



**Wafula v Public Service Commission & 5 others (Employment and Labour Relations
Petition E022 of 2021) [2022] KEELRC 4160 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4160 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E022 OF 2021
HS WASILWA, J
SEPTEMBER 20, 2022**

BETWEEN

AGGREY WAFULA PETITIONER

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 2ND RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 3RD RESPONDENT**

**MANAGEMENT & DEVELOPMENT, MINISTRY OF LANDS AND PHYSICAL
PLANNING 4TH RESPONDENT**

DAVID NYANDORO 5TH RESPONDENT

MINISTRY OF LANDS AND PHYSICAL PLANNING 6TH RESPONDENT

JUDGMENT

1. The Petitioner filed this petition dated September 6, 2021 on even date through the Firm of Keaton and Keaton & Company Advocates. The petition was based on the annexed supporting affidavit of claimant, Aggrey Wafula sworn on September 6, 2021. The Petitioner seeks the following orders:
 - a) A declaration do issue declaring that the appointment of the 5th Respondent acting Chief Land Registrar while there is a substantive office holder by the name of Sarah Mwendwa is unconstitutional and therefore unlawful on account of violation of Section 13 and 14 of the Land Registration Act No 3 of 2012 and Articles 10, 41, 73, 7, 232 and 236 of the Constitution 2010.



- b) An order of prohibition do issue prohibiting the Respondents from appointing, employing assigning and or in any manner allowing any person from acting as the Chief Land Registrar while there is a substantive holder of the office.
 - c) An order of prohibition do issue prohibiting the 5th Respondent from acting, performing and in any way manner carrying himself as the Chief Land Registrar while there is a substantive holder of the office of the Chief Land Registrar.
 - d) A declaration do issue that the 4th Respondent Anne W Kariithi has contravened Chapter 6 of the Constitution of Kenya and specifically Article 73 by purporting to appoint the 5th Respondent as the acting Chief Land Registrar while there is a substantive holder of the office hence unfit to hold any public office.
 - e) An order directing the 1st Respondent to initiate the removal of Anne W Kariithi from office as a result of constitutional violation aforesaid.
 - f) A permanent injunction do issue against the Respondents restraining the Respondents by themselves and/or agents from interfering in any manner with the lawful employment and discharge of duties by the substantive holder of the office of the Chief Land Registrar – Ms Sarah Mwendwa.
 - g) Costs of this petition.
 - h) Such or any other Orders as this Honourable Court shall deem just to grant.
2. The Honourable Attorney General entered appearance on behalf of the Respondents on the September 13, 2021 and filed Grounds of Opposition filed on the September 23, 2021 and a replying affidavit deposed upon by the 4th Respondent, Anne W Kariithi, on the October 15, 2021.

Petitioner's Case.

- 3. The Petitioner avers that the current substantive holder of the office of the Chief Land Registrar of the 6th Respondent is one Sarah Mwendwa after being reinstated pursuant to a Court Order.
- 4. That the Respondents have on several occasion employed tactics and antics to remove and having failed, have employed the 5th Respondent, to serve in the said office when there is a substantive holder in the said office.
- 5. As a result of the said appointment by the 4th Respondent, operations at the 6th Respondent have been grounded, which actions is impeding on service delivery to millions of Kenyans.

Constitutional Foundation of the Petition.

- 6. According to the Petitioner, the 4th Respondent, being a Director and Human Resource practitioner has failed in her legal duty to advise the 6th Respondent on best human practices and instead has colluded with the 5th Respondent in perpetuating the illegality.
- 7. The issuance of appointment letter to the 5th Respondent by the 4th Respondent when there was no vacancy in the office of the 6th Respondent is illegal.
- 8. It is averred that several demand letters were send to the 4th Respondent to take corrective measures to no avail. Therefore, that the failure by the 4th Respondent to act on the said issue raises questions on her competence as director of Human Resource and Development as she has overseen and participated



in the violation of the Constitution and Public Service Act. He states that the 4th Respondent ought to be declared unfit for the said office.

9. The appointment of another person when there is a substantive holder in the said office is in violation of principles and values under Article 10 of the Constitution as read together with Article 41, 73 and 75 of the Constitution.
10. It is averred that the substantive holder is entitled to protection of Articles 232 and 236 of the Constitution and the appointment of another individual while she is still in office is in violation of Article 10, 73, 75, 232 and 236 of the Constitution of Kenya 2010.
11. The closure of the office of the Chief Registrar office by the Respondents is in furtherance of their illegal acts and in violation of the Constitution as to service delivery to millions of Kenyans.
12. That unless the Court intervenes and compel the Respondents to operationalize the office of the Chief Registrar and allow the substantive holder Ms Sarah Mwendwa to serve and discharge her duties, the members of the public will be greatly prejudiced.

Respondents Case.

13. The Respondent's grounds of opposition re-produced verbatim came out as follows;
 - 1) That the subject matter of this petition and application as to the holder of office of Chief Land Registrar is sub judice and is the subject of the Petition 24 of 2020 in the Employment and Labour Relations Court at Nairobi.
 - 2) That the applicant has not demonstrated he has locus to commence the suit or authority to sue on behalf of the holder of the office of Chief Land Registrar.
 - 3) That these proceedings do not meet the threshold enshrined under Article 22 of the Constitution for a party to institute proceedings on behalf of another.
 - 4) That the applicant indicates through the deponent Aggrey Wafula that the holder of the office of the Chief Land Registrar has been frustrated by the Respondents and the alleged appointment of an acting Chief Land Registrar whereas, there is no documentation annexed herein indicating the authority to sue on behalf of the named Chief Land Registrar Ms Sarah Mwendwa.
 - 5) That the applicant is not an employee of any of the Respondents therefore lacks locus to commence this petition and had failed to provide evidence that Articles 27, 73(1)(b), 73(2)(c), 129, 236 and 259 of the Constitution have been violated as a result of the alleged appointment of the 5th Respondent as the Acting Chief Land Registrar.
 - 6) That the applicant has failed to specifically demonstrate with reasonable precision of the actions of the Respondents in allegedly appointing the 5th Respondent as the Acting Chief Land Registrar, the alleged violations of the Constitution as the acting Chief Land Registrar, the alleged violations of the Constitution which is contrary to the established principles in the case of Anarita Karimi Njeru V Republic (1979) 1 KLR 154 reiterated in the Court of Appeal case of Mumo Mutemu V Trusted Society of Human Rights Alliance, Civil Appeal No 290 of 2012.
 - 7) That this Honourable Court has repeatedly pronounced itself on the importance of specificity in drafting of constitutional petitions and the Petitioner's claim has failed to meet threshold for specificity in drafting.



- 8) That the applicant has failed to demonstrate the requirements for a grant of orders of injunction as sought in the application having failed to demonstrate the elements as set out within the case of *East Africa Industries V Trufoods EA 420* and the case of *Giella V Cassman Brown (1979) EA* affirmed in various superior Court authorities.
 - 9) That the applicant has not adduced any evidence before the Court in support of the assertion that the 5th Respondent has been appointed as the Acting Chief Land Registrar contrary to the provisions of the *Evidence Act* Cap 80 Laws of Kenya, that states that he who alleges must prove.
 - 10) That the application and the petition herein lack merit and are an attempt to curtail the Respondents from carrying out their lawful mandates.
 - 11) That the application is vague, full of glaring conjectures and does not raise issues for constitutional interpretation by this Honourable Court, is an abuse of the Court process and therefore ought to be struck out with costs to the Respondents.
14. In addition to the grounds of opposition the Respondents through the 4th Respondent filed a replying affidavit stating that the Petitioner lack locus standi and has failed to meet the threshold in Article 22(2) of the *Constitution* to institute these proceedings. It is stated that the Petitioner can only institute this petition on his own behalf.
 15. It is averred that the Petitioner is not an employee of the Respondent or an employer organization as such there is no employee/employer relationship to clothe the Petitioner with standing herein. Further that the Petitioner exhibited any authority from Ms Sarah Mwendwa giving him authority to sue on her behalf, neither was any evidence table before Court to demonstrate incapacity by Sarah to institute this suit on her own.
 16. She stated that the Petitioner has not demonstrated how Articles 27, 73(1)(b), 73(2), 129, 236 and 259 of the *Constitution* have been violated by the Respondents.
 17. The allegation of frustration on the Chief Land Registrar and the alleged closure of office was not demonstrated either by the Petitioner.
 18. The 4th Respondent denied being in collusion with the Respondent to frustrate the said Chief Land Registrar. Also that she is not aware of any appointment of the 5th Respondent.
 19. She avers that the issue of who is the substantive holder of Chief Registrar's office is subject of Nairobi ELRC Petition 24 of 2020.
 20. The affiant prayed for the petition to be dismissed with costs.
 21. The Respondent further filed another replying affidavit deposed upon by the 6th Respondent's Assistant Human Resource Director, Mr Luka M Kaburu, deposed upon on the October 25, 2021 reiterating the contents of the Respondent reply and in addition avers that the evidence exhibited by the Court bailiff does not demonstrate that the Respondent's closed the Chief Registrar's Office or at all rather that the marking on the door showing the Chief Land Registrar as Sarah Mwendwa is a clear indication that the said Sarah was still in her office. Additionally, that the Memo dated October 15, 2021 inviting the said Chief Land Registrar to attend training on the use of digital platform for officers demonstrate further that she was still in office.
 22. The petition proceeded by way of written submissions with the Petitioner filing their submissions on the June 5, 2022 while the Respondents filed theirs on the April 19, 2022.



