



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 123 OF 2019**

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF: ARTICLES 1, 2, 3 4(2), 10, 12(1)(A), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 159, 162, 165, 232, 234, 258 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGES VIOLATION OF ARTICLES 2, 10, 27, 41(1), 47, 73, 232, 234 AND 259(1) OF THE CONSTITUTION; THE STATUTORY INSTRUMENTS ACT 2013; GOVERNMENT CIRCULAR REF. NO. OP. CBA.2/7A OF 20<sup>TH</sup> MARCH 2009, ON THE MANDATORY RETIREMENT AGE FOR PUBLIC SERVANTS**

**AND**

**IN THE MATTER OF: THE MANDATORY RETIREMENT AGE FOR PUBLIC SERVANTS**

**AND**

**IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF RETAINING EDWARD KIPTOO KOSGEI AS THE DIRECTOR, LAND ADMINISTRATION BEYOND THE MANDATORY RETIREMENT AGE OF 60 YEARS FOR PUBLIC SERVANTS**

*BETWEEN*

**STEPHEN OCHIENG.....PETITIONER**

**VERSUS**

**PUBLIC SERVICE COMMISSION..... 1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS AND**

**PHYSICAL PLANNING.....2<sup>ND</sup> RESPONDENT**

**AND**

**EDWARD KIPTOO KOSGEL.....INTERESTED PARTY**

**JUDGMENT**

The Petitioner describes himself in the petition as a law abiding citizen of Kenya, a public spirited individual, a human rights defender, a student of law and a strong defender of the rule of law. By his Petition dated and filed on 15<sup>th</sup> July, 2019, the Petitioner challenges the appointment of the Interested Party as the Director, Land Administration at the Ministry of Lands and Physical Planning beyond the mandatory age of retirement.

The brief facts as set out by the Petitioner in the Petition are that the employment records held by the 1<sup>st</sup> Respondent and the Ministry of Lands and Physical Planning indicate that the 1<sup>st</sup> Interested Party attained the mandatory retirement age of 60 years on 30<sup>th</sup> June, 2019. By a

letter dated 30<sup>th</sup> August, 2018, the 2<sup>nd</sup> Respondent notified the Interested Party of the Government's decision to retire him from service effective 1<sup>st</sup> July, 2019 on the ground of attaining the mandatory retirement age on 30<sup>th</sup> June, 2019. Pursuant to the 2<sup>nd</sup> Respondent's letter dated 31<sup>st</sup> August, 2018, the Interested Party signed a clearance form dated 20<sup>th</sup> June, 2019 communicating his decision to exit public service.

By a letter dated 26<sup>th</sup> June, 2019, the 1<sup>st</sup> Respondent notified the 2<sup>nd</sup> Respondent that a decision had been made to appoint the Interested Party on "local agreement terms" for one year effective 1<sup>st</sup> July, 2019 upon attainment of the mandatory retirement age of sixty years.

The Petitioner avers that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's desire to retain the Interested Party was irregular. Further that the engagement of the Interested Party in the public service beyond the mandatory age of retirement is an anathema to the rule of law and runs afoul of the National Values and principles of governance.

Further, he avers that the engagement blocks the advancement of other deserving Kenyans and is discriminatory against other public servants who are forced to retire upon attaining sixty years of age.

Petitioner thus seeks *inter alia* the following orders:-

- i. A declaration that the Interested Party is subject to the mandatory retirement age of 60 years for public servants.
- ii. A declaration that keeping the Interested Party in employment beyond the mandatory retirement age of 60 years for public servants is illegal and unconstitutional and, therefore, invalid, null and void ab initio.
- iii. A declaration that the Interested Party ought to have vacated office, handed over to an acting Director, Land Administration and proceeded for his retirement on 1<sup>st</sup> July, 2019 upon attaining the government's mandatory retirement age of 60 years.
- iv. A declaration that since 1<sup>st</sup> July, 2019, after he had attained the mandatory retirement age of 60 years, the Interested Party had been in office illegally and must refund all the earnings he has made in his irregular employment since then.
- v. An order prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondent whether by themselves or any of their employees or agents or any person claiming to act under their authority from appointing the Interested Party as the Director, Land Administration for any length of time, even in an acting capacity for one day.
- vi. An order compelling the Interested Party to refund all earnings he has made while in office illegally since 1<sup>st</sup> July, 2019.
- vii. An order compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to immediately retire the Interested Party and simultaneously commence the process for recruiting and appointing a new Director, Land Administration in strict compliance with the law.
- viii. A declaration that the 1<sup>st</sup> Respondent's decision contained in the letter dated 26<sup>th</sup> June, 2019 is illegal, a nullity, null and void.
- ix. An order that the costs of this suit be provided for.

