



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION 24 OF 2020**

**IN THE MATTER OF ARTICLE 41 OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATION ACTION ACT**

**BETWEEN**

**SARAH NJUHI MWENDA.....PETITIONER/APPLICANT**

**AND**

**THE HEAD OF THE 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**

**RULING**

1. The application herein is the Petitioner's Notice of Motion dated 19.2.2020 and it brought under articles 22 and 23 of the Constitution and rules 3, 4, 19 and 23 of the Constitution of Kenya (Protection of Right and Fundamental Freedoms) Practice and Procedure Rules 2013 and other enabling provisions. It seeks the following orders-

- a. THAT this application be certified urgent and be heard *ex parte* at the first instance.
- b. THAT pending the hearing of this instant application *inter partes*, the Honourable Court do issue conservatory orders restraining the Respondents whether by themselves or through their agents and/or servants from redeploying and/or releasing the Petitioner from the Ministry of Lands and Physical Planning to the State Law & Department of Justice and/or interfering with her terms of service as chief lands registrar attached to the Ministry of Lands and Physical Planning.
- c. THAT pending the hearing and determination of this motion, the Honourable Court do issue conservatory orders restraining the Respondents whether by themselves or through their agents and/or servants from redeploying and/or releasing the Petitioner from the Ministry of Lands and Physical Planning to the State Law & Department of Justice and/or interfering with her terms of service as chief lands registrar attached to the Ministry of Lands and Physical Planning.

d. THAT the Honourable Court do issue conservatory orders restraining the Respondents whether by themselves or through their agents and/or servants from redeploying and/or releasing the Petitioner from the Ministry of Lands and Physical Planning to the State Law & Department of Justice and/or interfering with her terms of service as chief lands registrar attached to the Ministry of Lands and Physical Planning.

e. THAT the Honourable Court do issue conservatory orders protecting the Petitioner/Applicant from victimization of any form pending hearing and determination of the substantive petition herein.

f. THAT the Honourable Court be pleased to give orders for the hearing and determination of the Petition herein on priority basis and give further orders it may deem just and expedient in the circumstances.

g. THAT the costs of this motion abide the outcome of the Petition.

2. The Application is premised on the grounds set out in the motion and the Applicant's supporting affidavit sworn on 18.2.2020. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have opposed the application vide the Replying Affidavit sworn by Dr. Nicholas Muraguri on 27.2.2020.

### **Applicant's case**

3. The Applicant's case is that she was appointed Land officer II on 28.3.1991 after successful interview by the 4<sup>th</sup> respondent; that her appointment to the position was confirmed on 10.7.1995; and that she rose through the ranks until 14.8.2014, when she was promoted to her current position of the Chief Land Registrar job grade 'U' based at the Ministry of Lands and Physical Planning Headquarters. According to the applicant, she has acquired extensive and invaluable experience in land administration.

4. It is further applicant's case that in March 2015, the Applicant together with other officers were suspended following corruption allegations and charged in court in **EACC Case No. 13 of 2015**; that during the pendency of the criminal case, the 2<sup>nd</sup> Respondent attempted to force her into early retirement which she opposed as she had not attained the age of 60; that the said criminal charges were later withdrawn on 30/11/2017 but contrary to her legitimate expectation, she was not reinstated to her position immediately as is the norm in the public service.

5. The applicant further contended that she served the 2<sup>nd</sup> Respondent with the demand letter dated 24.1.2018 through her advocates and the suspension was finally lifted by the Advisory committee on 23.4.2018. However, the 3<sup>rd</sup> Respondent failed to sign the letter dated 24.5.2018 to communicate the lifting of the suspension prompting the 2<sup>nd</sup> respondent to do so by the letter dated 4.12.2018. The said letter was against the Civil Service Code of Regulations because it directed her to report to the principal secretary for further instructions instead of directing her to resume work immediately.

6. It is further applicant's case that after reporting back to her office, she has been frustrated and hindered from performing her functions attendant to her office as outlined in section 13 of Land Registration Act, which duties have been delegated to her juniors whereas she takes all the blame for any complaints raised. To address this issue, she wrote the letter dated 31/7/2019 cautioning her juniors for signing documents without authority and advised them to follow protocol by ensuring that their actions were authorized by her.

7. Finally, the applicant contended that she was served with the letter dated 12/2/2020 from the 1<sup>st</sup> Respondent communicating the decision by the Head of the Public Service to post her from the Ministry of Lands and Physical Planning to the State Law & Department of Justice for further redeployment. The letter also directed her to hand over the office to a senior assistant chief land registrar which post does not exist in the public service.

8. She faulted the said posting because the letter did not state her new assignment and responsibilities and because she was not subjected to due process before this action was taken. She contended that the action is in bad faith and is an attempt to frustrate her and hinder her from performing her duties. She further contended that respondents' actions amount to unfair labour practices and a blatant violation of her rights under Articles 41, 47 and 50 of the constitution which has caused her immitigable harm and damage and if this Court does not intervene, her constitutional rights will be grossly violated. She therefore urged this Court to grant her the conservatory orders sought.

### **Respondent's case**

9. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents admitted that the Petitioner was employed on 28<sup>th</sup> March, 1991 in the position of Lands Officer II at the State Department of Lands. They however deny that the Petitioner has served in the said position continuously as alleged by her and contended that she served in other places and/or departments within the Public Service as assigned by the respective State Departments. They exhibited the letter dated 26<sup>th</sup> July, 2007, authored by the Permanent Secretary, Secretary to the Cabinet and Head of the Public Service that affected three officers, the Applicant included.

10. They further averred that subsequent to the foregoing letter, the Petitioner/Applicant was released to the State Law office and thereafter redeployed to the Ministry of Co-operative Development and Marketing as Principal State Counsel, a position which she held until 16<sup>th</sup> September, 2013 when she was posted to the Ministry of Lands, Housing and Urban Development vide the Solicitor General's letter dated even date.

11. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contended that the Petitioner/Applicant accepted all the said postings or deployments and maintained a good employer-employee relationship as there is no complaint raised by her during the subsistence of her employment or any cases of indiscipline. They further contended that the Petitioner/Applicant was not a target or a victim in the impugned deployment as communicated in the letter dated 29<sup>th</sup> January, 2020 since several other civil servants were affected by the deployment.

12. They contended that the transfers and/or deployment were done in accordance with Section B31(2) of the Human Resource Policies and Procedures Manual for Public Service, 2016 and that the assertion by the Applicant that she is being unfairly targeted and victimized is therefore unfounded and untrue.

13. They admitted that during the pendency of the criminal proceedings facing the Applicant, the 2<sup>nd</sup> respondent suggested to her to take an early retirement to mitigate the problem caused by her prolonged suspension which inhibited service delivery, but the Applicant declined. They therefore denied that the Applicant was being forced to proceed on early retirement.

14. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent contended that they provided the applicant with the necessary support after resuming work and she went about her normal functions without any interference from them. They further contended that the office of the Chief Land Registrar is in the public service and another person can be appointed to occupy it the overriding objective being to improve service delivery to the members of the public. They therefore averred that the application is devoid of merit and urged this Honourable Court to dismiss it with costs.

### Submissions by the parties

15. Mr. Omari, learned counsel for the Applicant argued the application and fully relied on the facts set out in the applicant's supporting Affidavit. He submitted that the applicant was appointed Chief Lands Registrar on 14.8.2014 following a competitive recruitment by the 4<sup>th</sup> respondent but thereafter she was subjected to victimisation and even charged in a criminal case which was later withdrawn. He contended that after the said criminal case was withdrawn, the Applicant was not reinstated but remained on interdiction for months before it was lifted after pushing hard for the same. He further contended that the respondents have demonstrated an intention of removing the Applicant from office and even pressed her to take early retirement while the criminal case was still pending. He further contended that even after resuming work the Cabinet Secretary has been bypassing the Applicant by giving the Deputy Registrar the duty to sign title deeds.