Petitioner's Submissions.

23. The Petitioner submitted on two issues; whether the 5th Respondent was appointed as the Acting Chief Land Registrar while there is a substantive office holder and whether the reliefs sought should be granted.
24. On the first issue, it was submitted that its unconstitutional and unlawful for the Respondent to appoint the 5th Respondent as the Acting Chief Land Registrar when there was substantive office holder who was reinstated pursuant to Court Order. It was argued that the appointment of the 5th Respondent stalled the operation of the 6th Respondent, affecting the millions of Kenyans whose land transactions have stalled as a result.
25. It is the Petitioner's submission that the Respondents acted in contempt of Court Orders in Nairobi ELRC Petition No 24 of 2020 which quashed the transfer of the said Ms Sarah from being the Chief Land Registrar to the State Law Office and for immediate reinstatement of the said person.
26. In the end the Petitioner submitted that having had a substantive occupier in the said office of the Chief Land Registrar, the Respondents should be reinstated from acting to the contrary by employing another acting office holder and allow the petition as prayed.

Respondent's Submissions.

27. The Respondent submitted on three issues; whether the Petitioner has locus standi to institute this suit; whether the 5th Respondent, David Nyandoro, was appointed by the Respondents to replace Sarah Mwendwa and whether the Respondents have interfered with the employment of the said Sarah Mwendwa.
28. On locus standi, it was submitted that the Petitioner lack standi under Article 22(2) of the Constitution for the reason that, he does not have authority to act on behalf of the said Sarah Mwendwa, neither is he an employee of the 6th Respondent so as to create employer-employee relationship. Having failed to demonstrate any relationship with regard to the Respondents, the said Petitioner lack standing to bring this suit and the same ought to be dismissed with costs.
29. On whether the 5th Respondent was employed by the Respondents, it was submitted that the 5th Respondent was never appointed by the Respondent as the Acting Chief Land Registrar as alleged by the Petitioner, demystifying the allegation of frustration by the Respondents.
30. On the alleged interference with Sarah Mwendwa discharge of her duties, it was submitted that there was no evidence tabled before this Court to affirmed the alleged interfere of employment therefore the entire petition is misconceived and the same ought to be dismissed with costs.
31. I have examined the averments and submissions of the parties herein. The main contention of the Petitioner is that the Respondents have frustrated one Sara Mwendwa from carrying out her duties as Chief Land Registrar by appointing the 5th Respondent as Acting Chief Land Registrar.
32. The 5th Respondent has denied even being appointed as alleged which fact the 4th Respondent also denied.
33. There is also no appointment letter exhibited before Court as proof that the 5th Respondent has been appointed as Chief Land Registrar as alleged.
34. In the absence of any specific evidence to prove allegation by the Petitioner, this petition is hanging on shaky ground without any evidence to support the prayers sought.



35. It is my finding that the petition therefore lacks merit and is dismissed in its entirety.

36. There will be no order of costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kiprono for Petitioner – present

Munyala holding brief for Andati for 5th Respondent – present

Nyambura for 1st, 2nd, 3rd, 4th and 5th respondents – present

