



**Gikenyi B & another v Nakhumicha & 2 others; Amoth & 58 others  
(Interested Party) (Petition E134 & E124 of 2023 (Consolidated))  
[2023] KEELRC 3222 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3222 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E134 & E124 OF 2023 (CONSOLIDATED)**

**B ONGAYA, J**

**DECEMBER 7, 2023**

**IN THE MATTER OF ILLEGAL & IRREGULAR APPOINTMENT AT  
THE MINISTRY OF HEALTH BY CABINET SECRETARY – HEALTH**

**AND**

**IN THE MATTER OF A PETITION UNDER ARTICLES  
10,19,20,21,22,23,27,28,41,43,47,73,159,162,232  
AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF RULE 4,10,11,13 OF THE CONSTITUTION OF KENYA  
(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL  
FREEDOMS) – HIGH COURT PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF PUBLIC SERVICE COMMISSION ACT NO. 10 OF 2017**

**AND**

**IN THE MATTER OF PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**BETWEEN**

**DR. MAGARE – GIKENYI B ..... 1<sup>ST</sup> PETITIONER**

**KENYA UNION OF CLINICAL OFFICERS ..... 2<sup>ND</sup> PETITIONER**

**AND**

**HON SUSAN NAKHUMICHA, CABINET SECRETARY ..... 1<sup>ST</sup> RESPONDENT**



HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT  
PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT  
AND  
DR PATRICK AMOTH & 58 OTHERS ..... INTERESTED PARTY

## JUDGMENT

1. The petitioner filed the petition on 06.07.2023. The petitioner prayed for:
  - a. A declaration that acting appointment is restricted to the existing employees/staff of the organization, which is a temporary conferment upon a public officer, by the appointing authority, the power to perform duties of a public officer other than the office the officer is substantively appointed to hold, while the public officer continues to hold the substantive appointment and thus the purported appointment of Dr. Peter Shikuku and Dr. Tom Omenge as such is null and void ab initio.
  - b. A declaration that the appointment of the senior management team of the Ministry of Health in acting capacity must at all material times be in strict compliance with the provisions of section 34 of the Public Service Commission Act and other relevant provisions in the HR manuals.
  - c. A declaration that it was unconstitutional to revoke the appointment of existing officers like Dr. Sore Otieno and replacement by Dr. Peter Shikuku without change of designation.
  - d. An order of certiorari to remove into the court for purposes of being quashed, the purported appointments of the senior management of the ministry of health vide an internal memo dated 19.04.2023 and titled reorganization of the ministry.
  - e. An order of prohibition to issue prohibiting the 1<sup>st</sup> respondent from usurpation of the powers of the 3<sup>rd</sup> respondent of appointment in acting capacity of persons to act in those offices/positions.
  - f. An order of mandamus compelling the 1<sup>st</sup> respondent to draw to the 3<sup>rd</sup> respondent the indent for advertisement of the position of director general of health and other vacant posts.
  - g. That any other order or/and modification of petitioner's prayer(s) which this honourable court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.
  - h. An order that the costs consequent upon this petition be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and sworn on 06.07.2023. The petitioner's case is as follows:
  - a. The Public Service Commission Regulation 2020 defines appointment as engagement of a person to a position or a job and includes acting appointment, re-appointment, promotion and re-designation in the public services.
  - b. Whereas the Public Service Commission has through relevant constitutional and statutory provisions delegated part of its appointment powers to public servants and persons known as authorized officers such as the 1<sup>st</sup> respondent, such delegated power is statutorily limited to the



appointment of officers to Job Group L and below but the Commission reserved to itself the appointment power of officers to Job group M and above.

