



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU**

**COURT NAME: ELDORET LAW COURT**

**CASE NUMBER: ELRCPET/17/2020**

**CITATION: JUMA OKUMU VS CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING AND PUBLIC SERVICE COMMISSION AND 1 OTHER**

**JUDGMENT**

1. By a Petition dated 8th September 2020 the petitioner sought orders among others that

(i) A declaration be and is hereby issued that in view of the unresolved issues touching on the 1st Interested Party's involvement in massive fraud and corruption in respect to the property known as LR. No. 3586/3 she is unfit to hold any public office including any position in the office of the Director of Surveys.

(ii) A declaration be and is hereby issued that the reinstatement and subsequent appointment of the 1st interested Party as the acting Director of Surveys should have been subject to the provisions of Chapter Six and principles of public service and national values and principles.

(iii) An order of Certiorari do issue quashing the impugned appointment of the 1st interested Party as the acting Director of Surveys.

(iv) An order of Mandamus do issue compelling the 1st and 2nd Respondents to take appropriate administrative actions against the 1st Interested Party to determine her suitability or otherwise to continue serving in the public service on account of the serious allegations of involvement in corrupt practices and abuse of office.

2. The petition was supported by the affidavit of Juma Okumu the petitioner who deponed on the main that

(i) I am a Kenyan citizen and a public interest, constitutional principles and good governance defender. I am also a human rights activist and a public spirited individual and in which capacities. I have instituted these proceedings.

(ii) The 1st and 2nd Respondent have appointed the 1st Interested Party as the Acting Director of Surveys without regard to the Law and the 1st Interested Party has been discharging duties pertaining to the office pursuant to the said appointment.

(iii) The 1st Interested Party's appointment as the Acting Director Surveys and her continued stay in the office constitutes gross violation of the Constitution on grounds that: -

(iv) The appointment of the 1st Interested Party as the Acting Director of Surveys without advertisement of this position and or competitive recruitment and her continued and or protracted stay in office violates the constitutional requirement for equal opportunities for appointment in public service under Article 232(1)(1) of the Constitution.

(v) I am advised by my advocates on record and I verily believe it to be true that it is a cardinal principle that persons being appointed to act or hold public offices must be compliant with the provisions of Chapter Six of the Constitution and must be of impeccable work ethics, character and integrity.

(vi) The 1st interested Party was implicated in corrupt practices involving land massive fraud and falsification of official land records in the office of the Director of Surveys. In particular, and for avoidance of doubt, the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions found the said 1st Interested party culpable for fraud and falsification of documents relating to the much published and infamous Karen land scandal touching on land known as L.R No 3586/5 measuring about 134.4 acres (the land"). The 1st Interested Party was in this regard found culpable of massive fraud and falsification of documents which facilitated the fraudulent transfer of the land to an entity known as Tele source Com Limited.

(vii) As a result of the 1st interested Party involvement in the massive fraud and falsification of documents in relation to the land in

question, she was relieved of her duties by the Respondents herein as provided for under the law.

(viii) Notably, the courts never acquitted the 1st Interested Party of the charges of abuse of office, fraud and falsification of documents. Rather her prosecution was abandoned on a technicality as aptly pointed out by the Court of Appeal as page 36 of the its judgement in Nairobi Civil Appeal No. 102 of 2016, Engineer Michael Mwaura Kamau versus Ethics and Anti-Corruption Commission and Others on the basis that the Ethics and Anti-Corruption Commission was not properly constituted at the time it investigated and recommended the prosecution of the 1st Interested Party of her involvement in fraudulent land dealings.

(ix) I am informed by my advocates on record and I verily believe it to be true the Court of Appeal in the said case of Nairobi Civil Appeal No 102 of 2016 Engineer Michael Mwaura Kamau versus Ethics and Anti-Corruption Commission and Others emphasized that since the appeal succeed on a technicality the Ethics and Anti-Corruption Commission and Director of Public Prosecution as well as other relevant government agencies were at liberty to proceed as they deemed necessary once the said Ethics and Anti-Corruption Commission was properly constituted.

(x) The Ethics and Anti-Corruption Commission investigated the involvement of the 1st Interested Party in the massive fraud and falsification of records and established that she is culpable.

(xi) The involvement of the 1st Interested Party in massive fraud and falsification of documents for the land herein and in respect to which the Ethics and Anti-Corruption Commission found her culpable shows that she lacks integrity, has violated the national values and principles of good governance and her continued holding of office is not only unlawful but also poses a danger to general public and Government considering that land is not only an emotive issue but also sensitive.

(xii) I verily believe that a person like the 1st Interest Party whom both the Director of Public Prosecution and the Ethics and Anti-Corruption Commission has found culpable for falsifying land records, engaging in corruption and interfering with public documents and in respect to which findings she has neither been cleared administratively or through the judicial system is unfit to hold office in a sensitive and emotive docket such as the office of the Director of Surveys.

(xiii) I verily believe that it is further baffling how the 1st and 2nd Respondents could purport to appoint the 1st Interested Party to the position of Acting Director of Surveys, an office mandated with safeguarding sensitive land records yet she has unresolved corruption and or fraud allegations relating to falsification of land records.

(xiv) By a letter dated 2nd September, 2020 and received by the Respondents herein on 3rd September 2020 (pages 26 and 27 of the exhibit) I informed them that I had just learnt of the appointment of the 1st Interested Party as the Acting Director of Surveys and requested for the following information.

(a) The date when the office of the Director of Surveys became vacant.

(b) The procedure that was adopted in appointing the 1st Interested Party as the Acting Director of Survey including whether the said position was advertised and the holder thereof completely recruited.

(c) The qualification and competencies of the 1st Interested Party as the Acting Director of Surveys.

(d) A confirmation whether the 1st Interested Party was subjected to the values and principles in public service enshrined under Articles 10 and 232 as well as chapter six of the Constitution.

(xv) The Respondent have despite receiving my request to be supplied with the above information as contained in my letter dated 2nd September, 2020.

(xvi) The position held by the 1st Interested Party was neither advertised nor completely filled by the Respondents. I also verily believe that the 1st Interested Party does not hold requisite qualification to discharge the obligation of the office that she purports to hold.

(xvii) By a letter dated 2nd September 2020 I brought to the attention of the Ethics and Anti-Corruption Commission that they had left the 1st Interested Party to walk scot free despite the existence of evidencing linking her to massive fraud and falsification of documents. The letter dated 2nd September 2020 which I personally delivered to the Ethics and Anti-Corruption Commission and the Director of Public Prosecution requesting that they take action against the 1st Interested Party.

(xviii) The Ethics and Anti-Corruption Commission and the Director of Public prosecution have not responded as to whether they will undertake or continue the investigation and prosecution of the 1st interested Party despite the existence of evidence that points to her culpability.

3. From the record, the respondents did not file any response to the petition and only the 1st and 2nd interested party filed a replying affidavit.

The 1st interested party in her affidavit in reply deposed on the main that;

(i) THAT I am appointed as the Acting Director of Surveys on the 16th of March, 2020, by the principal Secretary in the Ministry of Lands and Physical Planning.

(ii) THAT from the foregoing the letter made it very clear that I was to perform the duties of Director of Surveys.

(iii) THAT a plain reading of the said letter is very clear, to wit that my appointment was in an acting capacity and not substantive position.

(iv) THAT prior to my appointment in an acting capacity as the Director of Surveys, I was and still is the Senior Deputy Director of Surveys.

(v) THAT the previous holder of the office of the Director of Surveys.

(vi) THAT in response to paragraph 10 and 11 of the petitioner's Supporting Affidavit the false narrative being advanced by the said Petitioner is that Ethics and Anti-Corruption Commission and the Director of Public Prosecution having initiated the charges which culminated in being presented to court to take, that in itself was a conviction.

(vii) THAT in response to paragraph 14 of the Petitioner's Supporting Affidavit. The 2nd and the 3rd interested Parties in this petition abandoned the prosecution of the 1st Interested Party and her co-accused whether on a technicality or otherwise, the fact remains that the prosecution of the 1st interested party and her other accused person has not materialized thereafter.

(viii) THAT pursuant to the judgment of the Court of Appeal, which is marked as 5 in the Petitioner's annexures, the Court of Appeal in page 24 stated. The appeals succeed on the technical ground that the EACC was not properly constituted at the time it completed the Investigations and forwarded its report and recommendations to the DPP, from the foregoing anti-corruption constitutional edicts and the parties are at liberty as they deem necessary on the basis of a properly constituted EACC and within the dictates of the Constitution and that law.

(ix) I am advised by my advocate which advise I verily believe to be true, that in pursuant to the Court of Appeal's Judgement dated the 14th of July 2017 it is obvious that the investigations undertaken by the 2nd interested party were a nullity.

(x) THAT the 2nd and the 3rd interested parties have had ample time to initiate new investigations and thereafter prosecution taking into account the Court of Appeal Judgement which they have not.

(xi) THAT further to the foregoing the Petitioner equally has the opportunity to initiate private prosecution of the 1st Interested Party, which is provided for in law from 2017, when the Court of Appeal rendered its verdict.

(xii) THAT the inference of guilt of the accusations leveled against me and my co-accused persons can only be determined by a court of law in a final judgement passed by the said court.

(xiii) THAT the Petitioner herein in paragraph 18 of the Petition seems to be taking the role of a court of law, where he seems to be convicting me of the charges that were brought against me and my co-accused person, yet he is not mandated to do so.

