



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO 24 OF 2020**

**SARAH NJUHI MWENDA.....PETITIONER**

**VERSUS**

**THE HEAD OF PUBLIC SERVICE.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY**

**MINISTRY OF LANDS AND PHYSICAL PLANNING.....2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY**

**MINISTRY OF LANDS AND PHYSICAL PLANNING.....3<sup>RD</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION.....4<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The subject of this Petition is the re-deployment of the Petitioner from the position of Chief Land Registrar at the Ministry of Lands and Physical Planning to the State Law Office and Department of Justice.
2. The Respondents responded by way a replying affidavit sworn by the Principal Secretary in the Ministry of Lands and Physical Planning, Dr. Nicholas Muraguri, on 20<sup>th</sup> August 2020.
3. The Petition was urged by way of written submissions.

**The Petition**

4. By her Petition dated 19<sup>th</sup> February 2020, the Petitioner accuses the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents of unilaterally declining to lift her suspension and allowing her to resume duty.
5. The Petitioner states that she has been working for the Ministry of Lands and Physical Planning since 28<sup>th</sup> March 1991 and has risen through the ranks to the position of Chief Land Registrar stationed at Ardhi House, Nairobi.
6. Sometime in March 2015, the Petitioner, together with the then Cabinet Secretary, Ministry of Lands and Housing, Hon Charity Ngilu were suspended, following corruption allegations on account of which they were charged in court in *EACC Case No 13 of 2015*. The charges were later marked as withdrawn by a court order issued on 30<sup>th</sup> November 2017.
7. The Petitioner claims that, following the withdrawal of the charges, she had a legitimate expectation that she would be immediately reinstated to her post of Chief Land Registrar, stationed at the Ministry Offices at Ardhi House, Nairobi without victimisation.

8. The Petitioner states that she was not allowed to resume her duties but was instead frustrated by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who unilaterally declined to lift her suspension.

9. The Petitioner goes on to state that even though she was finally allowed to access her office in December 2018, she was frustrated/hindered from undertaking the responsibilities attendant to her office as Chief Land Registrar.

10. The Petitioner accuses the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents of pressurising her to go on early retirement, notwithstanding that she had not reached the retirement age of 60 years.

11. The Petitioner further accuses the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents of victimising, frustrating/hindering and/or undermining her work by by-passing her statutory roles as Chief Land Registrar and unilaterally delegating her responsibilities and duties to junior members of staff, while contravening the express provisions of land laws.

12. The Petitioner complains that by a letter dated 12<sup>th</sup> February 2020, the 1<sup>st</sup> Respondent purported to unprocedurally and unilaterally re-deploy her from the Ministry of Lands and Physical Planning to the State Law Office and Department of Justice.

13. According to the Petitioner, the said re-deployment smacked of bad faith and appeared to be yet another manoeuvre by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to frustrate the Petitioner, thus preventing her from undertaking her duties.

14. The Petitioner contends that the Respondents' actions amount to unfair labour practices and are a breach of the Petitioner's rights as guaranteed under Articles 41, 47 and 50 of the Constitution of Kenya, 2010.

15. The Petitioner contends that the Respondents are in breach of Article 41 of the Constitution in the following respects:

- a) Unjustifiably delaying the lifting of the Petitioner's suspension for over 5 months after withdrawal of the charges against her;
- b) Preventing the Petitioner from discharging her work obligations as Chief Land Registrar;
- c) Undermining the Petitioner's office as Chief Land Registrar by allocating her legal duties to her juniors while by-passing her critical function in land administration;
- d) Pressurising the Petitioner to go on early retirement yet she had not reached the retirement age of 60 years;
- e) Frustrating the Petitioner after she declined to go on early retirement;
- f) Re-deploying the Petitioner to the State Law Office and Department of Justice on account of her refusal to go on early retirement;
- g) Purporting to re-deploy the Petitioner to the State Law Office and Department of Justice, without assigning her any specific role/function/title.

16. The Petitioner avers that the Respondents are in violation of Article 47 of the Constitution in the following respects:

- a) Purporting to re-deploy the Petitioner from the Ministry of Lands and Physical Planning, without giving her reasonable notice;
- b) Failing to seek the Petitioner's views prior to the re-deployment;
- c) Failing to communicate the reasons for re-deployment in writing;
- d) Failing to abide by the rules of natural justice.

