



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CONSTITUTIONAL PETITION NO. 4 OF 2015**

**GEOFFREY MWORIA..... APPLICANT**

**-VERSUS-**

**WATER RESOURCES MANAGEMENT AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**JAMES AMBUSO.....2<sup>ND</sup> RESPONDENT**

**PHILIP J. OLUM.....3<sup>RD</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 15<sup>th</sup> May, 2015)

**RULING**

The petitioner filed a petition on 28.04.2015 through Magee Wa Magee & Company Advocates. The petition alleged violation of the petitioner's fundamental rights and freedoms under Articles 29(d), 41(1), 41 (2) (b), 47 (1) and 47 (2) of the Constitution of Kenya, 2010. The petition also invoked Articles 20(1), 22(1), 23(1), 162(2) (a), 162(3) and Article 165(3) (b) of the Constitution.

The petitioner concurrently filed a notice of motion brought under rules 2, 4(1) and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and under Articles 22(1), 23(1), 29(d) and 41(2) (b) of the Constitution of Kenya, and all other enabling provisions of the law. The application was based on the grounds stated therein and the supporting affidavit of the petitioner.

The core prayers in the notice of motion were as follows:

- a) That the honourable court be pleased to order that the transfer of the petitioner from Ewasonyiro North Catchment Area, Nanyuki to Lake Victoria North Catchment Area, Kakamega as communicated to him vide letters dated 12.03.2015 and 9.04.2015 be deferred pending the hearing and determination of prayer 3, 4 and 5 here below.
- b) That the honourable court be pleased to order that the transfer of the petitioner from Ewasonyiro North Catchment Area, Nanyuki to Lake Victoria North Catchment Area, Kakamega as communicated to him vide letters dated 12.03.2015 and 9.04.2015 be deferred until the hearing and determination of the petition herein.
- c) That the honourable court be pleased to issue such further and better relief as it may deem fit and just to issue.

d) That the cost of the application be provided for.

The petitioner is a career public official initially serving in the civil service and later absorbed in the service of the 1<sup>st</sup> respondent, a statutory body and therefore a public employer. Before the current dispute the petitioner was deployed at the 1<sup>st</sup> respondent's Nanyuki office. The petitioner has 6 years of service to go before attaining the mandatory retirement age of 60 years.

The petitioner's case is that he received on 31.03.2015 a letter of transfer dated 12.03.2015 requiring him to report on transfer at Kakamega by 12.04.2015. It was the petitioner's further case that at the time of the transfer letter he had been required to record some statement at the Ethics and Anti-Corruption Commission (EACC) in an investigation involving alleged corruption against the 2<sup>nd</sup> respondent. In particular, the petitioner has set out the instances of issues of alleged want of integrity against the 2<sup>nd</sup> respondent in the letter dated 26.03.2015 addressed to the Cabinet Secretary for Environment, Water and Natural Resources.

The allegations by the petitioner against the 1<sup>st</sup> respondent range from alleged unfair petitioner's transfer from Loitokok to allegedly prevent the petitioner from travelling to Japan on a project he was working on; alleged unfair demands for money the petitioner says he send to the 2<sup>nd</sup> respondent throughout 2012 and in failing to meet increasing demands the 2<sup>nd</sup> respondent allegedly threatened to sack the petitioner; in December 2012 the 2<sup>nd</sup> respondent allegedly demanded that the petitioner cuts his annual leave to go and induct an officer junior to the petitioner; on 1.03.2013 the 2<sup>nd</sup> respondent allegedly demanded that the claimant writes to recommend an unqualified person to be employed as a driver; in June 2013 the 2<sup>nd</sup> respondent allegedly unfairly accused the petitioner for being behind certain negative publicity in the print media and the petitioner faced some disciplinary process; an appeal against the unfair decision in that disciplinary case has been problematic to determine despite intervention by the Commission on Administrative Justice and due to the alleged influence by 2<sup>nd</sup> respondent; on 30.10.2014 the 2<sup>nd</sup> respondent is said to have sneaked into the petitioner's Nanyuki office and pretending to be friendly-the petitioner says he attempted to coach him on what to tell the EACC and upon the claimant's refusal to the coaching the 2<sup>nd</sup> respondent allegedly became incensed and he told the petitioner if he sinks he will sink with the petitioner and thereafter the petitioner received a letter to record a statement with EACC; and the petitioner made a report to the police about the threats. The petitioner further states that while deployed at the Mombasa office, the 2<sup>nd</sup> respondent instructed him to pay to the 2<sup>nd</sup> respondent 10% of all the 1<sup>st</sup> respondent's funds provided for the operations of the Mombasa office and that issue is one of the core issues under the investigation by the EACC.

