



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

MISC APP. NO. 8 OF 2014

(Formerly Garissa H. C. JR Misc No 7 of 2013)

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE FOR JUDICIAL REVIEW
ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 ARTICLES 47 AND 175

AND

**IN THE MATTER OF: THE TRANSITION TO DECENTRALIZED GOVERNMENT ACT
SECTION 14**

BETWEEN

ISAAK MOHAMED MOHAMUD.....APPLICANT

VERSUS

THE TRANSITION AUTHORITY.....RESPONDENT

JUDGEMENT

Mr Ingutia for Applicant

Mr Mwangi for Respondent

1. Leave was granted to the ex parte applicant Isaak Mohamed Mohamud to institute Judicial Review proceedings against the Transition Authority (Respondent) on 6th June, 2013 by the High Court. The High court subsequently transferred the case to the Employment and Labour Relations Court vide a ruling dated 1st April, 2014.
2. The Applicant seeks;
 - i. An order of certiorari removing to this Honourable Court the decision of the Transition Authority to rescind the appointment of the Applicant as the County Assembly Clerk Wajir - County.
 - ii. An order of prohibition to prohibit the Respondent herein from unlawfully and irregularly removing the Ex-parte applicant from his post as the Clerk to the County Assembly – Wajir County

3. The Application is founded on the grounds set out on the body of the Notice of Motion as follows;
 - a. The decision to rescind the appointment of the Ex-parte applicant was unconstitutional because;
 - i. The Ex-parte applicant was not subjected to fair administrative action.
 - ii. The decision is in breach of the principle of separation of powers.
 - b. The Respondent acted unreasonable in redeploying the Ex-parte applicant to an entity that does not exist.
4. The Application is also supported by the Affidavit of Isaak Mohamed Mohamud sworn on 5th June, 2013 the Applicant, in which he deposes *inter alia*; that he was appointed as the Clerk to the Wajir County Assembly following rigorous interviews conducted by the Public Service Commission. The letter is annexed and marked 'IM'
5. The applicant commenced work which included the day to day running of the County Assembly and setting up of select and sectional committees.
6. In this regard he also oversaw the swearing in of the County Assembly Members, election of speaker and his deputy and induction of members of the County Assembly.
7. By a letter dated 22nd May, 2013 marked 'IM2' the Hon. Bishar Omar Hussein Speaker Wajir County Assembly confirmed the aforesaid functions were diligently performed by the Applicant.
8. By a letter dated 26th April, 2013 marked 'IM3' Mr Stephen K. Makori secretary and CEO of the Transition Authority rescinded the appointment of the Applicant in the position of the County Assembly Wajir and re-deployed him back to Wajir Town Council with immediate effect.
9. No reasons were assigned to that decision in the said letter. The letter was copied to the Interim county Secretary and the Hon. Governor Wajir County. The same was not copied to the Speaker of the County Assembly, Wajir.
10. On 13th May, 2013 the Applicant in the company of the Speaker visited the Chief Executive Officer of the Respondent to express concern on the sudden re-deployment which was done without notice and not giving an opportunity to the Applicant or the Speaker of the County Assembly to make representations.
11. The Applicant's position is that the move was orchestrated by the executive arm of the county government of Wajir contrary to the principles of separation of powers.
12. That no reason whatsoever was assigned to the move and the action was therefore in breach of the Applicant's right to fair administrative action. The decision was also malicious and unreasonable in that the applicant was deployed to a non existent entity called Wajir County Council. This was in utter disregard of the fact that the Applicant had trained and prepared to serve as the Clerk to the County Assembly. A certificate signifying the training is attached and marked 'IM4'.

Response

13. The Respondent vide a replying affidavit of Mr Stepehn Makori, the Chief Executive Officer, of the Respondent sworn on 31st July 2014 is opposed to the grant of the application on the following grounds; that the Respondent is established under Section 4 of the Transition to Devolved Government Act, Cap 265A. That under Section 7 thereof the Respondent is only mandated to;
 - a. Facilitate and co-ordinate the transition to the devolved system of Government.
 - b. Transfer functions from National to the County Government and;

c. To ensure successful transition to the devolved system of Government.