17. The Petitioner further accuses the Respondents of violating Article 50 of the Constitution on fair hearing as well as Section 10(5) of the Employment Act which requires consultation with an employee, prior to alteration of terms of service.

18. The Petitioner adds that the Respondents violated Section 4 of the Fair Administrative Action Act, in as far as the Petitioner was not subjected to due process prior to the impugned re-deployment.

19. The Petitioner also claims that the Respondents violated Sections 12, 13 and 14 of the Land Registration Act, regarding the office of the Chief Land Registrar.

20. The Petitioner therefore seeks the following remedies:

- a) A declaration that the Respondents' conduct as a whole, culminating with the re-deployment of the Petitioner amounts to an unfair labour practice and a violation of the Petitioner's rights as enshrined under Articles 41, 47 and 50 of the Constitution of Kenya, 2010;

- b) An order of certiorari quashing the Respondents' undated letter/circular re-deploying the Petitioner from the Ministry of Lands and Physical Planning to the Department of Justice and the subsequent letter dated 2<sup>nd</sup> February 2020;
- c) An order of prohibition restraining the Respondents from interfering with the Petitioner's terms of service;
- d) An order of mandamus directing the Respondents to reinstate the Petitioner to the position of Chief Land Registrar stationed at the Ministry of Lands and Physical Planning;
- e) Protective reliefs restraining the Respondents from victimising the Petitioner in any way.

## **The Response**

21. The Principal Secretary in the Ministry of Lands and Physical Planning, Dr. Nicholas Muraguri, swore a replying affidavit on behalf of the Respondents on 20<sup>th</sup> August 2020.

22. Dr. Muraguri states that the Petitioner's appointment to the position of Chief Land Registrar was effected under her initial appointment letter dated 28<sup>th</sup> March 1991, by which she was employed as Lands Officer III.

23. He further states that the Petitioner's appointment as Chief Land Registrar was on promotion and not a new employment in the public service. He adds that this appointment did not confer or take away any other term and condition of employment, save for change of job grade and salary scale.

24. Dr. Muraguri maintains that the Petitioner's transfer was within her employment agreement. He cites paragraph 6 of the letter of appointment which provides that the Petitioner is liable to be posted to any station within the Republic of Kenya, to discharge the usual duties of her office.

25. Dr. Muraguri avers that the Petitioner had served in several places within the public service, where she executed different roles as assigned by the respective State Departments or Government Agencies.

26. In this regard, it is deponed that vide a letter dated 26<sup>th</sup> July 2007 under reference '*Deployment of Officers*' three officers, among them the Petitioner were transferred from the State Department of Lands to the State Law Office. Subsequently, the then Permanent Secretary, Ministry of Lands communicated the said decision and proceeded to issue a posting letter dated 27<sup>th</sup> July 2007 to the Petitioner, releasing her to the State Law Office.

27. Dr. Muraguri goes on to depone that after the Petitioner reported to the State Law Office, she was deployed to the Ministry of Co-operative Development and Marketing vide letter dated 8<sup>th</sup> August 2007, where she served until 16<sup>th</sup> September 2013. After this, the Petitioner who was then designated as *Principal State Counsel*, was posted to the Ministry of Lands, Housing and Urban Development vide the Solicitor General's letter dated 16<sup>th</sup> September 2013.

28. According to Dr. Muraguri, the foregoing postings and deployments were well received by the Petitioner. He points out that the record does not bear any complaint by the Petitioner nor was there any disciplinary case from any State Department where the Petitioner has served, thus exhibiting a good employee/employer relationship.

29. Dr. Muraguri avers that the impugned re-deployment letter dated 29<sup>th</sup> January 2020, issued by the Head of Public Service, which affected a total of 30 officers across the public service, communicated normal postings that did not in any way target the Petitioner.

30. Regarding the role of the Head of Public Service in the re-deployment, Dr. Muraguri refers to Section B31(2) of the Human Resource Policies and Procedures Manual for Public Service, 2016 which provides that in exceptional circumstances, transfers of officers in Job Group 'Q' and above shall be approved by the Public Service Commission, on recommendation by the Central Human Resource Management Postings Committee.

