



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANOUS CIVIL CASE NO 226 OF 2013

IN THE MATTER FOR LAW REFORMS ACT CAP.26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT, CAP.21 OF THE LAWS OF KENYA

IN THE MATTER FOR THE APPLICATION FOR ORDERS OF CERTIORARI,

AND

**IN THE MATTER OF KENYA NATIONAL POLICE SERVICE COMMISSION ACT OF 2011
LAWS OF KENYA AND RULES MADE THEREUNDER.**

AND

**IN THE MATTER OF APPOINTMENT OF COUNTY POLICE COMMANDERS DURING THE
MONTH OF JUNE 2013 BY THE INSPECTOR GENERAL OF THE NATIONAL POLICE
SERVICE**

BETWEEN

INTERNATIONAL CENTRE FOR

POLICY AND CONFLICT.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

INSPECTOR GENERAL OF

THE NATIONAL POLICE SERVICE.....2ND RESPONDENT

CHAIRMAN OF THE NATIONAL

POLICE SERVICE COMMISSION.....3RD RESPONDENT

JUDGEMENT

Introduction

1. By their Notice of Motion dated 26th June, 2013, the *ex parte* applicant herein, **International Centre For Policy and Conflict** seeks the following orders:

- 1. An order of Certiorari to being to this honourable court for the purpose of being quashed the decision of the Respondents purporting to appoint or deploy some 47 county Police Commanders on or about the 13th day of June 2013.**
- 2. An order of Mandamus to compel the 3rd respondents to initiate and conduct the process of removing the second respondent from the office of the Inspector General of the National Police Service.**
- 3. The cost of this application be in favour of the Applicant.**

Ex parte Applicant's Case

1. The application is based on the following grounds:

1 The respondents Actions and omissions are in the said two sets of appointments and or deployment are illegal to the extent that the Article 246(3) (a) of the constitution has reserved that duty and any such duties to the National Police Service Commission and to the extent that the actions were made by the Inspector general of the National Police service Commission, the actions are illegal.

2 The actions of the respondent are illegal to the extent that the process of deployment in the service is done by the National Police Service Commission and as such the said actions were taken in the absence of jurisdiction and thus Ultra vires.

3 The decisions of the fist respondent has locked out competitiveness and rewarding merit in the National Police service act and as such can only have the long term effect of demoralizing the had working members of the National Police Service.

4 The position of the law in the matters of the appointment has been provided for both in the constitution and the National police service Act 2011. To the extent that the 1st respondent acted outside these provisions, he has demonstrated real contusive bad faith by openly disregarding the law.

5 That national police Service Commission had started off the process of recruiting the County Police Commanders and had invited applications form interested and qualified personnel. By acting before they can be allowed to finish that process, the 1strespdont has sought to undermine the clear provisions of the law thus undermining a legal process.

6 The 1st Respondent is a state office sworn to defend and uphold the Constitution of Kenya as provided for in Article 3 of the constitution, and by acting against these legitimate expectations as held by the public, he is thus in breach of the same and thus a candidate for removal from office.

7 The Applicant and indeed the other well meaning members of the public had and still retain legitimate expectations that where a vacancy has been advertised by a competent authority as was done by the National Police Service Commission, then the same will be basis of recruitment. By the respondent abrogating himself the powers to do so, he has thus breached the legitimate expectations and thus acted as though he were law unto himself.

2. The application is supported by Supporting Affidavit filed on 26th June, 2013 sworn by **Ndung'u**

- Wainaina**, the Executive Director of the applicant herein on 25th June, 2013.
3. According to the deponent, on or about the 13th day of June 2013 the second respondent addressed a press conference where he announced having appointed some 47 county Police Commanders. However, in the deponent's view, the said second respondent does not have the mandate of making such appointments and or deployment as the **National Police Service Act** (hereinafter referred to as the Act) that creates and details the duties and powers of the second and third respondents gives such duties to the third respondent and as such the second respondents action were taken in the absence of jurisdiction.
 4. In the deponent's view, the same decision of appointments and or deployments were acts of impunity and in protest, he petitioned the third respondent to initiate a process of removing the second respondent from office no response was received.
 5. It was further deposed that even when the second respondent has appeared to make decisions that put the second and third respondents at conflicts in managing and administering the National Police Service, and he has always written to the third respondent to demonstrate his desire for the Police Service to run professionally.
 6. To the deponent, the developments around the National Police Service have now become pure cases of one department wanting to perform the roles not meant for them by the law hence it is now prudent for this Honourable court to pronounce itself at the centre of this controversy and grant the orders sought herein.

