



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

ELRC MISCELLANEOUS CAUSE NO. E116 OF 2021

PATRICK NYAGA.....APPLICANT

VERSUS

KENYA FOREST SERVICE.....RESPONDENT

PUBLIC SERVICE COMMISSION.....INTERESTED PARTY

JUDGMENT

1. The applicant brought this application under Section 89 of the Public Service Commission Act, Section 49(3) (a) of the Employment Act, 2007; Section 12(3) (Viii) of the Employment and Labour Relations Court Act, 2014 and Rule 17(1) (2), (3) and (4) of the Employment and Labour Relations Court (procedure) Rules, 2016 seeking for an order in the following terms:-

1. Spent.

(a) That the decision of the Public Service Commission made vide letter dated 12th August, 2020 reinstating into service the Applicant without loss of benefits and payment of all outstanding emoluments be recognized, adopted and enforced as a judgment of the Court and a decree to issue forthwith.

(b) Costs of the application.

2. The application is premised on grounds set out on the face of the Notice of motion marked (a) to (h) the nub of which is that the respondent has unlawfully, willfully refused, failed and/or neglected to reinstate the Applicant without loss of benefits as directed by the decision of the Public Service Commission vide letter dated 12th August, 2020 in clear violation of provisions of Section 49(3) (a) of the Employment Act, 2007, Section 76(6) of the Public Service Commission Act, 2017, Section 67 of the Public Service Commission's Regulations which action amounts to unfair labour practice and in violation of Article 41 of the Constitution of Kenya, 2010.

3. That Article 234(2) (b) of the Constitution mandates the Public Service Commission to exercise disciplinary control over and remove persons holding or acting in offices in the public service.

4. That further Article 260 of the Constitution defines Public Service as the collective individual, other than state officer, performing a function within a state organ.

5. That the applicant held the position of Senior Deputy Director, Finance and Administration KFI Grade 2 with effect from 1st July, 2012 and was successfully vetted and replaced as per the presidential directive dated 4/6/2018.

6. That on or about 26th February, 2018, the applicant was served with a letter of the even date sending him on compulsory leave. That whilst on leave, the Chairman of the Board of Directors in a media release dated 12/3/2018, attempted to abolish the position of Senior Manager Finance and Administration and replaced it with two new positions namely the head of finance and the senior deputy Chief Conservator of forests – Human Resource and Administration where a forest officer was appointed to be in charge in violation of the provisions of the Human Resources Management Professionals Act, 2012 and Section 34 of the Public Service Commission Act, 2017.

7. The Applicant was subsequently issued with a notice to show cause dated 14/9/2018 to which he responded. On 4/10/2018. The applicant appeared before the Human Resource and Administration Committee for a hearing.

8. On 11th October, 2018 the applicant was issued with a letter of dismissal from service.

9. On 19/10/2018, the applicant appealed to Public Service Commission and copied Kenya Forest Service. The Board invited the applicant to appeal to the Board within 14 days upon realizing that the applicant had appealed to the Public Service Commission.
10. On 17/7/2019, the applicant appeared before *Ad hoc* Appeals Committee of the Board. The *Ad hoc* appeals committee did not uphold the dismissal of the applicant. That notwithstanding, the full Board upheld the dismissal.
11. On 7/10/2019, the applicant appeared before the Public Service Commission. The applicant and the respondents made submissions to the Public Service Commission and subsequently the Public Service Commission set aside the dismissal and reinstated the applicant to his job with full pay as per the provisions of Section 74(6) of the Public Service Commission Act, 2017. The provision provides:-

“where the commission sets aside a decision under subsection (5) (b), the public officer shall revert to the previous status held and receive the attendant benefits as though the decision set aside was never made.”

The consideration by Public Service Commission was in terms of Section 74(5) of the Public Service Commission Act, 2017. The applicant prays for the reliefs sought.

Replying Affidavit

12. The Respondent filed a replying affidavit of Laura Yego sworn to on 21/7/2011 and the gist of the response to the application is:-

“(i) That the Respondent is aware of the letter from Public Service Commission (PSC) setting aside the Applicant’s dismissal by a letter dated 12th August, 2020.

“(ii) That the Respondent’s Board of Directors deliberated on the matter and resolved not to reinstate the Applicant in accordance with the Public Service Commission letter aforesaid.

“(iii) That presently, it is not possible to integrate the Applicant in the Respondent’s staff Establishment as his position as senior Manager, Finance and Administration has been abolished in a restructuring process.”

