



Nyamu v Ministry of Water, Sanitation and Irrigation & 2 others (Petition E043 of 2022) [2023] KEELRC 3411 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3411 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E043 OF 2022
K OCHARO, J
NOVEMBER 23, 2023**

BETWEEN

ERIC MUTHUURI NYAMU PETITIONER

AND

MINISTRY OF WATER, SANITATION AND IRRIGATION .. 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction

1. Through his petition herein dated 4th February 2022, the Petitioner seeks the following orders against the Respondents jointly and severally: -
 - a. A declaration that the act of the 1st Respondent in relieving the Petitioner of his duties is a breach of the latter's Constitutional rights under Articles 27(1), (2) and (3), 28, 41 and 48 of *the Constitution* of Kenya and that the same is null and void for all intents and purposes.
 - b. An order of Judicial Review of Certiorari to quash the decision of the 1st Respondent vide a letter dated 11/2/2022 relieving the Petitioner of his duties as the Technical Officer, Strategic Communication, Advocacy and Public Relations.
 - c. An order of Judicial Review of Prohibition to prohibit the Respondents from appointing any other person as Technical Officer, Strategic Communication, Advocacy and Public Relations.



- d. In the alternative and without prejudice to prayer (b) and (c) above, an order of payment of all dues to the Petitioner in the period that he would have served between the date of filing of this Petition and the end of the term.
 - e. Costs of this Petition and interests thereon.
 - f. Any other relief or order that this Honourable Court may deem fit to grant.
2. The Petitioner attached various documents and letters to his Petition, in support thereof.
 3. In response to the Petition, the 1st Respondent filed a Replying Affidavit sworn by one Caroline Wanjiku Mugwe on 22nd March 2022. On its part, the 2nd Respondent filed a Replying Affidavit sworn by one Dr. Simon K. Rotich on 23rd March 2022.
 4. The Petitioner responded to both Replying Affidavits vide his Further Affidavit sworn on 4th April 2022.
 5. On 29th July 2022, when the matter came up for directions, this Court directed that the Petition be canvassed by way of written submissions. This culminated in the Petitioner's Submissions dated 28th November 2022; the 1st and 3rd Respondents' Submissions dated 15th December 2022 accompanied by a List and Digest of Authorities dated 15th December 2022; and the 2nd Respondent's Submissions dated 15th February 2023.

Petitioner's case

6. The Petitioner's case is that at all material times, he was a Technical Officer, Strategic Communication, Advocacy and Public Relations in the 1st Respondent Ministry. He was appointed and served in the position under a letter of appointment and written contract of 11th February 2021 by the 2nd Respondent. As per the written contract, the term of service was two years, from 12th February 2021 to 11th February 2023.
7. The Petitioner asserts that the contents of the Letter of Offer and the Contract of Employment were completely different.
8. The Petitioner states that the circumstances that in February 2022, it dawned on him that his salary had been deducted without his consent and or notice. This prompted him to write a letter dated 25th February 2022 to the 1st Respondent's Principal Secretary seeking an explanation.
9. The petitioner states that on 1st March 2022, the 1st Respondent issued him with a Letter of Termination of Contract dated 11th February 2022, effectively terminating his employment. The termination was without any justification in law. According to the letter, the termination was attracted by the fact that his employment was tied to the tenure of office of the former Cabinet Secretary, Ministry of Water, Sanitation and Irrigation, who had resigned on the 7th of February 2022.
10. It is the Petitioner's passionate contention that although his Letter of Offer indicated that his appointment was tied to the tenure of the Cabinet Secretary, the letter did not indicate that it was tied to the tenure of office of a particular Cabinet Secretary, Ms Sicily Kariuki, as indicated in the Termination Letter. Further, his Contract of Service contained no clause whatsoever tying his employment to the Cabinet Secretary, Ms. Sicily Kariuki.



11. The Petitioner takes issue with the fact that the termination letter was copied to the Cabinet Secretary and not to the Permanent Secretary. Further, contrary to the stipulations of his Contract of Employment, he was not given a termination notice.
12. He further states that the 1st Respondent terminated his contract in a manner that violated provisions of *the Constitution*, his constitutional rights, and various stipulations of the *Employment Act*, 2007. He singled out the provisions and rights under Articles 10, 21, 27, 28, 41, 47, and 48 of *the Constitution* of Kenya 2010, as those that were breached. He was discharged from employment without any sufficient reason and without being accorded a fair hearing.

1st and 3rd Respondents' case

13. It is the 1st Respondent's case that the position of Technical Officer, Strategic Communication, Advocacy and Public Relations, which the Petitioner was appointed to, did not exist in its approved establishment. The position was availed on Local Arrangement Terms which allowed a sitting Cabinet Secretary to hand pick an advisor to support his or her office and serve during his or her tenure.
14. The 1st Respondent contends that under such an arrangement, the actual length of the ensuing contract of employment depends on the pleasure and tenure of the particular Cabinet Secretary.
15. The 1st Respondent avers that the decision to appoint the Petitioner to the subject position was communicated to the Cabinet Secretary, Sicily K. Kariuki (Mrs.) by the 2nd Respondent through a letter dated 3rd February 2021. The term of the appointment was expressly stated as 2 years and tied to her tenure.
16. The 1st Respondent asserts that the position of the Petitioner was supernumerary. It was personal to the Cabinet Secretary, a fact which the Petitioner was aware of. That the Petitioner's employment was intended to end upon the expiry of the Cabinet Secretary, Sicily K. Kariuki's, tenure at the 1st Respondent Ministry, or the expiry of 2 years, whichever came first.
17. That once the Cabinet Secretary's term came to an end on 7th February 2022, the contracts of service of all her Advisors, including the Petitioner, effectively ended. Consequently, the Petitioner's petition is without merit and should be dismissed with costs.

The 2nd Respondent's Case

18. The 2nd Respondent contends that Regulation 27 (1) of the Public Service Commission Regulations 2020 permits certain State Officers, namely The President, Deputy President and Cabinet Secretaries to make written requests to the 2nd Respondent for the appointment of various advisors to their respective offices.
19. That under Regulation 27 (8) of the Public Service Commission Regulations 2020, each advisor shall be appointed on contract for a period not exceeding three years renewable once for a further three years. The appointment of an advisor for a State Officer shall not extend beyond the tenure of the State Officer.
20. The 2nd Respondent states that through her letter dated 16th November 2020, the above-mentioned Cabinet Secretary, made a written request to the 2nd Respondent for the establishment of the supernumerary position of Strategic Communication, Advocacy and Public Relations Advisor in her office and for the Petitioner to be appointed to the said position.



21. It is further that stated after considering her written request, the 2nd Respondent declined to establish the said supernumerary position and to appoint the Petitioner to the same. The decision was communicated to the Cabinet Secretary vide a letter dated 18th December 2020.
22. Vide a letter dated 25th January 2021, the Cabinet Secretary appealed the 2nd Respondent's decision and requested the 2nd Respondent to reconsider her request. That the 2nd Respondent considered her appeal and reversed its decision of 18th December 2020. The 2nd Respondent resolved, in its 2654th meeting held on 3rd February 2021, to appoint the Petitioner to the supernumerary position of Technical Officer, Strategic Communication, Advocacy and Public Relations in place of one Daniel Cigua, who did not take up his appointment. This decision was communicated to the Cabinet Secretary vide the 2nd Respondent's letter dated 3rd February 2021. The letter specified the terms of the appointment, key that the appointment was on Local Agreement Terms, fixed for 2 years with effect from the date the Petitioner took up duties and was tied to the tenure of the Cabinet Secretary.
23. It is averred that in implementation of the 2nd Respondent's decision and the letter of 3rd February 2021, the Petitioner was engaged on Local Agreement Terms as evidenced by his Letter of Offer and Employment Contract. That the Letter of Appointment informed the Petitioner of his terms of employment as aforesaid, and that his employment was subject to the prevailing Public Service Regulations, including Regulation 27 (8).
24. The Respondents state that the then Cabinet Secretary resigned on 7th February 2022. Consequently, the Petitioner's employment contract was automatically terminated with effect the date. As such, the 2nd Respondent contends that the 1st Respondent had every right to issue the Petitioner with the impugned termination letter. The 2nd Respondent concludes that the Petitioner misunderstood the terms of his employment on supernumerary terms under Regulation 27 (8) of the Public Service Commission Regulations 2020, hence the present Petition.