Respondents' Case

7. In opposition to the application the respondents filed a replying affidavit sworn by **Johnson Mafenyi Kavuludi**, the third Respondent herein (also referred to herein as the Commission) on 11th July, 2013.
8. According to him, while admitting that the 2nd Respondent does not have the mandate to make appointments in the National Police Service, the 2nd Respondent did not appoint forty seven (47) County Police Commanders as alleged but in fact deployed forty seven (47) Officers of the National Police Service to the forty seven (47) Counties.
9. According to the 3rd Respondent, the institution mandated to make appointment to the service is the National Police Service Commission, established under Article 246 of the Constitution of Kenya and whose membership includes the second Respondent and himself as provided for under clause 2 of the aforesaid Article and that the second Respondent does have the function and power to deploy Officers in the service as provided under Section 10(1) of the Act and that on the contrary, himself and/or the Commission have no mandate to effect deployment of Officers in the service.
10. According to him, the deployment of the forty seven (47) Officers was not an act of impunity by the second Respondent as alleged in paragraph 4 of the Affidavit and consequently, there was no ground to initiate proceedings for the removal of the second Respondent. In his view, the aforesaid deployment was effected so that there exists no vacuum in the provision of security services to the forty Seven (47) counties of the Republic of Kenya given that the office of the Provincial Police Officers had effectively been abolished after the 2013 elections and that all government structures were re-organized in accordance with the County Government structure. To him, the said deployment was a temporary measure pending substantive appointment of the County Commanders by the Commission, as borne out by the directive of the Permanent Secretary (as it then was), Provincial Administration and Internal Security (as it then was), in his letter reference OP.PA. 3/17/A dated 6th June 2013.
11. He averred that the Commission had embarked on a competitive and transparent process of appointment of the County Commanders in accordance with the law and that the process was ongoing but the process was necessarily slow as the Commission had to ensure inter alia that Offices shortlisted for consideration were suitable and competent and that they conform to the constitutional requirement of ethnic, regional and gender balance. He reiterated that the process of recruitment of the aforesaid Commanders by the Commission was on-going and that the shortlist of Officers would soon be release and successful applicants invited for interviews by the Commission.

12. In light of the forging, it was deposed that the aforesaid deployment was effected by the second Respondent in good faith and for the benefit of the country and in proper exercise of the powers granted to him by the constitution and the Act. He however averred that neither himself nor the Commission received any Petition for the removal of the Inspector General as alleged in paragraph 4 of **Mr. Ndungu Wainaina's** Affidavit or at all hence the Orders being sought here are an abuse of this Honourable Courts process. It was further his view that the Application by the Petitioner is based upon an erroneous interpretation of Law and facts.

Applicant's Submissions

13. On behalf of the applicant it was submitted that a person cannot be deployed temporarily to a new office, the first holder of an office must hold it in a fairly permanent way and to that extent the contention that the officers were temporarily deployed ought to collapse.
14. It was submitted that the appointments and deployments were not policy matters under Article 254 of the Constitution but were direct employment and deployment.
15. It was submitted that good faith cannot be a defence against actions that are not explicitly backed by written law. Whereas the 2nd Respondent may in an emergency send a contingent of members of the police service to respond to the crisis, it was contended that a nationwide deployment cannot be said to be an urgency when new officers are sent to occupy new offices. Based on Craig Administrative Law, 5th Edn. At page 5, the applicant prayed that the orders sought herein be allowed.

Respondents' Submissions

16. On behalf of the Respondents it was submitted that save for generalised assertions of illegality the applicant has not brought its claim with the well set purview of the grounds for issuance of judicial review orders. Similarly, it was submitted, based on *De Smith's Judicial Review*, 6th edition, Sweet & Maxwell at 611 that the applicant has not brought its application within the definition of legitimate expectation.
17. It was submitted that the application deals with issues of National Security and if the Court were to rule against deployment there would be a vacuum in security co-ordination in the counties hence the Court in exercising its discretion ought to consider public interest and decline to issue the orders sought. In support of this submission the respondents relied on **Republic vs. Judicial Service Commission ex Parte Pareno [2004] 1 KLR 203 at 219**, **Republic vs. Kenya National Commission on Human Rights ex parte Uhuru Kenyatta [2010] eKLR** and *Halsbury's Laws of England* 4th Edn. Vol. II page 805 para 1508.
18. Since the orders sought herein seek to deal with what has already transpired it was submitted on the authority of **Kenya National Examinations Council vs. Republic ex parte Gathenji** that the orders sought herein should not be granted.