The petitioner is apprehensive that his transfer to Kakamega is not normal as it is a trap which may lead to his death, and he feels insecure that his life is in danger in view of the 2<sup>nd</sup> respondent's alleged interference in the investigations by the EACC. The petitioner says that the 2<sup>nd</sup> respondent is extremely powerful in the 1<sup>st</sup> respondent's organisation and is keen to ruin the petitioner's employment and life.

The petitioner's other fear is that the 2<sup>nd</sup> respondent's ancestral home is about 50Km from Kakamega which exposes the petitioner to enhanced sense of insecurity in view of the ongoing threats and the EACC investigation. The claimant's prayer is that the transfer to Kakamega should be held in abeyance until the inquiry by the EACC is completed and his appeal in previous disciplinary case is heard and determined by the 1<sup>st</sup> respondent's board.

The petitioner's further case is that the 3<sup>rd</sup> respondent unfairly instituted and continued the disciplinary case against the petitioner currently subject of the pending appeal which is yet to be resolved by the 1<sup>st</sup> respondent's board. The petitioner is afraid that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have acted unfairly to transfer him to Kakamega. He is further afraid that by the letter dated 9.04.2015 by the 3<sup>rd</sup> respondent, he was required to immediately report to Kakamega in circumstances whereby his concerns against the transfer as set out in the letter to the Cabinet Secretary of 26.03.2015 had not been addressed or resolved.

The 3<sup>rd</sup> respondent's letter of 9.04.2015 referred to the petitioner's said letter to the Cabinet Secretary of 26.03.2015 meaning that the respondents were aware of the petitioner's objections. The petitioner says that he does not understand why he is being required to move to Kakamega in the middle of the present crisis in which he has recorded statements with the EACC on two recent occasions.

The respondents opposed the application by filing on 06.05.2015 the notice of preliminary objection through Prof. Albert Mumma & Company Advocates. The grounds of preliminary objection were that there was no statement of claim upon which the notice of motion application dated 28.04.2015 was founded as there was no memorandum of claim as provided for in the Industrial Court (Procedure) Rules, 2010; and the Employment and Labour Relations Court sitting in Nyeri has no jurisdiction to entertain the applicant's notice of motion dated 28.04.2015.

The respondents also filed the replying affidavit of Eng. Phillip Olum sworn on 4.05.2015 to oppose the application. The respondents' grounds of opposition can be summed up as follows:

- a) The 1<sup>st</sup> respondent has 6 catchment areas across the country namely Athi, Tana, Ewaso Nyiro North, Rift Valley, Lake Victoria South and Lake Victoria North. Under Article 6 of the Constitution the 1<sup>st</sup> respondent is obligated to deliver its services by ensuring reasonable access throughout the country.
- b) That it is the government policy that public officers are deployed to serve in any part of the country based on qualifications and suitability and not on the basis of the origin of the officer.
- c) The petitioner being an experienced hydrologist, his services were needed in Kakamega hence the transfer in issue.
- d) The petitioner did not act in good faith in filing the present application because he was to report as transferred on 12.04.2015 but he filed the petition and application on 28.04.2015, after lapsing of the effective date of the transfer.
- e) The alleged threat to the petitioner's life was reported on 17.03.2015, a week after receiving the transfer letter and in any event staying in his preferred stations in Embu, Kerugoya and Meru will not of itself provide security.
- f) The respondents as the employers are entitled to transfer the petitioner as the employer and the 1<sup>st</sup> respondent was entitled to transfer the petitioner to Kakamega.
- g) The 2<sup>nd</sup> respondent had not demanded any money from the petitioner at any time or at times as alleged by the petitioner and the 2<sup>nd</sup> respondent never denied the petitioner a chance to travel out of the country.
- h) The 2<sup>nd</sup> respondent had not directly or indirectly inflicted psychological torment or torture on the petitioner and the petitioner had not reported such allegations to the 1<sup>st</sup> respondent.
- i) The 2<sup>nd</sup> respondent never asked the petitioner to break his annual leave as alleged or to recommend a person to be employed as a driver as alleged.
- j) The allegations made by the petitioner were currently subject of investigation by the EACC and no finding of wrongdoing on the part of the 2<sup>nd</sup> respondent had been made. The allegations by the petitioner should therefore not be relied upon to allow the petitioner's application.
- k) All trips made by the 3<sup>rd</sup> respondent were in accordance with the prevailing rules and regulations.

