



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 86 OF 2020

**IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 22, 23, 41, 47, 50, 155, 159, 162, 236, 258, 259 AND 260 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF: ALLEGED AND/OR THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 10, 41 AND 50(2) OF THE CONSTITUTION**

AND

IN THE MATTER OF: ALLEGED AND/OR THREATENED BREACH OF ARTICLES 155 AND 236 OF THE CONSTITUTION

AND

IN THE MATTER OF: THE PUBLIC SERVICE ACT, NO. 10 OF 2017

AND

**IN THE MATTER OF: THE PUBLIC SERVICE COMMISSION HUMAN RESOURCE POLICIES AND PROCEDURES
MANUAL, 2016**

BETWEEN

LILLIAN W. MBOGO-OMOLLO

PETITIONER

v

CABINET SECRETARY

MINISTRY OF PUBLIC SERVICE &

GENDER

1st RESPONDENT

THE ATTORNEY GENERAL

2nd RESPONDENT

JUDGMENT

1. Lillian W. Mbogo-Omollo (Petitioner) was initially appointed by the President into the office of Principal Secretary, Public Service and Youth on or about 24 December 2015 in accordance with Article 132 as read with 155 of the Constitution.
2. In 2017, the country held elections and consequently, the President again nominated and/or appointed the Petitioner as Principal Secretary, Public Service and Youth effective 26 January 2018. The Petitioner was notified of the appointment through a letter dated 12 March 2018.
3. Sometime in May 2018, the Petitioner stepped aside to allow investigations into alleged mishandling of funds and upon completion of the investigations, the Petitioner was charged before the Magistrates Court on 29 May 2018 with corruption-related offences.
4. As a result of the criminal charges, the Cabinet Secretary, Public Service, through a letter dated 29 June 2018 notified the Petitioner that she had been suspended from office with effect from 19 June 2018 in line with Part XII, section 70(1) & (3) of the Public Service

Commission Act, No. 10 of 2017.

5. On 19 May 2020, the Cabinet Secretary wrote to the Petitioner to inform her that her appointment had lapsed with the appointment of another person to the office of Principal Secretary, Public Service.

6. Aggrieved, the Petitioner moved the Court on 8 June 2020 alleging that the decision violated Articles 10, 41 and 236 of the Constitution.

7. The Petitioner sought the following orders

(i) A declaration that the revocation of the Petitioner's appointment is unconstitutional for violating Articles 41, 155 and 236 of the Constitution.

(ii) A declaration that the revocation of the Petitioner's appointment is unconstitutional for violating the Petitioner's right to legitimate expectation.

(iii) A conservatory order stopping the implementation of the 1st Respondent's decision contained in the letter dated 12th May 2020 and 19th May 2020.

(iv) An order of judicial review by way of certiorari to remove into this Court the decision of the 1st Respondent contained in the letter dated 12th May 2020 and 19th May 2020 for the purposes of quashing on account of being unconstitutional.

Alternative to the above

(v) Service gratuity at the rate of 31% of the basic remuneration package for the term served.

(vi) Restoration of all withheld salary and allowances for the years under suspension.

(vii) General damages for the breach of the Petitioner's constitutional rights and/or the right to legitimate expectation.

(viii) Compensation for the unlawful revocation of the Petitioner's appointment.

(ix) Certificate of Service.

(x) Costs of the Petition.

(xi) Interests on above at court rates from the date of filing of the Petition until payment in full.

(xii) Any other orders that this Honourable Court deems fit and just to grant in the circumstances.

8. Filed with the Petition was a Motion under a certificate of urgency.

9. On 9 June 2020, the Court directed that service be effected upon the Respondents and when the parties appeared before the Court on 23 June 2020, the Court directed that both the Motion and Petition be taken together and that the Respondents do file their responses, and the Petitioner replies before 31 July 2020.

10. The Cabinet Secretary filed a replying affidavit sworn on 10 July 2020.

11. When the Petition was mentioned on 3 August 2020 to confirm compliance, the Petitioner made an oral application to amend the Petition.