31. Dr. Muraguri states that during the pendency of the criminal proceedings, the Petitioner, who was the substantive holder of the office of Chief Land Registrar, had stepped aside thus inhibiting delivery of service.

32. Dr. Muraguri admits that the Petitioner's opinion on the option of her taking early retirement was sought vide the 2<sup>nd</sup> Respondent's letter dated 22<sup>nd</sup> August 2016. The Petitioner rejected this option and the matter was let to rest.

33. He adds that upon resumption of office, the Petitioner received the necessary support from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and she went about executing her normal functions without any interference.

34. The Respondents challenge the legal standing of this Petition on the ground that the Petitioner is in violation of Section 9(2) of the Fair Administrative Action Act No 4 of 2015, in that she did not exhaust all the internal dispute resolution mechanisms before coming to court.

35. The Respondents further posit that this Court has no jurisdiction to entertain the Petition since the Petitioner's contract of employment does not have statutory underpinning to render breach thereof actionable by way of a constitutional petition rather than an ordinary suit.

36. The Respondents also take the view that the Petitioner has not demonstrated with precision how her fundamental rights and freedoms under the Constitution have been violated and has not produced any evidence to prove the alleged violations.

#### **Determination**

37. In determining this Petition, I will first deal with the preliminary issues raised by the Respondents. First in line is the averment that the Petition is premature because the Petitioner has not exhausted the internal dispute resolution mechanisms. In this regard, the Respondents contend that the Petitioner is in violation of Section 9(2) of the Fair Administrative Action Act No 4 of 2015.

38. In her defence, the Petitioner states that the urgency of the matter at the time of institution, militated against pursuit of internal dispute resolution mechanisms. The Court was invited to take into account that the impugned re-deployment letter was to take effect with immediate effect.

39. In its decision in *Zena Achieng Mohamed v County Public Service Board of Kilifi & 6 others [2021] eKLR* this Court held that where the subject matter of a dispute is threatened, a party is entitled to approach the Court for relief despite the existence of an internal dispute resolution mechanism. This is the route taken by the Petitioner to preserve her position as Chief Land Registrar and she cannot be faulted for that.

40. At any rate, if the Respondents were keen on exhausting the internal dispute resolution mechanism, they ought to have taken the initiative immediately after determination of the interlocutory Notice of Motion. The Court did not see any effort by the Respondents in this regard and they are therefore estopped from fronting some theoretical mechanism to defeat the Petitioner's Petition.

41. The second preliminary issue raised by the Respondents is that the Petitioner was not entitled to bring the current Petition because her contract of employment did not provide for this mode of enforcement. The only thing I will say here is that the Rules of this Court allow a party to choose how to bring their complaint before the Court, including by way of a claim, a petition or judicial review application. The question is not whether the contract of employment provides for a particular mode of pleading but whether the legal threshold has been met.

42. This provides a logical bridge to the third preliminary issue raised by the Respondent which is that the Petitioner has not demonstrated with precision how her fundamental rights and freedoms under the Constitution have been violated. In pursuing this line, the Respondents relied on the decisions in *Republic v Anarita Karimi Njeru [1979] KLR 154* and *Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR* where it was held that constitutional petitions must be pleaded with reasonable precision.

43. I have looked at the Petitioner's pleadings, which set out the violations complained of together with the relevant constitutional provisions. From these, I have drawn specific issues for determination, touching on specific rights. I am therefore satisfied that the 'precision principle' has been satisfied.

44. Having dispensed with the preliminary issues, I will now proceed to determine the Petition on merit.

45. In challenging the re-deployment, which is the subject of this Petition, the Petitioner relies on Article 47 of the Constitution which provides as follows:

#### **47. Fair Administrative Action**

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) 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.***

46. The Respondents were at pains to pass off the impugned re-deployment as an ordinary re-assignment of duty within the public service, that could not be construed as an adverse action against the Petitioner. This is an issue in contention requiring interrogation.