(xiv) THAT it is ironic that the petitioner herein has invoked several articles of the Constitution of Kenya but seems to ignore or conveniently forget Article 50(2) of the said Constitution.

(xv) THAT from the foregoing it is obvious that this petition has been hurriedly filed in court with malicious and ulterior motives.

(xvi) THAT I have been undertaking the duties of the Director of Survey from the date of appointment i.e the 15th of March 2020 and Seven months later, is when the Petitioner herein decides to challenge my appointment.

(xvii) THAT if according to the Petitioner, I am not fit to hold my public office, then using his reasoning and logic he ought to have challenged my position as the Senior Deputy Director, Survey immediately the 2nd and 3rd Respondent abandoned my prosecution.

(xviii) THAT as long as I have not been convicted by any Court of Law in Kenya for any of the offences I have been charged with, I am deemed innocent as proven guilty it is only the Court that can declare me guilty.

(xix) THAT in response to paragraph 24 of the Affidavit by the Petitioner, I confirm that I am not more than qualified to hold the position of Director of Survey, having been a Senior Director in the same position.

(xx) THAT it is common knowledge that position in acting capacity are never advertised and neither is it subject to public participation. As stated elsewhere, I have not been substantively appointed to the said Director of Survey.

(xxi) THAT it is obvious from the Petition and the Affidavit by the Petitioner that this petition itself violates Article 27 (1) of the Constitution where the petitioner has singled me out yet other public officers, who I was charged with have resumed their public duties and no petition by the petitioner has been filed against them.

#### 4. The 2nd interested party on its part deposed among others that

(i) THAT I am a male adult of sound mind an investigator with the Ethics and Anti-Corruption Commission (hereinafter the Commission) and duly authorized to swear this affidavit.

(ii) THAT I am a member of the team that conducted investigations in respect of the matter raised, conversant with the facts giving rise to the petition dated 8th September 2020 (hereinafter 'the petition) thus competent to swear this affidavit on behalf of the Commission.

(iii) THAT the Commission's legal mandate to investigate corruption and economic crimes is derived from the provisions of Article 79 of the Constitution Section 23 of the Anti-Corruption and Economic Crimes Act 2003 (hereinafter ACEDA) and section (3)(2) of the Ethics and Anti-Corruption Commission Act 2011 (hereinafter EACC Act).

(iv) THAT pursuant to the said mandate the Commission investigated allegations of corruption touching on various Public Officers and private individuals relating to a property known as LR No 3586/3 measuring 134.4 acres situated at Karen in Nairobi.

(v) THAT upon conclusion of the investigation the Commission made appropriate recommendations to the 3rd Interested party and as a result of the said recommendations the 1st interested party was among individuals arraigned at the Milimani Anti-Corruption Court Case Number 13 of 2015 whereupon they were charged with several corruption and criminal offences.

(vi) THAT during the pendency of the said criminal case the Court of Appeal ruled vide Civil Appeal No. 102 of 2016 Michael Sistu Mwaura Kamau vrs Ethics and Anti-Corruption Commission and 4 (four) others that the Commission was not properly constituted during the period and could not therefore fully discharge the constitutional mandate.

(vii) THAT the ruling therefore affected the said criminal case since part of the investigations were conducted during the impugned period.

(viii) THAT the charges against the 1st interested party and other accused person were subsequently withdrawn under Section 87 of the criminal Procedure Code pursuant to Court of Appeal decision in Civil Appeal No 102 of 2016. Michael Sistu Mwaura Kamau vrs Ethics and Anti-Corruption Commission and 4(four) others.

(ix) THAT the Commission is currently in the process reviewing and consolidating all matters affected by the Court of Appeal ruling with a view making appropriate recommendations to the 3rd Interested Party which may lead to changing the suspects afresh.

(x) THAT I am informed by Counsel on record for the Commission which information I verily believe to be true that before a decision is made on whether to charge the 1st Interested party a fresh or not the Commission cannot stop her reinstatement and/or appointment to another position.

(xi) THAT I am informed by Counsel on record for the Commission which information I verily believe to be true that the Commission can only advise the Respondent herein under Section 62 of the Anti-Corruption and Economic Crimes Act to suspend the 1st interested Party after she has been arraigned and charged in court

5. In the submission in support of the petition, Mr. Mathai for the petitioner submitted that it was a cardinal principle that persons being appointed to act or hold public offices including the 1st interested party must be compliant with provisions of Chapter six of the Constitution and as such must be of impeccable work ethics, character and integrity.

6. Chapter six imposes an obligation on appointing authority to take into account the integrity of the person being considered for appointment as a public officer. Article 73(2) of the constitution places an obligation on any appointing authority to inquire into their personal integrity competence and suitability prior to making the appointment.