Petitioner's Submissions

25. In his submissions dated 28th November 2022, the Petitioner identifies three (3) issues for determination, namely: -
 - a. Whether the rights of the Petitioner have been violated;
 - b. Whether orders of certiorari and prohibition should issue against the Respondents; and
 - c. Who bears the costs of this Petition?
26. On the first issue, the Petitioner submits that the 1st and 2nd Respondents made a unilateral decision to reduce his salary in February 2022 without notice, and subsequently terminate his employment. Their act was only visited on the Petitioner. As a result, he was discriminated against contrary to Article 27 of *the Constitution*.
27. The petitioner further submits that at all material times, he was an employee of the 1st Respondent, entitled to the enjoyment of employment rights under Article 41 of *the Constitution*. The act of the 1st Respondent to reduce his salary without notice to, and or consultation with, him, amounted to a breach of the right guaranteed under the Article.
28. Article 47 of *the Constitution* guarantees every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. Further, under the same Article, it is provided that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



- The Petitioner was not involved in the matters forestated before action was taken by the 1st and 2nd Respondents, yet he was supposed to be. The 1st and 2nd Respondents violated the petitioner's right under the Article. It is submitted.
29. The Petitioner submits further that the action by the 1st and 2nd Respondents infringed on the canons of fair hearing. To buttress this point reliance is placed on the case of Republic v National Land Commission & Another ex parte Farmers Choice Limited [2020] eKLR, and the Court urged to issue the orders of judicial review of certiorari and prohibition.
30. Concerning the order of mandamus, the Petitioner submits that his petition meets the threshold for the grant of the same as was aptly elaborated in the case of Republic vs Principal Secretary Ministry of Internal Security & Another ex parte Schon Noorani & Another [2018] eKLR. The petition demonstrates sufficiently that the 1st and 2nd Respondents had a public legal duty to act that was owed to him. Further, they failed to act as was expected of them. They acted contrary to what the contract of employment provided for. They terminated his contract before the contractual period. The Respondents should be compelled to reinstate him.
31. On costs, the Petitioner submits that costs follow the event hence the Petitioner should be awarded costs.

1st and 3rd Respondent's Submissions

32. In their submissions dated 15th December 2022, the 1st and 3rd Respondents equally identify three issues for determination: -
- a) Whether the 1st Respondent appropriately and lawfully terminated the Petitioner's contract of service;
 - b) Whether the Petitioner has demonstrated with precision how his fundamental rights and freedoms under *the Constitution* have been violated or are threatened contrary to the legal provisions; and
 - c) Whether the Petitioner is entitled to the reliefs sought.
33. On the first issue, it is submitted that the Petitioner was appointed into and served in a political office that was created at the pleasure of the former Cabinet Secretary of the 1st Respondent.
34. Further, the office was established That the 2nd Respondent is granted the authority to established by the 2nd Respondent pursuant to its constitutional authority under Article 234 (2) (a) of *the Constitution* of Kenya 2010. Additionally, under Section 45 (1) and (4) of the Public Service Act 2017, the 2nd Respondent is permitted to engage employees in positions established by it on contractual terms for periods of 12 months to 5 years and regulate their terms of employment.
35. In addition to the foregoing, Regulation 27 (1), (3), (5) and (8) empowers the 2nd Respondent to appoint not more than 2 Advisors at a time for incumbent Cabinet Secretaries, which appointments are at the request of the respective Cabinet Secretaries. Any appointment secured as such shall be for a term of 3 years renewable once for another 3 years, limited to the tenure of the particular Cabinet Secretary. This characteristic is reiterated in Section B.20 of the Human Resource Policies of the Public Service Commission, 2016.
36. It is submitted for the 1st and 3rd Respondents that the limitation on the term of service is contractual. Like any contractual term, it should be upheld by this Court. To support this submission, the 1st and 3rd Respondents cite the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR.



