



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E011 OF 2020

IN THE MATTER OF: ARTICLES 2, 3, 10, 19, 20, 22, 23, 25, 27, 28, 35, 41, 47, 50, 165, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT OF 2015

AND

IN THE MATTER OF: RULES 4, 10, 11, 13 AND 20 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: SECTIONS 5 AND 45 OF THE EMPLOYMENT ACT, 2007

BETWEEN

ABDI DUBOW KORIOW.....PETITIONER

V

HASSAN NASSIP JELLE..... 1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. Abdi Dubow Koriow (Petitioner) filed a Petition with the Court on 22 July 2020 alleging that the appointment of a new Chief and Assistant Chief for Sangole Location and sub-location respectively were unfair, discriminatory and should be quashed and, breach of contract.
2. Filed together with the Petition was a Motion under a certificate of urgency seeking interim conservatory orders.
3. On 3 August 2020, the Court directed that the Motion and the Petition be canvassed simultaneously.
4. The Court directed the parties to file and exchange pleadings and submissions.
5. As a result, the following were filed

i. Petitioner's supplementary affidavit on 1 September

ii. Petitioner's further affidavit on 8 September 2020

iii. Petitioner's submissions on 10 September 2020.

iv. 2nd – 4th Respondents replying affidavit sworn by Deputy County Commissioner, Ijara Sub-County and submissions on 30 September 2020.

6. The 1st Respondent did not file any pleadings (there is no affidavit attesting to service upon him despite Court directing the Petitioner on 7 August 2020 to file one).

7. In his submissions, the Petitioner identified 5 Issues being

i. Whether the Petitioner's right to legitimate expectation was infringed.

ii. Whether the appointment of the 1st Respondent offends the laid down principles of the Constitution and statute with regard to public office appointments.

iii. Whether the appointment of the 1st Respondent is merited.

iv. Whether the Petitioner is entitled to unpaid salary for the period between December 2017 and November 2019 when his post was advertised.

v. Costs of the Petition.

8. The 2nd to 4th Respondents on their part raised 4 Issues, to wit

i. Whether the Petitioner's act of self-reinstatement to work is legitimate?

ii. Whether the appointment of the 1st Respondent is merited?

iii. Whether the Petitioner's constitutional rights were violated?

iv. What is the relief available, if any?

Background

9. The Petitioner was appointed as Assistant Chief, Sangole sub-location in 1993. Around 3 January 2017, the Petitioner tendered his resignation in order to contest for the position of Member of the County Assembly in the 2017 General Elections.

10. On 6 March 2017, the Petitioner wrote to the Principal Secretary, Ministry of Interior indicating that he was cancelling his resignation with effect from 1 February 2017.

11. Despite the cancellation of the resignation, the Petitioner participated in the party primaries and was issued with a Certificate of Nomination on 30 May 2017 by the Independent Electoral and Boundaries Commission.

12. A year later, on 8 January 2018, the Petitioner requested the Principal Secretary to be reinstated to his position as Assistant Chief. He referred to a Circular from the Head of Public Service OP/CAB.1/38 dated 14 July 2017.

13. The Petitioner was advised to formally reapply for the position of Assistant Chief. The request was not successful and the Petitioner appealed.

14. The Public Service Commission, in a letter dated 7 March 2018 and addressed to the Cabinet Secretary, Interior declined to allow the appeal.

15. The Cabinet Secretary, through a letter dated 29 March 2018 and copied to the Petitioner notified him that his appeal had been declined.

16. The Petitioner made another appeal on 6 June 2018 but the second appeal did not succeed and he was informed accordingly through a letter dated 22 January 2019.

17. On or around 5 April 2019, approval was given for the advertisement for the position of Assistant Chief, Sangole sub-location.

18. In the meantime, the position of Chief for Sangole Location had also fallen vacant and authority to advertise was given on 5 April 2019. The Petitioner applied but did not succeed.

19. Appearing to have reached the end of the road, the Petitioner moved the Court as already stated above alleging constitutional violations and breach of contract.

20. The Court has condensed the Issues as identified by the parties as examined hereunder.

Infringement of right to a legitimate expectation

21. The Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Ors* (2014) eKLR stated of legitimate expectation

Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.

22. On his part, H.W.R. Wade & C.F. Forsyth in the scholarly book *Administrative Law* address legitimate expectation at pages 449 to 450, thus

It is not enough that an expectation should exist; it must in addition be legitimate.... **First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... **Second**, clear statutory words, of course, override an expectation howsoever founded..... **Third**, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy....

