



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.41 OF 2015

HENRY OCHIDO PETITIONER

VERSUS

NGO CO-ORDINATION BOARD RESPONDENT

JUDGEMENT

1. On 28th May 2015, the Petitioner filed his Petition together with his application and Notice of Motion seeking urgent orders to restrain the Respondent from interfering with his employment. On 21st July 2015, the Petitioner amended his petition. On 7th August 2015 the Respondent replied via Replying Affidavit of Josephine Ngatia. Both parties filed their written submissions and also highlighted the same orally in Court on 27th October 2015.

2. The Petitioner is seeking for orders that

a) a declaration be issued that the Petitioner enjoyment of his rights and fundamental freedoms secured in the Bill of Rights under Articles 41, 47, and 50 of the Constitution have been threatened and infringed or are threatened by the Respondent by failing, neglecting and refusing to give the Petitioner a hearing before the adverse administrative process of a transfer and demotion.

b) A declaration be issued that the Respondent constructively dismissed the petitioner.

c) An order be issued directing the Respondent to pay the Petitioner 12 months' salary compensation totalling Kshs.284, 271 x 12 = 3,411,252.

d) An order be issued for exemplary and general damages.

e) An order be issued for damages on constitutional rights violation under articles 27, 41, 47 and 50.

f) Pension dues be paid to the petitioner

g) The Court does issue any other direction, declaration and/or orders that serve the cause of justice.

h) The costs of this Petition be borne by the respondent.

The Petition

3. The Petition as set out under the Amended Petition before Court is that the Petitioner as the Acting Deputy Director of the Respondent but the same is under threat of unlawful, unfair and wrongful demotion through a transfer to the Respondent regional office in Kisumu.

4. The Petitioner was employed by the Respondent on 6th December 2004 and served in various capacities the last position being that of acting Deputy Executive Director since 4th December 2014. On 4th March 2015 the Respondent commenced the transfer and demotion of the Petitioner without a hearing, notice or reasons. That such a decision was made by the Respondent Executive Director who has no such mandate under the Non-Governmental Co-ordination Act. The Petitioner was not given reasons as to why he was not confirmed in the position he had been holding for 3 months other than the fact Mr Andrew Ogombe had been recalled back to the head office in Nairobi while the Petitioner was been transferred to the Kisumu office. If there had been fairness the Petitioner should have been returned to his former position as head of Operations Finance Department in Nairobi, a position only tenable in the head office, Nairobi. The Respondent organogram had not changed so as to affect the Petitioner and require him to move from the head office and where he had been appointed by the directors as acting Deputy Executive director, the Petitioner had a legitimate expectation that he would be confirmed in that position.

5. The case is also that the Petitioner was never informed as to why he was not confirmed in his acting position and when the Respondent made a decision to transfer him. That there was no due process in his case. The decision not to confirm the Petitioner as Deputy Executive Director and transfer him to Kisumu instead adversely affected him and before making such decision, he should have been invited for a discussion. The right to fair administrative action had been violated for lack of reasons and the drastic action taken. Kisumu is a satellite office and of lower stature where the Petitioner skills, knowledge and experience will not be applied and this amounts to a demotion despite the benefits being similar to what he had while in Nairobi.

6. The petitioner's case is also that he has been resident in Nairobi for over 20 years with a family and school going children. To require him to move to Kisumu is punitive transfer is therefore unreasonable and in bad faith. The email of 11th March 2015 by Josephine Ngatia asking if the Petitioner had moved to Kisumu was in bad faith. The Respondent failed to consider that the Petitioner had been resident in Nairobi, he had no house in Kisumu and had not been given time or been facilitated to move there. The petitioner's contract of employment has his terms and conditions of work and he is only answerable to the Respondent board and not the Executive director.

7. The petitioner's case is also that he wrote to the Respondent who refused to give a reply or be given a hearing on the transfer to Kisumu which is an indication of bad faith and confirms an effort to violate his constitutional rights. During the pendency of this Petition that Respondent put the Petitioner under intolerable conditions in the forced transfer forcing him to resign and claim constructive dismissal. Such intolerable conditions also entailed the Respondent failing to hear the petitioner; he was removed as a senior officer of the Respondent from its website which exposed him to ridicule having to answer questions from friends and members of the public. The Respondent on 10th July 2015 disabled the petitioners official email account despite the fact that he was their employee until 20th July 2015 when he was forced to resign. The Petitioner had not been paid his transfer allowance despite several reminders making it impossible to move to Kisumu. The Respondent failed to give the Petitioner reasonable relocation period noting that he had settled in Nairobi with his family and had school going children. These factors forced the Petitioner to resign in protest due to the toxic working environment created by the respondent

8. The Petitioner attached his affidavit in support of his petition. The Petitioner avers that his transfer to Kisumu satellite office of the Respondent was in bad faith, he was not given a hearing or reasonable time to organise himself and family to move and was also not facilitated. He had been serving as acting Deputy Executive Director for 3 months and had a legitimate expectation that he would be confirmed but was not given any reasons for his demotion and transfer to Kisumu. The Respondent moved another officer Mr Ogombe from Kisumu to Nairobi an indication that the transfer of the Petitioner was meant to injure him with the move and demotion. The reason given that he was on transfer to have a tour of duty to

the regional office was not a proper reason to effect a transfer. This was a cover up as Mr Ogombe ought to have remained in Kisumu and the Petitioner made the Deputy Executive director. Had the Respondent intended to have him transferred with should have been done within a reasonable period, be given reasons for the transfer, hold consultations and sufficient notice with facilitation.

9. The Petitioner also avers that his letter of employment does not state that he could work anywhere else other than at the head office where he remained for 11 years. There was no board decision requiring the transfer of the Petitioner and what has been submitted is fictitious. This is an effort by the Respondent to try and justify the transfer through whatever means possible including preparing minutes after the fact. The transfer letter has mandatory orders which demonstrate bad faith. The Kisumu office is of a lower stature and where the Respondent was keen to have the officer perform well, the Executive Director should have sat at this office. The Petitioner was therefore compelled to resign from his position.

Respondent's case

10. In response to the petition, the Respondent filed a Replying Affidavit sworn by Josephine Ngatia on 10th June 2015 and a Supplementary Affidavit filed on 7th August 2015. She avers that as the human resource manager of the Respondent is conversant with the petitioner. The Petitioner was issued with a **transfer letter on 9th March 2015** upon which he disappeared from the office without permissions until 16th March 2015 when he applied for leave and was to report back on 28th April 2015. Instead of reporting back to the office, the Petitioner applied for 10 days to do his examinations and was to report back on 14th May 2015. He however proceeded to be absent without permission on 29th and 30th April 2015. On 14th May 2015 the Petitioner failed to attend a staff retreat in Mombasa without due course. On 18th May 2015 the deponent wrote to the Petitioner seeking to know as to whether he had reported to the Kisumu office to which there was a reply that the Petitioner was to see his doctor on 20th May 2015 and was thus not at work. On 20th May 2015, the Petitioner filed his petition.

11. Ms Ngatia also avers that it was impossible to grant the Petitioner a hearing as once he was handed his transfer letter he disappeared from the office and remained absent. He then took 30 days annual leave; 10 days exam leave, 5 days sick leave, and make it impossible to be available. The Petitioner never resumed his office duties so as to be given a chance for hearing. This was not a case of constructive dismissal as alleged, the Petitioner refused to take his transfer. The Respondent provided the Petitioner with a good work environment and did not compel his to resign from his office and no such evidence has been submitted. On 26th May 2015 the Respondent advised the Petitioner to report to work at his new station since the Court had declined to grant interim orders and the Respondent was lawfully entitled to transfer him.

12. The Respondent also in reply states that their website was undergoing construction, the Petitioner was asked to avail his details for inclusion but he failed to do so. The website was launched without the petitioner's details. An email on 25th March 2015 to this effect had been sent to the Petitioner and he cannot claim that the non-inclusion of his details from the Respondent website created intolerable conditions leading to his resignation and his email account is still valid and accessible. On 12th March 2015 the Petitioner was issued with his transfer allowance cheque but he has refused to collect it and has remained away from the office since 9th March 2015 to the time of filing the Petition on 20th May 2015.

13. It is the respondent's case that the Petitioner formed a private business in 2008 and converted it into a limited liability company in 2011 with the purpose of providing services to NGOs in Kenya. The Petitioner has been doing consultancy business while working for the Respondent and being paid by the exchequer to provide the same services. This is in clear conflict of interest and an abuse of office as he has been receiving payments for his services. Refusal to move to Kisumu office has nothing to do with the stated reasons, rather it is purely for economic reasons of being available in Nairobi so as to continue servicing his clients and private gain while on the payroll of the respondent. The petitioner's conduct is in clear breach of chapter 6 of the Constitution and in conflict with his position with the respondent. the Petitioner breached article 73(2) (c) (i) and (ii) by failing to declare his personal interests in conflict with

his duties; was in breach of 75(1) (a) (b) and (c) where he failed to conduct himself in a manner so as to avoid conflict of interests between public and private duties, compromised public duty for personal interest, and demeaned the office he held. The Petitioner also breached Article 77 of the Constitution when he engaged in other gainful employment while in the public service. The Petitioner was in breach of section 16 and 26 of the Leadership and Integrity Act for engaging in gainful employment while in the service of the respondent.

14. The respondent's case is also that the Petitioner was acting as Deputy Executive Director and there was no entitlement to the position. Mr Ogombe was not at the Kisumu office as a disciplinary posting, rather the Petitioner was sent to the office to take charge and the reasons for his transfer were clearly set out. The Petitioner was hell-bent to resist the transfer by taking annual leave; exams leave and sick leave. The transfer was reasonable and the Respondent complied with constitutional provisions. It was prudent for the Respondent to transfer the Petitioner to Kisumu office than to temporarily relocate it as this would have meant the Petitioner was going to earn a daily allowance for each day he was in Kisumu. This was a board decision and despite the error in the dates, the transfer letter was issued to the Petitioner on 9th March 2015 after the board meeting. The transfer was not in bad faith and does not constitute an unfair labour practice.

15. That the Petitioner failed to take his transfer to Kisumu office so as to remain in Nairobi and to continue with his private business. This would have encouraged a conflict of interest. The Petition should therefore be dismissed with costs.

16. In the Further Affidavit filed on 9th September 2015, the Petitioner avers that he was lawfully on leave and away from work and the allegations that he was absent has no basis. He does not have the capacity to perform the functions of the Respondent under section 7 of the NOG Act and has not committed any offence known in law and where the Respondent had information against the Petitioner with regard to conflict of interest no disciplinary action was taken against him and this information is only being used herein to intimidate him to withdraw the current petition. This also confirms the transfer was not in good faith and the information shared is brought to the wrong forum and should be ignored.

17. The Petitioner further avers that he requested for a meeting before his transfer but the Respondent declined. The Respondent kept all the petitioner's employment records and details and where such was required for the website, these were available for inclusion. Payments for government officer's are paid through the bank and not by cheques and this is what the Respondent should have done with the petitioner's transfer allowances. The Petitioner was never called to collect his cheque or given sufficient time to relocate to Kisumu. The conditions created by the Respondent were intolerable which forced the Petitioner to resign from his position.

18. The Petitioner also avers that the minutes presented by the Respondent are fake as they do not set out why he was transferred to Kisumu and at the same time transferred Mr Ogombe to Nairobi, such minutes are manufactured to demote the Petitioner and at no time was the Executive Director given the authority of the board to act as he did. The Employment Act provides that the place of work should be stated and by transferring the Petitioner to Kisumu was to precipitate his resignation which is an unfair labour practice.

Submissions

19. The Petitioner submitted that he was unfairly, unlawfully and wrongfully transferred without a hearing, notice or reason and thus demoted. His employment contract was specific and did not require him to work in Kisumu as his station had been in Nairobi for 11 years. The unilateral transfer to Kisumu was without notice or reasons and the Executive Director acted beyond his powers. At the time the Petitioner had been the acting Deputy Executive Director and had a legitimate expectation of being confirmed for the position he had held for 3 years and to be moved to Kisumu in an office that was of lower stature was a demotion. This was not necessary as another officer from Kisumu Mr Ogombe was also transferred to Nairobi. The Petitioner has relied on the case of **Severine Luyali versus Ministry of Foreign Affairs & International Trade & 3 Others [2014] eKLR** where the Court held that the

Respondent was in breach of natural justice where they denied the Petitioner the right to be heard before making a decision that was detrimental to a legitimate expectation. Fairness required adherence to natural justice as held in **A. M. Msagha versus Chief Justice of Kenya & 7 Others [2006] eKLR**. The reasons affecting an employee's employment must be given and where this is not done, it amounts to a violation of article 41 of the constitution.

20. The Petitioner also submitted that the minutes submitted by the Respondent are not a true record due to its disparities. The Notice to Produce documents was served upon the Respondent to prove the authenticity of their assertions but only part of such minutes were made available.

21. The Petitioner also submitted he was constructively dismissed when he was compelled to resign due to the intolerable conditions he was put under. His emails account was disabled making it impossible for him to work and his continued employment with the Respondent untenable as held in **Emmanuel Mutisya Solomon versus Agility Logistics, Cause No.1148 of 2011**. The Petitioner has been resident in Nairobi; has worked with the Respondent in Nairobi for over 11 years; has a family and school going children in Nairobi and to be moved to Kisumu meant that the Respondent was deliberately acting in bad faith and the relocation was unreasonable meant to make him resign his position. That this was constructive dismissal as defined by the Court in **Simon Ngugi Kamau versus Silpack Industries Limited [2015] eKLR**. The orders sought in the Petitioner should therefore be granted.

22. On their part, the Respondent submitted that the Petitioner was transferred with due notice and a reason given in a letter dated 4th March 2015 but he remained away from the office. The Petitioner was never demoted or his employment terms changed and his acting position was not a confirmation for the position of Deputy Executive director. While the Petitioner was in an acting capacity, he retained his substantive position with the Respondent and there had never been any representations that he would get the position. The Petitioner was therefore transferred in his same capacity on similar job terms.

23. The Respondent also submitted that this was not a case of discrimination against the Petitioner and there is no violation of article 27 of the constitution. The Petitioner has not laid out the basis of such an averment. The practice of the Respondent to transfer its officers was exercised in this case with due notice and facilitation of the Petitioner but he failed to report to his new station and opted to resign instead. There is therefore no breach of the Constitution and there is no case of unfair labour practice. In the transfer of the petitioner, the Respondent paid one month salary as allowance per its regulations; all transport and baggage expenses were to be paid; sufficient time was given and where more time to settle was requested for, the Respondent was willing to accommodate the petitioners' request. That Respondent employees are supposed to render service within the Republic and the Petitioner was not attached to Nairobi. Kisumu office is one of the offices of the Respondent and any office could be transferred to such an office. The reason the Petitioner failed to report stating that it was of a lower stature clearly demonstrates that he was refusing to move to such an office. His skills and expertise were still necessary for this office but he failed to take the transfer.

24. The Respondent also submitted that this is not a case of constructive dismissal as in an employees' resignation, there must be no other motive for resignation other than the acts complained against as held in **Pretoria Society for the Care of the Retarded versus Loots, Labour Appeals Court, South Africa**. The Petitioner has failed to show that his resignation was justified; there was no fundamental change to his contract and nothing was intolerable to cause the resignation. The Petitioner was engaged in private business hence his unwillingness to move to Kisumu on duty. He continued to operate a limited liability company against his work terms, code of conduct and integrity requirements under the constitution.

25. The Petitioner received KShs.173, 817.00 for his transfer but never moved to the new office and should refund such monies. All the claimed amounts are not due as the Petitioner resigned out of his own volition. He should refund the allowance and pay 3 months' notice. The Petitioner should also be dismissed.

Determination

The issues that emerge for determination I find them to be as follows;

Whether there was a violation of the petitioner's rights

Whether the Petitioner was unfairly treated

Whether this is a case of constructive dismissal

Whether the orders sought should be granted

26. I have considered all the pleading, the affidavits and submissions of the parties. These were quite extensive and raise various issues.

27. The current employment and labour relations regime in Kenya create many protections for the employee. Such protections include but not limited to fair labour practices as under article 41 of the constitution, non-discrimination as per article 27 and treatment with dignity and fairness, all rights under the constitution. The employer as well has been bestowed with prerogatives at the work place to ensure that employees perform their duties as allocated; to give directions and create policies to ensure work performance and where there is misconduct, gross misconduct, such an employer has the latitude upon notice to summarily dismiss an employee found with such misconduct. The prerogative to ensure that work is done to the satisfaction of an employer therefore entails the employer having the mandate to allocate work without inhibitions and to do so in an environment that facilitates the employee to work in a conducive environment.

28. In this regard therefore, a transfer of an employee is one such prerogative of an employer subject to sufficient and reasonable notice to enable the subject employee report to the new station of transfer with the requisite facilitation. It is therefore not in the choice of an employee to dictate where they wish to work, once work has been created, and in the view of the employer they find that a particular employee is best placed in a certain location or work station, the duty on the employer is to inform the employee and the employee's role is to ensure their work performance in the allocated station. To otherwise contest work allocation in a set work station on the basis that the Respondent has not properly allocated such a station is to challenge that prerogative of the employer. The basic standard as set out in the **Severine Luyali case** is that;

The respondents have the power to transfer the Petitioner but the same must be exercised in a lawful manner and not be arbitrary. The petitioner's tour of duty had been granted and when this was varied, no reasons were given even when she expressed her reasons for seeking for such extension.

29. For the employer to thus enjoy this prerogative, there is the duty not to act arbitrarily and ensure the employee is fully notified of the transfer and where the employee seeks a variation, such must be put into account in a manner that entails hearing what the employee has to say with regard to the transfer. This could be extension of time; facilitation; review of job requirement and any other reasonable terms that may arise. The employee also as the duty, once issued with a transfer in employment, where there may be an issue that require to be addressed, such must be stated in clear terms and within a reasonable period to enable the employer address such and to ensure the smooth movement of labour from one office to the other. It cannot therefore be left to the employer to second-guess as to the intentions of the employee. Any requests for reviews, variations or rescission of the transfer must be clearly set out. The best practice in employment relations is to put such requests in writing. This is to enable the other party to Respondent in with clear directions. This was the gist in the **Severine Luyali Case**, where the Court held that sufficient and reasonable notice was a good labour practice to be ensured where the employer required the transfer of an employee. Equally the application for review by the employee required good consideration to ensure each party was aware of what was expected of them. Court held;

... It does not only require an employer to act in good faith, the employee is equally bound by the same rule, to act with utmost due diligence and in good faith toward the directives issued by the

employer

30. In this regard, the Petitioner has extensively submitted that his constitutional rights were violated by the respondent. That he was transferred without notice or being given reasons for it and in any case his employment contract did not say that he would be moved from Nairobi to Kisumu and to be so moved, it was a demotion as this was an office without stature. That the Respondent acted in bad faith and in transferring the Petitioner to Kisumu they were also transferring Mr Ogombe to Nairobi which was pure malice. That the Petitioner had been in Nairobi office and acting as Deputy Executive Director for 3 months and had a legitimate expectation to be confirmed in this position but instead he was demoted and transferred to Kisumu where his skills and knowledge would not be put into good use. Such were serious matters that prompted this Petitioner as the Petitioner moved the Court seeking to stop his transfer to Kisumu.

31. From the records and submissions of the parties, it is not contested that the Petitioner was employed by the Respondent in 2004 as a programmes officer and moved through the ranks to last position of Head of Operations, Compliance and Research. Both letters are signed by the Respondent Executive director; the place of work is not stated; and the terms of employment are set out in both letters dated 5th November 2004 and 16th November 2010 respectively. I take it then, the prevailing situation is that the Petitioner remained at the respondent's Nairobi office until the letter dated 4th March 2015 stating;

TRANSFER FROM NAIROBI OFFICE (HQS) TO REGIONAL OFFICE (KISUMU)

Following the recalling of the Deputy Executive Director Mr Andrew Ogombe back to the headquarters, Nairobi, I wish to inform you that you will now relinquish the duties of Ag. Deputy Executive Director with immediate effect.

Further you have been transferred to the Regional office in Kisumu as the head of Operations, Compliance and Research. In addition to overseeing the operations at the regional office, you will ensure maximum monitoring, evaluation and capacity building of the NGOs in the region and the staff at the regional officer. You will be reporting to the Executive Director on all matters pertaining to the Kisumu office.

...

[Signed]

Executive Director.

32. I take it the transfer with to operate immediately as no timeline was given for the Petitioner to report to the regional office, Kisumu. It is however clear that the Respondent had recalled the Deputy Executive director, Mr Ogombe back to the Nairobi office. To this, on 17th March 2015 the Petitioner replied thus;

REMOVAL AS ACTING DEPUTY EXECUTIVE DIRECTOR AND TRANSFER TO KISUMU

...

1. Your letter does not give any reasons for the decision to remove and not to confirm me in the position I was holding other than that it was based on the recall of Mr Andrew Ogombe back to the headquarters. It is my considered view that such a far-reaching decision cannot be premised on the mere fact of another officer having been recalled to Nairobi

2. Secondly, if indeed the above position can be justified, it would follow hence that I should revert back to my previous posting and position as the head of operations Compliance and Research, a position that is only tenable at the Nairobi office based on the NGO Boards organogram and the

duties attached to the position which include oversight on operations, compliance and research. I wish to further note that any change in the organogram has to be approved by the Board of Directors and I am not aware of any such approval.

3. ...

7. the decision to transfer me to Kisumu which is a satellite office and as such of a lower stature, and where clearly my skills, knowledge and experience will not be optimally applied; amounts to a demotion notwithstanding your claims that my benefits remain the same. Under the circumstances and in accordance with the protection afforded to public servants by article 236 of the constitution, I was entitled to due process.

...

In view of the foregoing issues, it is my considered view that the said decision asking me to relinquish the position of Ag. Deputy Executive Director and further transferring me to Kisumu be reviewed.

33. The Petitioner thus did set out 11 reasons as to why the decisions made and communicated vide letter of transfer dated 4th March 2015 should be reviewed. From the submissions, and as admitted by the petitioner, his position was that of Head of operations, compliance and research. He was acting Deputy Executive Director and the substantive holder of the position was Mr Ogombe had been recalled from the regional office Kisumu. With that recall of the substantive office holder for the position of Deputy Executive director, took his position as the headquarters. Mr Ogombe was the Respondent Deputy Executive Director for the respondent.

34. I find no legitimate claim by the Petitioner over the same position. The officer appointed for this position was in existence and known to the Petitioner but based in the regional office, Kisumu. The Petitioner was only in an acting capacity and despite being in such a position for 3 months, he remained on a substantively different position as he was never confirmed on this position. It cannot therefore be a justification that such a position should have been confirmed and the Petitioner retained in the same. Even where there was no substantive holder for the position of Deputy Executive director, the procedures set out by the employer for the appointment of the position would still have come to play. The Petitioner cannot therefore claim any entitlement over this position.

35. Equally, the assertion by the Petitioner that he was answerable to the Board and not the Executive Director is a misconception of the fact. The Executive Director was his immediate supervisor and the board at the next level. In any case the Petitioner was the acting Deputy Executive Director under the Executive Director and not acting Deputy to the board. To take it that he could not take lawful instructions from the Respondent officer in charge is to act contrary to what is reasonable and required at his place of work. The Respondent Executive Director is apposition governed under the NGO Act and such an Executive Director is the chief officer responsible for the secretariat operations. As such, the secretariat staff at the headquarters and regional offices and branches are all under the supervision of the chief officer of the respondent. The Petitioner fell under such supervision and could not supersede this office and seek direct supervision by the board. To do so would be to defeat the purpose for the setting up of the office of the Executive Director and remove the role of the board as the policy body of the respondent.

36. The Petitioner also sought for a review of his transfer to the regional office to Kisumu. His reasons are the since he had not been confirmed as the Deputy Executive director, he should revert back to his previous position as such position was only tenable in the Nairobi office; his place of work was Nairobi and not elsewhere; the reasons for the transfer had not been communicated; his transfer was done without prior discussions with him; this was a demotion and change of his employment terms; he was treated with indignity when the letter of transfer was handed over to him by a junior officer; he was resident in Nairobi with his family and school going children; and that on 11th March 2015 the human resource manager called him asking why he had not reported to Kisumu office which was malicious.

37. The above reasons for seeking a review on the transfer as set out by the Petitioner assessed as set out above and noting the prerogatives of the employer is that in the letter dated 4th March 2015, the Respondent in the transfer of the Petitioner re-affirmed that his position as Head of Operations Compliance and Research would remain the same with same benefits and terms. To this the Petitioner contested noting that despite this confirmation, the Kisumu office was of a lower stature to which I find no rationale, basis or ground as this was one of the offices of the Respondent and the Petitioner had simply been moved to such an office. Where work was required to be undertaken in such an office by an officer of the respondent, the Petitioner happened to be the officer. In any event the Deputy Executive Director had just been recalled from such an office. Matters of *stature* are subjective and cannot form a rational basis as to why the Petitioner was not keen to work in this office. In this regard, it is the nature of work the Petitioner was to undertake as was confirmed by the Respondent and not the stature of the office that is important. Had the office not been conducive for habitation of any officer, this can be a reasonable basis not to send any officer in such an office but the question of *stature* to be applied to avoid a transfer, I find to be a standard the Petitioner was setting too high as a demand to his moving to such an office. It is not reasonable and lacks any justification.

38. As noted above, both letters issued to the claimant on his positions with the Respondent have not indicated which office he was to be based. Even where this was stated, any review of his contract terms and conditions were put into writing as required in law. However, such changes, reviews or any amendment are regulated under section 10 of the Employment Act thus at clause (1) and (5);

(1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than two months after the beginning of the employment—

...

(5) 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.

39. At clause (1), an employer is required to put into writing all employment terms and conditions and where any specific terms is not so written, this should be done within two (2) months. Therefore any review or changes to the written terms and conditions of employment must be in consultation with the employee so as to reflect the changes and bring such changes to the attention of such an employee. It is therefore imperative from these mandatory provisions of the law that to move an employee from one office to the next in a transfer, work location or even where the job terms remain the same, the disruption in operations require notification and consultations with the employee to ensure smooth operational shift. In this case the I find the Petitioner occupied a senior position in the Respondent establishment, he had been acting Executive Director for 3 months and his substantive office was that of the head of Operations Compliance and Research and in such capacities was entitled in the minimum to prior consultations before his transfer to enable him organise himself and family. Even where the Respondent enjoyed the prerogative to transfer the petitioner, such should not have been arbitrary, without prior notice and without consultations with him. Matters that the Petitioner sets out in his letter dated 17th March 2015 should have formed the basis of such consultations before he proceeded on the transfer.

40. I therefore find the Respondent failed to issue a reasonable notice of transfer to the petitioner, there were no prior consultations and the changes made to his terms and conditions of employment with the relocation of work station was arbitrary and contrary to section 10 of the Employment Act. This is affirmed by the Court in ***Githunguri versus Republic [1986] eKLR*** in the finding that;

... That official undertakings given officially must be honoured and members of the society are entitled to an orderly and tranquil life and not be subjected to vicissitudes of law especially when there have been no subsequent fresh events to justify it.

41. Employment and labour relations thrive best in an atmosphere of good faith. Work place

productivity is enhanced in an environment of consultations. Employees give their best in work performance where they feel their concerns are addressed by the employer and employers enjoy maximum returns from the labour of their employees where they set a conducive work environment. Where there is predictability. A projection is possible even where work dynamics sometimes may require work flexibility. To therefore ambush an employee with an immediate transfer, a transfer that was possible to plan for or had been foreseeable with the recall of the Deputy Executive Director was to ambush the petitioner. The further on the Petitioner to ask if he had moved to the new station without holding consultations was arbitrary. This does not foster healthy labour relations but fundamentally where the employer fails to meet mandatory provisions of the law, this is an unfair labour practice.

42. I find there was no due process. This was procedural unfairness.

43. On the issues raised with regard to demotion of the Petitioner and that his employment terms were changed, as noted above, the only substantive change made in the employment terms and conditions of the Petitioner was the work environment. His movement to Kisumu from Nairobi was the only issue otherwise I find this was not a demotion, the Petitioner retained his position albeit with additional duties to oversee several other operations within the regional office in Kisumu. Once an employee of an entity such as the respondent, there was reasonable expectation of work station, work at the headquarters for a long duration notwithstanding. The employment letter does not spell out that the position held by the Petitioner had to be based in Nairobi. To make such a requirement would be setting up new terms that the parties had not contemplated to govern the employment relationship.

44. The Petitioner also brought to the attention of the Respondent that he had been resident in Nairobi for long and had his family and school going children. Had there been consultations in the first instance, such are the factors that would have been brought to the attention of the Respondent that were to guide the notice period required to enable the Petitioner reorganise his personal life so as to be able to report to his new station. The transfer standing, the reporting dates and the adjustments necessary and the required facilitation should have been a matter of course where consultations had been held. The Petitioner was therefore justified in noting that the decision of the Respondent was taken without notice and this was going to have an impact on his family and by converse, have a negative impact on his work productivity.

45. That set out, the Respondent wrote to the Petitioner on 26th May 2015 thus;

...

TRANSFER FROM NAIROBI TO KISUMU REGIONAL OFFICE

Reference is made to ... the letter dated March 4th 2015, various electronic mails communications between you and the Board and most recently your ex parte Court orders and Petition No. 41 of 2015 ...

The Board has also noted that since you were severed with your transfer letter, you have asked for an been granted all manner of leaves ranging from, annual leave of 28 days, to exam leave of 10 days and 5 days sick off from May 20, 2015 to May 25, 2015 per your email correspondence of May 29, 2015 with human resource manager; all of which have expired.

... You will appreciate the board has since your transfer patiently accommodated your various requests for leave which as noted hereinabove have expired. You are therefore required to IMMEDIATELY report to your new work station pending the interparties hearing of your Petition mentioned hereinabove.

YOU ARE HEREBY ADVISED that under Clause 10.1 of the HR Manual and Clause 8.3.19(c) of the revised HR Manual: an employee who without leave or reasonable cause absents himself from duty for more than 48 hours, shall be regarded as having vacated his office and shall be paid salary up to the last day he was on duty.

...

46. In this regard the conduct of the Petitioner came into focus. Upon receipt of his transfer letter and as noted above, he replied seeking a review of the transfer on 17th March 2015.

On 9th March 2015, the Petitioner was served with the transfer letter;

On 16th March 2015 the Petitioner applied for 30 days annual leave and was granted 28 days;

On 28th April 2015 the Petitioner was to report back to the office from annual leave;

On 29th April 2015 the Petitioner applied for 10 exams days leave;

On 8th May 2015 the Petitioner reported at the Kisumu office;

On 14th May 2015 the Petitioner was to resume duty;

On 11th May 2015 the Respondent wrote to the Petitioner on the staff retreat in Mombasa;

On 14th May 2015 the Petitioner replied noting that he had no emails access at his residence;

On 18th May 2015 the Respondent wrote to the Petitioner seeking to know if he had reported to Kisumu;

On 19th May 2015 the Petitioner replied noting that he had a doctor's appointment on 20th May 2015;

On 20th May 2015 the Petitioner filed his Petition herein;

On 26th May 2015 the Respondent directed the Petitioner to report to Kisumu;

On 9th June 2015 the Respondent wrote to the Petitioner on facilitation to move to Kisumu office; and

Subsequently, the Petitioner resigned. Annexure "HO10" not attached to the petitioners Supplementary Affidavit.

On 20th July 2015 the Respondent accepted the resignation of the petitioner.

47. With the above outline, it is clear that that which the Respondent ought to have done prior to the transfer of the Petitioner was now being done in reverse. The Petitioner was being given time to organise himself so as to report to his new work station in Kisumu and by letter dated 9th June 2015, facilitation was offered as a further communication from the letter dated 4th March 2015. With regard to the letter on the reviews sought by the Petitioner on 17th March 2015, I find no response by the respondent. The concerns noted above on the notice period, the reporting dates, the concerns about the petitioner's family and school going children, these have not been replied to. What the Petitioner was left with was the letter dated the letter dated 26th May 2015 with notice that where he failed to report to his new station within 24 hours and remained absent from duty, a sanction would follow. The Petitioner equally does not aid his case at all! Upon writing to the Respondent on 17th March 2015 and realising that his transfer would not be changed, he applied for all manner of leave under the book! This is noted by the Respondent in the letter dated 26th May 2015. He took 28 days annual leave; 10 days exams leave; and 5 days sick leave. The applications for annual leave and exams leave were approved. What is missing is the sick leave.

48. The above notwithstanding, on 8th May 2015 the Petitioner reported to Kisumu office and he was paid his allowances. The Petitioner was supposed to travel to Mombasa for the staff retreat but stated that he had no internet access in his residence and could not travel. Further communication to him was that he was seeking medical attention and was due to see a doctor on 20th May 2015. This is contested by the Respondent noting the Petition herein was filed on the same day. However what is important here is that the Petitioner was at Kisumu office on his transfer on 8th May 2015. What transpired later upon filing the Petition is the letter dated 26th May 2015 which is directing the Petitioner to report to the Kisumu office to which the Petitioner submitted that he was being threatened and intimidated in bad faith. So where was the Petitioner after 20th May 2015? Did he ever go back to the Kisumu office? Did the Petitioner ever work for the Respondent after this date?

49. The answer to the above questions leads to the next issue on whether the Petitioner was constructively dismissed by the respondent. Constructive dismissal or discharge has been defined by the Court in **Nathan Ogada Atiagaga versus Davis Engineering Ltd, Cause No.419 of 2014** as follows;

Constructive dismissal, occurs when an employee resign because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge...

50. Due to the conduct of an employer that make the work environment intolerable, the employee is thus forced to tender his resignation. As submitted by the Petitioner in the case of **Emmanuel Mutisya Solomon versus Agility Logistics, Cause No.1448 of 2011**, and the basics of a constructive dismissal can be described as;

... Situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed.

51. The intolerable conditions set by the employer are of the nature that the continued employment of employee is not tenable and he has to resign. Thus by the conduct of the employer there is a fundamental breach of the contract of employment, such breach has no reasonable cause, and such conduct has severely damaged the employment relationship. Such are matters that an applicant, Petitioner or claimant must address when claiming constructive dismissal. Section 43 of the Employment Act requires that the party terminating an employment contract must prove the reasons for such termination, the reasons that *genuinely believed to exist, and which caused the termination of employment contract*. The burden of justifying such circumstances, reasons or breach is placed on the Petitioner as the one claiming under this head. Such were grounds set out in the case of **Mariana Onica and Another versus Sky Aero Limited, Cause No.1815 of 2014** the Court held that;

... in bringing such a dispute, it is for the employee to prove that the employer was responsible for introducing the intolerable condition, and for the employee to prove that there was no other way of resolving the issue except for resignation. In other words, it is not for the employer or the Respondent in this case to show that he did not introduce any intolerable condition it is for the employee to show that he did.

52. In this case, the Petitioner submitted that he was placed under intolerable conditions and forced to resign when he was to transfer to the Respondent regional office in Kisumu; he was not given a hearing before the forced transfer; he was removed from the website of the Respondent which led to ridicule by

friends and members of the public; his email account was disabled; no transfer allowance was paid; there was no reasonable relocation period; that the Respondent failed to appreciate that the Petitioner was resident in Nairobi with his family and had school going children and he needed to organise for change of schools and relocation from Nairobi to Kisumu.

53. To the above submissions, the Respondent contested the same in their defence and stated that the website was under reconstruction whereby the Petitioner was invited to give his details but he declined; his email account is valid and accessible; there was a payment for transfer allowance vide cheque which the Petitioner refused to collect and later a bank deposit was made which monies the Respondent is claiming back; and the Respondent introduces a new angle to the matter by citing that the Petitioner had a private company running business for personal gain and outside his employment with the Respondent and this was the core reason as to why he resisted the transfer from Nairobi to Kisumu. That this private business was in conflict of interest, raised matters of integrity and amounted to a violation of the Constitution where a public officer was undertaking personal duties while on the exchequer payroll.

54. What is clear from the proceedings and analysis above, a work transfer is the prerogative of the employer. The Petitioner cannot claim a forced transfer save for the modalities that this was enforced contrary to section 10 of the Employment Act as set out above. I also find no evidence that the removal of the Petitioner from the Respondent website caused the Petitioner public ridicule forcing him to tender his resignation. there is also no contestation by the Petitioner that his email account was valid and accessible, where the Petitioner was unable to communicate via emails, there are other acknowledged modes of communication that are acceptable between an employer and an employee. I find a cheque attached to the Supplementary Affidavit of Ms Ngatia indicating a payment to the Petitioner which is said to be his transfer allowance, where the Petitioner remained in Nairobi unable to report to Kisumu due to the non-issuance of his transfer allowance, nothing stopped him from collecting such a cheque. The defence that all payments by the Respondent were made via bank transfer is neither here or there. Where there was a willingness to relocate to Kisumu from Nairobi, the Petitioner having been advised to collect his cheque, he should have obliged. 55.

On the issue that the Petitioner was resident in Nairobi with his family and school going children, upon the finding that indeed the Petitioner should have been consulted before his transfer to Kisumu to enable him organise himself and family for relocation, this I find to have been a serious lapse on the part of the Respondent but the degree in the lapse is not commensurate to the conduct of the petitioner. This is so because, as noted above, the Petitioner does not give an answer as to his whereabouts from 20th May 2015. The Petitioner had already reported to his new work station on 8th May 2015. The Petitioner had received the transfer allowance via his bank account but effectively failed to take up his transfer as on 26th May 2015 the Respondent had to issue a notice to him to be at his place of work. Such are matters that the Court cannot ignore in a case such as this one where the Petitioner is seeking an equitable remedy. The conduct of each party becomes an issue here. In this regard the Court in **Elizabeth Washeke & 62 Others versus Airtel Networks (K) Limited 7 Another, Cause 1972 of 2012** held that;

Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. ... Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public.

56. The approach and attitude of the Petitioner to his work colleague, his supervisor the Executive Director does no justice to his case. This is evident at paragraph 23 of his Supplementary affidavit where the Petitioner avers;

That in response to paragraph 24, 25 and 26 the Petitioner avers that it would be better then if the averments are sound to have the Executive Director operate and sit in Kisumu office to deliver better the services of the respondent. The Petitioner reiterates that the Kisumu office is of a lower stature as even the Respondent has affirmed in paragraphs....

57. This leads me to the issue of the Petitioner running a private company while in the employment of

the respondent. These facts are not denied save that the petitioner's contention is that they are introduced in these proceedings in bad faith. As these facts speak for themselves and are herein introduced to challenge the case of constructive dismissal, I find them relevant. The petitioner, as an officer of the Respondent was in conflict of interest to run an entity such as the Limited Liability Company registered and providing services to NGOs in Kenya. This is a direct affront on chapter 6 of the constitution. The fact that such matters are introduced by the Respondent in defence does not change the veracity of the petitioner's violation of constitutional provisions as such touch on his integrity.

58. However, While the Respondent was aware and had records and evidence of the Petitioner engaging in private business while in their employment, they did nothing. Instead of addressing any misconduct, gross or otherwise, they opted to take a different route of transferring him. This is not what an employment relationship should be. Parties work in good faith but where there is any form of misconduct or a conflict of interest as the Respondent has submitted, this is not to be wished away but should be dealt with. This creates confidence, avoids malpractices at the work place and ensures that each employee give due service for the function they have been employed to undertake. To circumvent the course of justice through a transfer is only burying the problem without addressing it. It does not cure the misconduct, rather it creates resentment and leads to petitions such as this one. This ends up aiding the petitioner's case that indeed such information, even where it is true, it has been submitted in bad faith. Had this not been the same, the Respondent as the employer had the liberty, latitude and material sufficient to commence termination proceedings against the petitioner. To thus transfer the Petitioner from one office to the next is the injustice to the public and the exchequer. I find that this information from the Respondent is not presented in good faith.

59. On the claim for constructive dismissal, the petitioner's letter of resignation is missing from the entire record. Despite having the Petition and its amendments, the submissions herein, this document is the one that set out the reasons as to why the Petitioner had to resign. It is a fundamental foundation for the claim for constructive dismissal. Its existence, content and context is crucial to this claim. Annexure "HO9" and "NO10" to the Supplementary Affidavit of the Petitioner dates 17th July 2015 are one and the same. The resignation letter was therefore not available for the Court to assess it. Its importance cannot be overemphasised in this case.

Remedies

60. The Petitioner is seeking various orders as set out above. Save for the violation to his rights under section 10 of the Employment Act, the Petition must fail in all other respects. To fail to ensure the Petitioner was treated fairly with regard to notification of his transfer and hold consultations with him in terms of allowing him reasonable time to be able to change workstations largely resulted in the Petitioner devising his own means on how to cope with it. However, the Petitioner did not aid his case for constructive dismissal at all. For the violation of the petitioner's employee right in law, compensation is due.

61. The absence from duty by the Petitioner when he took his annual leave, exams leave and sick leave were with the approval of the respondent. Section 46(b) of the Employment Act prohibit an employer from taking any disciplinary action against an employee who has taken their annual leave or any other lawful leave thus;

46. The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

...

(b) The going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;

62. For the time the Petitioner was lawfully away from work, he should not be penalised. He was paid his transfer allowance while on lawful leave and as such to be made to repay such amounts would be

double punishment.

63. That said, the Respondent is seeking to recover the transfer allowance paid to the Petitioner at Kshs.173, 817.00 together with notice pay of 3 months at Kshs.852, 812.00. The rules of practice for the Court do not change simply because this is the Employment and Labour Relations Court. Any claim before the Court must meet acceptable standards of procedure especially bring to the notice of the other party any claim that a party may have to enable such party give their defence. Such is a practice that this Court upholds with the highest regard. The Respondent ought to have filed a cross-Petition to enable the Petitioner reply thereto. To thus claim in submissions for notice pay and a refund of the transfer allowance is a practice that is not acceptable.

Conclusion

In the final analysis I make the followings orders;

- (a) The Petitioner is awarded compensation of 3 months' salary for procedural unfairness at Kshs.852, 812.00;**
- (b) The Petitioner shall be paid 50% of his costs;**
- (c) The payments due above shall be subject to tax deductions.**

Orders accordingly.

Dated signed and delivered in open Court at Nairobi this 12th day of November 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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