37. The 1st and 3rd Respondents state that the appointment of the Petitioner to the subject position was procedurally appropriate as it had a statutory underpinning.
38. That the limitation was expressly indicated in the 2nd Respondent's letter dated 3rd February 2021 of approval to the 1st Respondent and in the Offer Letter to the Petitioner dated 11th February 2021. The Petitioner accepted the terms of the appointment and is therefore bound to those terms. The 1st and 3rd Respondents cite the case of Samuel Chacha Mwita vs Kenya Medical Research Institute [2014] eKLR in support of their submission.
39. This Court is urged to note the Court's interpretation of the clause "...for a term commensurate to the term of the Governor, commencing 2nd April 2018 [sic]" in the case of Commission for Human Rights and Justice vs Michelle Bibi Fondo & 2 Others [2021] eKLR where the Court held that the impugned appointment of the County Attorney was subject to the incumbent Governor's tenure, and not the contractual tenure. The 1st and 3rd Respondents submit that similarly, the clauses "...tied to your tenure as the Cabinet Secretary" and "...for a period of two (2) years during the tenure of the Cabinet Secretary" should be interpreted to mean that the Petitioner's appointment was subject to the tenure of the former Cabinet Secretary. As such, the expiry of the former Cabinet Secretary's office term extinguished the Petitioner's term, and statutorily abolished the office that he held, defeating any claim for continued service by the Petitioner.
40. Pursuant to the above, the 1st and 3rd Respondents submit that the 1st Respondent appropriately and lawfully terminated the Petitioner's contract of service according to the terms contained in the duly executed contract.
41. On the second issue, the 1st and 3rd Respondents state that the Petitioner's pleadings contain omnibus citations of alleged rights, without specificity. That the failure to precisely and specifically describe the violations complained of makes it difficult for the Respondents to defend this suit. This is a procedural impropriety that cannot be excused. The petition should be struck out. To support this submission, reliance is placed on the decision in the cases of Anarita Karimi Njeru v The Republic 91976-1980) KLR 1272, and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
42. On the third issue, the 1st and 3rd Respondents argue that the Petitioner was appointed and discharged according to the statutory law empowering the 2nd Respondent to establish and abolish offices.
43. It is stated that the orders sought by the Petitioner are legally unenforceable as the position he seeks to be reinstated to does not exist following the resignation of the former Cabinet Secretary. An order of certiorari will be issued where the impugned decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons as was held in Kenya National Examination Council vs Republic ex parte Geoffrey Gathenii Njoroge [1997] eKLR. In the present case, it has not been demonstrated that the Respondents acted in excess of their powers or in one way or the other contravened rules of natural justice.
44. On the order of prohibition sought, the 1st and 3rd Respondents submit that the Court in Kenya National Examination Council (Supra) held that such an order can only be available where a decision hasn't been made. It cannot be granted after the action.

2nd Respondent's Submissions

45. The 2nd Respondent submits that Petitioner's letter of appointment expressly indicated that the position into which he was being appointed was supernumerary based on Local Agreement Terms for



Two (2) years with effect from the date he assumed duties. Further, that it was tied to the tenure of the then Cabinet Secretary for the 1st Respondent.