Interested Party's Submissions

19. On behalf of National Conservative Forum, an interested party, it was submitted that under Article 246, the 2nd Respondent had no mandate to make appointment which is the preserve of the Commission to which the 2nd Respondent is a member. In the view of the interested party the 2nd Respondent had no mandate to make the unilateral appointments and by making such appointments, the 2nd Respondent perpetrated an illegality which must be rectified by the Court. In the interested party's view, the 2nd Respondent similarly does not have jurisdiction under section 10 of the Act in matters pertaining to recruitment and appointment as the same is vested in the Commission.
20. Relying on **Nancy Makokha Baraza vs. Juddicial Service Commission & 9 Others [2012] eKLR**, it was submitted that the 2nd Respondent acted ultra vires authority conferred on him by Parliament.

Determination

21. Article 245 of the Constitution provides as follows:

(1) There is established the office of the Inspector-General of the National Police Service.

(2) The Inspector-General—

(a) is appointed by the President with the approval of Parliament; and

(b) shall exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.

(3) The Kenya Police Service and the Administration Police Service shall each be headed by a Deputy Inspector-General appointed by the President in accordance with the recommendation of the National Police Service Commission.

(4) The Cabinet secretary responsible for police services may lawfully give a direction to the Inspector-General with respect to any matter of policy for the National Police Service, but no person may give a direction to the Inspector-General with respect to—

(a) the investigation of any particular offence or offences;

(b) the enforcement of the law against any particular person or persons; or

(c) the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.

22. As I held in High Court Misc. Application No. 93 of 2013 between **Republic vs. The Deputy Inspector General of National Police Service and 2 Others ex parte Morris Sagala & Others** any law which prescribes the powers of the Inspector General under Article 245 of the Constitution must itself comply with the provisions of the Constitution otherwise the same would be void to the extent of its inconsistency.

23. Article 246 of the Constitution which establishes the Commission sets out in Clause (3) the powers of the said Commission and these are to:

(a) recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service;

(b) observing due process, exercise disciplinary control over and remove persons holding or acting in offices within the Service; and

(c) perform any other functions prescribed by national legislation.

24. Clearly, the powers to *inter alia* **determine** promotions and transfers within the National Police Service lie with the Commission.

25. It is however provided under Article 245 of the Constitution that no person may give directions to the Inspector General with respect to “the employment, assignment, promotion, suspension or dismissal of any member of the National Police Service.” As I held in **Republic vs. The Deputy Inspector General of National Police Service and 2 Others ex parte Morris Sagala & Others** (supra), it is clear that the drafters of the Constitution deliberately left out *transfer* as one of the powers which the Inspector General exercises without directions from any one and therefore the powers of transfer of members of the Service were reserved to the Commission. It is noteworthy that whereas the Inspector General was vested with the powers of appointment of any **members** of the police service, the powers to appoint a person to hold **offices** in the Service was reserved for the Commission. Clearly, the drafters of the Constitution sought to distinguish between **members of the Service** and **Offices of the Service** hence the demarcation in their source of appointments.

