



**Wafula & 2 others v Public Service Commission & 4 others; Law Society of Kenya & 2 others (Interested Parties) (Petition E218, E217 & E226 of 2023 (Consolidated)) [2024] KEELRC 1283 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1283 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E218, E217 & E226 OF 2023 (CONSOLIDATED)**

**B ONGAYA, J  
MAY 24, 2024**

**BETWEEN**

**AGGREY WAFULA ..... 1<sup>ST</sup> PETITIONER  
OKIYA OMTATA OKOITI ..... 2<sup>ND</sup> PETITIONER  
ISSA ELANYI CHEMAO ..... 3<sup>RD</sup> PETITIONER**

**AND**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
PRINCIPAL SECRETARY, MINISTRY OF PUBLIC SERVICE .... 2<sup>ND</sup>  
RESPONDENT  
CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE .. 3<sup>RD</sup> RESPONDENT  
PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL  
PLANNING ..... 4<sup>TH</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL  
PLANNING ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY  
MBURU PETER NG'ANG'A ..... INTERESTED PARTY  
DAVID NYAMBASA NYANDORO ..... INTERESTED PARTY**



## JUDGMENT

1. The judgment relates to three consolidated petitions each filed by each petitioner separately but relating the same transaction, namely, the advertisement of the vacancy in the office of the Chief Land Registrar by the Public Service Commission and the ensuing shortlisting, interview, recruitment and selection for appointment of the successful candidate to fill the vacancy. The processes appear to have progressed and concluded in accordance with the constitutional and statutory provisions save for the final stage of appointment of the successful candidate now the subject of the instant petitions.
2. The 1<sup>st</sup> petitioner filed the petition dated 24.11.2023 through Keaton & Keaton Advocates and learned Counsel Mr. Felix Keaton appeared in that behalf. The 1<sup>st</sup> petitioner states that he is a Kenyan citizen and a user of services from the State Ministry of Lands and Physical Planning. He brings the petition on his behalf and on behalf of the public in defence of the Constitution. The 1<sup>st</sup> respondent is an independent Constitutional Commission established under Article 233 of the Constitution and operationalised under the Public Service Commission Act No 10 of 2017. The 1<sup>st</sup> petitioner prayed for the following orders:
  - a. A declaration that Peter Mburu Ng'ang'a was properly and lawfully selected as Chief Land Registrar, Ministry of Lands and Physical Planning.
  - b. An order directing the respondents to issue Peter Mburu Ng'ang'a with an appointment letter for the position of Chief Land Registrar, Ministry of Lands and Physical Planning.
  - c. An order of Mandamus to issue compelling the 2<sup>nd</sup> respondent to issue Peter Mburu Ng'ang'a with an appointment letter for the position of Chief Land Registrar, Ministry of Lands and Physical Planning.
  - d. A declaration to issue that any appointment of the Chief Land Registrar while there is a qualified candidate one Peter Mburu Ng'ang'a selected after due process is unconstitutional and therefore unlawful on account of violation of section 13 and 14 of the Land Registration Act No 3 of 2012 and Articles 10, 41, 73, 75, 232 and 326 of the Constitution of Kenya 2010.
  - e. A declaration that Nixon Korir Generali, the respondent has contravened chapter 6 of the Constitution of Kenya and specifically Article 73 by circumventing the process of appointment of the Chief Land Registrar hence unfit to hold any public office.
  - f. A permanent injunction to issue against the respondents restraining them by themselves and by their agents from interfering in any manner with the lawful employment and discharge of duties by the substantive holder of the office of Chief Land Registrar, Peter Mburu Ng'ang'a.
  - g. An order of certiorari do issue quashing the 2<sup>nd</sup> respondent's decision of issuing a letter to a candidate not selected or recommended by the 1<sup>st</sup> respondent.
  - h. An order of prohibition prohibiting the 2<sup>nd</sup> respondent from issuing an appointment letter for the position of Chief Land Registrar to a candidate not selected by the 1<sup>st</sup> respondent.
  - i. Or that such other orders as the Honourable Court shall deem just.
3. The second petitioner filed the petition dated 21.11. 2023 in person. The petitioner states that he is a resident of Nairobi City County, a law abiding citizen of Kenya, a public spirited individual, and a human rights defender. He is a member of the Kenyans for Justice and Development Trust, a legal trust