- c. Once the 3<sup>rd</sup> respondent approved the newly reorganized structure/organization, if at all, the 1<sup>st</sup> respondent was enjoined to submit to the 3<sup>rd</sup> respondent a recommendation of officers to be appointed to specific offices in acting capacity including their seniority together with an indent to enable the commission appoint the relevant officers in the acting capacity as well as put up an advert for substantive appointments of the same.
- d. The 1<sup>st</sup> respondent acted ultra vires and exceeded her statutory powers as delegated and so usurped the powers of 3<sup>rd</sup> respondent when she purported to, vide her, impugned internal memo dated 19.04.2023 and titled Reorganization of the Ministry, undertake the impugned appointments of the fifty-five officers to each of the fifty-five newly created offices at the level of Director General of Health, Deputy Director General of Health, Directors and Divisional Heads in acting capacity contrary to clear provisions of section 34(1)(a) of the [Public Service Commission Act](#) as read with section B.3 (1) 7 (4) of the [PSC Human Resources Policies and Procedures Manual](#) for the Public Service.
- e. That the appointment of Dr. Patrick Amoth as the Acting Director General of Health, and who has continuously acted as such for over the past three years from on or about January 2020 was ultra-vires the provisions of section 34(3) & (5)(b) of the [Public Service Commission Act](#).
- f. The impugned appointments were made unilaterally by the 1<sup>st</sup> respondent who did not subject the same to the scrutiny advise and recommendation of the Ministerial Human Resource Management Advisory Committee as required by section A.15 of the [PSC Human Resource Policies and Procedures Manual](#) for the public service.
- g. The impugned internal memo by the 1<sup>st</sup> respondent contained appointments of four Chief Executive Officer in acting capacity for each of the four state corporations including the National Quality Control Laboratory.
- h. That the appointment of Chief Executive Officers of state corporations by the 1<sup>st</sup> respondent was yet again in excess of her powers amounting to further usurpation of the powers and mandate bestowed upon the boards of management of such state corporations, which are the respective lawful appointing authorities and so she once more exceeded her powers and which act was ultra-vires the provisions of sections 34(1) (a) of the [Public Service Commission Act](#) as read with the State Corporation Act and the specific Acts of the respective state corporations.
- i. That the unilateral appointments were based on tribalism, nepotism and favouritism rather than qualification.
- j. The appointments are against the law and/or the legal principle that an officer shall not supervise his superior colleagues as envisaged at articles 28 and 29 of the [Constitution](#) and the same is so cardinal that section B.29 of the [PSC human resource policies and procedures manual for the public service](#) goes as far as even splitting the seniority between officers in the same grade/ job group.
- k. Failure to observe seniority in acting appointments and/or deployments will create quagmire situations and chaos in the public service as a substantive junior officer may be elevated to the supervisory role over his superior thus creating difficulties in disciplinary control as a junior officer cannot commence or participate in disciplinary proceedings against his superior in terms of the statutory general principles of disciplinary process.



- l. The official full name of Dr. Peter Shikuku is Dr. Peter Shikuku Kibet, and that he was only appointed by the 1<sup>st</sup> respondent who thought they were from the same ethnicity.
  - m. That Dr. Peter Shikuku Kibet is an employee in the Ministry of Education at the University of Nairobi, and his appointment as Acting Medical Superintendent of National Spinal Hospital was ultra vires the provisions of section 40(2) of the *Public Service Commission Act*.
  - n. That at the National Spinal Hospital, apart from Dr. Soren Otieno who was relegated to reporting to his junior Dr. Peter Shikuku there are other senior officers to Dr. Peter Shikuku including Dr. Stephen Kauka.
  - o. The public stands to suffer irreparably as the foregoing chaotic appointments will result in a demoralized workforce that will compromise the delivery of services of the mandate of the ministry.
3. The 3<sup>rd</sup> respondent filed the replying affidavit of Remmy N. Mulati MBS, the Deputy Commission Secretary (Corporate services) of the 3<sup>rd</sup> respondent, sworn on 11.07.2023 and drawn by Michael Maurice Ogosso Advocate. It was stated and urged as follows:
- a. The petitioner's demand letter/complaint of 08.05.2023 was never brought to the Commission's attention prior to the institution of the instant suit, and the Commission has learnt of the same through the present proceedings.
  - b. The Commission has reviewed the impugned internal memo of 19.04.2023 against the approved staff establishment and the organization structure for the Ministry of Health and established that the said memo is unlawful.
  - c. The Ministry of Health has not submitted its report for a review of organizational structure and staff establishment to the Commission for consideration and approval as per Executive Order No. 1 of 2023.
  - d. All the offices/positions outlined under the state department for public health and professional standards do not exist as they have not been established and approved by the Commission.
  - e. Most of the offices/positions outlined under the State Department for Medical Services do not exist as they have not been established and approved by the Commission.
  - f. The appointments made by the Cabinet Secretary are contrary to the law as well as the approved staff establishment and organizational structure for the ministry.
  - g. The Cabinet Secretary has violated the *Constitution*, the *PSC Act* 2017, the *PSC Regulations* 2020 as well as the Commission's delegation instrument of 14.12.2022 issued to the authorized officers.
  - h. Under Article 234(2) (a)(ii) of the *Constitution* as read together with Part VI of the *PSC Act*, 2017 and part III of the *PSC Regulations* 2020 the power and function to make appointments in the public service vests in the Commission.
  - i. Pursuant to article 234(5) of the *Constitution* as read together with sections 31 and 32 of the *PSC Act*, 2017 the Commission appointed Principal Secretaries as the authorized officers of the various Ministries/State Departments and delegated some of its powers and functions to the said authorized officers.