The Petition is supported by an affidavit sworn by the Petitioner on 12<sup>th</sup> July 2019. Therein, the Petitioner re-iterates the averments in the Petition.

Contemporaneously with the Petition, the Petitioner filed a Notice of Motion application under Certificate of Urgency dated and filed on 15<sup>th</sup> July, 2019 (the **Application**). Therein, the Petitioner sought interim conservatory orders restraining the Respondents from appointing the Interested Party as the Director, Land Administration pending inter parties hearing of the Application and temporary orders pending hearing and determination of the Petition.

## **Responses**

The Respondents and the Interested Party opposed the Petition and the Application.

On 26<sup>th</sup> July, 2019, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 22<sup>nd</sup> July, 2019 by SIMON ROTICH, the 1<sup>st</sup> Respondent's Acting Secretary/ Chief Executive Officer. Therein, the deponent deposed that in a letter dated 14<sup>th</sup> June, 2019, the 1<sup>st</sup> Respondent received a request from the 2<sup>nd</sup> Respondent to retain the Interested Party in employment for a period of two years with effect from 1<sup>st</sup> July, 2019. He deposed that in the said letter, the 2<sup>nd</sup> Respondent indicated that there were serious succession gaps in the Ministry, particularly at Senior Management Levels in the Department of Lands Administration. A copy of the said letter was annexed to his affidavit and marked as "**SKR-1**".

It was the deponent's deposition that since the Ministry gave a valid reason for retention of the Interested Party, the 1<sup>st</sup> Respondent allowed the request for purposes of ensuring that there was no disruption in service delivery with the exit of the Interested Party. He deposed that the 1<sup>st</sup> Respondent however limited the retention to a period of one year only.

The deponent deposed that although the Petitioner avers that the retention of the Interested Party has adversely affected the upward mobility

of some officers, he has not provided particulars of the affected officers. Further, **Section 80(2)** of the **Public Service Commission Act, 2017 (PSC Act)** allows for retention of public officers in office beyond the retirement age provided the conditions prescribed therein are met. He deposed that since the law allows retention of some officers under certain circumstances the retention of the Interested Party cannot therefore be said to be discriminatory.

On 26<sup>th</sup> July, 2019, the 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 25<sup>th</sup> July, 2020 by ANNE W. KARIITHI, the Director of Human Resource in charge of the Ministry of Lands. Therein, the deponent deposed that the Petition and Application are bad in law and ought to be dismissed as the 1<sup>st</sup> Respondent has powers under the **Human Resource Policies and Procedures Manual for Public Service, Clause B 20 (iii and iv)** to appoint on contract terms, officers at senior levels as they may determine from time to time and where capacity in the Public Service Commission is lacking or specific skills are required. She deposed that **Section 45** of the **PSC Act** gives the 1<sup>st</sup> Respondent powers to engage persons on contractual terms provided that certain requirements are met.

It was the deponent's deposition that there are severe succession management problems in the Department of Land Administration in the Ministry of Lands despite efforts to fast-track the promotion of officers. She further deposed that it was at the senior management level particularly that the gap is glaringly wide which required a person of the Interested Party's calibre to hold over until the problem is conclusively addressed.

The deponent deposed that the interest of the Respondents is not just to fill a vacancy but also to consider the kind of person appointed to hold the office. Further, that the functions of a Director of Land Administration are technical in nature and require technical skills and vast experience which the Interested Party has continually displayed over the years.

On 26<sup>th</sup> July, 2019, the Interested Party filed a Replying Affidavit sworn on 25<sup>th</sup> July, 2019 by EDWARD KIPTOO KOSGEL, the Interested Party herein. The deponent deposed therein that he joined public service and rose through the ranks to become the Director of Land Administration with an unquestionable track record and upon attaining the mandatory retirement age of sixty years in the public service, he was subsequently offered a contract on Local Agreement terms as deposed by the 1<sup>st</sup> Respondent.

It was the deponent's deposition that the Petitioner has not challenged his track record in terms of leadership, competency and integrity, hence the Petition has been brought in bad faith. Further, he prayed that the Petition be dismissed for the reason that taking up the contract was not an extension of his retirement age but an appointment on Local Agreement Terms which has no relation to his retirement age and is not unlawful.

Further, he deposed that the Petitioner has come to Court with dirty hands (sic) in that he has not shown how he obtained the annexures to the Application neither did he request for them as required under **Article 35** of the Constitution, the same being in the possession of the Respondents and the deponent and hence the Petitioner does not deserve the orders sought. He deposed that he took the contract as an opportunity to continue serving Kenyans and did not solicit for it or use undue influence.

On 31<sup>st</sup> July, 2019, when the matter came up for hearing the Office of the Attorney General on record for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents orally sought leave to represent the Interested Party which leave was granted. On the same day, this Court issued directions consolidating the Petition and Application and parties were directed to proceed by way of written submissions.

### **Petitioner's Submissions**

The Petitioner filed his submissions dated 5<sup>th</sup> September, 2019 on 6<sup>th</sup> September, 2019. Therein, he identified the issues arising as:-

1. Whether the Petitioner has locus standi to bring forth this issue before Court?
2. Whether this Court has jurisdiction to hear and determine this Petition
3. Whether the Interested Party' employment beyond the mandatory retirement age is legal?
4. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondent have any authority to appoint the Interested Party or any other employee past their mandatory retirement age?
5. Whether pensioners can be retained in the public service?
6. Whether the interested party should refund any monies earned after 1<sup>st</sup> July, 2019?

On the issue of his *locus standi*, the Petitioner submitted that **Article 3(1)** of the Constitution grants every citizen the obligation to respect, uphold and defend the Constitution. He also relies on the provisions of **Article 22** that vests the *locus standi* to enforce the Bill of Rights on any person who witnesses the infringement of the Constitution more specifically of the Bill of Rights.

He relied on the case of **Randu Nzai Ruwa & 2 Others v Secretary, The Independent Electoral and Boundaries Commission & 9 Others [2016] eKLR** and the Supreme Court case of **Mumo Matemo v Trusted Society of Human Rights Alliance & 4 Others** that set precedent on *locus standi* in public interest litigation.

The Petitioner submitted that Article 260 of the Constitution acknowledges him as a person and further vests in him under Article 258 of the Constitution the right to institute Court proceedings in the belief that the Constitution has been contravened by the Respondents.

It was the Petitioner's submission that the Petition was filed in public interest. That public interest cases encompass more than just the parties to a particular matter since public interest litigation is meant to benefit the wider public and not just individuals. In support of this submission he further relied on the case of **Kiluwa Limited & Another v Commissioner of Land & 3 Others [2015] eKLR** and **Timothy Otuya Ofubwa v County Government of Trans Nzoia & 3 Others [2016] eKLR**.

On whether this Court has jurisdiction to hear and determine the Petition, the Petitioner relied on **Articles 10, 22, 23, 41, 50(1), 159, 160(1), 162(2)(a), 165(5), 258 and 259** of the **Constitution of Kenya** as read with **Section 12** of the **Employment and Labour Relations Court Act**. He submitted that this Court is vested with the jurisdiction to deal with constitutional issues arising within matters under its jurisdiction.

On whether the Interested Party's employment beyond the mandatory retirement age is legal, the Petitioner submitted that the rule of law has been violated by the Respondents and the Interested Party to the extent that they made and entered into a contract that has provisions contrary to the express provisions of the law on mandatory retirement in public service.

It was submitted by the Petitioner that a statutory instrument is a law made under authority conferred by an Act of Parliament. He cited **Section 2** of the Statutory Instruments Act that provides:-

**“statutory instrument” means any rule, order, regulation, direction, from, tariff of costs or fees, letters patent, commission, warrant, proclamation, bylaw, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.**

In light of this provision, the Petitioner submitted that government circulars are valid law. The Petitioner relied on **Government Circular Ref. No. OP.CAB.2.7A dated 14<sup>th</sup> February, 2014: RETENTION IN SERVICE OF OFFICERS BEYOND THE MANDATORY RETIREMENT AGE**. He submitted that the said circular: -

- i. Discourages the retention of officers in service after they attain the mandatory retirement age of sixty years
- ii. Directs principal secretaries “to ensure all officers ages fifty eight years and above have duly identified successors to enable smooth exit from the service when they attain the mandatory retirement age of sixty years.”