Determination

13. The respondent attempted, unlawfully to abolish the position held by the Applicant in Kenya Forest Service. The unlawful abolition of the office was followed by purported dismissal of the Applicant from the position held by him despite absorption of the applicant from the allegations made against him by an *Ad hoc* disciplinary Committee of the Board. The full Board disregarded the decision of its own committee.

14. Upon Appeal to the Public Service Commission the decision by the Board to dismiss the Applicant from the position he held was set aside and the Public Service Commission reinstated the applicant to his previous position with no loss of benefits in terms of Section 74(6) of the Public Service Commission Act, 2017.

15. The provisions of Section 74(6) are couched in mandatory terms as follows:-

“where the commission sets aside a decision under subsection (5) (b), the public officer shall revert to the previous status held and receive the attendant benefits as though the decision set aside was never made.”

16. The respondent has not cited any provisions of the law which entitles the Board to countermand a decision of Public Service Commission arrived at after hearing the applicant and the respondent in terms of Section 74(6).

17. The respondent has also not cited any provision of the law which allowed the Board to abolish an established senior position of Kenya Forest Service without recourse to the Public service Commission.

18. It is also pertinent to note that the Public Service Commission, the interested party herein filed a replying affidavit to the application sworn to by Simon K. Rotich on 22/7/2021. In the said affidavit, Public Service Commission states that the respondent sought an advisory opinion on the matter by a letter dated 14/1/2020 to the Hon. Attorney General. The Hon. Attorney General advised the respondent that Public Service Commission handled the appeal lawfully and in terms of the applicable constitutional and legislative provisions.

19. From the said advisory which this Court fully agrees with, the provisions of Section 74(1) of the Public Service Commission’s Act confers Public Service Commission with the power to hear appeals from any public officer and such persons who may appeal to public Service Commission include officers employed by the respondent in terms of Section 15 of the Forest Conservation and Management Act under which the Board appoints its officers.

20. It is the Court’s finding and as per the advisory by the Attorney General that the provisions of Section 74(1) of the Public Service Commission Act and Section 15 of the Forest Conservation and Management Act, are not in conflict. The Board exercises the mandate to appoint and discipline an officer whereas Public Service Commission exercises its mandate to hear appeals from the decision of the Board. The decision of the Public Service Commission on appeal is binding on the Board and must be followed. Any act of the Board to the contrary is unlawful, and in contravention of the applicable statutory and constitutional provisions. Indeed, the conduct by the Board, is insubordinate to the Appellate authority of Public Service Commission to which the Board must pay deference to. Any action short of

compliance, amounts to impunity and not in keeping with the principles and values of public service to which the Board is bound by in terms of Article 232(1) (a) , (e) and (2) (b) of the Constitution of Kenya, 2010, which provides:-

“232(1) The values and principles of Public Service include:-

(a) high standards of professional ethics.

(e) accountability for administrative acts; and

(2) The values and principles of public service apply to public service in:-

(b) all state corporations”

21. Willful disobedience of a lawful decision of Public Service Commission violates these values and principles and amounts to unfair labour practice in violation of Article 41 of the Constitution. That conduct also violates Article 47 of the Constitution which entitles all persons including public servants to:-

“..... the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. “

22. The conduct by the Board was not lawful, reasonable and procedurally fair.

23. Furthermore, the conduct by the Board violates Article 236 under which public officers are protected as follows:-

“236. A public officer shall not be:-

(a) Victimized 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 law.”

24. Furthermore, no persons may interfere with a decision of Public Service Commission which is an independent commission as provided under Article 233, 234 and 249 of the Constitution. See in the matter of the **Interim Independent Electoral & Boundaries Commission (2011) eKLR at paragraphs 59 and 60.**

25. The conduct by the Board did not adhere to this constitutional command by unlawfully abolishing the office of the applicant and refusing to adhere to a decision of its own *Ad hoc* committee and a decision of a superior authority, namely the Public Service Commission.

26. In the final analysis, the conduct by the respondent is unlawful, null and void *ab initio* and the Court issues a mandatory order that:-

(a) The decision by Public Service Commission setting aside the decision by the Board to abolish the position held by the applicant and dismiss him from service is upheld.

(b) **The respondent to reinstate** the applicant to the position he held prior to its impugned decision without loss of benefits and payment of all outstanding emoluments, from the date of purported dismissal to date.

(c) The respondent to pay the costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 30TH DAY OF SEPTEMBER, 2021.

MATHEWS N. NDUMA

JUDGE

APPEARANCES

OKWEH ACHIANDO FOR APPLICANT

MR. LUTTA FOR RESPONDENT

LEGAL OFFICER; PUBLIC SERVICE COMMISSION

EKALE – COURT ASSISTANT