incorporated in Kenya and founded on republican principles and which was set up for the purpose of promoting democratic governance, sustainable economic development, and prosperity. It is in public domain that he the serving Honourable Senator for the County of Busia. He named the Principal Secretary, Ministry of Lands and National Planning as the 1<sup>st</sup> respondent; the Honourable Attorney General as 2<sup>nd</sup> respondent; and, David Nyandoro as the 3<sup>rd</sup> respondent. He named the Public Service Commission as the 1<sup>st</sup> interested party and Mburu Peter Ng'ang'a as the 2<sup>nd</sup> interested party. He prayed for orders as follows:

- a. A declaration that the Principal Secretary, Ministry of Lands and National Planning decision to appoint David Nyandoro as the Chief Land Registrar and not Mburu Peter Ng'ang'a who was recommended for the appointment by the Public Service Commission is irregular, unlawful, and unconstitutional and, therefore, invalid, null, and void ab initio.
  - b. A declaration that Mburu Peter Ng'ang'a Mburu who was recommended for the appointment by the Public Service Commission has a right to be and should be appointed the Chief Land Registrar.
  - c. An order quashing the appointment decision by the Principal Secretary, Ministry of Lands and National Planning appointing David Nyandoro as the Chief Land Registrar.
  - d. An order compelling the Principal Secretary, Ministry of Lands and National Planning to, with immediate effect, appoint Mburu Peter Ng'ang'a as the Chief Lands Registrar.
  - e. An order compelling each party to pay their costs of the petition.
  - f. Any other relief the Honourable Court may deem just to grant.
4. The 3<sup>rd</sup> petitioner is Issa Elanyi Chema filed the petition dated 10.11.2023 through Manyonge Wanyama & Associates LLP. He pleaded that he is a Kenyan citizen who has filed the petition in the public interest under Article 22(2) (c) and 258(2) (c) of the [Constitution](#) to protect the rule of law and promote the tenets of good governance and constitutionalism to ensure that the constitutional principles and procedures are complied with in the interest of justice and the rule of law. He named the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as the Principal Secretary and Cabinet Secretary, Ministry of Lands and Physical Planning; the Honourable Attorney General and, the Public Service Commission respectively. He named Peter Ng'ang'a Mburu and David Nyambaso Nyandoro as the 1<sup>st</sup> and 2<sup>nd</sup> interested parties respectively. He prayed for orders as follows:
- a. A declaration that the appointment of David Nyambaso Nyandoro as Chief Land Registrar on 20.11.2023 by the Principal Secretary is unlawful and unconstitutional.
  - b. A declaration that the action by the Principal Secretary to deliberately delay the appointment of named Peter Ng'ang'a Mburu as the Chief Lands Registrar pursuant to the decision of the Public Service Commission from 28.09.2023 without any justifiable reason is unlawful and contravenes the right to fair labour practices and fair administrative action under Articles 41 and 47 of the [Constitution](#) respectively.
  - c. A declaration that the failure by the Public Service Commission to provide information about the impugned recruitment of the Chief Lands Registrar violated the petitioner's right to information protected under Article 35 of the [Constitution](#) as read with section 4 of the [Access to Information Act](#), 2016.