- j. On 14.12.2022 the Commission issued a Delegation Instrument on the Exercise of the Human Resource Powers and Functions in the Public Service to the Authorized Officers.
  - k. By issuing the impugned memo of 19.04.2023 the Cabinet Secretary for Health purported to exercise the human resource powers and functions that have been delegated by the Commission to the authorized officers in the Ministries and State Departments contrary to the law and the delegation instrument of 14.12.2023.
  - l. The Cabinet Secretary for Health also usurped the constitutional and statutory powers and function of the Commission as well as the delegated powers and functions of the authorized officers of the Ministry of Health.
  - m. In making the impugned appointment, the Cabinet Secretary for Health also usurped the constitutional and statutory powers and functions of the Commission as well as the delegated powers and functions of the authorized officers of the Ministry of Health. Specifically, she violated sections 32,33 and 34 of the [PSC Act](#), 2017 as read together with regulations 16 and 23 of the [PSC regulations](#) 2020.
  - n. That save for the acting appointment for the position of Director General for Health, the rest of the other appointments done by the Cabinet Secretary for health were never approved by the Public Service Commission. In cases where such appointments have been approved, appointments can only be made either by the Commission or the authorized officers as may be appropriate.
  - o. The appointment of CEOs (even Ag CEOs) and staff of state corporations is the responsibility of the Boards of State Corporations unless the constituting legal instrument for that particular State Corporation provides otherwise.
  - p. The deployment and re-designation of staff of state corporations is the responsibility of the board.
  - q. A cabinet Secretary does not have the legal authority to deploy/transfer staff from one state corporation to another.
  - r. A Cabinet Secretary does not have the legal authority to re-designate staff of state corporations.
  - s. A public officer may be seconded to a state corporation subject to approval by the Public Service Commission in accordance with section 42 of the [PSC Act](#), 2017 as read together with Regulation 37 of the [PSC Regulations](#) 2020.
  - t. Requests for secondment of officers from the service to states corporation must be made by the boards/CEOs of the concerned state corporation.
  - u. In such cases, the authorized officers of the Ministry/State Department are required to submit such requests to the Commission for consideration and approval. This is because under paragraph 13.0 of the Commission's delegation instrument of 14.12.2022 secondment of officers to and from the service has not been delegated to the authorized officers of ministries/ state departments.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondent filed the Replying Affidavit of Stephen Khaemba, Deputy Director Human Resource Department Ministry of Health, sworn on 11.07.2023 and through learned Principal State Counsel Christine Oyugi for the office of the Attorney General. It was argued and stated thus:



- a. It is not true that the Ministry has made appointments of the senior management team as alleged by the petitioner.
- b. The 1<sup>st</sup> respondent was merely communicating to the Principal Secretaries for Medical Services and Public Health & Professional Standards on the temporary deployment of officers arising out of the reorganization of the government through executive order no. 1 of 2022 and revised by executive order no. 1 of 2023.
- c. The executive order created two state departments dealing with medical services and public health & professional standards which was a shift from the previous circumstances where there was no state department.
- d. Based on the reorganization of the Ministry through executive order, the 3<sup>rd</sup> respondent vide letter dated 22.12.2022 informed the two state departments on the need to embark on restructuring of the state departments in line with the executive order no. 1 of 2022.
- e. The two state departments immediately commenced the exercise of restructuring and a proposed organizational structure was submitted on the 14.03.2023 to the 3<sup>rd</sup> respondent.
- f. The 3<sup>rd</sup> respondent further guided that the ministry submit an organizational structure with detailed functions and staffing levels and also form a lean technical team from the two state departments to be able to finalize the review of the proposed structure before tabling the report to the 3<sup>rd</sup> respondent board for approval.
- g. That the review of the proposed structure as guided by the 3<sup>rd</sup> respondent is still ongoing by the two state departments and therefore currently there is no organizational structure that has been approved by the 3<sup>rd</sup> respondent.
- h. Given that there is no approved organizational structure, the 1<sup>st</sup> respondent could not make any appointments as purported by the petitioner.
- i. The Ministry is taking all necessary steps to have the organizational structure approved by the 3<sup>rd</sup> respondent where advertisement and substantive appointments will be made.
- j. That there is no officer who has been appointed to any position in the ministry either substantively or in an acting capacity as alleged by the petitioner.
- k. The Ministry is taking all necessary steps to have the organizational structure approved by the 3<sup>rd</sup> respondent where advertisement and substantive appointments will be made.
- l. Pending the approval of the organizational structure by the 3<sup>rd</sup> respondent the Ministry through the two state departments undertook its own internal arrangements which culminated in the temporary deployment of officers.
- m. The 1<sup>st</sup> respondent did deploy officers temporarily to oversee implementation of the functions pending finalization of the restructuring of the ministry of health to align it to the executive order.
- n. If indeed the assertions that the officers were appointed on an acting capacity were true, the officers could be earning acting allowances in accordance to the existing policies on acting appointments.
- o. The existing service regulations requires that when an officer is appointed either substantively or in an acting capacity, he/she should be issued with a letter of appointment detailing the



terms and conditions of the appointment. In this case none of the officers under reference was issued with a letter appointing them to the various positions.