7. According to Counsel it was uncontested that the 1st Interested Party was found criminally culpable of fabrication of land records while working as Senior Deputy Director of Survey and this led to her being charged in court. The 2nd interested party in its replying affidavit indeed confirmed that the 1st Interested Party was yet to be cleared of her involvement in the act of falsifying land records and has indicated the possibility of charging her afresh in court.

8. Mr. Mathai further submitted section 34(2) of the PSC Act, 2001 clearly stipulated that a person shall not be appointed to hold a public office on acting capacity unless the person satisfies all the prescribed qualifications for holding the public office. It was therefore absurd that the respondent and the 1st interested party would argue that the provisions of the Constitution demanding that a potential appointee's work ethics, character and integrity do not apply in acting appointments.

9. Counsel further submitted that land was a sensitive subject and those in charge of records must be of impeccable character and integrity. On this submission counsel relied on the decision of Lady Justice Mumbi Ngugi in the case of Benson Riitho Mureithi Vs J.W. Wakhungu and 2 Others (2014) eKLR.

10. The Court has once again noted that the respondent and the Interested parties did not file any submission. This petition raises serious fundamental questions around the issue of governance and integrity in public service. It further raises the ever-raging debate whether a public officer accused of an offence and undergoing prosecution should continue to hold office under the principle of presumption of innocence until proven guilty.

11. The centrality of good governance, integrity and accountability need not be overemphasized since it is an express provision in the Constitution. A whole Chapter (Chapter6) is dedicated to leadership and Integrity.

12. The inclusion of this chapter in the Constitution had a purpose and a background. The purpose being that public officers must be men and women who are accountable, transparent and have integrity. The background on the other hand was informed by the previously prevailing

situation in public service was rife with impunity corruption and unethical practices such as nepotism and favouritism ruled over competence in public appointments. Although since the promulgation of the 2010 Constitution the chapter has faced considerable resistance by those still beholden to the old order, its presence in the constitution has to some considerable extent professionalized public service.

13. Lady Justice Mumbi Ngugi in the of Benson Riitho Mureithi v. J.W Wakhungu and 2 Others cited by Counsel for the petitioner aptly observed as follows:-

“ It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requesting that they make the appointments on the basis of clear constitutional entries , that they allow for public participation and those they appoint meet certain integrity and competence standards. This burden, however is justified by our history and experience which led the people of Kenya to include an entire chapter on leadership and integrity in the constitution. In the present case as the respondent tacitly concede there are serious unresolved questions with regard to the integrity of the Interested Party which do not appear to have been considered by the 1st respondent in making the appointment to the chairmanship of the Athi Water Service Board.”

14. The Interested Party does not deny that she was subject of a criminal charge where she and others were accused of falsification of land records. The charge was withdrawn following the decision of the Court of Appeal declaring EACC as improperly constituted at the time. The Court however recommended that prosecution of the Interested Party and her co-accused could resume once the EACC is properly constituted. The decision of the Court of Appeal did not delve into the merit or otherwise of the charges. The 2nd Interested Party has further deponed that the Commission was reviewing the case including the 1st Interested Party’s which were affected by the Court of Appeal’s decision with a view to reviving the same now that EACC has been properly constituted.

15. It is the Court’s view that in order for EACC to recommend prosecution and receive concurrence ODPP and eventually cause the arrest and arraignment in Court of the Interested party and her co-accused, there must have been reasonable preponderance of evidence to support the charges. The question whether such evidence could support a conviction or not was to be decided by the trial Court.

16. However, in view of the fact that the standard of proof in a criminal charge is higher than civil or administrative decision making, the accusations against the 1st interested party were serious and remained unresolved. They therefore presented reasonable impediment to her upward elevation whether in substantive or acting capacity. Her contention that she was to be presumed innocent until proven guilty may not be of relevance at this point since the charges were withdrawn.

17. To ignore these serious allegations and seek to promote the 1st Interested Party before they are resolved would fly in the face of Chapter 6 of the Constitution and Section 34(2) of the Public Service Act. For avoidance of doubt, the observation by the Court in the above regard does not affect the status of the 1st interested party and the position she may be holding in public service. However, unless the allegations are resolved in her favour, they remain reasonable impediment to her being recommended for elevation or appointment to another public office.

18. In conclusion the Court hereby declares that: -

(a) In view of the unresolved issues touching on the 1st Interested Party involvement in fraud and corruption in respect of property known as LR.No 3586/3 she is unfit to hold the position of Director of Surveys in any Capacity.

(b) There will be no order as to costs of the Petition.

19. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF MARCH 2021**

**SIGNED BY: HON. JUSTICE J. N. ABUODHA**