14. The Respondent states that it has no capacity to employ civil servants. That the Applicant is an employee of the Public Service Commission and the Respondent has been wrongfully joined as a party to this suit.

15. That the Applicant previously worked as a Town Clerk of Wajir County Council. That the Respondent in consultation with the Public Service Commission only seconded the Applicant to act as interim clerk for Wajir County Assembly pending the formation of the County Government after the general elections of 4th March 2013.

16. That after the said general elections, the Applicant's appointment as interim County Assembly Clerk of Wajir County was rescinded and he was consequently redeployed back to the Wajir Town Council through the letter dated 26th April 2013.

17. That the position of Clerk to the County Assembly Wajir has been filled by the County Assembly Service Board and the Applicant cannot be reinstated to that position.

18. That the orders sought to quash the decision of the Transition Authority vide the letter dated 26th April 2013 is not enforceable. That the application is vexatious and a blatant abuse of the court process and same be struck out with costs.

Issues for determination

19. The following issues fall to be determined;

- i. Whether the right of the applicant to fair administrative action was violated by the Respondent
- ii. Whether the decision to recall the applicant was null and void for breaching the principle of separation of powers and rules of natural justice and therefore same should be removed to the honourable court and be quashed.
- iii. Whether an order of prohibition should issue prohibiting the Respondent from unlawfully and irregularly removing the Applicant from the post of the Clerk to the County Assembly.

Determination

20. The letter dated 25th February, 2013 written by the Respondent to the Applicant clearly states that the Applicant was deployed as interim Clerk to the County Assembly. It is also common cause that the mandate of the Respondent was transitional in nature as is set out in the Replying Affidavit and in terms of section 7 of the Transition To Devolved Government Act, Cap 256 A.

21. The Respondent could not confer on the Applicant an appointment beyond the transition period of the devolved system of Government. It is not disputed that the County Government once in place and in particular, the Assembly Service Board has the statutory mandate to appoint a Clerk to the County Assembly Wajir as is the case in all other Counties in the Republic of Kenya.

22. It is the court's considered view that the Respondent conferred a temporary appointment on the Applicant and the Applicant was aware or ought to have been aware of that situation since the same is expressly stated in the letter of appointment.

23. Once the role of the Respondent expired, it was within its statutory mandate to recall the Applicant to his substantive position prior to the interim appointment.

24. The Respondent did not therefore violate the Applicant's right to a fair administrative action because he still holds his substantive position within the public service and need only request to be re-deployed appropriately by the competent authority which happens not to be the Respondent.

25. The Respondent did not therefore act *ultravires* its statutory mandate. There is nothing untoward in the Respondent copying the letter of recall to the Governor of the Wajir County since he is the titular head of the County Government of Wajir.

26. However, it would have been prudent to also copy the letter to the Speaker of the Wajir County Assembly because he was at the time the immediate supervisor of the applicant. This omission does not however constitute a violation of the applicant's constitutional right under Article 47 to fair administrative action nor was it in violation of the rules of natural justice, the position having been temporary in the first place.

Issue III

27. It is not disputed that the position of the Clerk, Wajir County Assembly has been substantively filled by the County Government of Wajir. The Applicant has not demonstrated any or any substantial justification for an order of prohibition to be issued by this court to stop what has presumably been lawfully done. This court being one of equity does not issue orders in vain.

28. In view of the determination of issue no I and II above, even if the position was still vacant, an order of prohibition against the Respondent after the substantive County Government has assumed authority of Wajir County as has happened throughout Kenya, the Respondent would not be in a position to restore the Applicant to the interim position it had during transition conferred on him.

29. The Applicant having been lawfully recalled by the Respondent was at liberty to apply to be considered for the substantive appointment, together with other eligible Kenyans once the position was advertised in line with the principle of transparency in recruitment of state and public officers which he did not.

30. Accordingly, the application lacks merit and the same is dismissed with costs.

Dated and Delivered at Nairobi this 31st day of July 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE