



**Wafula v Public Service Commission & 6 others (Employment and Labour Relations
Petition E218 of 2023) [2023] KEELRC 3225 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3225 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E218 OF 2023**

B ONGAYA, J

DECEMBER 7, 2023

**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 13 AND 14 OF THE LAND
REGISTRATION ACT, NO. 3 OF 2012**

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**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

BETWEEN

AGGREY WAFULA PETITIONER

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF PUBLIC SERVICE 2ND
RESPONDENT**

CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE .. 3RD RESPONDENT



**PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 4TH RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 5TH RESPONDENT**

**DIRECTOR, HUMAN RESOURCE MANAGEMENT & DEVELOPMENT,
MINISTRY OF LANDS AND PHYSICAL PLANNING 6TH RESPONDENT**

MINISTRY OF LANDS AND PHYSICAL PLANNING 7TH RESPONDENT

RULING

1. The Petitioner filed an application by the notice of motion dated 24.11.2023 through Keaton & Keaton Advocates. The application was under Articles 3, 10, 22, 23(3)(c), 50, 159 and 162(2) of *the Constitution* of Kenya 2010, section 12 of the *Employment and Labour Relations Court Act*, 2011, and, rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The applicant is seeking the following orders:
 - a. That the application be certified as urgent and service thereof be dispensed with in the first instance.
 - b. That pending the hearing of the application or further orders by the Honourable Court, there be a stay of the implementation of the recruitment process for the position of Chief Land Registrar.
 - c. That pending the hearing of the application or further orders by the Honourable Court, the respondents by themselves, their agents or servants be restrained from appointing a substantive Chief Land Registrar.
 - d. That pending the hearing and determination of the application inter-partes, a conservatory order be issued restraining the respondents or any of them and any state officer or organ of state from appointing substantive Chief Land Registrar, save for Mburu Peter Ng'ang'a.
 - e. That pending the hearing and determination of this application inter-partes, the respondents be directed to produce the results and criteria used for the selection of the Chief Land Registrar.
 - f. That pending the hearing of the substantive petition, the respondents be directed to allow the approved and qualified candidate Mburu Peter Ng'ang'a to discharge the duties of the office of Chief Land Registrar unhindered.
2. The application is supported by the affidavit of the petitioner sworn on 24.11.2023, his supplementary affidavit sworn on 28.11.2023, his further supplementary affidavits both sworn on 05.11.2023. The application was made upon the following grounds:
 - a. On or around 28.03.2023 the 1st respondent advertised inter alia, vacancies for the position of Chief Land Registrar.
 - b. The candidates were shortlisted and attended interviews on 14.09.2023 respectively.
 - c. Vide communication dated 28.09.2023 the secretary/Chief Executive Officer of the 1st respondent communicated to the 2nd respondent, conveying the decision of the 1st respondent



that Mr. Mburu Peter Ng'ang'a be appointed to fill the position of Chief Land Registrar, after due process of selection was followed.

- d. The 2nd respondent has employed tactics and antics and is inclined to circumvent the process and has threatened to appoint another person, outside the decision, communication or recommendation of the 1st respondent.
 - e. The said acts or omissions by the 1st respondent is prima facie illegal and unconstitutional.
 - f. The 1st respondent's actions have created grotesque confusion in the State Ministry of Lands and Physical Planning and hampered operations and service delivery to the public.
 - g. The respondents have failed in the said duty imposed by the law to the detriment of service delivery to Kenyans.
 - h. Unless the Court intervenes, service delivery to the members of public will be greatly hindered.
 - i. The said actions by the respondents set a dangerous precedent and stand out as dangerous rodent eating at the very roots of constitutionalism and the rule of law that ought to be safeguarded by *the Constitution* of Kenya 2010 and all persons responsible for implementation and execution of *the Constitution*.
 - j. Unless the Court intervenes by granting conservatory orders, service delivery to Kenyans will be affected with the resultant effect of furthering the unconstitutional acts and set in motion foundations of blatant disregard for the Supreme Constitution of the Republic of Kenya.
 - k. There is urgent need for the Court to move with speed as a custodian of the majesty of *the Constitution* and strike a blow for the principles of constitutionalism and the rule of law by halting any further blatant and unconstitutional processes driven by the respondents.
 - l. It is just and equitable allow the application.
 - m. That this application be heard and determined on priority basis.
3. The 1st respondent has filed the replying affidavit of Dr. Simon K. Rotich, CBS, the Secretary/ Chief Executive Officer of the Public Service Commission, sworn on December 4, 2023 and through Jacqueline Manani, Advocate. It was argued and stated as follows;
- a. The application has been filed in favour of or on behalf of one Mburu Peter Nga'ng'a who is a public officer and who is fully capable of pursuing his rights before the Commission or a court of law.
 - b. The petitioner has no locus standi to bring this petition and the application seeking orders for the benefit or on behalf of Mburu Peter Ng'ang'a.
 - c. That this application does not qualify as a public interest matter and the petitioner cannot purport to make a claim and seek orders on behalf of Mburu Peter Ng'ang'a.
 - d. The Commission advertised the position of Chief Land Registrar and received applications and shortlisted nine applicants being
 - i. Mucheke Zubeda Yusuf
 - 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 Kipkemoi
 - viii. Ketyenya Clarah Chemutai
 - ix. Nyangau Thomas Morara
- e. The Commission then wrote to the Ethics and Anti-Corruption Commission (EACC) and the National Intelligence Service (NIS) on 31.08.2023 seeking information on the shortlisted candidate.
 - f. The Commission received on September 20, 2023 a response from EACC dated September 11, 2023. The response mentioned that Mburu Peter Ng'ang'a had been charged in Milimani Anti-Corruption Court Case No. 33 of 2018 with abuse of office contrary to section 46 as read with section 48 of ACECA No. 3 of 2003 but the charges were however withdrawn by the DPP under section 87(a) of the CPC.
 - g. The Commission conducted interviews on 14th and 15th September 2023 and Mburu Peter Nga'ng'a emerged as the top candidate.
 - h. On September 28, 2023 the Commission held an Ordinary Board Meeting in which one of the agenda items was to consider the Selection Board Report for the position of Chief Land Registrar.
 - i. Since there was no adverse report that had been received by the Commission as at the time of the discussion, the Commission discussed and resolved to appoint Mburu Peter Ng'ang'a as the Chief Land Registrar.
 - j. The Deputy Commission Secretary (Corporate Services) was then immediately instructed to send a letter to the Principal Secretary, State Department for Lands informing him of the Commission's decision to appoint Mburu Peter Ng'ang'a as the Chief Land Registrar.
 - k. The Deputy Commission Secretary (Corporate Services) then sent a letter dated September 28, 2023 to the Principal Secretary, State Department for Lands as the Board Meeting was ongoing.
 - l. In the course of the meeting (in the afternoon) while the Commission was proceeding with other agenda items, the Commission received verbal adverse information about Mburu Peter Ng'ang'a from the NIS. This prompted the Commission to revisit the earlier discussion and upon discussions, the Commission rescinded the earlier decision appointing Mburu Peter Ng'ang'a as the Chief Land Registrar and instead appointed Nyandoro David Nyambaso.
 - m. By the time the Commission was rescinding the earlier decision, the letter communicating the decision to appoint Mburu Peter Ng'ang'a had already been dispatched to the Principal Secretary, State Department for Lands. The Commission therefore resolved to recall the said earlier letter.
 - n. A letter dated September 28, 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.