- d. A declaration that the appointment of David Nyambaso Nyandoro by the Principal Secretary instead of Peter Ng'ang'a Mburu as appointed by the Public Service Commission undermined the functions of the Commission under Article 234 of the Constitution.
  - e. An order of Certiorari be issued to quash the decision of the principal secretary appointing David Nyambaso Nyandoro Chief Lands Registrar.
  - f. An order of Mandamus be issued directing the Principal Secretary and the Cabinet Secretary to implement the Commission's decision issued on 28.09.2023 and immediately effect the appointment of Peter Ng'ang'a Mburu as the Chief Land Registrar.
  - g. An order of permanent injunction be issued to restrain the Principal Secretary and the Cabinet Secretary or persons acting under their authority from subjecting Peter Ng'ang'a Mburu to unfair labour practices.
  - h. Costs of the petition.
5. The Public Service Commission filed in petition E217 of 2023 the replying affidavit of Dr. Simon K. Rotich, Commission Secretary and CEO, sworn on 07.11.2023, drawn, and filed through learned Counsel Mrs. Jacqueline Manani Advocate. The affidavit set out the facts and chronology of the events leading to the instant dispute as follows:
- a. A vacancy arose in the office of Chief Land Registrar and the Commission advertised the vacancy on 28.03.2023.
  - b. Several persons qualified applied for consideration and the Commission shortlisted nine applicants as follows:
    - i. Mucheke Zubeda Yussuf.
    - ii. Nyandoro David Nyambaso.
    - iii. Mburu Peter Ng'ang'a.
    - iv. Maina Chelimo Sarah.
    - v. Ng'etich Charles Kipkurui.
    - vi. Obare Fedson Nyagaka.
    - vii. Leitich Benard Kipkemboi.
    - viii. Ketyenya Clarah Chemutai.
    - ix. Nyangau Thomas Morara.
  - c. The Commission wrote to the Ethics and Anti-Corruption Commission and the National Intelligence Service thus, "The Commission finds it essential to subject the candidates to comprehensive background check and vetting. Kindly let us have your response and any other relevant information that may assist the Commission on or before 8<sup>th</sup> September, 2023."
  - d. Paragraph 7 of the replying affidavit states as follows. " 7. The Commission received a response from EACC dated 11<sup>th</sup> September 2023 on 20<sup>th</sup> September 2023. The response mentioned that Mburu Peter Ng'ang'a had been charged in Milimani Anti-Corruption Court Case No 33 of 2003 but the charges were however withdrawn by the DPP under section 87(a) of the CPC meaning that the charges can still be brought against Mburu Peter Ng'ang'a at a later date."



- e. The Commission conducted interviews on 14<sup>th</sup> and 15<sup>th</sup> September 2023 and Mburu Peter Ng'ang'a emerged as the top candidate.
- f. On 28.09.2023 the Commission held an ordinary Board meeting in which one of the Agenda was to consider selection board report for the Position of Chief Land Registrar There was no adverse report received by the Commission against Mburu Peter Ng'ang'a and the Commission resolved to appoint Mburu Peter Ng'ang'a as Chief Land Registrar. The Deputy Commission Secretary (Corporate Services) was then immediately instructed to send a letter to the Principal Secretary, State Department of Lands informing him of the Commission's decision to appoint Mburu Peter Ng'ang'a as the Chief Land Registrar. The letter conveying that appointment is not exhibited on the replying affidavit but it is exhibited on the supplementary affidavit of Aggrey Wafula, the 1<sup>st</sup> petitioner, sworn on 28.11.2023 as exhibit AW1. The letter dated 28.09.2021 addressed to the Principal Secretary Hon. Generali Korir Nixon and by Dr. Simon K. Rotich CBS, Commission Secretary and CEO stated as follows:

“This is to convey the decision of the Public Service Commission that subject to compliance with the Office of the President's Circular No OP.3/7A/VOL.X/17 of 24.06.2023, Mr. Mburu Peter Ng'ang'a P/No 2006004272, Deputy Chief Land Registrar (CSG 6/ Job Group R) in your Ministry (State Department of Lands and Physical Planning) be appointed to fill the One (1) advertised post in the grade of Chief Land Registrar (CSG 4/ Job Group T) – Salary Scale : Kshs 180, 160 – Kshs 335, 450 p.m) w.e.f 28.09.2023. Please note that any vacancy which may occur in the next six (6) months should be declared to the Commission for filling. Take the necessary action.”

