



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 107 OF 2016

JOSEPHINE NGATIA CLAIMANT

VERSUS

EXECUTIVE DIRECTOR OF NON-GOVERNMENTAL

ORGANIZATIONS COORDINATION BOARD 1ST RESPONDENT

NGOs CO-ORDINATION BOARD 2ND RESPONDENT

Mr. John Obima for claimant

Mr. Melly for respondent

RULING

1. The applicant Josephine Wangui Ngatia is employed by the respondent as the head of human resource and development management since November 2013 following a successful interview and promotion.
2. In terms of her job description submitted to court and marked “jw4” the applicant’s duties include providing leadership, organize, direct and coordinate the provision of the required human capital and general information needs of NGOs coordination board, the respondent, through effective human resource management planning, development and compensation arrangements.
3. The specific tasks performed by the holder of this office is detailed in the job description document.
4. On or about 18th July 2016, at around 8:13 p.m., the applicant received an email from the executive director of the NGOs’ board Mr. Yusuf Frazul Mohamed informing the management staff that he had transferred the applicant to head the Garissa regional office with immediate effect from 1st August 2016. The email is marked “jw5 –jw6”.
5. The Garissa office, is a new satellite office with three staff. Two of the staff have the their job description as head of station similar to the new assignment given to the applicant. The applicant states that this scenario exposes her to potential conflict and no space or proper job description to implement at the same station.
6. The letter of transfer gives her a job description which is clearly not matched by her academic qualifications and job description effectively setting the applicant up for frustration and failure.

7. The letter purports that the applicant will be involved in the refugee repatriation process, a role that is the preserve of the Ministry of Foreign Affairs, the Ministry of Interior, the United Nations High Commission for Refugees and the Government of Somalia.
8. That the NGOs coordination board has no involvement in the process and if that was the case, this would fall squarely under the department that deals with operations, compliance and research.
9. In terms of the organogram of the respondent, the organization has an establishment of over thirty five (35) positions with human resource and administration office, currently handled by the applicant coming in the tier of top management reporting directly to the office of Deputy Executive Director and the Executive Director.
10. There is no other officer in the establishment tasked to deal with the docket the applicant is handling at the head office. The Satellite office at Garissa, according to the applicant, information that is not refuted by the respondent comes under the office of head of operation, compliance and research, if at all.
11. The applicant states that the transfer was not done in good faith, that it is malicious and ill-intentioned to defeat her employment, especially because she had raised an issue on the irregular holding of staff files by the 1st respondent, and recruitment processes.
12. That the NGOs coordination board has been running without the full board of directors from March 2015 and this has made the 1st respondent make decisions that are in excess of his mandate. That these decisions, including that for transfer of the applicant are illegal, null and void.
13. That the applicant is currently involved in developing the board's organization structure and career guidelines in conjunction with directorate of personnel management services. The document is yet to be finalized. This work can only be done and concluded at the head office.
14. That she is a single mother and breadwinner of her family and has a minor who is due to sit her National examination (KCPE) this year. She suffers from asthma and is of constant medical attention. The transfer at this time will be precarious to her family interest.
15. That the 1st respondent made verbal threats to the claimant following her appearance to the Ethics and Anti-corruption Commission and the CID following allegations against him concerning his academic credentials. That the transfer is consistent with this threat to keep the petitioner away from Nairobi.
16. That the 1st respondent has denied the petitioner leave contrary to the organization policy on grounds that leave will only be granted upon relocation of the claimant.
17. The claimant seeks interim orders be confirmed pending the disposal of the petition.

Response

18. The respondents filed a counter application on certificate of urgency to have the interim orders of the court set aside instead of responding to the initial application. This practice is gaining notoriety and in court's view is one which is inimical to expeditious administration of applications filed under certificate of urgency and administration of justice.
19. The respondent relies on the supporting affidavit to the application filed on 16th August 2016 to oppose the initial application by the petitioner.
20. The gravamen on the opposition is thus;

That the allegations made by the applicant to the effect that she risks losing her job of the human resource and development manager; that the petitioner's transfer is unconstitutional and she will be rendered

redundant and that her position requires that she is stationed at the headquarters office in Nairobi only are false. That the petitioner has been denied leave days which is mandatory as per the code of conduct of the board and that the 2nd respondent was not consulted in effecting the petitioner's transfer and the board has not been in existence since the year 2015 are also false and meant to mislead the court to grant the petitioner injunctive relief.

21. The respondents submit that the petitioner was issued fourteen (4) days notice of her transfer to the 2nd respondent's regional office in Garissa and was given one month's salary as transfer allowance for relocating to Garissa.

22. That the petitioner was allowed fourteen (14) days leave from the date of the transfer notice, a reimbursement of travelling costs and costs for transportation of her personal belongings.

23. That injunctive orders are prejudicial to the respondents in the discharge of their statutory mandate to render public service.

24. That the 2nd respondent is mandated to facilitate and coordinate the work of all national and international non-governmental organizations operating in Kenya. More importantly, due to the on going repatriation of refugees, there is an influx of funding to non-governmental organizations which need to be regulated and their functions have to comply with the law, a function which is undertaken by staff of the non-governmental organization coordination board in Garissa under supervision management of the petitioner.

25. That there is need for the court to intervene to have a senior officer of the board to immediately be deployed to Garissa to oversee the above mentioned operations as an interim measure.

26. That the transfer of the petitioner was done in terms of policy and law and the application and petition lacks merit and should be dismissed with costs.

Determination

27. The issue for determination is whether the applicant meets the prequisite of granting interim orders pending the hearing and determination of the petition.

28. In the case of **Mrao Ltd. Vs. First American Bank of Kenya Ltd & 20 others, Civil Appeal No. 39 of 2002, the Court of Appeal at Mombasa**, per Kwach, Bosire and O'Kubasu JJA held;

“the principles for granting an interlocutory injunction are that

a) The applicant must show a prima facie case with a probability of success;

b) An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;

c) If the court is in doubt it will decide an application on the balance of convenience.”

26. In the present case, having considered the competing arguments by the parties, while avoiding to pre-judge the facts of the case at this stage, it would appear the applicant has shown a prima facie case with a probability of success that the transfer of the head of human resource and development manager with specified job description domiciled at the headquarters of the respondent to a satellite office with a staff compliment of three (3) persons is inappropriate and unreasonable considering all the circumstances of the case.

30. Furthermore the applicant has demonstrated that the transfer is likely to render her not only redundant at the new posting but she is likely to lose her job in the process, to her loss and detriment.

31. Furthermore, the balance of convenience which in this case, includes her personal circumstances and public interest, favours retention of the applicant at the headquarters to perform her mandate to the 2nd respondent clearly stipulated in her contract of service and the policy document of the 2nd respondent.

32. Accordingly, the application is granted and the court orders that pending the hearing and determination of the petition, the respondents are enjoined from transferring the applicant to Garissa.

33. Costs to follow the outcome.

Dated and delivered at Nairobi this 22nd day of September, 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE