



**Wafula v Public Service Commission & 7 others; Ethics & Anti-Corruption Commission & another (Interested Parties) (Petition 19 of 2024) [2024] KEELRC 2522 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2522 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 19 OF 2024**

**B ONGAYA, J**

**OCTOBER 18, 2024**

**IN THE MATTER OF ARTICLES 3, 10, 20, 21, 22, 23, 27, 41, 47, 73, 75, 76, 165, 232 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA;**

**AND**

**IN THE MATTER OF SECTIONS 3, 6, 7, 8, 9, 11, 13, 37, 38, 39 & 52 OF THE LEADERSHIP AND INTEGRITY ACT, CHAPTER 182 OF THE LAWS OF KENYA**

**BETWEEN**

**AGGREY WAFULA ..... PETITIONER**

**AND**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING ..... 2<sup>ND</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING ..... 3<sup>RD</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE ... 4<sup>TH</sup> RESPONDENT**

**PRINCIPAL SECRETARY, PUBLIC SERVICE ..... 5<sup>TH</sup> RESPONDENT  
GORDON ODEKA OCHIENG, DIRECTOR LAND ADMINISTRATION .... 6<sup>TH</sup> RESPONDENT**

**NANCY KATHIKA ..... 7<sup>TH</sup> RESPONDENT**

**ELIZABETH NJOROGE ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY**



## THE COMMISSION ON ADMINISTRATIVE JUSTICE ... INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 18<sup>th</sup> October, 2024)

### JUDGMENT

1. The petitioner filed the petition dated 21.11.2023 through the firm of Keaton & Keaton Advocates, seeking the following prayers:
  - a. A declaration be and is hereby issued declaring that the appointment of the 6<sup>th</sup> respondent as Director, Land Administration is unconstitutional and therefore unlawful on account of violation of Articles 10,41,73,75,232 and 236 of *the Constitution* of Kenya, 2010.
  - b. A declaration be and is hereby issued declaring that the appointment of 7<sup>th</sup> and 8<sup>th</sup> respondents as Deputy Director(s), Land Administration is unconstitutional and therefore unlawful on account of violation of Articles 10,41,73,75,232 and 236 of *the Constitution* of Kenya, 2010.
  - c. A declaration be and is hereby issued declaring that the office of the Director, Land Administration is vacant.
  - d. A declaration be and is hereby issued declaring that the office of the Deputy Director, Land Administration is vacant.
  - e. An Order directing the respondents to initiate the process of recruitment of the Director, Land Administration through a transparent and competitive process.
  - f. An Order directing the respondents to initiate the process of recruitment of the Deputy Director(s), Land Administration through a transparent and competitive process.
  - g. An order directing that the holders of 1<sup>st</sup> to 5<sup>th</sup> respondents and Director Human Resources Management of the 7<sup>th</sup> respondent be personally surcharged for the salaries drawn by the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Respondents owing to the illegal appointments.
  - h. Costs of this petition.
  - i. Or that such other Orders as this Honourable Court shall deem just.
2. The petitioner is a private Kenyan Citizen who brought the petition on his behalf and on behalf of the public, as a user of services from the State Ministry of Lands and Physical Planning.
3. The petitioner's case was that on or about April 2023, the 1<sup>st</sup> to 5<sup>th</sup> respondents appointed Mr. Gordon Odeka Ochieng, the 6<sup>th</sup> respondent herein, as the Director of Land Administration. That during the said period, the said respondents also appointed the 7<sup>th</sup> and 8<sup>th</sup> respondents as Deputy Directors of Land Administration without following due process. According to the petitioner, the appointment of the said persons was not in accordance with the law.
4. It was the petitioner's averment that as state officers, the respondents were bound by the provisions of Articles 10 of *the Constitution* of Kenya on national values and principles of governance. Further, their purporting to appoint the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents without proper qualifications and without subjecting the positions of Director and Deputy Director Land Administration to a competitive and transparent recruitment process, negated the values and principles of public service under Article 232 of *the Constitution*.