- g. The replying affidavit exhibit SKR-1 are the minutes of 2781<sup>st</sup> Commission meeting held on 28.09.2023. The appointment of Mburu Peter Ng'ang'a as the Chief Land Registrar was under minute 6, SBR No 47/2023 –V/No 17/2023. The minute shows that after making the appointment, the Commission placed on the reserve list Mr. Nyandoro David Nyambaso; and, Ms. Maina Sarah Chelimo each being in the grade CSG 6/ Job Group R in the Ministry of Lands, Public Works, Housing and Urban Development) (State Department for Lands and Physical Planning), be placed on reserve to be appointed to the grade of Chief Land Registrar (CSG4/Job Group T – Salary Scale : Kshs 180. 160 – Kshs 335, 450 p.m) should vacancies occur and are declared to the Commission within the next six(6) months without the necessity of another interview.
- h. The same exhibit SKR-1 minute 36 is review of Commission's decision on appointment of the Chief Land Registrar SBR No 47/2023 –V/No 17/2023. It is recorded that the Commission recalled the appointment of Mr. Mburu Peter Ng'ang'a to fill the one (1) advertised position of Chief Land Registrar and the Commission noted that the decision communicating the appointment of Mr. Mburu Peter Ng'ang'a had been dispatched to the Authorised Officer (the Principal Secretary); and, adverse report was received from the National Intelligence Service in respect of Mr. Mburu Peter Ng'ang'a; observed that although Mr. Mburu Peter Ng'ang'a had performed well in the interviews and ranked No 1 in order of merit, the requirements for appointment to the grade of Chief Land Registrar as contained in the advert included academic and professional qualifications, experience, vetting and clearance by relevant State Agencies in line with the provisions of Chapter Six of the Constitution of Kenya; and in view of that the Commission:
  - i. Recalled the decision letter regarding the appointment of Mburu to the position of Chief Land Registrar which had not yet been implemented by the Authorised Officer;



- ii. Rescinded the decision appointing Mburu to the position of of Chief Land Registrar; and,
  - iii. Decided that Mr. Nyandoro David Nyambaso be appointed to fill the one (1) advertised post in the grade of Chief Lands Registrar (CSG4/Job Group T – Salary Scale : Kshs 180. 160 – Kshs 335, 450 p.m.).
- i. The replying affidavit for the Commission exhibit SKR-4 is the letter dated 28.09.2023 by the Commission Secretary and CEO to the Principal Secretary, in content and form, similar to the one appointing Mr. Mburu, but, now conveying the Commission’s decision appointing Mr. Nyandoro to the position of Chief Land Registrar and which appointment letter did not mention and convey the Commission’s decision rescinding and recalling the earlier appointment of Mr. Mburu.
  - j. In petition E218 of 2023, the Commission filed a similar replying affidavit sworn on 04.12.2023 by the same Dr. Simon K. Rotich, Commission Secretary and CEO. The same exhibits were annexed.
6. For the Ministry and its Cabinet Secretary, Principal Secretary, and Director Human Resource Management and Development, the replying affidavit of Janerose Karanja, the Director Human Resource Management & Development sworn on 05.11.2023 and filed through the Honourable Attorney General, and, learned Chief Legal Counsel Mr. Oscar Eredi appeared in that behalf. While the Commission’s minutes confirm that the letter appointing Mr. Mburu had been delivered to the Ministry, the Ministry’s replying affidavit mentions nothing about that letter conveying the appointment of Mr. Mburu. Instead the affidavit mentions that the Ministry received the letter dated 28.09.2023 conveying the appointment of Mr. Nyandoro and thereafter, by letter dated 17.11.2023, the Principal Secretary communicated to Mr. Nyandoro the Commission’s decision appointing him the Chief Land Registrar. Exhibit JK-1 on that replying affidavit is the Commission’s letter conveying the appointment of Mr. Nyandoro with a receipt stamp dated 17.11.2023. At paragraph 10 of the replying affidavit it is stated that the Commission’s letter of 28.09.2023 was received at the Ministry on 17.11.2023 and on the same date the Principal Secretary acted to convey the appointment to Mr. Nyandoro on the same day by the letter dated 17.11.2023 and it is stated that Mr. Nyandoro having been appointed, the instant petition is a futility. Compare that with paragraph 15 of the replying affidavit for the Commission in petition E218 of 2023 that as at time the Commission was rescinding the appointment of Mr. Mburu, the letter conveying Mr. Mburu’s appointment had already been dispatched to the Principal Secretary and then further at paragraph 16 thus, “16. A letter dated 28<sup>th</sup> September 2023, communicating the decision to appoint Nyandoro David Nyambaso as the Chief Land Registrar, was then immediately dispatched to the Principal Secretary, State Department for Lands on the same date. See annexure marked SKR 4.” The letter exhibit SKR-4 is the one the Commission states was dispatched immediately (on 28.09.2023) and it is the same one the replying affidavit for Ministry says was received on 17.11.2023. The emerging serious incredible flow of events is deeply excruciating looking at the high trust imposed upon the respondents by the Constitution. How then can it be invalid that the petitioners are lamenting that the Ministry and in particular the Authorised Officer, the Principal Secretary, has failed to explain the failure to convey to Mr. Mburu his appointment as the Chief Land Registrar from the date the Commission’s letter dated 28.09.2023 was dispatched to the Ministry to, 17.11.2023, when the Ministry alleges to have received the Commission’s decision appointing Mr. Nyandoro. It appears to the Court that things went seriously wrong in a manner that appears mysterious contrary to governance principles and values in Article 10 and public service values and principles in Article 232 as well as the integrity and leadership standards in Chapter 6 of the Constitution. The Court finds accordingly.