16. As regards the posting of the applicant to the State Law Office for redeployment, the counsel submitted that the same was flawed because the letter does not state the position, which she is being deployed/re-designated to just like the List of Transfers signed by the Head of the Public Service. Although he appreciated that the Respondents have powers to deploy the applicant he submitted that they cannot do so arbitrarily urging that under section 10(5) of the Employment Act, an employer is required to consult with an employee before changing the terms of service. He further submitted that section 40(3) of the Public Service Act gives conditions for re-designation. He contended that the consent of the employee is required, that there must be a vacancy in the new station and the transfer should not be arbitrary.

17. He argued that in this case, no reference of a vacancy was made. He contended that the HR Policies and Procedures Manual at Clause B21 reiterates that there must be a vacancy before such transfer or redesignation. He submitted that the Fair Administrative Action Act alludes to according a person a hearing before taking any action which affects him or her.

18. He further submitted that the Applicant's competence and expertise at the Lands Office was not considered before the transfer. He relied on **Ken T. Sungu v KPA [2020] eKLR** where Ndolo J held that the prerogative to transfer must be exercised for pure reason to meet the operational needs of the employer and the Court intervenes if the reasons are collateral.

19. Mr. Odukenya, learned state counsel, representing the Respondents opposed the application. He submitted that the employer has a prerogative to deploy its officers and contended that the Applicant was properly transferred to the State Law Office. He further submitted that it is not true that the Applicant has all along only worked at the Lands Office and observed that she was indeed transferred from the Lands Office to the State Law office on 2007 and posted as State Counsel in the Ministry of Co-Operatives.

20. He also submitted that the Applicant is an employee of the Public Service Commission, in Job Group U and the mandate to transfer her is provided under Clause B 31 (2) of the HR Policy Manual. He argued that the redeployment of the Applicant is for purposes of improving service delivery and restructuring at the Lands Office and is not meant to victimise the Applicant. He further argued that the Applicant's position is a public office and she does not hold a personal position.

21. He relied on the case of **Teachers Service Commission v Thomas Joseph O Onyango Civ. Appeal No 122 of 2015** where the Court of Appeal set aside the decision of this Court which barred transfer of a teacher for a period of 3 years and, held that the court lacks knowledge of the peculiar needs and distribution of teachers.

22. The learned state counsel contended that the transfer of the applicant does not mean loss in rank or benefits and urged the Court to deny the conservatory orders sought, and direct the Applicant to report to her new station.

23. In a brief rejoinder, Mr. Omari submitted that the appointment to position of Chief Land Registrar does not allow transfer and re-designation and observed that the Applicant is not being transferred to State Law Office as Chief Land Registrar. He further contended that if the transfer is for purposes of improvement of services, then the question is whether the Applicant is a poor performer or is incompetent. He submitted that Ndolo J in the **KPA case** discussed the issue of poor performance and further relied on section 4 of the Fair Administrative Action Act.

24. He submitted that counsel did not prove that there is a vacancy at the new station for the position of Chief Land Registrar. He contended that the Applicant being an expertise and her appointment to a specific position entitled her the legitimate expectation. He urged the Court not to allow the transfer the applicant otherwise the position will be advertised.

### Issues for determination

25. There is no dispute that the Applicant is currently employed by the 4<sup>th</sup> Respondent as the Chief Land Registrar in the Ministry of Lands and Physical Planning. The issue for determination therefore is whether the Applicant has met the threshold for granting conservatory orders

pending hearing and determination of the Petition filed herein.