5. The petitioner pleaded that consequently, the impugned appointments of the Director and Deputy Directors, Land Administration was in contravention of Articles 10, 41, 73, 75, 232 and 236 of the Constitution, and therefore null and void within the meaning of Article 2(4) of the Constitution.
6. In his Supporting Affidavit sworn on 21.11.2023, the petitioner stated that unless the Court intervenes by declaring the recruitment process to the positions of Director Land Administration and Deputy Director(s) Land Administration flawed and illegal, service delivery to members of the public will be greatly hindered. His case is that the respondents' actions set a dangerous precedent and the Court should halt any further blatant and unconstitutional processes driven by the respondents.
7. The petitioner further averred that Article 20 of the Constitution binds all state organs and all persons and further requires this Court to adopt the interpretation that most favours the enforcement of a right or fundamental freedom in applying a provision of the Bill of Rights.
8. In response, the 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents filed a replying affidavit through the Office of the Attorney General. The affidavit was sworn on 15.12.2023 by Janerose Karanja, the Director, Human Resource Management & Development at the State Department for Land & Physical Planning.
9. Ms. Karanja stated that on merit and recommendation by the authorized officer, the 6<sup>th</sup> respondent was promoted to Senior Deputy Director, Land Administration, CSG 5/Job Group 'S' with effect from 25.11.2020. Upon his appointment as Director, Land Administration, the 6<sup>th</sup> Respondent moved to CSG 4/Job Group 'T' with effect from 12.08.21. That this was on account of the Public Service Commission (PSC) putting the headship of technical directorates at CSG 4/Job Group 'T'. She asserted that the 6<sup>th</sup> respondent has thus risen through the ranks to his position, having been first appointed to the Civil Service as a Lands Officer on 05.01.1989.
10. It was further stated that the 7<sup>th</sup> respondent was appointed on merit to the grade of Deputy Director, Land Administration, Job Group 'R' with effect from 19.10.2016, vide the PSC Letter of even date and after having served in Job Group 'P' for five and half (5 ½) years. The 7<sup>th</sup> respondent joined civil service as a Land Officer II, Job Group 'K' with effect from 01.05.1995 and that she has modestly risen through ranks to her position.
11. It was also noted by Ms. Karanja that the 8<sup>th</sup> respondent was equally appointed on merit to the grade of Senior Assistant Director, Land Administrator, Job Group 'Q' with effect from 26.10.2016. The said position was then regraded to Deputy Director, Land Administration, CSG 6 with effect from 01.08.2019. The 8<sup>th</sup> Respondent joined civil service as a Land Officer III, Job Group 'H' with effect from 04.09.1991 and that she has also modestly risen to her position.
12. In sum, it was averred that the appointments in respect of the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents are above board as far as merit and compliance with the law are concerned. Ms. Karanja asserted that the petitioner was simply driven by malice, ill will and personal vendetta against the respondents and that the petition is hence vexatious and an abuse of the process of this Honourable Court.
13. The 1<sup>st</sup> respondent filed its replying affidavit sworn on 04.03.2024 by its Deputy Commission Secretary (Corporate Services), Remmy Mulati. The learned Assistant Director, Legal Services Ms. Wangeci Gichangi appeared for the 1<sup>st</sup> respondent.
14. Mr. Mulati stated that in 2016, the Commission decided that all Assistant Commissioners of Lands (Job Group P) in the Ministry of Lands and Physical Planning to be appointed to fill the four (4) advertised posts in the grade of Deputy Director, Land Administration, Job Group R. Subsequently, the 7<sup>th</sup> respondent was appointed to the position of Deputy Director, Land Administration. Mr. Mulati stated that the petitioner cannot thus allege that due process was not followed in the promotion