- o. On September 29, 2023 the Commission received a letter dated the same date from NIS confirming the information earlier received verbally by the Commission about the adverse report on Mburu Peter Ng'ang'a. and the Commission is unable to attach the letter from NIS as it also contains confidential information about another officer who is not the subject matter of this petition.
 - p. It is not true that the Principal Secretary, State Department for Lands is inclined to circumvent the process or has threatened to appoint another person contrary to the decision of the Commission as alleged by the petitioner.
 - q. An appointment to any position only crystalizes once a letter of offer of appointment had been issued to a successful applicant who has accepted to take up the offer in writing.
 - r. Mburu Peter Ng'ang'a was not and has not to date been offered an appointment to the position of Chief Land Registrar as no letter of offer of appointment has been issued to him.
 - s. An employer can change its mind about a decision to appoint a person at any time before a letter of offer of appointment has been issued to a successful applicant.
 - t. The Commission could not ignore the information provided by NIS especially considering the sensitivity of the position of Chief Lands Registrar.
 - u. An employer cannot be forced to appoint a person to any position. The decision to appoint rests with the employer and where the employer has undertaken a credible recruitment process, there would be no justification to nullify a decision of the employer and replace it with a decision of the court.
 - v. The Commission has demonstrated that a credible recruitment process was undertaken through which Mburu Peter Ng'ang'a emerged as the top candidate, however, he did not meet the qualifications as he failed the requirements of Chapter 6 of *the Constitution*.
 - w. The Commission is not bound by law to appoint only persons who emerge top in interviews. The Commission can fail to pick a top candidate if they are not cleared by the relevant government agencies like EACC and NIS or if they belong to a gender or ethnic group that is already over represented in the particular entity for which the Commission is recruiting or if the person with disability equally qualifies and has performed well in the interview but is not the top candidate.
 - x. Nyandoro David Nyambaso was issued an appointment letter immediately the Commission communicated to the Principal Secretary the decision to appoint him to the position of Chief Land Registrar, and has therefore been holding the position of Chief Land Registrar for a period of about two months now. The position of Chief Land Registrar is therefore not vacant and the interim orders sought in the petitioner's application cannot therefore issue as they have been overtaken by events.
 - y. Orders of mandamus compelling the Principal Secretary State Department for Lands to issue an appointment letter to Mburu Peter Ng'ang'a and orders directing the respondents to issue an appointment letter to Mburu Peter Ng'ang'a cannot issue because there is no vacancy in the position of Chief Land Registrar.
4. The 4th, 5th, 6th and 7th respondents filed the replying affidavit of Janerose Karanja, Director Human Resource Management & Development Department for Lands and Physical Planning sworn on



05.11.2023. Mr. Eredi, the learned Chief Litigation Counsel appeared in that behalf for the Attorney General. It was stated and urged thus:

- a. That upon announcement of the vacancy of the position of the Chief Land Registrar vide a media advert on 28.03.2023 the position attracted many applicants whereof 8 candidates were finally shortlisted and did interviews between the dated of 14th and 15th November, 2023, namely:
 - i. Charles Ngetich
 - ii. Sarah C. Maina
 - iii. David Nyandoro
 - iv. Peter Ng'ang'a Mburu
 - v. Clara Ketyenya
 - vi. Zubeda Muccheke
 - vii. Benard Leitich
 - viii. Fedson Orare
- b. By a letter dated 28.09.2023 the 1st respondent communicated to the 4th respondent its decision to appoint one Mr. Nyandoro David Nyambaso to the position of Chief Land registrar.
- c. Immediately and on the same day the above letter was received, a letter in respect appointing one Mr. David N. Nyandoro to the grade of Chief Land Registrar Job Group T was done by the 4th respondent.
- d. Prior to his appointment Mr. Nyandoro was serving as Deputy Chief Land Registrar having been appointed to this position on 09.01.2020. Mr. Nyandoro joined the Ministry of Lands on the 29.03.2006 as Registrar of Titles II where he has subsequently risen through the ranks to his current position. In his course of service, Mr. Nyandoro has been a beneficiary of the public service excellence awards 2019, being an award given to an employee who demonstrates excellence in achieving results through high performance.
- e. Prior to the communication of appointment made by the 1st respondent, a letter dated 28.09.2023 referenced PSC/212/2/(8);PSC/212/2/1/1/(3) from the 1st respondent purporting to appoint one Mr. Mburu Peter Ng'ang'a was received on the 28.09.2023 and was immediately followed by a letter from the 1st respondent dated 28.09.2023 referenced PSC/212/2/9;PSC/212/2/1/1/(4) which sought to withdraw the aforesaid letter on the basis that the communication was erroneously made and therefore directed that the letter be surrendered back to the 1st respondent. The said letter was therefore duly returned to the 1st respondent.
- f. The 4th, 5th, 6th and 7th respondents have no role in taking the decision to appoint save for implementing that decision as it had already done.
- g. The notice of motion is an abuse of the process of the court and that the petitioner is malicious, vexatious and has a personal vendetta against Mr. Nyandoro having instituted a similar suit in Nakuru ELRC No. E22 of 2021 Aggrey Wafula vs. Public Service Commission and 5 others. Where the petitioner sought to stop the purported irregular appointment of Mr. Nyandoro



as the Chief Land Registrar whereas no appointment had been made. The suit was dismissed on 20.09.2022.