The Petitioner submitted that the directive in the circular is clear that the process of scouting a successor is meant to be initiated some time before the incumbent officer attains the mandatory age of retirement. He submitted that the 1<sup>st</sup> Respondent having failed in this task should not try to impose orders and directives that are both contrary to the government policies and the law.

The Petitioner also relied on the 1<sup>st</sup> Respondent's Human Resources and Procedures Manual for the public service issued in May 2016. Specifically that:-

- i. Section D.18 outlines the various forms of exit from the public service which include retirement on attainment of mandatory retirement age.
- ii. Section D.21 which provides that “All officers shall retire from the service on attaining the mandatory retirement age of 60 years, 65 years for persons with disabilities and/or as may be prescribed by the Government from time to time.”

It was the Petitioner's submission that Section 80 of the Public Service Commission Act, 2017 provides that upon attainment of the mandatory retirement age by a public officer as prescribed, the officer must proceed to retire from office. He submitted that the word shall as used in the section imports a form of command and is not permissive. In interpretation of the word shall in the statutory context, the Petitioner relied on the case of **Adrian Kamotho Njenga v Kenya School of Law [2017] eKLR** and **Republic v Kenya Revenue Authority, Commissioner, Ex-Parte Keycorp Real Advisory Limited [2019] eKLR**.

The Petitioner submitted that both the Respondents and Interested Party are only using the terms “new contract under local terms” to shield themselves and deviate from the emerging facts that the contract leads to the conclusion that the Interested Party was not and is not exempted from the above cited laws. He submitted that given that the law in force supersedes contracts, it is clear that there is no way the Interested Party can stay in office beyond the mandatory retirement age.

On whether the Respondents have any authority to appoint any other employee past the mandatory retirement age, the Petitioner submitted that the Respondents herein acted in contravention of **Article 10, 233 and 234** of the **Constitution**. He submitted that the Respondent and the Interested Party abused the National Values and failed to act with integrity and good governance. They also failed to offer equal opportunity by discriminating other Kenyans who wish to occupy the position of Director of Land and Administration.

The Petitioner submits that the Respondents have failed to table any evidence that the Interested Party met the conditions prescribed in **Section 80(2)** as invoked by the 1<sup>st</sup> Respondent in its Replying Affidavit. Further, that the reason being given by the Ministry, being a problem in matters of succession does not amount to sufficient reasoning to retain the Interested Party.

It was the Petitioner's submission that the 1<sup>st</sup> Respondent is mandated and tasked to scout for successors, two years before the retirement of an incumbent public office holder. The 1<sup>st</sup> Respondent has equally failed to show any evidence before this Court of succession problems or challenges allegedly faced by the Ministry of Lands in filling the position of the Interested Party.

The Petitioner submitted that the 2<sup>nd</sup> Respondent's reliance on **Section 45** of the Public Service Act also fails as neither the Respondents nor

the Interested Party have met the conditions set therein. **Section 45** of the Act provides that the officer to be contracted must express in writing, the willingness to engage further as a public officer and the decision made at least three months before the expiry of the public officer's terms. It was the Petitioner's submission that these conditions remain unmet as the Interested Party vide his clearance form dated 20<sup>th</sup> June, 2019 clearly expresses his readiness to leave the position. Further, that the Interested Party has not shown any interest in writing of his retention to continue serving under contractual capacity.

On whether pensioners can be retained in the public service, the Petitioner submitted that while **Section 80(2)** of the Public Service Act allows the employment of pensioners, it sets very stringent conditions for doing so. He submitted that the 1<sup>st</sup> Respondent or any other appointing authority may only employ pensioners where it is demonstrated through a process that accords with **Articles, 10, 27 and 232** that the pensioner to be employed:-

- i. Possesses rare knowledge, skills and competencies for the time being required in the service;
- ii. is willing to be engaged on contract; and
- iii. his/her performance shall not in any way be impaired by age.