7. At paragraph 14 of the affidavit of Dr. Simon K. Rotich for the Commission sworn on 04.12.2023, it is stated that in the course of the Commission’s meeting on 28.09.2023 while the Commission was handling other agenda for the day’s meeting (in the afternoon) the Commission received verbal adverse information from the National Intelligence Service against Mr Mburu prompting the Commission to rescind and recall the letter earlier in the day conveying the appointment of Mr. Mburu. At paragraph 17 the replying affidavit states that on 29.09.2023 the Commission received a letter from the National Intelligence Service confirming the adverse information against Mr. Mburu but which letter was not exhibited due to confidential information in the letter relating to the other officers.
8. Within safeguards of right to privacy and the confidentiality concerns for the involved officers, Mr. Mburu was by Court order allowed to peruse the letter so as to elect to consent to its being produced and exhibited in the instant proceedings. Mr. Mburu was allowed to peruse the letter and in terms of the Court order that his consent be obtained, if the letter was to be produced (in redacted or obscured form locking out the information about other mentioned officers), Mr. Mburu filed his affidavit on production of the letter sworn on 01.03.2024 and drawn and filed through Mbugua Ng’ang’a & Company Advocates – and learned Counsel Mr. Mbugua Nga’ng’a as lead by Ms. Guserwa Advocate appeared in that behalf. Mr. Mburu confirmed that the letter by NIS had been inspected on 14.02.2024 at around 2.30p.m at the Commission’s premises and that he consented that the letter so inspected be placed on record in the instant proceedings. Mr Mburu has further stated in his affidavit as follows:
- “6. That the said letter that was inspected and is to be produced by the 1<sup>st</sup> respondent is a two page letter dated 29<sup>th</sup> September 2023 from the National Intelligence Service. The date 29<sup>th</sup> is handwritten. The said letter was allegedly received by the 1<sup>st</sup> respondent on the 5<sup>th</sup> of October 2023 and bears the 1<sup>st</sup> Respondent’s receiving stamp in that regard.”
- “7, That I am further informed by my Advocates on record, which information I verily trust to be true, that the said letter to be produced has handwritten internal notes/ instructions between officials of the 1<sup>st</sup> respondent all dated 5<sup>th</sup> October 2023. The 2<sup>nd</sup> page of the letter states that there are allegedly adverse findings with respect to me and another of the shortlisted candidates, whose name was redacted.”
- “8. That am informed by my said Advocates, which information I truly believe to be true, that the said letter I am consenting to be produced before this Honourable Court has no attachment or annexure or enclosure and neither does it make reference to any attachment, annexure or enclosure.”
- “9. That I therefore swear this Affidavit for purposes of giving my consent to production of the above referenced letter dated 29<sup>th</sup> September 2023 in Court.”
9. The petition was fixed for cross-examination of Mr. Aggrey Wafula, Mr. Peter Mburu Ng’ang’a, Ms. JaneRose Karanja and Dr. Simon K. Rotich, CBS as fixed on 14.03.2024 but hearing was adjourned for recorded reasons including that the Commission Secretary was not able to attend for stated reasons. On 04.04.2024, the Court ordered inter alia, “1.The parties’ respective cases be determined on the basis of pleadings and affidavits on record while noting respondents’ witnesses have not been availed for unexplained reasons for purposes of testing their respective affidavit evidence.”