47. The position of Chief Land Registrar is created by Section 12 of the Land Registration Act in the following terms:

***12. (1) There shall be appointed by the Public Service Commission, a Chief Land Registrar, and such other officers who shall be public officers as may be considered necessary for the effective discharge of the functions under this Act.***

***(2) Any officer appointed under this Act shall be competitively recruited and vetted by the Public Service Commission.***

48. The Petitioner's appointment as Chief Land Registrar was effected by letter dated 14<sup>th</sup> August 2014 from the then Chairperson of the Public Service Commission, Prof. Margaret Kobia to the then Cabinet Secretary, Ministry of Land, Housing and Urban Development, Hon Charity Ngilu stating:

"Dear CS,

**APPOINTMENT – CHIEF LAND REGISTRAR**

Reference is made to Letter No.C/MLS/11/15/3/1 Vol. XXII/47 of 17.4.2014 declaring the post of Chief Land Registrar to the Public Service Commission for competitive filling.

Following conclusion of the interviews, I am pleased to inform you that the Commission has subject to compliance with the Office of the President’s General Letter OP.3/7A/Vol.X/17 of 24<sup>th</sup> June 2003, appointed Ms Sarah Njuhi Mwenda, P/No. 1991024225 currently Acting Assistant Commissioner of Lands (Land Registration) in the Ministry, to fill the advertised post of Chief Land Registrar (Job Group T) w.e.f 14.8.2014.

The remuneration and benefits are as follows:

.....  
.....  
.....

Please take the necessary action.

Yours sincerely

(signed)

Prof. Margaret Kobia, PhD, CBS

**CHAIRPERSON**

**PUBLIC SERVICE COMMISSION”**

49. Pursuant to this letter, a letter of appointment was issued to the Petitioner on 19<sup>th</sup> August, 2014 stating:

“Dear Madam,

**APPOINTMENT TO THE GRADE OF CHIEF LAND REGISTRAR–JOB GROUP ‘T’**

I am pleased to convey the decision of the Public Service Commission of Kenya as communicated vide letter Ref. No. PSC/10/20/1/1 dated 14<sup>th</sup> August 2014.

The salary scale attached to the post is Kshs 152,060x13,640..... You will enter the scale at Kshs. 152,060 per month and your future incremental date will be August.

Other allowances attached to this post are as follows: -

.....  
.....  
.....

The Ministry congratulates on this well deserved appointment.

Yours Faithfully

**Ibrahim M. Hussein, OGW**

**For: PRINCIPAL SECRETARY”**

By letter dated 19<sup>th</sup> February 2015 from the Cabinet Secretary, Ministry of Land, Housing and Urban Development, the Petitioner was notified of the upgrading of her position to Job Group ‘U’.

50. From the foregoing, it is evident that the Petitioner was interviewed and appointed to the statutorily created position of Chief Land Registrar. This was not a promotion, posting or deployment within an established scheme of service.

51. That being the case, the Petitioner could only be removed from the position of Chief Land Registrar pursuant to due process. Positions in the public service are not candy to be given and withdrawn at will.

52. Article 236 of the Constitution offers the following protection to public officers:

**236. A public officer shall not be-**

**(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or**

**(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.**

53. The Court was referred to the decision in *Antoinette Bonita Kamau & another v Energy Regulatory Commission [2019] eKLR* where it was held that re-designation can only be lawfully undertaken with consultation of the affected employees. This position accords with Section 40 of the Public Service Act

54. That said, I find and hold that the Petitioner's re-deployment to the State Law Office and Department of Justice was irregular and unlawful. Consequently, the following orders will issue:

a) The undated circular titled '*Central Human Resource Management Postings*' issued by the Head of Public Service, in as far as it relates to the Petitioner's re-deployment from the Ministry of Lands and Physical Planning to State Law Office and Department of Justice, is hereby quashed;

b) The letter dated 12<sup>th</sup> February 2020 titled '*Release on Transfer*' issued to the Petitioner on behalf of the Cabinet Secretary, Ministry of Lands and Physical Planning is hereby quashed;

f) The Respondents are directed to reinstate the Petitioner to the position of Chief Land Registrar stationed in the Ministry of Lands and Physical Planning.

55. The Respondents will meet the costs of this Petition.

56. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF JANUARY 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Omari for the Petitioner

Mr. Odukenya for the Respondents