The Petitioner submitted that the employment of pensioners cannot be at the whims of the 1<sup>st</sup> Respondent or any other appointing authority. That it must be demonstrated that the conditions above are met. In support of this submission, he relied on the case of **Joseph Mutuura Mbeeria & Another v Cabinet Secretary for Education, Science & Technology & 2 Others [2014] eKLR** where the Court discussed the minimum standards applicable in positions within the public service in line with **Article 10 and 232** of the Constitution as read with the relevant statutory provisions.

The Petitioner submitted that it is only in circumstances where a competitive recruitment process fails to produce a suitable candidate to fill the position that the law allows for employment of pensioners in the public service.

On whether the Interested Party should refund any monies earned after 1<sup>st</sup> July, 2019, it was the Petitioner's submission that he has demonstrated that the Interested Party has been in office after he attained the mandatory retirement age. As such, the Interested Party has no basis in law to keep any public monies he was paid while unlawfully occupying the office of the Director of Land Administration.

#### **Respondents and Interested Party's Submissions**

On 23<sup>rd</sup> October, 2019, the Respondents and the Interested Party filed their written submissions. Therein, they identified the following issues for determination: -

1. Legality of engagement of the Interested Party on contract *after the mandatory age of retirement of 60 years for public servants*
2. Whether the appointment of the interested party infringes or threatened to infringe the rights of the petitioner under the Constitution
3. Use of public documents obtained contrary to the law
4. Whether the petition offends order 53 of the Civil Procedure Rules 2010.
5. Efficacy of the orders/declarations sought

On the legality of the engagement of the Interested Party, it was the submission of the Respondents and Interested Party that there is no constitutional or statutorily set mandatory retirement age within the public service or even whether a person serving on contract can be subjected to the retirement rule, if any. Further, that the regulation of the retirement age has been done through regulations supplemented by policy prescriptions in form of circulars and service codes of conduct.

The Respondents and the Interested Party submitted that the retirement age of public servants was vested by law, set at 55 years with the possibility of extension on appropriate reasons subject to approval by the 1<sup>st</sup> Respondent.

It was the Respondents and Interested Party's further submission that pursuant to **Regulation 19**, the Government vide a **Circular Ref No. OP. CBA.2/7A** dated 20<sup>th</sup> March 2009 and titled '**Review of the Mandatory Retirement Age for Public Servants**' raised the retirement age for all Public Servants from fifty five years to sixty years with effect from 1<sup>st</sup> April, 2009 with the exception of judges, academic staff, research scientists, and public servants with disabilities whose retirement age ranges from sixty years to seventy four years. They submitted that the raising of the mandatory retirement age was necessitated by the need to tap into the professional and technical skills of those who had attained the fifty five year mark.

The circular provided for a transition mechanism for public officers under contract wherein it stated:

"Employees serving on contract as at 5<sup>th</sup> March, 2009 after attainment of the age of 55 years will however continue to serve for the duration of these contracts. Contracts expiring before the attainment of the age of 60 years will be renewed in accordance with the provisions of the contract."

The Respondents and the Interested Party submitted that with the promulgation of the Constitution of Kenya, 2010, terms and conditions of services of public servants are primarily regulated under Chapter Thirteen of the Constitution. In particular, **Article 234(2)(g)** of the **Constitution** empowers the Public Service Commission to review and make recommendations to the national Government in respect of conditions of service, code of conduct and qualifications of officers in the public service.

They submitted that based on a purposive interpretation of the Constitution, public servants could be defined as the holders of an office within the National Government, a County Government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament. Further, even though the Public Service Commission is empowered to review and make recommendations to the National Government regarding the qualification for service in the public service, the Constitution itself does not set the age limit for service in the Public Service. However, matters of code of conduct of Public Servants are now regulated by the **Human Resource Policies and Procedure Manual for the Public Service (May 2016)**, which replaced the Revised version of 2006.

It was the Respondents and Interested Party's submission that since then, there have been fundamental changes both in the structure of the Public Service and the management of the Human Resource. These changes include the promulgation of the Constitution and reforms in various aspects of Public Service Management. They submitted that the changes have necessitated a review and harmonization of the Code of Regulations. In doing so, the Code has been renamed Human Resource Policies and Procedures Manual for the Public Service in tandem with best human resource practices. **The Human Resource Policies and Procedures Manual** (the **Manual**) provides guidelines in the management and development of human resource capacity towards the achievement of various national goals and objectives.