An expectation whose fulfilment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.

23. In asserting that his right to legitimate expectation was violated, the Petitioner contended that he notified the Respondents of the revocation of his resignation through a letter dated 6 March 2017, long before the general elections and that upon the revocation, he resumed his duties as Assistant Chief and that consequently his remuneration was reinstated with effect from April 2017.

24. According to the Petitioner, the right to legitimate expectation crystallised upon the Respondents paying his remuneration for up to 4 months after he had revoked his resignation without making any formal response to the cancellation of resignation.

25. Citing *Jane Kiongo & 15 Ors v Laikipia University & 6 Ors* (2019) eKLR, the Petitioner asserted that his right to legitimate expectation had materialised.

26. In the circumstances, would it be reasonable to expect that the continued payment of the Petitioner's remuneration after the purported revocation of his resignation created a legitimate expectation?

27. The Court does not think so.

28. First, the Petitioner voluntarily resigned from his position as Assistant Chief. A resignation once given cannot unilaterally be withdrawn (see *Riordan v War Office* (1961) 1 WLR 210; *Harris & Russel Ltd v Slingsby* (1973) IRLR 221 and *Brennan v C Lindley and Co Ltd* (1974) IRLR 153).

29. The Petitioner unilaterally attempted to cancel his resignation and purportedly resumed work before securing the go-ahead of the employer. He even appealed but was not successful.

30. Secondly, although the Petitioner asserted that he had revoked his resignation through his letter of 6 March 2017, the records placed before the Court tell a different story, for the Petitioner was issued with a Certificate of Nomination by the Independent Electoral and Boundaries Commission on 30 May 2017.

31. Thirdly, the Petitioner did not provide any evidence that there was a clear and unambiguous representation made to him by the employer that his revocation of resignation had been accepted.

32. Fourthly, the Respondents explained that the continued payment of remuneration to the Petitioner was erroneous and the Petitioner did not rebut the probability that due to the bureaucratic nature of public service, it could not have taken 3 or 4 months to stop the payments.

33. Fifthly, the Petitioner did not lead any evidence as to any particular formal duties he performed with the knowledge or concurrence of his employer after his resignation.

34. The Court finds no legitimate expectation arose in the circumstances of this case.

Whether 1st Respondent's appointment met the threshold expected of public office

35. Article 232 of the Constitution has set out the values and principles which should imbue public service. These include accountability,

transparency, merit, competition, equal opportunities and representation of Kenya's diverse communities.

36. In the view of the Petitioner, the process leading to the appointment of the 1st Respondent fell short of the requisite threshold. He maintained that having served for so long, the 1st Respondent had no advantage over him.

37. Moreover, the 1st Respondent and the Assistant Chief who replaced him were from the same clan. He even lamented that the Chief for the neighbouring location also belonged to the same clan as the 1st Respondent.

38. Apart from making the assertions, the Petitioner did not present any evidence or corroborative evidence that the 1st Respondent and the Assistant Chief belonged to the same clan.

39. The Petitioner also did not present any evidence as to the qualifications set out in the advertisements for the positions. There was no iota of evidence on the qualifications and experience of the 1st Respondent.

40. The Petitioner did not prove the allegations on failure to meet the expectations of the values and principles of the public service in the appointment of the 1st Respondent.

41. Closely tied to the threshold question, the Petitioner contended that the 1st Respondent did not merit the appointment as Chief because his appointment had been predetermined.

42. However, no evidence or particulars of the assertion was placed before the Court.

Breach of contract

43. The Petitioner prayed to the Court to order the payment of his remuneration from December 2017 to November 2019 on the assumption that he was never issued with a notice of termination of employment and that he only realised he was no longer in employment upon the advertisement for the position of Assistant Chief.

44. The Court is not prepared to accept the contention by the Petitioner that he was unfairly dismissed on the state of the record. He unilaterally resigned and his attempts to be taken back were declined by the Respondents when his appeals failed. He even obtained a Certificate of Nomination on 30 May 2017.

45. This, the Court finds, was not a case of breach of contract. Any remuneration paid to the Petitioner appears to have been without consideration. Such was paid in error as contended by the Respondents and it is the employer who should be asking for restitution on account of unjust enrichment.

Conclusion and Orders

46. From the above, the Court finds no merit in the Petition and it is dismissed with costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 29th day of October 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Makori instructed by Musyoki Mogaka & Co. Advocates

1st Respondent did not participate

For 2nd -4th Respondents Ms. Oyugi, Senior Litigation Counsel, Office of the Attorney General

Court Assistant Lindsey