Station.***
  2. ***That this Court be pleased to issue an order of prohibition directed to the Respondent, the CEO Kenya Wildlife Service restraining the Respondent from adopting and/or confirming the transfer of the Applicant from Kenya Wildlife Service Headquarters (Capture Unit) to Kitale Station.***
  3. ***That this Court be pleased to issue an order of certiorari quashing the decision of the Respondent, the Kenya Wildlife Service to transfer the Applicant from Kenya Wildlife Service Headquarters (Capture Unit) to Kitale Station.***
  4. ***That the costs of this application be provided for.***
3. The Application is supported by the statement and verifying affidavit of the Applicant dated 4<sup>th</sup> May 2016 and a supplementary affidavit filed on 27/5/2016.

4. The Applicant avers that he was unprocedually transferred by the Respondent from Nairobi to Kitale and that the Respondent have completely refused/ignored to consider his application for review.
5. The Applicant has deponed that his transfer to Kitale was a consequence to investigations and/or investigations carried by the Respondent's officers which was not made clear to him as there was no basis and/or any *lota* of evidence of criminality allegations imputed against him.
6. The Applicant avers that the transfer was made in disregard to the Respondent's Staff Manual which deals with transfer policy. He cited Section F 2(5) of the said Policy which he says states transfer cannot be used for disciplinary measures. He also states that the Manual details that transfer should be effected in November but in his case this was done in February after he had been interrogated 3 times and the transfer was effected in 3 weeks. He avers he was warned of being sacked if he didn't cooperate.
7. The Application states that a transfer can only be effected after recommendations from Deputy Director (Human Capital) to the Director General but that in his case, the transfer was done by a Clerical officer one Mr. Umuro yet the HR Deputy is one Lynette Muganda.
8. He contends that this move is against Article 41 of the Constitution on fair labour practice and Article 47 on fair administration action and that no reasons were advanced as to why he was transferred in February and not November as is the norm. This he says infringes on Article 35 of Constitution on right to information.
9. He therefore concludes that the transfer was actuated by malice as Respondent had a pre-determined position.
10. He therefore seeks prayers as sought above.
11. The Respondent filed a Replying Affidavit in opposition of the application deponed to by Lynette Muganda dated 17<sup>th</sup> of May 2016.
12. In the affidavit, she states that the Applicant in his letter of appointment, accepted to work in any of the Respondent's branches or stations in Kenya, he accepted his transfer allowance and has already reported to his new station further, he had not lodged an appeal or given reasons as to why he should not be transferred to his new station. She states that if this application is granted, a dangerous precedent will be set as employees will now decide which stations and positions they wish to serve.
13. In their submissions, filed in Court on the 14<sup>th</sup> of June 2016, the Respondent submits that the Court should note that the relationship between the Respondent and the ex-parte Applicant is contractual and is of a private nature and has no statutory underpinning.
14. They refer to Halsbury's Laws of England, Judicial Review, the ambit of Judicial Review (2) persons against whom Judicial Review may lie (volume 61(201) 5<sup>th</sup> Edition Paragraph 604:

***“Decisions of bodies whose authority is derived solely from contract or from the consent of the parties will usually not be amenable to Judicial Review. In between these extremes, it's helpful not only to look at the source of the power but also the nature of the power.”***

Furthermore,

***“Private employment is clearly outside the realms of Judicial Review. Employment by a public body does not per se inject any element of public law.”***

15. They go on to refer to the case of Jaguongo Dominique Ochieng vs Teachers Service

**Commission (2015) eKLR** where Justice Abuodha J. N while delivering his ruling stated that:

*“These are as it were, private law matters that do not fall within the ambit of public law to which Judicial Review is applicable. Whereas there is a public interest in the way Respondent manages and conducts its affairs in relation to teachers generally, there is no public interest of the considerations of the Respondent taken into account in the transfer or re-assignment of teachers generally if such transfer is carried out in good faith and in a non-discriminatory manner.*

*“The complaints raised by the Applicant seem to be purely what he deems to be personal inconvenience if he was to proceed to transfer to Kisumu. He has not shown in what way the transfer has gone against the principle of natural justice or breach of Article 41 of the Constitution.”*

*“The Applicant has not sufficiently demonstrated any issue around the transfer which extends beyond his contractual rapport with the Respondent...”*

16.The Respondent also refers to the Court of Appeal case of **Staff Disciplinary Committee of Maseno University & 2 Others vs. Ochonga Okello [2012] eKLR** where the sentiments of the above case were echoed and the Alnashir Visram, JA & R.N. Nambuye as they then were in granting the appeal stated.