They submitted that the Manual incorporates provisions of the Constitution, Labour Laws and other Legislation that govern various aspects of industrial relations in the Public Service. The Manual is also anchored on other policies and guidelines governing the management of the Public Service. It provides the basis for human resource policies and regulations in the wider Public Service. That these policies are not exhaustive of all the rules and regulations governing Public Servants in their day to day activities which should be read alongside other relevant Statutes, where applicable, for better interpretation and application.

It was the Respondents and Interested Party's submission that by dint of **Regulation 20**, appointments to contract terms in the public service is based on specific legitimate reasons such a skill and productivity requirements that is not readily available within the realm of Public Servants under pensionable terms. **Regulation D. 21** set out the mandatory retirement age for public servants at sixty years with the exceptions of persons with disability.

The Respondents and the Interested Party submitted that the contextual meaning of **Regulation D.21** is that it is a general Government policy prescription that the mandatory retirement age for all public officers is sixty years, subject to any other law or prescription by Government from time to time. They submitted that there have been select cases of exercising the exemption granted under **Regulation D.21** to employ persons beyond the retirement age of sixty years on contract terms in accordance with **Regulation E.13 and E.19** of the 2006 (Revised) Manual and **Regulation B.20** of the May, 2016 Public Service Policy. In particular:

- i. That vide a letter dated 14<sup>th</sup> June, 2019, the 2<sup>nd</sup> Respondent requested the 1<sup>st</sup> Respondent for concurrence to retain Mr. Edward Kosgei in service on Local Agreement Terms for a further period of two (2) years with effect from 1<sup>st</sup> July 2019; and
- ii. The Public Service Commission vide its letter Ref. No. PSC/10/L/116/(6) dated 26<sup>th</sup> June, 2019 approved the appointment of Mr Edward Kosgei on Local Agreement Terms for a period of one (1) year on strategic grounds.

It was the Respondents and the Interested Party's submission that by dint of **Regulation E.19 (2006 revised)** and **D.21 (May, 2016)**, there is an allowable policy exception regarding employment on Contract terms/Local Agreement Terms in the Public Service for persons beyond the mandatory retirement age considered on a case to case basis and therefore, appointment of persons in the Public Service beyond the mandatory retirement age is legal subject to consideration of appropriate strategic reasons and upon approval by the 1<sup>st</sup> Respondent.

The Respondents and the Interested Party submitted that in order to appreciate the appointment on contract of the Interested Party, it is necessary to understand the reasons given by the 2<sup>nd</sup> Respondent in the replying affidavit of one ANNE W. KARIITHI dated 25th July, 2019 at paragraph 4 and 5 and those set out by the Replying Affidavit by the 1<sup>st</sup> Respondent sworn by Mr Simon Rotich on 22<sup>nd</sup> July, 2019 at paragraphs 6,7 and 8.

The Respondents and the Interested Party submit that as is clearly set out in the Replying Affidavit of both the Respondents and that of the Interested Party, the Interested Party was appointed on contract to continue the implementation of the reforms that are at critical stage hence it was necessary to appoint him on contract after attaining the retirement age as he is a suitable candidate.

It was the Respondents and Interested Party's submission that is clear that the appointment of the Interested Party falls within the ambit of the exceptions provided by the regulations and **Section 80(2)** of the PSC Act. The process of granting contract by the Respondents to the Interested Party was procedural, regular and within the law and with the consideration of utmost public interest. In support of this submission they relied on the decision of the Court of Appeal in **Kenya Revenue Authority v Menginya Salim Murgani Civil Appeal No. 108 of 2009** where it held that:

“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down in statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task, it is for them to decide how they will proceed.”

It was the Respondents and Interested Party's submission that based on the above case, it is clear that 1<sup>st</sup> Respondent has the mandate to appoint officers on Local Agreement Terms under the Public Service Act and the Public Service Code of Regulations. They relied on the

case of **Okiya Omtata Okioti v CS for Interior & Others, Petition No. 114 of 2016 [2018] eKLR.**

The Respondents and the Interested Party submitted that while the Petitioner alleges that the Respondents irregularly extended the tenure of the Interested Party, the same was not an extension of term. The Interested Party lawfully retired from service upon attaining the mandatory age of retirement and was separately engaged on contract as per the law.