5. The interested party filed the affidavit of Florence W. Muturi, the Secretary and Chief Executive Officer of the Law Society of Kenya sworn on 05.12.2023 and filed by MOB Law Advocates. The President of the Society Mr. Eric Theuri Advocate and Mr. Onyango Advocate appeared in that behalf. It was stated as follows:
 - a. Section 4 of the Law Society of Kenya Act empowers the interested party to uphold the Constitution of Kenya and advance the rule of law and the administration of justice.
 - b. Under section 13(1) (c) of the Land Registration Act No. 3 of 2012, for a person to be considered for the position of the Chief Land Registrar, they must be an Advocate of the High Court of Kenya of not less than ten years standing. It is the interested party that would confirm such standing.
 - c. Public Service Commission Regulations 2020 give effect to Articles 155(3)(a), 158 and 234 of the Constitution of Kenya and governs procedures and standards relating to the recruitment, selection for and appointment to any office in the public service. Under regulation 16, the 1st respondent invokes provisions of section 36 and 10 of the Public Service (Values and Principles) Act, 2015 to have regard to merit, equity, aptitude and suitability, take into account consideration the prescribed qualifications for holding the office including abilities, skills, knowledge, experience and personal qualities relevant to carrying out of the duties; the efficiency of the public service; the provable experience and demonstrable milestones attained by the candidate and potential for development; the integrity of the candidate; and the standards, values, and principles set out in Articles 10, 27, 54(2), 55(c), 232 and Chapter 6 of the Constitution. Fairness and meritocracy matrix should govern the 1st respondent in and any adverse report against a candidate for public or state office must be presented to the candidate and to the Commission and if legal proceedings are involved, the reports be filed before the Court.
 - d. The 1st respondent is not permitted in law to be at liberty to conclude a merit-based recruitment exercise only to whimsically change the candidate on account of an alleged adverse report from the National Intelligence Service.
 - e. The 1st respondent did not enquire from the interested party as to the status of the individual purported to have been appointed to occupy the office of the Chief Land Registrar.
 - f. An appointment in violation of the Constitution, the Public Service Commission Act, and the regulations thereunder, is null and void ab initio.
6. Submissions for the 1st respondent were filed on 06.12.2023. The parties agreed to making of the ruling based on the material on record. The Court has considered the parties' respective cases and makes finding as follows.
7. To answer the 1st issue, the petitioner had the standing to make the instant petition and application. It is that the office of the Chief Land Registrar is not only a public office but is also established by statute and is vested with important public authority and duty. The recruitment to that office is by the 1st respondent in exercise of the constitutional powers vested per Article 234 of the Constitution. It should be obvious that the petition was filed in the public interest as envisaged in Article 258 to enforce the constitutional provisions about the 1st respondent's exercise of the constitutional authority, function and power of recruitment, selection, and making an appointment in the office of the Chief



Land Registrar. The petitioner did not state that the petition had been made on behalf of Mr. Mburu Peter Ng'ang'a and who was only mentioned as he turned out to have participated in the process. Paragraph 1 of the petition stated that the petitioner is a private citizen and user of services from the State Ministry of Lands and Physical Planning and further thus, "He brings this petition on his behalf and on behalf of the public in defence of *the Constitution*." The Court returns that the petitioner's description is not disputed and he enjoyed the necessary standing per Article 258(1) that every person has the right to institute court proceedings claiming that *the Constitution* has been contravened or is threatened with contravention. Further, he enjoyed standing per Article 258 (2) (c) that in addition to a person acting in own interest per Article 258(1), court proceedings under Article 258(1) may be instituted by a person acting in the public interest. The Court holds that the petitioner was entitled to act in his own interest and in the public interest.