26. This position is reinforced by section 10(2) of the **National Police Service Commission Act** which

- provides that “*subject to the provisions of the Constitution or any written law, the Commission may delegate to the concerned Inspector-General the recruitment, appointment and promotion of police officers under the rank of sergeant.*” In exercising the powers under this section the 2nd Respondent exercises a delegated power. It is again important to note that the powers of transfer are omitted from this section. Surely this cannot be said to have been by an oversight on the part of the Legislature. Section 10(3) of the same Act on the other hand bars the Commission from delegating to the Inspector General of Police powers of the Commission if the same would amount to unjustified delegation of the Commission’s discretion. One of the unjustified delegation in my view would be to delegate powers which the Constitution prohibits the Commission from delegating. Under subsection (5) thereof however, such delegation is required to be in writing; be subject to any conditions the Commission may impose; and not divest the Commission of the responsibility concerning the exercise of its powers or the performance of the duty delegated.
27. It is similarly noteworthy that section 10 of the ***National Police Service Act*** which sets out the functions of the 2nd Respondent does not purport to confer on the 2nd Respondent the power of transfer. Under Article 245(2)(b) of the Constitution the 2nd Respondent is mandated to “*exercise independent command over the National Police Service, and perform any other functions prescribed by national legislation.*”
28. It follows and I reiterate that the Inspector General of Police has no unilateral powers to “***recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the National Police Service***”. This Court is aware of attempts to twist the provisions of the Constitution to suit temporary convenience. That however will not do. Express provisions of the Constitution, the Supreme law of the land, ought not to be sacrificed at the altar of expediency. Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the Constitution no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like on Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud.
29. However under Article 245(4)(c) of the Constitution the 2nd Respondent has the power of assignment of any member of the National Police Service. By assignment it must necessarily refer to assignment of duties. Therefore, as clearly submitted on behalf of the applicant the 2nd Respondent is for example within his right in cases of emergency or in the interest of National Security to assign certain duties to members of the police force. If the term deployment used by the Respondent is limited to assignment then it is my view and I hold that there ought to be no objection to the exercise of such powers by the 2nd Respondent. However, the 2nd Respondent has no powers to unilaterally transfer members of the police service under the guise of assignment or deployment. It is not the term employed by the 2nd Respondent that determines whether or not the action taken is within the powers of the 2nd Respondent but the effect of the action taken.
30. In this case, it is contended by the Respondents that the action taken was temporary measure meant to ensure that there was no vacuum in security system in the country following the implementation of the devolved system of government. That any vacuum in security system in any part of this country may lead to catastrophic effect cannot be doubted. In such eventuality I am satisfied that the 2nd Respondent would be entitled to assign police officers as a temporary measure to ensure that there is no vacuum created by transition from one order to another.
31. In this application, I do not have any evidence before me on basis of which I can find that the action of the 2nd Respondent was meant to be permanent in order for the same to amount to appointments or transfers contrary to the powers of the 2nd Respondent.
32. It follows that there would be no basis upon which I would fault the 3rd Respondent in failing to initiate and conduct the process of removing the second respondent from the office of the Inspector General of the National Police Service.
33. In any case, the decision whether to initiate that process rests with the Commission in the exercise of its powers under section 15 of the ***National Police Service Act***. Under subsection (2) and (3) thereof provide:

(2) A person desiring the removal of the Inspector-General on any ground specified in subsection (1)

may present a petition to the Commission setting out the alleged facts constituting that-ground.

(3) The Commission shall consider the petition and, if at least two thirds of the members present and voting

agree that it discloses a ground under subsection (1), the Commission shall recommend to the Parliament the

removal of the Inspector-General.

34. Once a petition is presented to the Commission the Commission is obliged to consider the same. With respect to the order of mandamus it is the law as expressed in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** that:

“Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way..... These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same...”

35. In this case the public duty imposed on the Commission by section 15 of the ***National Police Service Act*** is to consider the petition in order to determine whether it discloses a ground under Article 245(7) of the Constitution. If the Commission on receipt of such a petition fails to consider the same, this Court is empowered to compel the Commission by an order of mandamus to do so.

36. The 3rd Respondent however contends that no such petition was received by the 3rd Respondent from the applicant. The applicant has relied on its letter dated 14th June, 2013 as the petition seeking that the process of the removal of the 2nd Respondent be initiated. However, unlike the letter dated 8th February, 2013 which was similarly exhibited, the so called petition does not bear any evidence that it was served on the 3rd Respondent. Apart from that I have not seen in that letter an express petition for the commencement of the process of removal of the 2nd Respondent. Instead the said letter was seeking a clarification on the procedure which was used by the 2nd Respondent to make the contested appointments. I am unable to equate the said letter to a petition.

37. It must now be clear that the Notice of Motion dated 26th June, 2013 is unmerited and must fail.

Order

38. Consequently the said application is dismissed but with no order as to costs as the applicant's application cannot be said to have been uncalled for in light of the fact that deployment, assignment and transfer or appointment are not events that can be termed as clearly distinct.

Dated at Nairobi this day 27th of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Lempaa for the applicant

Miss Ooko for Dr Khaminwa for the interested party

Ms Chilaka for Mr Bitta for the Respondent