46. The appointment was in line with Regulation 27 (8) of the Public Service Commission Regulations 2020. The 2nd Respondent reiterates that the resignation of the Cabinet Secretary on 7th February 2022 automatically terminated the Petitioner's contract.

47. The 2nd Respondent argues that the Petitioner could not have any legitimate expectation to continue holding the supernumerary position once the same terminated pursuant to Regulation 27[8] of the Public Service Commission Regulations. To fortify this submission the Respondent cited the holding in the case of *Richard Erskine Leakey & 2 Others v Samson Kipkoech Chamai* [2019] eKLR where the Court of Appeal held;

“ 37. Lord Diplock in the *Council of Civil Service Union V Minister for Civil Service* [1985] 1 A.C. 374 [at pages 408-409], stated that for legitimate expectation to arise, the contested decision must have the effect of depriving one of some benefit or advantage, which he had been permitted in the past by decision and decision-maker to enjoy and which he can legitimately expect to be permitted to continue to enjoy, or he has received assurances from the decision -maker that it will not be withdrawn without giving him an opportunity to advance reasons for non-withdrawal.”

48. The 2nd Respondent submits that the actions complained of do not amount to a breach of the Petitioner's rights and fundamental freedoms under *the Constitution* of Kenya 2010; the present Petition has not been pleaded with specific peculiarity per the threshold set in the *Anarita Karimi Njeru* and *Mumo Matemu* cases, hence should be struck out in limine; that the reliefs sought are ambiguous and cannot be lawfully explained; that the Petition goes against the Constitutional ideals of good governance, effective and efficient administration of justice and service delivery to the public; that a grant of the orders sought would hamper the Constitutional and statutory mandate of the Respondents herein; and that the petition goes against the public interest as defined by the Supreme Court in *Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR.

Issues for Determination

49. I have carefully considered the parties' pleadings, the material placed before this Court, and the submissions by their respective Counsel, the following issues present themselves for determination: -

- a. Whether the Petition herein is a properly crafted and presented one.
- b. Whether the Petitioner's term of service was limited to the tenure of the Cabinet Secretary, Sicily K. Kariuki;
- c. Whether the Court should grant the prayers sought by the Petitioner.

Whether the Petition herein is a properly crafted and presented one.

50. The Respondents contend that the petition herein does not meet the threshold of a properly crafted and presented petition. They state that it is infested with ambiguity and destituteness in the specificity of the rights allegedly violated and how his rights if any were violated. This makes the petition a suitable candidate for striking out. Undeniably, it is a fundamental rule of fair civil proceedings that parties should be appraised of the case they are to meet. Impreciseness and general couching of pleadings is



impermissible especially in an adversarial as is ours. He who asserts must formulate his case sufficiently clearly so as to indicate what he is relying on. This rule fully applies to petitions.

51. The threshold for a properly crafted and presented Constitutional petition which in my view, reinforces the importance and purpose of pleadings was aptly set out in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the Honourable Court of Appeal held that: -

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither a formulaic prescription of the factual claims nor a formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

(42) However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under sections 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). The procedure is also a handmaiden of just the determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* [1876]3 Ch. D. 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity



of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.”

52. It is Imperative to state that the decisions in the Mumo Matemu, and Anerita [supra] do not insist on a mathematical or scientific precision but reasonable precision.
53. It is with the above lens that I will interrogate whether the petition herein meets the requisite standard of a properly crafted petition. This Court finds that it has. Both in the petition and the affidavit in support thereof, the Petitioner has indeed set out duly the constitutional rights, and constitutional stipulations that he holds the Respondents breached. He has gone further to explain how in his estimation, the rights and stipulations were breached. I am of the view that he has done it with reasonable precision. The petition suffers not therefore from a grave procedural impropriety as submitted by the Respondents.

Whether the Petitioner’s term of service was limited to the tenure of the Cabinet Secretary, Sicily K. Kariuki;

54. It is not in dispute that the Petitioner herein was employed by the 1st Respondent under a contract dated 12th February 2021, that was preceded by a Letter of Offer of Appointment dated 11th February 2021. In my view, the two documents defined the terms and conditions of service of the Petitioner. The Letter of Offer of Appointment dated 11th February 2021 reads in part:

“This appointment is on Local Agreement terms for a period of two (2) years during the tenure of the Cabinet Secretary and subject to the prevailing Public Service Regulations.”

55. On its part, the Local Agreement Form (Revised 2017) Employment on Contract Terms, in Clause 3 thereof provides that:

“This Agreement is subject to the conditions set forth in the Schedule hereto annexed and other regulations in force from time to time applicable to pensionable officers of the Public Service which shall be read and construed as part of this agreement”.

56. Under the heading “Terms of Engagement”, the Agreement reads that: “The engagement of the person engaged is for a period of twenty-four months beginning from the 12th day of February 2021.”

57. The parties have taken opposing positions as regards the length of the period of service contemplated in the above-mentioned documents. The Petitioner contends that his contract was a fixed term contract of two [2] years. His tenure was not at all tied to the being in office of a particular Cabinet Secretary. On the other hand, the Respondents were of the view that the contract could terminate at the period, two [2] years or at the termination of the Cabinet Secretary, Ms Sicily Kariuki at whose instance he was appointed, whichever came earlier.

58. Both the letter of offer and the contract of employment expressly incorporated Public Service Regulations operational at the time as part of the terms and conditions of the Petitioner’s contract of service. An effective resolution of this dispute cannot therefore be attained without considering the relevant Regulations alongside the two documents.



59. Regulation 27 of the Public Service Regulations 2020 provides thus: -

“Appointment of advisors

- (1) The Commission shall be responsible for the appointment of advisors to the President, Deputy President and Cabinet Secretaries.
- (2) The Commission shall determine the number of advisors who shall be appointed for the President and Deputy President as may be needed for carrying out the functions of office.
- (3) Where the Commission appoints advisors for a Cabinet Secretary, it shall not appoint more than two advisors at a time.
- (4) A person may be appointed as an advisor only if that person—
 - (a) has the relevant qualification, experience, competencies and skills necessary for the performance of his or her duties as advisor; and
 - (b) meets the requirement of Chapter Six of *the Constitution*.
- (5) The Commission shall appoint an advisor only upon request in writing by the relevant State officer.
- (6) The written request under paragraph (5) shall state—
 - (a) that the technical competencies, skills and experience possessed by the proposed advisor do not exist in the public service;
 - (b) that the competencies and experience of the proposed advisor match the job requirements;
 - (c) the functions, duties and responsibilities of the proposed advisor.
- (7) An advisor shall be responsible to, and support, the requesting State officer and shall not be assigned any role that is performed by other officers in the public body.
- (8) Advisors shall be bound by the Public Service Code of Conduct and sign the oath of secrecy under the *Official Secrets Act* (Cap. 187).
- (9) Each advisor shall be appointed on contract for a period not exceeding three years and may be renewable only once for a period not exceeding three years:
Provided that the appointment of an advisor for a State officer shall not extend beyond the tenure of the State officer.
- (10) The Commission shall determine the grading and terms of service of each advisor.
- (11) A person appointed as an advisor shall undergo security and other vetting by the relevant State agencies before taking up the appointment.
- (12) Advisors shall undergo induction training by the Commission before taking up an appointment.



(13) Advisors shall not have or hold any supervisory role over any public officers.”

60. The Court notes that conveniently the Petitioner has not explained the process leading to his appointment. Reasonably, the explanation could be expected of any reasonable Petitioner’s Petition in the circumstances of a dispute as is herein.
61. The Respondents aver that the Petitioner was appointed as an Advisor to the Cabinet Secretary, Sicily Kariuki, following a written request made by the said Cabinet Secretary for his appointment. The Respondents have produced before this Court copies of the written request made to the 2nd Respondent by the Cabinet Secretary dated 16th November 2020; the Letter of Rejection from the 2nd Respondent dated 18th December 2020; the Letter of Appeal by the Cabinet Secretary dated 25th January 2021; and the Letter dated 3rd February 2021 from the 2nd Respondent allowing the Appeal.
62. The Respondents aver that the 2nd Respondent made the appointment of the Petitioner to the subject position under Regulation 27 of the Public Service Commission Regulations 2020. They particularly rely on Regulation 27 (8) to fortify their position that the appointment was tied to the tenure of the above-stated Cabinet Secretary. It was to terminate immediately when she vacated office. The Respondents appear to be relying on the wrong sub-regulation. The correct sub-regulation that provides for a limitation on the term of service of an Advisor to a State Officer appointed under the above-stated Regulation is sub-regulation (9) reproduced hereinabove.
63. This Court notes that the Petitioner does not dispute the fact that he was appointed as an Advisor to the Cabinet Secretary. Further, he does not dispute that he accepted the terms of the Letter of Offer dated 11th February 2021; and executed the Local Agreement made on 12th February 2021. As such, it is this Court’s finding that the provisions of Regulation 27 (9) of the Public Service Commission Regulations 2020 apply to him.
64. The Petitioner argues that the Letter of Offer did not specifically state that his tenure was tied to that of the then serving Cabinet Secretary, Sicily K. Kariuki. Respectfully, this argument is simplistic. It ignores the fact that the letter onboarded applicability of the Public Service Commission Regulations. There cannot be any doubt that Regulation 27 envisions a written request to be made by a particular Cabinet Secretary for appointment of a particular advisor. Further, sub-regulation 9 provides specifically that the advisor appointed under the Regulation cannot serve beyond the tenure of the State Officer who requested his or her appointment.
65. Flowing from the two documents hereinabove referred to, and the provisions of Regulation 20, I come to an inescapable conclusion that the Petitioner’s employment could terminate either by effluxion of time, the two years, or on the occurrence of an event, exit from office of the Cabinet Secretary, Sicily K. Kariuki, who requested for his appointment as her advisor, whichever came earlier. As her exit came in earlier than the lapse of the two years, the Petitioner’s employment terminated automatically at the occurrence.
66. This Court has held time and again that fixed term contracts lapse automatically by effluxion of time or on the occurrence of a particular contractually stipulated event. This Court sees no place for a termination notice where the contract has terminated by reason of either of the two reasons. The Petitioner’s argument that he was not issued with a termination notice contrary to the law, stands on quick sand. It isn’t persuading on this Court.



Whether the Court should grant the prayers sought by the Petitioner.

67. By reason of the premises, I find that the petition herein lacks in merit. The petitioner’s employment was lawfully terminated without a breach of any constitutionally guaranteed right and or constitutional provision, and or statutory provision. The reliefs sought cannot be availed to the petitioner.
68. However, the Court notes that Clause 8 of the Local Agreement Form made on 12th February 2021, provided for payment of gratuity to the Petitioner. I return that the Petitioner is entitled to gratuity equivalent to 31% of his basic salary for the years served. Further, per Section 51 of the Employment Act 2007, the Petitioner is entitled to a Certificate of Service.
69. In the upshot the Petition dated 4th April 2022 fails. However, I make the following orders: -
- a. The Petitioner be paid Gratuity by the 1st Respondent
(31% x Kshs. 99,900 x 12)Kshs. 371,628.00
 - b. The Petitioner be issued with a Certificate of Service by the 1st Respondent
 - c. Interest on (a) above at court rates from the date of this judgment till full payment.
70. It is so ordered.

READ, DELIVERED AND SIGNED THIS 23rd DAY OF NOVEMBER, 2023.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Mr. Ogosso for the 2nd Respondent.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