26. The position/office occupied by the Applicant is provided for under section 12 of the Land Registration Act while the qualifications for the same are set out under section 13 of the Act. The Applicant was appointed to the position of Chief Land Registrar vide the letters dated 14.8.2014 and 19.8.2014. In the letter dated 14.8.2014, the then Chairperson of the Public Service Commission, Prof. Margaret Kobia stated:

“... ”

**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 filing.***

***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...appointed Ms. Sarah Njuhi Mwenda,P/No.1991024225currently Acting Assistant Commissioner of Lands (Lands Registration) in the Ministry, to fill the advertised post of Chief Land Registrar (Job Group T) w.e.f. 14.8.2014.***

... ”

**Signed**

**Prof. Margaret Kobia,PhD,CBS**

**Chairperson**

**PUBLIC SERVICE COMMISSION”**

27. From the foregoing, it is evident that the Applicant was competitively selected to fill the position of Chief Land Registrar as the substantive holder of the said position. The appointment letter did not state that she was transferable to any other departments within the public service. It follows therefore that any decision to post her from that position to serve elsewhere cannot be treated as a normal transfer as alleged by the respondents, but rather removal from the office or a redesignation.

28. The court appreciates that an employer has the prerogative to transfer/deploy his employees, however, that prerogative should be exercised reasonably and not arbitrarily. In **Henry Ochido v NGO Co-ordination Board [2015] eKLR** the Court held:

***“In this regard therefore, a transfer of an employee is one such prerogative of an employer subject to sufficient and reasonable notice to enable the subject employee report to the new station of transfer with the requisite facilitation. It is therefore not in the choice of an employee to dictate where they wish to work, once work has been created, and in the view of the employer they find that a particular employee is best placed in a certain location or work station, the duty on the employer is to inform the employee and the employee’s role is to ensure their work performance in the allocated station....For the employer to thus enjoy this prerogative, there is the duty not to act arbitrarily and ensure the employee is dully notified of the transfer and where the employee seeks a variation, such must be put into account in a manner that entails hearing what the employee has to say with regard to the transfer. This could be extension of time; facilitation; review of job requirement and any other reasonable terms that may arise...”***

29. The question which arises is whether the constitution, statute law and the said HR Policies and Procedures Manual protect the Applicant, as a public officer from removal from office or re-designation without her consent?

30. Article 236 of the **Constitution** provides that: -

***“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.”***

31. In addition, Section 40 of the **Public Service Act** provides: -

***‘(1) The criteria for appointment of public officers prescribed under this Part shall apply when selecting public officers for re-designation.***

***(2) A public officer who wishes to re-designate shall apply, in writing, to the respective authorized officer or to the Commission through the concerned authorized officer, as the case may be, for re-designation.***

(3) A public officer may be re-designated to hold or act in a public office if —

- (a) the office is vacant;
- (b) he or she meets all the qualifications;
- (c) the re-designation shall not disadvantage any public officer who is already serving in the particular cadre;
- (d) the officer has consented to such a decision; and
- (e) the decision shall not reduce the public officer's salary.

32. Applying the above provisions to the facts of this case, it is clear that the applicant has made a strong case that as a public officer, she enjoys a measure of protection from removal from office or re-designation by the Constitution and the said Statute. She has also demonstrated that her purported posting from the position of Chief Land Registrar to the State Law office for redeployment was not done in consonance with the provision of the said Statute and the terms of her contract of employment as contained in the **HR Policies and Procedures Manual for Public Service, 2016**.

33. On the other hand, the respondent has not demonstrated that before the decision to post the applicant was made, there was a vacant office in the concerned new station; that the applicant holds the necessary qualifications for the new assignment; that the applicant was consulted and she consented to the decision; and, that the decision will not reduce her salary. In fact, the 1<sup>st</sup> respondent's letter to the affected ministries is not addressed or even copied to the State Law Office where the applicant is supposed to report for redeployment.