On whether the appointment of the Interested Party infringes or threatened to infringe the rights of the Petitioner under the Constitution, it was the Respondents and Interested Party's submission that there was no provision of the Constitution violated as a result of the appointments of the Interested Party on contract. They submitted that the Petitioner has failed to show how the Articles of the constitution were violated and hence his allegations are misguided and born out of misapprehension of the facts and applicable law. Further, that the petition does not satisfy the threshold of pleading a justiciable cause or controversy established by the Court in **Anarita Karimi v The Republic [1979]**. They also relied on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others** (supra) wherein the Court of Appeal reasserted the on the requirement of precision in pleading a case alleging the violation of Constitutional Rights.

With respect to the issue of the use of public documents obtained contrary to the law, it was the Respondents and Interested Party's submission that the Petitioner commenced these proceedings on reliance of privileged public documents which he obtained without authority. They submitted that the Petitioner in his petition annexed all the documents that can only be obtained from either the Interested Party or from the Respondents.

They submitted that while they are public documents, they are privileged communication and can only be obtained with authority. Further, that the Petitioner did not request for this information from the Government office and has no evidence to demonstrate he lawfully obtained the documents.

It was the Respondents and Interested Party's submission the proceedings herein are brought in the interest of the Petitioner or few of his constituents who feel the retention of the Interested Party has blocked their upward mobility. That while the Petitioner has camouflaged these proceedings as of great public interest and meant to safeguard and ensure the upholding the rule of law, there is need to safeguard the general interest of the public.

They submitted that there is reasonable expectation that privileged communication must be protected. The information was illegally obtained contrary to provisions of **Article 35** of the Constitution and **Section 80** of the Evidence Act. The Petitioner did not disclose the source of the documents he relied on, it is the Respondents submission that the Petitioner has come to Court with unclean hands and the said documents ought to be expunged from record. Further, for illegally obtaining information, the petition should be struck out with costs.

In advancing this position, the Respondents and the Interested Party relied on the case of **Nairobi Law Monthly & Another v Kengen eKLR 2013** where the Learned Judge while expunging the documents that were unlawfully obtained by the Petitioner, held that the Petitioner has an obligation to request for information and the State has the obligation to disclose the said information unless there are sufficient reasons for non-disclosure. They submitted that the use of clandestine means in the face of clear Constitutional means is unwarranted.

On whether the Petition offends **Order 53** of the Civil Procedure Rules 2010, the Respondents and the Interested Party submitted that Petitioner's case concerns judicial review because he is challenging the process through which the Interested Party was appointed into office. Judicial control of administrative action can only be commenced vide **Order 53** and the rules subsequent thereunder. They relied on the case of **Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR**. Therein, Odunga J. set out the grounds upon which administrative action is subject to judicial review.

It was the Respondents and Interested Party's submission that the determination of the irregularity or otherwise of an administrative decision is squarely the preserve of the Judicial Review Court or by this Court but by invoking the right rules of procedure.

They relied on **Alphonse Mwangemi Munga and 10 Others v African Safari Club Limited [2008] eKLR; Lawrence Nduttu & 156 others v Kenya Breweries CA 279/03; and Rashid Odhiambo Alogoh & 245 others v Haco Industries LTD HMIS'C 1520/1999** in support of their submissions. The holdings being that a party claiming violation or threatened violation of Constitutional rights does not have the licence to come to Court by way of a constitutional application even where there is no constitutional issue arising and where there are adequate remedies provided in other laws to cover such situations.

It was the Respondents and Interested Party's submission that public interest militates in favour of not granting the prayers sought as the same would be to the interest of the Petitioner and few of his constituents. Further that for an order to compel the Respondents to declare vacancy and commence the process of recruiting a new Director of Land Administration, an order for declaration cannot quash a decision made. It was the Respondents and Interested Party's submission that an order of mandamus cannot be issued in the circumstances. There is no vacancy in place and there is no evidence before the Court to warrant issuance of coercive orders against the Respondents. They relied on the case of **Wamwere v Attorney General (2004) 1 KLR**, where the Applicant sought an order of mandamus the Court held that:

"The application cannot succeed unless it can be shown that there was wrongdoing on the part of the Respondent. "

## **Determination**

I have considered the pleadings and extensive submissions filed by all the parties.