12. The Court allowed the request and directed that an Amended Petition be filed and responded to, and further that the parties file and exchange submissions.

13. The Petitioner filed an Amended Petition dated 13 August 2020 and the Respondents filed Grounds of Opposition thereto dated 26 August 2020.

14. The Petitioner filed submissions and authorities dated 18 September 2020 while the Respondents filed submissions dated 7 October 2020.

15. The Petitioner identified 7 Issues as arising in her submissions, being

(i) Whether the Petitioner is a public officer.

(ii) Effect of the suspension of the Petitioner's right to be presumed innocent.

(iii) Whether the Petitioner served at the pleasure of the President.

(iv) Due process.

(v) Whether there was a legitimate expectation created.

(vi) Whether the Respondents breached the Constitution and violated the Petitioner's rights under the Constitution and Statute.

(vii) Whether the Petitioner is entitled to the prayers sought.

16. The Respondents identified 3 Issues for the Court's determination, to wit:

(i) Whether the Petitioner's constitutional rights were violated

(a) The Constitutional doctrine of avoidance.

(b) Due process in revocation of the appointment of the Petitioner.

(c) Right to legitimate expectation.

(ii) Whether the Petitioner's dismissal by the Respondent (sic) is justified?

(iii) Whether the Petitioner is entitled to service gratuity and certificate of completion.

Invoking Constitutional rights in vain

17. The Respondents under what they termed the constitutional doctrine of avoidance challenged the competency of the Petition on the grounds that at issue were private law rights which could be determined through the means contemplated by the Employment and Labour Relations Court (Procedure) Rules, 2016.

18. According to the Respondents, what the Petitioner was alleging was a breach of contract.

19. The Respondents also asserted that the Petition did not meet the threshold as set out in *Anarita Karimi Njeru v R* (1979) eKLR and *Mumo Matemu v Trusted Society of Human Rights & 5 Ors* (2013) eKLR.

20. The Petitioner was holding the office of Principal Secretary. The office is established under Article 155 of the Constitution but there is no explicit Constitutional provision on removal from office, save for the power given to the President to remove in Article 132(2)(d) as read with Article 155 of the Constitution.

21. Lacking any other statutory framework for removal, it is the view of the Court that the Petitioner was in order to seek to rely directly on Constitutional provisions such as Article 41 and more appropriately Article 236 which assures public officers of certain protections.

22. On whether the Petition met the threshold of setting out the rights allegedly violated and manner of violation in sufficient detail, the Court is of the view that the details set out at paragraphs 30-54 of the Amended Petition put the Respondents on notice as to what the disputation was about in detail.

Whether the Petitioner was a public officer

23. The Petitioner was serving as a Principal Secretary appointed in terms of Articles 132 and 155 of the Constitution.

24. In terms of Article 260 of the Constitution, the office of a Principal Secretary is designated as a State Office and therefore being a state officeholder, the Petitioner was a state officer and a public officer as envisaged under the Constitution.

25. By dint of the provision, the Petitioner was holding a State Office as well as an office in the public service, thus a public officer.

26. The Court, however, notes that not all public officers are state officers while all state officers are *ipso facto* public officers.

Suspension and right to be presumed innocent

27. Upon the Petitioner being arraigned before the Magistrates Court, the Cabinet Secretary wrote to her on 29 June 2018, notifying her of her suspension on half-salary pending the finalisation of the criminal charges in line with Part XII, section 70(1) & (3) of the Public Service Commission Act.

28. On or around 12 May 2020, the Head of the Public Service wrote to the Cabinet Secretary informing her of the removal of the Petitioner from the payroll upon the appointment of a replacement.

29. The Cabinet Secretary, in turn, notified the Petitioner through a letter dated 19 May 2020 that her tenure had lapsed upon the appointment of another person to the office she held.

30. The actions of removal from the payroll and appointment of a replacement, the Petitioner argued, derogated from the constitutional requirement to be presumed innocent as enshrined in Article 50(2)(a) of the Constitution as well as sections 62 and 63 of the Anti-Corruption and Economic Crimes Act.