10. Considering no further material was filed, in view of the affidavits on record, the Court returns the following findings of fact:
- a. The decision by the Commission on 28. 09. 2023 appointing Mr. Mburu as the Chief Land Registrar per the Commission Secretary was delivered to the Principal Secretary on the same day. The Principal Secretary and the Ministry has opted to remain silent on that unshakable fact.
  - b. The fact that a verbal adverse communication was received at the Commission on 28.09.2023 against Mr. Mburu remains unverified. The persons involved in the alleged verbal communication have not been disclosed at all. On a balance of probability, there was no such verbal communication of adversity against Mr. Mburu and the Commission appears to have been misled in that regard to purport to rescind or recall Mr. Mburu's appointment.
  - c. The purported letter from NIS dated 29.09.2023 was received at the Commission on 05.10.2023. In the circumstance, on a balance of probability, there was no letter from NIS received at the Commission on 29.09.2023 and allegedly verifying adverse verbal communication of 28.09.2023 that guided the Commission in rescinding or recalling Mr. Mburu's appointment decision and Commission letter conveying that decision on 28.09.2023. The Court finds that as a matter of fact, there is not one thing that has been established to justify the rescinding or recall of Mr. Mburu's appointment on 28.09.2023 and in any event the decision to rescind or recall the decision and letter conveying the same, were both, never conveyed to the Principal Secretary as authorised officer or Mr. Mburu as the affected officer or candidate already duly appointed by the Commission.
  - d. The decision of the Commission recalling or rescinding Mr. Mburu's appointment appears not to have been conveyed to the Principal Secretary or any other official at the Ministry. The appointment of Mr. Mburu as was dispatched to the Ministry remained on 28.09.2023, as far as the Ministry was aware, upon facts before the Court, is intact and in place. The Ministry, in particular the Principal Secretary, as earlier found, has failed to explain why between 28.09.2023 and 17.11.2023 when the Ministry alleges to have received the Commission letter Conveying appointment of Mr. Nyandoro, the appointment of Mr. Mburu had not so far been communicated.
  - e. The Court has considered the replying affidavit of David Nyambaso Nyandoro sworn on 30.11.2023 and filed through M/S Wambo & Company Advocates. The Court finds that while urging that he was validly appointed, he has not rebutted any of the issues of fact as urged for the petitioners and Mr. Mburu as to show that the appointment of Mr. Mburu by any chance, was amenable to being rescinded and recalled by the Commission.
  - f. The material on record as set out in the replying affidavits have failed to demonstrate or establish a valid or any reason in existence that justified the purported rescinding of Mr. Mburu's appointment and purported recall of the letter conveying his appointment. In any event, the time allowed for National Intelligence Service to provide relevant information had lapsed on 08.09.2023 per the Commission's timelines in the letter-inviting the making of such information. After the timelines lapsed, it appears to the Court that the Commission could not consider belated information, if any, especially discriminately against one of the candidates whereas, candidates were to be given parity of treatment per Article 27 of the *Constitution* and section 5 of the *Employment Act*, 2007 on fair treatment and equality of opportunities.