34. In addition, the posting and the transfer letters did not state why the 1<sup>st</sup> respondent delegated the power to re-designate/deploy the applicant to the Solicitor General nor did they cite the law upon which such delegation was done. Is this a case of removing the applicant from her lawful office as the Chief Land Registrar in the Lands Office disguised as a transfer/ posting to the State Law Office? If the answer to that question is posting, was the law and her contract of service breached?

35. The answer to these questions and others will come out during the trial of the main petition. The concern now is whether conservatory orders ought to issue as prayed to preserve the substratum of the suit pending the hearing and determination of the petition.

36. In **Judicial Service Commission Vs Speaker of the National Assembly & Another [2013] eKLR**, it was held that:

***“Conservatory Orders in my view are not ordinary civil law remedies provided for under the constitution, the supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are in rem as opposed to remedies in persona. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”***

37. The foregoing position was acknowledged by the Supreme Court in **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others [2014] eKLR** when it held that:

***“Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders are therefore, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case, or high probability of success” in the applicant’s case for stay. Conservatory orders, consequently should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”***

38. The foregoing precedent is binding on me and I understand it to be saying that, in deciding whether or not to grant conservatory order in a matter like the instant application, the court must act judiciously by ensuring that the functioning of public agencies is not unnecessarily disrupted or halted on the one, and ensuring that the court will not act in vain on the other hand. In performing the said delicate balancing, the court must first satisfy itself that the applicant has established a strong and a meritorious case that is well founded on a legal and/or Constitutional provision upon which the suit is premised. Thereafter the court must undertake a further delicate balancing of the applicant's private rights against the interests of the wide public in granting or not granting the order. If the court is satisfied that there is a strong and well-founded grievance, and that the public interest is in favour of granting the order, the discretion ought to be exercised in favour of the applicant.

39. In this case the provisions of Article 236 of the constitution, section 40 of the Public Service Act and the HR Policies and Procedures Manuals cited by the applicant forms a solid ground upon which the application is premised. They all bind the respondents and I imagine that it is in the public interest that the respondents must not violate the same. The laws passed by the Parliament and the Constitution passed by the citizens of this country are not suggestions but a binding command of the sovereign which binds both the government and its subjects. Without obedience to the said laws the country would easily slide down from the rule of law to anarchy. Likewise, it is in the public interest and indeed it is the public policy that parties are bound the terms of all the valid contracts which they enter into and the court has the jurisdiction to enforce the same.

40. In view of the matters discussed above, I return that the application herein meets that legal threshold for granting the conservatory orders sought and proceed to allow the application as prayed. In my opinion, granting the said orders will preserve the substratum of the petition pending trial and ensure that the court will not act in vain. It is also my considered opinion that the functions of the Lands Registry

will not be disrupted or halted by the said orders because it has not yet been shown by evidence that continued employment of the petitioner as the Chief Land Registrar, will interfere with the orderly functioning of the Registry and service to the public. It has also not been shown by evidence that the applicant is unqualified for the job, or she has refused to perform her duties or that she has been performing her duties negligently.

41. Consequently, I grant the following orders: -

(a) THAT conservatory order be and is hereby given restraining the Respondents whether by themselves or through their agents and/or servants from redeploying and/or releasing the Petitioner from the Ministry of Lands and Physical Planning to the State Law & Department of Justice and/or interfering with her terms of service as chief lands registrar attached to the Ministry of Lands and Physical Planning, pending the hearing and determination of the petition herein.

(b) THAT Conservatory order be and is hereby given protecting the Petitioner/Applicant from victimization of any form pending hearing and determination of the substantive petition herein.

(c) THAT the hearing and determination of the Petition herein shall be done on priority basis as soon as the respondents file and serve their response to the petition.

(d) THAT the costs of this motion abide the outcome of the Petition.

**Dated and delivered at Nairobi this 13<sup>th</sup> of March, 2020**

**JUSTICE ONESMUS N. MAKAU**

**JUDGE**