31. Citing a passage in *Alex Kyalo Mutuku & 7 Ors v Ethics and Anti-Corruption Commission & 2Ors* (2016) eKLR to the effect that the suspension does not take away the right of the person so suspended to be presumed innocent, and the burden still lies on the prosecution to prove his or her guilt beyond reasonable doubt. Indeed, the provisions of section 62(3) make clear that should one be acquitted or for any reason the proceedings against him or her terminated, the public officer ceases to be suspended. It is my view therefore that section 62 of ACECA does not violate the petitioner's rights under Article 50(2)(a) the Petitioner contended that her suspension, removal from the payroll and replacement was illegal and unconstitutional and violated her rights.

32. Being a presidential appointee, the Respondents maintained that the Petitioner held an office of public trust, and because she had been charged with corruption offences, she was suspended as expected under section 62 of the Anti-Corruption and Economic Crimes Act.

33. Article 50(2)(a) of the Constitution, in the view of the Court, preserves an accused persons right to be presumed innocent within the criminal trial process and should not constrain the hands of parties to a contractual relationship.

34. The Court of Appeal in England in *North West Anglia NHS Foundation Trust v Gregg (2019) CA* observed that an employer does not usually need to wait for the conclusion of any criminal proceedings before dismissing an employee or commencing or continuing internal disciplinary proceedings, and courts will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger (not just a theoretical danger) that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene.

35. The Court, therefore, finds that the Petitioner's right to be presumed innocent was not violated when she was placed under suspension.

Service at the pleasure of the President and due process

36. The Petitioner took the position that since Article 155 of the Constitution did not provide the manner of dismissal of a Principal Secretary, it could not be taken that they serve at the pleasure of the President and that they were protected from removal without due process pursuant to Article 236 of the Constitution.

37. In the view of the Petitioner, and drawing from the Court of Appeal authority of *Narok County Government & Ar v Richard Bwogo Birir & Ar* (2015) eKLR, the removal from public or state office was constitutionally chained to due process and the rules of natural justice. The pleasure doctrine, the Petitioner urged, had died with the retired Constitution.

38. Submitting that the power to appoint was reposed in the President by Article 155 of the Constitution, the Petitioner in the same vein urged that in terms of section 51 of the Interpretation and General Provisions Act, it is the President who can validly revoke the appointment of a Principal Secretary but after due process as contemplated by Article 236 of the Constitution.

39. In this respect, and seeking refuge in the Court of Appeal authority of *Birir* (supra), the Petitioner contended that section 31 of the County Governments Act was in *pari materia* with Article 155 of the Constitution.

40. And asserting that she was an employee under an employment contract, the Petitioner urged the Court to find in line with the Court of Appeal decision in *County Government of Garissa & Ar v Idriss Aden Mukhtar & 2 Ors* (2020) eKLR that even as a state officer the Employment Act, 2007 applied to her and therefore the statutory procedural dictates in sections 41 and 44 of the Employment Act, 2007 and Regulation D.18 of the Public Service Commission Human Resource Policy should have been complied with.

41. Further, the Petitioner was of the view that under the statute she was charged under before the Magistrates Court, she could only be removed from office upon conviction and therefore the revocation of her appointment before the conclusion of the criminal case was contrary to the law.

42. Contrary to the Petitioner's assertions, the Respondents urged that Principal Secretaries serve at the pleasure of the President because the Constitution was silent on manner of their removal and therefore they could be dismissed pursuant to Article 132(2)(d) of the Constitution as read with Article 155.

43. Taking the argument further, the Respondents contended that Article 236 of the Constitution did not apply in the case of Principal Secretaries because they were a category delineated *special employment*. The case of *Tom Luusa Munyasya & Ar v Governor, Makuani County & Ar* (2014) eKLR.

44. The charging of the Petitioner, the Respondents disclosed, necessitated the splitting of the State Department the Petitioner was in charge of and thus the appointment of other persons.

45. Drawing the attention of the Court to Nairobi High Court Anti-Corruption Application No. 58 of 2018, *Asset Recovery Agency v Lillian Wanja Muthoni t/a Sahara Consultants & 5 Ors*, the Respondents found solace in the determination by the High Court that the Petitioner had received and/or benefitted from proceeds of crime and therefore her continued retention in office was untenable.

46. The office of a Principal Secretary, the Respondents urged, required high standards of integrity as demanded by Article 73(1) of the Constitution. The Petitioner had come to Court with unclean hands, it was stressed.
47. For the Respondents, it was summed up, the Petitioner's tenure lapsed upon the appointment of her replacement and the protection assured public officers by Article 236 did not apply to Principal Secretaries.
48. Article 132(2)(d) of the Constitution has given the President the discretion to dismiss a Principal Secretary in accordance with Article 155.
49. Could it be that the intention of the Constitution is that a Principal Secretary would stand dismissed upon the appointment of another person to replace him or her without due process as envisaged by Article 236?
50. According to the Respondents, that is the correct interpretation.
51. To unravel that question, the Court must at the first instance contextualise how the Constitution of Kenya should be interpreted.
52. The High Court in *FIDA v Attorney General* (2018) eKLR stated of the approach to Constitutional interpretation It is also beyond argument that Article 259 of the Constitution introduced a new approach to the interpretation of the Constitution. The Article obliges courts to promote *'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance*. This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The duty to adopt an interpretation that conforms to Article 259 is mandatory. Constitutional provisions must be construed purposively and in a contextual manner. Courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, interpretation should not be "unduly strained." It should avoid "excessive peering at the language to be interpreted.
53. Articles 132(2)(d) and 155 of the Constitution must therefore not be applied and/or interpreted in isolation from other provisions and more so Article 236 which assures public officers of certain protections.
54. This Court is unable to discern any intention, given a holistic and contextual approach that Articles 132(2)(d) and 155 intended to establish a limitation and/or derogation from the protection of due process assured public officers in Article 236.
55. Secondly, unlike under the retired Constitution under which the President could appoint and dismiss a Permanent Secretary at will, the current Constitution requires the Public Service Commission to recommend persons for appointment (appointment of Cabinet Secretaries follow a different process solely at the hand and discretion of the President).
56. It is in the public domain that before the Public Service Commission so recommends a person for appointment as a Principal Secretary, it calls for applications and conducts an evaluation or appraisal of the candidates to ensure they meet the Constitutional integrity test among other criteria.
57. Once a person has been appointed as a Principal Secretary, he or she becomes a public officer. As such public officer, the Principal Secretary becomes entitled to the protections assured all public officers by Article 236 of the Constitution.
58. The due process protection in Article 236 suggests to the Court that public officers have a legitimate expectation that being public officers, due process as envisaged under Article 236 of the Constitution would be observed in the process of their removal from office.
59. Thirdly, the power to remove a Principal Secretary is placed upon the President. Article 135 of the Constitution requires such decisions to be made and reasons given under the hand of the President.
60. The Respondents did not exhibit any such decision under the hand of the President.
61. The Petitioner was not subjected to due process, nor was she given reasons for the removal from office under the hand of the President. She was ingeniously notified that her tenure had ended because a replacement had been appointed.
62. The Court, in light of the above, finds that the removal of the Petitioner in the manner it was conducted was unconstitutional.

Remedies

63. The Petitioner was found by the High Court to be the beneficiary of proceeds of crime. The Court was not informed whether the decision has been appealed against.
64. In lieu of the remedies sought by the Petitioner, the Court orders

(a) THAT a declaration is hereby issued that a Principal Secretary is entitled to the protections assured public officers by Article 236

of the Constitution.

(b) The Petitioner is awarded a nominal Kshs 1/- (Kshs ONE) for the violation of her right to due process.

65. Each party to bear its own costs.

Delivered through Microsoft teams, dated and signed in Nairobi on this 21st day of October 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Omollo instructed by Sigano & Omollo Advocates LLP

For Respondents Ms. Mbilo, Principal Litigation Counsel, Office of the Attorney General

Court Assistants Judy Maina/Lindsey