11. Submissions were filed for the parties. The Court has considered the material on record and the parties' respective positions. The Court returns as follows.
12. To answer the 1<sup>st</sup> issue, the Court has found that on the material on record there is no established reason or ground for the Commission's decision to vary or rescind the appointment of Mr. Mburu to the position of Chief Land Registrar as the most suitable candidate in the findings of the Commission.
13. To answer the 2<sup>nd</sup> issue, the Court finds that having decided to appoint Mr. Mburu, the Commission's power or function to appoint with respect to the declared vacancy in the office of Chief Land Registrar was thereby exhausted. The recruitment, selection and appointment process ended in the appointment of Mr. Mburu and the appointing decision was that the candidates placed on reserve list including Mr. Nyandoro would be appointed only if a vacancy accrued within 6 months. The terms of the decision were communicated to the Principal Secretary in the letter appointing Mr. Mburu. The Principal Secretary as the Authorised Officer never reported a vacancy as per the terms of appointment of Mr. Mburu and the letter conveying the appointment. There being no vacancy reported and declared to the Commission by the Ministry, there was no vacancy for any candidates on the reserve list to be appointed in the manner Mr. Nyandoro was appointed. Article 259 (3) of the Constitution states that a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office. The occasion requiring the making of an appointment in the instant case never accrued, namely, no vacancy in 6 months was reported. The appointment from the reserved list had no basis at all and it should be obvious that there is no established constitutional or statutory provision empowering the Commission to unilaterally recall its decision without notice to those affected and upon alleged reasons that had not been tested through due process.
14. To answer the 3<sup>rd</sup> issue, the Court returns that the rescinding of the appointment of Mr. Mburu and the purported recall of the letter conveying his appointment as Chief Land Registrar violated his right to fair administrative action. Article 47 is clear that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, if a right or fundamental freedom of a person has been or is likely to be affected by administrative action the person has the right to be given written reasons for the action. Mr. Mburu was not given written reasons for the decision to rescind his appointment as Chief Land Registrar and the reason for the decision to recall the letter conveying the appointment, and, the reason the rescinding of appointment and the recall of letter were not conveyed to him or the Ministry. It was unreasonable and unfair especially that it has turned out that no such valid and genuine reason existed as envisaged in the standards set in sections 43 and 45 of the Employment Act, 2007. The Court therefore finds that Article 27 on equality before the law and Article 41 on fair labour practices were violated. Thus, in Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR it was held, "The 1<sup>st</sup> Interested Party could not act on the letter by the NIS as this would have violated the Constitution and the law. We say this because we operate in a constitutional democracy. Article 19 is clear that rights belong to individuals, are not granted by the State, and must be respected by all State Organs. Article 47(1) confers on every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The information the NIS said it had, and the manner of dealing with it, was an administrative action. That is, the persons adversely mentioned, if at all, were entitled to an action that was lawful and procedurally fair." The Court returns that to be the unwavering interpretation of the law and it bindingly applies to the instant case as the submissions made for the petitioners and the Law Society of Kenya in that regard are upheld.
15. To answer the 4<sup>th</sup> issue the Court returns that the rescinding of the appointment of Mr. Mburu and the recalling of the letter conveying his appointment and then, the purported decision appointing Mr. Nyandoro and conveying of the appointment of Mr. Nyandoro were all void acts. The Law Society



of Kenya filed its submissions dated 29.04.2024 through Mob Law Advocates. The Court follows the decision cited therein *Macfoy v United Africa Co. Ltd* [1961] 3All E.R 1169 thus “If an act is void, then it is in law a nullity. It is not only bad, but also incurably bad. There is no need for an order of the Court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.” That is the fate of the decisions the Court has found void in the instant petitions.

16. To answer 5<sup>th</sup> issue, the Court returns that the issues related to compliance with Chapter Six of the *Constitution* on leadership and integrity go beyond the instant case, The Court finds that the petitioner’s case that the public or state officers as may be implicated like allegedly the holder of the office of the Principal Secretary be found in breach shall go contrary to tenets of due process. The Principal Secretary was not sued in a personal capacity as to answer in that regard. Further, there exist elaborate constitutional and statutory provisions leading to findings of a state or public officer being culpable of breach of leadership and integrity standards. Prayers in that regard will be declined. Related to that is the misconceived petitioners’ case, particularly the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, that the Principal Secretary had appointed Mr. Nyandoro in disregard of constitutional mandate of the Commission under Article 234 of the *Constitution* as read with the *Public Service Commission Act*, 2017 to make such appointments. The reliefs based upon that misconception will collapse as the material before the Court were that the Principal Secretary appears to have been communicating a commission decision.
17. To answer the 6<sup>th</sup> issue, while the appointment of Mr. Nyandoro is amenable to quashing, upon the ruling delivered herein on 07.12.2023 allowing Mr. Nyandoro to continue in office as purportedly appointed as Chief Land Registrar and the principle of necessity, any thing done by the said Mr. Nyandoro as Chief Land Registrar shall be deemed validly and lawfully done except when otherwise established in any specific case. It is undisputed that the Chief Land Registrar performs crucial statutory functions and as of necessity, the very many transactions that may have been made in good faith by Mr. Nyandoro in the intervening circumstance that his ensuing holding of the office of the Registrar of Land was under dispute herein are protected. The Court finds accordingly.
18. The Court has considered the public interest nature of the proceedings and each party will bear own costs of the consolidated petition. The Court has considered all the petitions and the findings in this judgment. The Court has considered the prayers including for any other relief the Court may deem just. Final orders will issue as below.