The **Human Resource Policies and Procedure Manual for Public Service (May, 2016)** provides at Regulation B.20 for the appointment of personnel on contract terms. The said regulation in essence allows for appointment of personnel to the public service based on specific legitimate reasons such as skill and productivity requirements that may not be readily available within the pool of public servants under

permanent and pensionable terms. **Regulation D. 21** goes ahead to make a policy exception for appointment of persons beyond the retirement age on contract terms subject to appropriate reasons being advanced. I find that the 2<sup>nd</sup> Respondent laid a basis for the request to preserve the expertise of the Interested Party at the helm of the Land Administration Department and that the 1<sup>st</sup> Respondent was within its mandate to do so by way of engaging the Interested Party under Local Agreement Terms.

In the case of **Okiya Omtatah Okoiti v Head of Public Service & 5 Others** (supra) wherein the facts are on all fours similar to this petition, my brother **Abuodha J.** pronounced himself thus: -

“Article 232 of the Constitution provides for values and principles of public service.

....

B20 appointment on contract terms will be made under the following circumstances:

- i. Where persons to be appointed may not qualify for pension as per the respective pension scheme
- ii. Where officers are appointed to serve on fixed term projects
- iii. Appointments at senior levels as determined by the Public Service Commission from time to time
- iv. Where capacity in the public service is lacking or specific skills are required.
- v. Personal staff of specified state officers as determined by the commission from time to time.

20. The respondent through the Attorney General has given reasons why the 2<sup>nd</sup> and 3<sup>rd</sup> interested party were appointed for extra two years despite the fact that they had retired at 60 years. As observed earlier in this judgement the Government like any other employer should subject to rules of natural justice and the constitution be granted the managerial discretion to deal with its human resource function. Except in cases where there is violation of the constitution and statute the court would be reluctant to interrogate the veracity of the reasons given for appointment if ex facie they appear justifiable and reasonable.

21. The court however appreciates the watchdog role played by the petitioner by bringing the issue of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties, appointment on local service agreement to the attention of the court for adjudication. The principles of Public Service contained under article 232 of the constitution must be jealously guarded if the full impact of our progressive constitution is to be realized. The petitioner’s concern that appointment of persons who have attained the retirement age on local service agreement is genuine and must be commended. This window is vulnerable to abuse and could be used to reward loyalties or keep cronies in public service at the expense of equally qualified individuals.

...

23. In conclusion the court finds and holds that the appointment of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent on a two year local service agreement was lawful and for justifiable reasons. The court however would frown upon a further extension of the contract upon its expiry. Its hoped that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent will use the two years to manage their succession for continuity.

24. The petition is therefore found without merit and is hereby dismissed with no order as to costs.”

I am in agreement with the holding of my learned brother and I need not reinvent the wheel. I note however that in the present case the request under **Section 45** of the Public Service Act directs that the same ought to be made within three months before the expiry of the public officer’s terms. The 2<sup>nd</sup> Respondent made the request on 14<sup>th</sup> June, 2019 which was less than a month to the retirement of the Interested Party. Further, I find that the 2<sup>nd</sup> Respondent has not demonstrated that they made any efforts to find qualified personnel within and outside the public service through a competitive process in good time. The request for the engagement of the Interested Party therefore seems to have been a knee jerk reaction to the poor succession management by the Respondents. It is hoped that this and other similar Petitions that have been filed in the Courts will serve to remind the 1<sup>st</sup> Respondent to manage succession in the public service in the manner provided in the regulations and circulars.

This Court in exercising its judicial authority is mandated to propound the purpose and principles of the Constitution of Kenya. I commend the Petitioner for his valiant efforts in keeping the public service on its toes to ensure that the values and principles of public service are adhered to and that there is succession and progression to meet the progressive standards of our Constitution.

Ultimately, I find that the Respondents have justified the grounds for engagement of the Interested Party and since the contract has since lapsed, the orders sought by the Petitioner have become redundant.

**The upshot is that I dismiss the Petition with no order as to costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF JULY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**