*“The above opinion by the Judges is an emotive statement which opens a window for lecturers whose services are not statutory underpinned to obtain orders of Judicial Review.*

*However, orders of Judicial Review are orders by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the Respondent and Maseno University was a contractual relationship governed by private law.*

*The dispute between the Respondent and the Appellants arose from the performance of the Respondent’s contract of employment. While it is true that the Public has general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties.*

*The trial Judge appears to have been moved by the fact that the Respondent is “a senior lecturer who has dedicated his service to the public by imparting knowledge to us and to our children.*

*This may well be so. Nevertheless, that fact does not make the contractual relationship between the Respondent and the Applicant which is governed by the terms and conditions agreed by the parties a matter of public duty or matter governed by public law”.*

17.The learned Judges cite **Civil Appeal Erick D.J Makokha & Others vs. Lawrence Sagini & Others** and stated that:

*“I concur with the above proposition and find that the breach or threatened breach of the Appellants’ contract of employment was not a public act or a matter of public law but was a matter of contractual relationship between the respondent and the appellants governed by private law. It was not therefore an appropriate action justifying the granting of orders of judicial review.*

*The respondent may well have a genuine grievance. His remedy however, lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of judicial review as Prof. Ochong’ did not have public law right capable of protection under the supervisory jurisdiction of the Court.”*

18.The Respondents state that the relationship between them and the ex-parte Applicant is

contractual and consensual, it has no statutory underpinning and cannot be said to be done in exercise of a public function but it is that of a private nature that has not extended beyond the contractual nature.

19. The Respondent states that the ex-parte Applicant made the application for review of transfer on the 8<sup>th</sup> of March 2016, which is fourteen days after his transfer had been confirmed on medical grounds. His application which also states that he needs to attend to his wife does not elaborate or give particulars.

20. The Respondent states that the ex-parte Applicant applied for leave after he reported to work, which can be taken to mean that he was not opposed to his new station. The ex-parte Applicant has also failed to produce evidence to support claims of coercion into taking leave and such claims should not be taken seriously.

21. Having considered submissions of both parties, I will not go into the details of Judicial Review orders as submitted by the Respondents herein whether it is in realm of public or private law. This is an issue to be determined in the main claim.

22. My duty is to find out if the Applicant has established a prima facie case with a probability of success. In determining this, I refer to the Applicant employment letter which states as follows:

***“Conditions of offer and obligation***

- a. ***That your will accept to work in any branch or station or KWS in Kenya.***
- b. ***That any information you provide to KWS prior to the acceptance of this offer is correct.***
- c. ***You shall diligently and faithfully and to the best of your ability perform the duties for which you will be engaged and shall obey at all times the lawful orders of the service.***
- d. ***Acceptance of this offer of appointment is valid within a period of thirty (30) days only.***
- e. ***On reporting bring copies of two (2) passport size photographs and copy of your National Identity card”.***

23. The fact that the Applicant would serve in any station in Kenya was a term of the contract which the Applicant accepted and signed on 21/12/2001.

24. The Applicant however contend that the Respondents have gone against their own Human Capital Policy and Procedures Manual 2014 which sets out their transfer policy as follows:

***“F2 (4) to avoid unnecessary disruption of employees and their families, all transfers will be programmed to be effected in the month of November***

-----“.

***“(15) In the event that there are exceptional cases of need requiring immediate action, the Director General or the Deputy Director Human Capital may approve such transfer”.***

25. My understanding of the above provision is that they are made for good order of the organization but are not couched in mandatory terms. They can be disrupted in exceptional circumstances as per 15 above.

26. Though the Applicant contends that the transfer was done to disrupt him, he took it up and even took 3 days leave.

27. The Respondents aver they paid him transfer allowance which he has not contested.

28. My position is that Court's should not interfere with internal arrangements between an employee and employer except where there are gross violations. If not the Court will be acceding into the area of Managing Organizations which is not the province of this Court.

29. I do not find any gross violations to compel this Court to interfere with the transfer. I will order the Applicant to proceed with his transfer and duties immediately pending hearing and determination of the main claim.

Read in Open Court this 30<sup>th</sup> day of June, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Luta for Respondent – Present

Mr. Mugo for Claimant – Present