l) The petitioner had appealed against the warning imposed and the 1<sup>st</sup> respondent made explanations to the Commission on Administrative Justice and the Ministry of Environment, Water and Natural resources. The respondents did not deny that the 1<sup>st</sup> respondent had not determined the appeal.

m) It was denied that the 2<sup>nd</sup> respondent attempted to coach the petitioner on whatever he was to tell the EACC.

n) The respondents had not infringed the respondent's rights as alleged.

The court has considered the pleadings, the affidavits and submissions made for the parties.

The 1<sup>st</sup> issue for determination is whether this court has jurisdiction to determine the application. It was submitted that the court lacked jurisdiction because the petition and the application raised issues of enforcement of fundamental rights and freedoms which would fall in the jurisdiction of the High Court.

There is no doubt that the direct issue in dispute is transfer which is properly a human resource function and therefore obviously under the court's jurisdiction. It is no doubt a dispute between an employer and an employee. There is also no doubt that the alleged contravention of the rights came about due to the employment relationship between the parties and in the course of the petitioner's service as an employee of the 1<sup>st</sup> respondent and a co-employee of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It is the opinion of the court that on the facts of the case as alleged by the petitioner the alleged contravention of the petitioner's rights and freedoms in the circumstances of the case is clearly a dispute relating to employment and labour relations in terms of Article 162 (2) (a) of the Constitution. In the opinion of the court, it is the kind of matter that is in the exclusive jurisdiction of this court and for which the jurisdiction of the High Court is barred or ousted under Article 165 (5) of the Constitution.

The issue as stated in the respondents' submissions is whether the Employment and Labour Relations Court has jurisdiction to entertain and determine claims of breach of fundamental rights under Articles 22 and 23 or enforcement of the Constitution under Article 258 of the Constitution as pertains to employment and labour relations matters. The Court of Appeal has resolved the issue in the case of **Prof. Daniel N. Mugendi –Versus- Kenyatta University and 3 Others, Civil Appeal No. 6 of 2012**. The court stated thus, **“The question now is whether the appellant should go back and ‘sever’ the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in Petition No. 170 of 2012 – United States International University(USIU) –Versus- The Attorney General & Others.”**

That this court enjoys the jurisdiction to hear and determine employment and labour relations matters alongside claims of fundamental rights (and enforcement of constitutional and statutory provisions) ancillary and incident to those matters was upheld in the ruling delivered by this court on 30.04.2014 in **Geoffrey Makana Asanyo –Versus- Nakuru Water and Sanitation Services Company and 6 Others [2014]eKLR**. The Court of Appeal held as much in **Judicial Service Commission –Versus- Gladys Boss Shollei & Another [2014]eKLR**.

The 2<sup>nd</sup> issue as submitted for the respondents was that the suit ought to be transferred for hearing by the court in Nairobi. The court considers that it enjoys countrywide jurisdiction with unlimited territorial jurisdiction. However, the place of hearing of any one suit will be based on convenience to the parties and facilitation of expeditious, just and proportionate determination of the dispute as provided for in section 3 of the Employment and Labour Relations Court Act. In the present case the petitioner was deployed at the 1<sup>st</sup> respondent's Nanyuki office at the time the dispute in the petition crystallized. The 1<sup>st</sup> respondent has

confirmed that it has offices across the country and considering distribution of workload and facilitation of expeditious determination of the present dispute, the court finds that there is no compelling reason to transfer the petition for hearing elsewhere.