- p. The temporary deployment of officers was to ensure non- disruption of services given that health is an essential service.
  - q. The deployment of officers to the two state departments was initiated by the two principal secretaries of the two state departments through consultation with the 1<sup>st</sup> respondent and in accordance with the 3<sup>rd</sup> respondent's letter of appointment.
  - r. The officers identified are highly qualified and experienced in their respective professional space. The inputs from these officers will definitely enrich the development of the organization structure and propel the strategic trajectory towards achieving universal health coverage which has been an elusive target overtime.
  - s. It is in order for the 1<sup>st</sup> respondent to select suitable officers who may be seconded to the semi-autonomous government agencies pending finalization of the recruitment process to ensure service continuity and in some instances, to operationalize the SAGAs.
  - t. The deployment of Dr. Peter Shikuku Kibet was in order as a public officer may be seconded to any other public office as provided for by service regulations.
  - u. The deployment of Dr. Tom Menge was done procedurally in accordance with service regulations, and that he had previously served a Director in the Ministry prior to his deployment to Kenyatta National Hospital.
  - v. That A.g Director General Dr. Patrick Amoth has been duly appointed as the Ag Director general by the 3<sup>rd</sup> respondent.
  - w. The ministry has on numerous occasions tried to substantively fill the position of Director General but the matter has been marred by court cases.
5. By order of the court issued on 17.08.2023, the court ordered that Petition E134 of 2023 is consolidated with Petition E124 of 2023 with the lead file being E134 of 2023. The Court has as well considered the pleadings in petition E124 of 2023 which are substantially similar to E134 of 2023
  6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
  7. To answer the 1<sup>st</sup> issues, the account by the petitioners and the Public Service Commission on the Commission's constitutional and statutory mandate has not been denied. The account is upheld by the Court.
  8. To answer the 2<sup>nd</sup> issue, the Commission has confirmed that the Cabinet Secretary purported to exercise authority, power and functions only vested in the Commission by the Constitution and on Commission's delegation to Authorised Officers and the Cabinet Secretary was not one such Authorised Officer.
  9. To answer the 3<sup>rd</sup> issue, all the appointments or deployments by the Cabinet Secretary except for the Acting Director General of Medical Services were unconstitutional and ultra vires relevant statutory and regulatory or policy provisions.
  10. To answer the 4<sup>th</sup> issue, the Court finds that the reliefs prayed for will succeed. The Court has considered the public interest nature of the dispute and each party to bear own costs of the proceedings. The Court further finds that the related Petition E151 of 2023, *Okiya Omtatah Okiiti v The Cabinet*



*Secretary of Health and Another, and, Dr. Amina Guleid and 3Others (interested parties)* is equally determined accordingly.

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

- a. The declaration that acting appointment is restricted to the existing employees/staff of the organization, which is a temporary conferment upon a public officer, by the appointing authority, the power to perform duties of a public officer other than the office the officer is substantively appointed to hold, while the public officer continues to hold the substantive appointment and thus the purported appointment of Dr. Peter Shikuku and Dr. Tom Omenge as such is null and void ab initio.
- b. The declaration that the appointment of the senior management team of the Ministry of Health in acting capacity must at all material times be in strict compliance with the provisions of section 34 of the [Public Service Commission Act](#) and other relevant provisions in the HR manuals.
- c. The declaration that it was unconstitutional to revoke the appointment of existing officers like Dr. Sore Otieno and replacement by Dr. Peter Shikuku without change of designation.
- d. The order of certiorari to remove into the court for purposes of hereby quashing, the purported appointments of the senior management of the ministry of health vide an internal memo dated 19.04.2023 and titled reorganization of the ministry.
- e. The order of prohibition issued prohibiting the 1<sup>st</sup> respondent from usurpation of the powers of the 3<sup>rd</sup> respondent of appointment in acting capacity of persons to act in those offices/positions.
- f. The order of mandamus compelling the 1<sup>st</sup> respondent to draw to the 3<sup>rd</sup> respondent the indent for advertisement of the position of Director General of Health and other vacant posts.
- g. The declaration that by reason of Internal Memo dated 19.04.2023 the rights and freedoms of health workers protected under Articles 27 and 41 and the values and principles of public service under Article 232, and Article 234 of the [Constitution](#) of Kenya were thereby violated or threatened with violation.
- h. The related Petition E151 of 2023, *Okiya Omtatah Okiiti v The Cabinet Secretary of Health and Another, and, Dr. Amina Guleid and 3Others (interested parties)* is equally determined in terms of this judgment accordingly.
- i. Each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7<sup>TH</sup> DECEMBER, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