8. To answer the 2nd issue, the Court returns that the applicant has failed to establish a prima facie case for grant of the orders as prayed for. In particular the Court returns as follows:
 - a. The substantive office holder, Mr. David N. Nyandoro, has already been appointed to the office of Chief Land Registrar. The ad interim or interim conservatory order to restrain appointment of a substantive holder of the office has indeed been overtaken as submitted for the respondents.
 - b. There is no established basis in law or fact for the Court to issue interim order that only Mr. Mburu Peter Ng'ang'a could substantively hold the office in circumstances that no offer was made to him about the office and the office has since been filled. It appears to the Court that after the decision by the Commission to appoint Mr. Mburu Peter Ng'ang'a was made, the same was recalled prior to its perfection. Nothing has been shown denying the Commission the authority to recall the decision which had not been communicated to Mr. Mburu. Article 259(3) (a) of *the Constitution* provides 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. Further, Article 259 (8) of *the Constitution* states that if a particular time is not prescribed by *the Constitution* for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises. Did the Commission have a recall power or by appointing Mr. Mburu it became functus officio? The material on record show that the Commission retained some residual authority with respect to the vacancy they had appointed Mr. Mburu. The letter conveying Mr. Mburu's appointment was clear that it was an appointment, "... subject to compliance with the Office of the President's Circular No. OP.3/7A/VOL.X/17 of 24.06.2023..." And further, "Please note that any vacancy which may occur in the next Six (6) months should be declared to the Commission for filling." The circular referred to is not exhibited but it is clear that it stood in the way of Mr. Mburu's substantive holding of the office one way or the other and if the office remained vacant within 6 months thereof, then the Commission had to be informed suggesting the Commission had not, within six months, deemed to have with finality perfected or exhausted its power and function to make a substantive appointment to the office as the vacancy thereof had been declared, advertised, long and short lists done, interviews undertaken, and Mr. Mburu appointed subject to the quoted provisions of the Commission's letter conveying the decision. The upshot is that it appears the appointment of Mr. Mburu was a floating decision capable of recall as was done as the appointment had not crystallised. The merits of the recall is a matter for investigation at the full hearing but that the recall was potentially lawful and possible is not in doubt. In that regard, pending the hearing and determination of the petition it should be possible for the 1st respondent to avail the letter by the National Intelligence Service said to be dated 29.09.2021 which cements the information that triggered the recall and within such safeguards as the



Court may direct for protection of all interests involved and towards establishing the merits of the recall.

- c. Except for the said letter dated 29.09.2023, it appears that the prayer about the 1st respondent to provide information surrounding the recruitment, selection, and appointment together with criteria used has already been served in view of the replying affidavits filed and served for the respondents and the interested party.
 - d. The 1st respondent by affidavit confirms that it was aware that in on 28.02.2023 the 1st respondent advertised a vacancy in the office of Chief Lands Registrar and submission of interviews closed on 17.04.2023. Further, the interested party was aware that the 1st respondent shortlisted 9 candidates. However, despite that knowledge, the 1st respondent has not shown that any of the candidates and those selected for appointment and then the one appointed fell short of the criteria which is as elaborately set out in the interested party's affidavit. What then would the basis be for justifying the Court's interference in the instant substantive appointment? At this stage, it is not shown prima facie that the 1st respondent has, in intercepting the initial and then making a fresh substantive appointment in the office of the Chief Land Registrar, the constitutional, statutory, regulatory, or lawful policies that fettered the 1st respondent's exercise of function and discretion in that regard were breached at any rate or at all.
9. The Court returns that the applicant has failed to pass the test for the exercise of the Court's discretion to interfere or intervene in the employer's prerogative to undertake the human resource functions and powers to appoint a substantive holder of the office of Chief Land Registrar. In *Geoffrey Mworira – Versus- Water Resources Management Authority and 2 Others* [2015]eKLR the Court held thus, "The principles are clear. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of *the Constitution* or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."
- In conclusion, the application for the petitioner dated November 24, 2023 is hereby determined with orders:
- a. Pending the hearing and determination of the petition it should be possible for the 1st respondent to avail the letter by the National Intelligence Service said to be dated September 29, 2021 which cements the information that triggered the recall and within such safeguards as the Court may direct for protection of all interests involved and towards establishing the merits of the recall and as the Court will be moved by the parties to direct as may fall necessary.
10. In view of this ruling, the parties to consider compromising of the petition as may be just or appropriate or taking of directions for the further steps for expeditious hearing of the petition.
11. The costs of the application in the cause.

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

BYRAM ONGAYA



PRINCIPAL JUDGE

