



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E034 OF 2021

**IN THE MATTER OF INFRINGEMENT OF FUNDAMENTAL RIGHTS PURSUANT
TO SECTIONS 44, 45, 47, 49 AND 50 OF THE EMPLOYMENT ACT CHAPTER 226,**

LAWS OF KENYA AND ARTICLES 20, 22, 23, 27, 35, 41, 47, 48

AND 50 OF THE CONSTITUTION OF KENYA

SIBIAH STELLA OTIENO.....PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....1st RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....2nd RESPONDENT

REGIONAL COMMISSIONER, KISUMU.....3rd RESPONDENT

COUNTY COMMISSIONER, KISII COUNTY.....4th RESPONDENT

DEPUTY COUNTY COMMISSIONER,

KISII CENTRAL SUB-COUNTY.....5th RESPONDENT

ASSISTANT COUNTY COMMISSIONER, KIOGORO DIVISION.....6th RESPONDENT

PUBLIC SERVICE COMMISSION.....7th RESPONDENT

ATTORNEY GENERAL.....8th RESPONDENT

JUDGMENT

1. On or about 16 October 2020, the Deputy County Commissioner wrote to Sibiah Stella Otiemo (the Petitioner) notifying her of appointment as Assistant Chief II, Nyaura Sublocation.
2. The Petitioner did not last long in office, for on 1 February 2021, the Deputy County Commissioner, Kisii Central Sub-County, wrote to her informing her of the revocation of the appointment with immediate effect.
3. The Petitioner was aggrieved, and on 11 May 2021, she filed a Petition alleging that the revocation of the appointment was unfair and seeking orders:

(i) A declaration that the termination of service of the Petitioner by the 5th Respondent was irregular, illegal, unlawful and amounted to unfair labour practices and contrary to the provisions of sections 41, 43, 44, 45, 47, 49 and 50 of the Employment Act, Chapter 226 Laws of Kenya.

(ii) Rescission of the termination letter and effective reinstatement of the employment to her employment with the Respondents herein on similar terms and/or privileges.

(iii) Further in the alternative and without prejudice to the foregoing, payments on account of salary in lieu of notice, service pay, terminal benefits and compensation for loss of employment an (sic) account of 12 months' salary.

(iv) Payment of salary in lieu of leave days not taken. (v) Payments of salary for days worked up to and including the date of termination of employment.

(v) Costs and interest.

(vi) Certificate of Service.

4. Filed together with the Petition was a motion under a certificate of urgency seeking interim reliefs.

5. When the Motion was placed before the Court, it directed that it be served together with the Petition.

6. When the Motion came up on 27 May 2021, the Court directed the parties to file and exchange affidavits and submissions ahead of judgment today.

7. During the same appearance, the Court issued an order restraining the Respondents from proceeding with the recruitment process of /replacing the Petitioner.

8. The County Commissioner, Kisii, filed a replying affidavit in opposition to the Motion and Petition on 17 June 2021.

9. The Petitioner filed her submissions on 22 June 2021, while the Respondents submissions were not on record by agreed timeline.

Petitioner's case

10. The Petitioner's case was straightforward.

11. She asserted that she applied for the position of Assistant Chief, Nyaura Sub-location, was shortlisted and interviewed and was later issued with an appointment letter dated 16 October 2020, signed by the Deputy County Commissioner.

12. On the termination of the appointment, the Petitioner contended that the decision was not preceded by a hearing, nor were reasons given.

13. According to the Petitioner, the decision was arbitrary and was also actuated by malice and infringed on her right to be afforded an opportunity to be heard as envisaged by sections 41, 42 and 45 of the Employment Act 2007.

Respondents' rebuttal

14. The defence advanced by the Respondents was equally straightforward.

15. According to the Respondents, the Petitioner's appointment was revoked because an officer had signed the appointment letter without authority (Deputy County Commissioner); the Petitioner had not undergone vetting as envisaged by the Human Resource Policy and Procedures Manual; the Petitioner had not signed a Commitment Form (P.41(1)); the Petitioner had not signed or accepted the offer/appointment letter; the Petitioner's examination certificates and results had inconsistent particulars; the Petitioner's identity card had different names from the ones in other documents, and that the Petitioner had integrity concerns and thus did not meet the Constitutional threshold for public office as contemplated by chapter 6 of the Constitution.

Evaluation

16. The Petition was poorly drafted. The Respondents replying affidavit was casual in its disclosure of pertinent facts.

17. The Court has considered the Motion, Petition, affidavits and submissions and come to the view that the Petition should succeed for the following reasons.

18. One, the Petitioner was a public officer within the meaning of Article 260 of the Constitution.

19. By dint of Article 236(b) of the Constitution, the Petitioner was assured of a normative protection from removal from office without due process.

20. The Respondents should have afforded the Petitioner an opportunity to be heard on the integrity complaints, discrepancies in the identity and examination documents before the purported revocation of appointment through the letter dated 1 February 2021.
21. The Respondents did not demonstrate that they observed the due process protections assured the Petitioner as a public officer.
22. Two, the Petitioner went through a recruitment process that the Respondents have now disowned. It was not within the mandate of the Petitioner to ensure compliance with any of the Respondents internal human resource policy procedures and functions, such as who signed the appointment letter.
23. If there was any irregularity in the signing of the appointment letter, it was up to the Respondents to rectify the irregularity and not mete out the ultimate sanction of termination or revocation of appointment.
24. Three, it was the responsibility of the Respondents to vet the documents produced by the Petitioner before issuing the offer of employment or letter of appointment, and further to ensure that the Petitioner signed the Commitment Form or any other confidentiality documents as soon as was practicable upon appointment.
25. The failures, therefore, should not have been visited upon the Petitioner through revocation of appointment.
26. Lastly, the Respondents attempted to rely on the Delegation of Public Service Commission Human Resource Functions to the Cabinet Secretary (Revised August 2015).
27. The said instrument of the delegation was revoked by the Public Service Commission on 30 July 2018 and replaced by a new Circular/Instrument.
28. It cannot be that the Respondents were not aware that *the Delegation of Public Service Commission Human Resource Functions to the Cabinet Secretary* (Revised August 2015) had been replaced in July 2018.

Conclusion and Orders

29. In light of the foregoing, the Petition succeeds and the Court orders:

- (i) A declaration is hereby issued that the revocation of the appointment of the Petitioner by the 5th Respondent was irregular, illegal, unlawful and amounted to unfair labour practices and contrary to the provisions of sections 41, 43 and 45 of the Employment Act as read with Article 236 of the Constitution.
- (ii) An order is hereby issued rescinding the letter revoking the Petitioner's appointment.
- (iii) An order is hereby issued reinstating the appointment of the Petitioner without loss of any benefits or remuneration with effect from 1 February 2021.

30. In ordering the reinstatement of the Petitioner, the Court has taken consideration of the fact that the Court had issued an order restraining the Respondents from replacing the Petitioner and that the position of Assistant Chief is a public office.

31. Petitioner to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF NOVEMBER 2021.

RADIDO STEPHEN, MCIARB

Judge

Appearances

FOR PETITIONER OCHWANGI & CO. ADVOCATES

FOR RESPONDENTS MR. NYAUMA, SENIOR LITIGATION COUNSEL, OFFICE OF THE ATTORNEY GENERAL

COURT ASSISTANT CHRISPO AURA