The court is guided with the opinion in the ruling delivered on 30.04.2014 in **Kenya Plantation Agricultural Workers Union –Versus- Kakuzi Limited [2014]eKLR** thus, “**The court is guided that under section 3 of the Industrial Court Act, 2011, the court is obligated to facilitate the just, expeditious and proportionate resolution of disputes governed by the Act. The court is further guided that under section 29(1) of the Act, the court shall ensure reasonable, equitable and progressive access to the judicial services in all counties. Taking into account those principles, the court has particularly considered that the place of the applicant’s business is in Thika, the claimant’s offices and place of business is in Nakuru, and on a balance of convenience or the court’s distribution of workload, the case may be heard by the court sitting in Nairobi or at Nakuru. There is no dispute that previous disputes between the parties have been heard and determined by the court at Nairobi and there is no dispute that the court diary at Nairobi may have been outstretched as submitted for the claimant (respondent in the application).**”

Thus taking into account just, expeditious and proportionate determination of the suit and the distribution of workload to the court in the various stations the court sits, the court finds that it will be convenient for the suit to be heard and determined by the court at Nyeri as there is no compelling reason for the petition to be heard elsewhere.

The **3rd issue** for determination is whether the petitioner is entitled to the interim conservatory orders as prayed for. The respondents have invoked the opinion of the court (Mbaru J.) in **Mary Nyanagasi Ratemo & 9 Others –Versus- Kenya Police Staff Sacco Limited & Another[2013]eKLR** where the court stated, “**Therefore the right to transfer an employee from one duty station to another remains the prerogative of the employer. This becomes an implied right of the employer as the entity in need of the employee services and due to work demands. Such an employee can be moved, relocated, placed or transferred as required by the employer. A court cannot interfere with this implied right unless an employee shows that this is done with disregard to fair labour practices...**”

The general principle is that the court will not interfere with any of the employer’s rights to perform internal human resource functions such as disciplinary control and like in this case, transfer. With respect to the court’s interference in employer’s exercise of disciplinary control of the employees and which principles the court holds would apply to the employer’s exercise of the power to transfer, the court upholds its opinion in **Aviation and Allied Workers Union –Versus- Kenya Airways Limited [2012]eKLR**, where the court stated, “**...Thus, similarly this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case it is established that the disciplinary process has been commenced or is continuing unfairly. The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result into unfair imposition of a punishment against the employee. The court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or, if the procedure is in clear breach of the agreed or legislated or employer’s prescribed applicable policy or standards, or, if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case. The court will normally not intervene if it is established that there exist mechanisms between the employer and the employee such as appeal or revision that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the court’s intervention and, the employee has not exhausted such internal mechanisms.**”

The court further upholds its opinion in **Kenya Plantation and Agricultural Workers Union –Versus- James Finlay (K) Limited [2013] e KLR** where it was stated, “**The court considers that the employer is entitled to undertake redundancy just like the other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service including dismissal on disciplinary grounds. The general principle is that the**

**court shall not interfere in the employer's entitlement to undertake these functions and interference by the court shall be exercised very sparingly. The court's rare intervention can be justified on account of obvious breach by the employer of the statutory or agreed due process or such other manifest injustice and in circumstances whereby the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process...."**

The principles are clear.

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process.

In the present case, the petitioner has lamented that in a previous disciplinary case a punishment by way of a warning was imposed against him in what he considers was irregular and unfair manner. The petitioner appealed and invoked the intervention of the Commission on Administrative Justice and the parent state department. Despite the intervention, the appeal has not been determined by the 1<sup>st</sup> respondent. In the ensuing transfer the petitioner had serious grievances which he communicated to the Cabinet Secretary in the parent state department. In the opinion of the court, the petitioner was entitled to seek the Cabinet Secretary's intervention as he was justified to infer waning confidence in the 3<sup>rd</sup> respondent in view of the pending appeal which had received the 1<sup>st</sup> and 3<sup>rd</sup> respondents' inaction.

The court has carefully considered the replying affidavit in that regard and it is clear that the respondents' position is that the petitioner's pending appeal is a gone case in view of the explanations the respondents made to the Commission and the parent state department. By that conduct on the part of the respondents, the court finds that the employer in this case appears to have made it impossible to address the petitioner's grievances using internal mechanisms so that come the dispute and grievances about the transfer, the petitioner was entitled, as he did, to apprehend that internal mechanisms would not be available.

Turning back to the transfer, the court finds that the petitioner has advanced serious grounds to oppose the transfer and the respondents have conceded that the same are subject to the on-going investigations by the EACC. At this stage the court will not delve into the merits of the petitioner's grievances or their veracity and impact on his fundamental rights as that will best be canvassed at the full hearing of the petition. Nevertheless, what is clear at this stage is that the petitioner had serious objections by way of grievances against the transfer.