In conclusion, the consolidated petitions are hereby determined with orders as follows:

#### **Orders;**

1. The declaration that the Public Service Commission’s decisions purportedly rescinding the appointment of Dr, Peter Mburu Ng’ang’a and the decision purportedly recalling the letter conveying appointment of the said Dr, Peter Mburu Ng’ang’a and then, the purported Commission’s decision appointing Mr. David Nyamaso Nyandoro and conveying that appointment and all processes and Communications flowing therefrom were all void acts and therefore, a nullity as are in any event, set aside and in particular, the letter Ref. No PSC/212/2/1/1; PSC/21/2/ (12) dated 28.09.2023 purporting to convey the Commission’s appointment of the said Mr.Nyandoro as Chief Land Registrar and as well the letter purporting to convey that purported appointment Ref. No 2006004230/(218) dated 17.11.2023 signed by Hon. Generali Nixon Korir, Principal Secretary, are both void, a nullity, and set aside.



2. The Commission's decision appointing Dr. Peter Mburu Ng'ang'a as the Chief Land Registrar and the Commission's letter conveying the same on 28.09.2023 are hereby upheld.
3. The Principal Secretary, State Department for Lands and Physical planning, as the Authorised Officer, to forthwith convey to Peter Mburu Ng'ang'a the Commission's decision of 28.09.2023 conveyed to the Ministry by the Commission Secretary's letter dated 28.09.2023 that, Mr. Mburu Peter Ng'ang'a P/No 2006004272, Deputy Chief Land Registrar (CSG 6/ Job Group R) in the Ministry (State Department of Lands and Physical Planning) be appointed to fill the One (1) advertised post in the grade of Chief Land Registrar (CSG 4/ Job Group T) – Salary Scale : Kshs 180, 160 – Kshs 335, 450 p.m) w.e.f 28.09.2023.
4. The declaration that upon the ruling delivered herein on 07.12.2023 and upon the principle of necessity, anything done by the said Mr. Nyandoro, apparently as Chief Land Registrar, shall be deemed validly and lawfully done, except where otherwise established in any specific case, as the case may be.
5. The order of permanent injunction hereby issued to restrain the Principal Secretary and the Cabinet Secretary herein, by themselves or by their agents, from subjecting Dr. Mburu Peter Ng'ang'a to unfair labour practices.
6. The declaration that the Principal Secretary's deliberate delay herein to implement the Commission's decision of the appointment of Dr. Mburu Peter Ng'ang'a as the Chief Land Registrar pursuant to the decision of the Public Service Commission made and communicated to the Principal Secretary on 28.09.2023, and the delay being without any justifiable reason, was unlawful and contravened the rights to fair labour practices and fair administrative action under Articles 41 and 47 of the Constitution of Kenya 2010, respectively.
7. The declaration that the purported appointment of Mr. David Nyamaso Nyandoro as the Chief Lands Registrar instead of Dr. Mburu Peter Ng'ang'a as had been appointed and communicated by the Public Service Commission on 28.09.2023, undermined the functions and powers of the Commission under Article 234 and as established under Article 233 of the Constitution of Kenya .
8. The judicial review order of Mandamus hereby issued that the Principal Secretary and the Cabinet Secretary herein to fully implement the Commission's decision made on 28.09.2023 that, Mr. Mburu Peter Ng'ang'a P/No 2006004272, Deputy Chief Land Registrar (CSG 6/ Job Group R) in the Ministry (State Department of Lands and Physical Planning) be appointed to fill the One (1) advertised post in the grade of Chief Land Registrar (CSG 4/ Job Group T) – Salary Scale : Kshs 180, 160 – Kshs 335, 450 p.m) w.e.f 28.09.2023.
9. Each party to bear own costs of the consolidated petitions.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 24TH MAY 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