- of the 7<sup>th</sup> respondent since all qualified persons at the Ministry were appointed and/or promoted to the advertised position through the said letter of 19.10.2016.
15. Mr. Mulati further asserted that the appointment of the 8<sup>th</sup> Respondent from 01.08.2019 was pursuant to a Circular by the Cabinet Secretary, Ministry of Public Service, Youth and Gender Ref. No. MPSYG.DPSM.2/6/4A VOL XI (32) titled “Implementation of job evaluation results: Conversion from 21-tier grading structure in the civil service in the National Government”. The said Circular required that authorized officers issue conversion letters to all employees in public service indicating their new grades and designations.
  16. Mr. Mulati further averred that the Cabinet Secretary, Ministry of Lands & Physical Planning, through a letter dated 21.07.2021, wrote to the Commission requesting that the 6<sup>th</sup> Respondent be appointed on merit to the position of Director Land Administration. He asserted that the Commission while considering the said request, noted that the 6<sup>th</sup> respondent was the only senior officer as the other two officers in the grade of Senior Deputy Director Land Administration were serving on contract having attained the mandatory retirement age and therefore not eligible for promotion. Subsequently, the Commission appointed the 6<sup>th</sup> respondent to the said position through a letter dated 19.08.2021.
  17. It was the 1<sup>st</sup> respondent’s case that the 7<sup>th</sup> and 8<sup>th</sup> Respondents having been appointed to the said positions on 19.10.2016 and 01.08.2019 respectively, the petitioner’s suit is time-barred pursuant to the provisions of section 90 of the *Employment Act*.
  18. In addition, Mr. Mulati fronted that promotion on merit is based on a recommendation and request to the Commission by the authorized officer and does not therefore require a competitive process. He contended that the orders sought by the petitioner herein undermine the principles that underpin the running of public institutions since the appointments or promotions complied with the law.
  19. Mr. Juma Kisaka Advocate filed a notice of appointment to act for the 1<sup>st</sup> interested party dated 07.05.2024 and no further papers were filed in that behalf.
  20. The Court has considered all the material on record including the respective cases as urged for the parties. The Court returns and finds as follows:
    - a. The petitioner has not rebutted the steps outlined for the respondents and in particular the Ministry and the Commission to explain the emplacement of the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents to the positions held. In particular, the Court has noted that the emplacement was by upgrade of all affected officers or only officer available for promotion with respect to 6<sup>th</sup> respondent’s appointment as a Director. The petitioner has failed to show that an officer eligible for promotion or upgrading to the positions was disadvantaged in any manner.
    - b. The respondent has therefore failed to show that the impugned upgrades or promotion were unlawful. It appears to the Court that where the decision was made to upgrade all officers, then no contravention of the law or constitution can be returned. Further, where only one officer was available for promotion within the service and the vacancy being internally available to serving officers, then no law or provision of *the Constitution* was contravened. It further appears to the Court that within Article 232 of *the Constitution* on the value and principle of economical use of public resources, it would not only be superfluous but also uneconomical use of public resources to advertise a promotional vacancy whereby the only qualified officer in the service is known and obviously the only available candidate. The petition must fail.
    - c. The Court holds that a vacancy in a public office needs not be advertised where all eligible serving officers are being promoted or upgraded or where the promotional vacancy, by attached



qualifications, is available to the only one serving officer ,or such number of serving officers as the vacancies in the service. This particularly applies to promotional vacancies which by their attached qualifications are only available to serving public officers, and through proper human resource succession management, would not be available to non-serving public officers, or as it were, available for external candidates.

- d. The Court has considered all circumstances of the case and there will be no orders on costs. It is the view of the Court that such amounts to fostering career civil servants or public officers consistent with a robust and professional public service delivery which in the commonwealth, is well known for its permanency and professionalism, with discouragement of horizontal entry especially at top levels requiring rich and deep understanding and wisdom in running of governmental affairs.

In conclusion, judgment is hereby entered for dismissal of the petition with no orders on costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 18<sup>TH</sup> OCTOBER 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