The pertinent issue is whether, in any event, the respondents, and in particular the 1<sup>st</sup> and 3<sup>rd</sup> respondents have been shown to have availed or instituted a grievance management procedure or a genuine complaints procedure that the petitioner could confidently invoke to address his opposition to the transfer that he says has engulfed him into psychological torture and has been manifested into a serious threat to his life. The material on record shows that the 1<sup>st</sup> and 3<sup>rd</sup> respondents have not made available such genuine or any grievance management procedures and the court finds that the petitioner's grievances in opposition to the transfer could not be resolved within the petitioner's internal mechanisms or it has been made difficult by the respondents that the petitioner's grievances get so resolved. The court further holds that the absence of the relevant grievance or genuine complaints mechanism on the part of the 1<sup>st</sup> respondent, which is a well developed public body established under legislation with important national functions and many employees, amounts to unfair labour practice in contravention of Article 41 of the Constitution. As already found by the court, in the circumstances of the present case the petitioner was entitled, as he did, to apprehend that the internal mechanisms would not be available specifically or generally and he was therefore entitled to invoke the court's intervention.

To answer the 3<sup>rd</sup> issue for determination, and taking into account the applicable principles and the findings of the court, the court returns that the petitioner is entitled to the conservatory orders as prayed for.

The court will interfere in the transfer because the 1<sup>st</sup> and 3<sup>rd</sup> respondents are proceeding in a manner that makes it impossible to internally and fairly resolve the petitioner's grievances as raised against the transfer. In any event, such internal mechanisms for grievance management have not been said to exist and their application does not even begin to emerge in the present case. In that set of circumstances, the court finds that its intervention or interference in the transfer decision is justified to avert the manifest injustice that the petitioner has established is likely to occur if he proceeds on the transfer, namely, his concerns will most unlikely be fairly resolved internally by the 1<sup>st</sup> respondent. The court finds as much especially whereby the respondents' transfer policy has not been shown to exist and therefore to have been complied with.

Article 232 of the Constitution requires the 1<sup>st</sup> respondent to uphold the values and principles of public service amongst of which include high standards of professional ethics; responsive, prompt, effective, impartial and equitable provision of services; accountability for administrative acts; and transparency and provision to the public of timely accurate information. The court has considered the provisions of that Article and finds that nothing before the court shows the 1<sup>st</sup> respondent's internal operational systems and policies against which the petitioner's lamentations against the transfer can be measured against and the transfer be found to be in conformity with the cited values and principles of public service. Thus, the court finds that the petitioner's concerns in objecting to the transfer are reasonable and the court's interference would be justified pending the full hearing of the petition.

Finally, while making the findings, the court has been guided by the provisions of Article 236 of the Constitution that a public officer shall not be victimised or discriminated against for having performed the functions of office in accordance with the Constitution or any other law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. The court considers that in the instant case the petitioner's case is that the transfer amounts to victimization in view of his performance of public duty, namely, cooperating and making relevant statements in the investigation being undertaken by the EACC. That consideration in the opinion of the court serves as an impetus to allowing the application so that the issues in dispute are ventilated at the full hearing before the transfer in issue may take effect or is stayed depending on its propriety and validity or lack of it.

In conclusion, the petitioner's application by way of the notice of motion filed on 28.04.2015 will succeed and the court makes orders as follows:

- a) That the transfer of the petitioner from Ewaso Nyiro North Catchment Area, Nanyuki to Lake Victoria North Catchment Area, Kakamega as communicated to the petitioner vides letters dated 12.03.2015 and 9.04.2015 is hereby deferred until the hearing and determination of the petition herein.
- b) For avoidance of doubt, any and all steps and proceedings by the respondents flowing from the letters dated 12.03.2015 and 9.04.2015 are stayed as shall not take effect and the petitioner shall continue in the 1<sup>st</sup> respondent's employment at Nanyuki in the same office and capacity prior to issuance of the letters and with full benefits without break in service until the hearing and determination of the petition herein.
- c) The respondents to pay costs of the application.

**Signed, dated and delivered** in court at Nyeri this **Friday, 15<sup>th</sup> May, 2015.**

**BYRAM ONGAYA**

**JUDGE**