



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION 21 OF 2019**

**ANTOINETTE BONITA KAMAU.....1<sup>ST</sup> PETITIONER**

**VERSUS**

**ENERGY REGULATORY COMMISSION.....RESPONDENT**

**CONSOLIDATED WITH**

**PETITION 22 OF 2019**

**ELIZABETH WANJIKU NJAU.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**ENERGY REGULATORY COMMISSION.....RESPONDENT**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: ARTICLES 2(1), 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 32, 33, 35, 41, 47,  
50, 159, 162(2), 165(5)(b), 232, 236 AND 258 OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 10, 27, 28, 32, 33, 35, 41, 47, 48, 50,  
232 AND 236 OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF: SECTION 5, 10, 45 AND 46 OF THE EMPLOYMENT ACT, 2007;**

**AND**

**IN THE MATTER OF: SECTIONS 5, 6, 7, 8, 9 AND 10 OF PUBLIC  
SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015;**

**AND**

**IN THE MATTER OF: SECTIONS 9, 10, 11 AND 12 OF**

**PUBLIC OFFICER ETHICS ACT, CAP 183 OF 2003;**

**AND**

**IN THE MATTER OF: SECTIONS 8, 9, 10, 11 AND 15 OF THE**

**LEADERSHIP & INTEGRITY ACT CAP 182 OF 2012;**

**AND**

**IN THE MATTER OF: SECTIONS 4, 6, 7, 8, 9 AND 11 OF THE**

**FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015;**

**AND**

**IN THE MATTER OF: RULES 4, 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

**PRACTICE AND PROCEDURE RULES, 2013;**

**JUDGMENT**

The Petitioners are both employees of the Energy Regulatory Commission, the Respondent herein, a state corporation established under the Energy Act. **ANTOINETTE BONITA KAMAU** the 1<sup>st</sup> Petitioner was first employed by the Respondent as a Public Relations Manager on 6<sup>th</sup> January 2006. By then the Respondent was operating as the Energy Regulatory Board (ERB). Following the operationalisation of the Energy Act 2006 the Respondent was transitioned to the Energy Regulatory Commission (ERC) from July 2007. The staff of ERB including the 1<sup>st</sup> Petitioner were transited to ERB on 1<sup>st</sup> July 2008. Under the new organisational Structure, she was re-designated to the post of Senior Manager Communication and Public Affairs reporting to the Director General.

On 1<sup>st</sup> December 2017, the Respondent approved a new organization structure and the 1<sup>st</sup> Petitioner was re-designated as Head of Corporate Communication, Job Grade 9 reporting to the Director General. On 9<sup>th</sup> February 2017 she was informed that under the new structure she will move to the Corporate Services Directorate and report to Director Corporate Services.

On 28<sup>th</sup> June 2017, the Respondent's Board approved the Human Resources Policies and Procedures Manual. The Manual introduced a new grading structure with the highest being ERC 1 and the lowest ERC 9. The effect of this was that the 1<sup>st</sup> Petitioner's job grade changed from Job Grade 9 to ERC 3. The new structure also converted all positions in Job Grades ERC 1 to 3 from permanent and pensionable terms to 5-year fixed contract terms with gratuity payable at the end of the term. The affected employees were given an opportunity to either exit under an exit package or choose to transition to contract. The 1<sup>st</sup> Petitioner opted for the 5-year contract

The 2<sup>nd</sup> Petitioner **ELIZABETH WANJIKU NJAU** was first employed by the Respondent on 2<sup>nd</sup> June 2009 as the Senior Manager, Human Resource and Administration Job Grade 9 reporting to the Director General. In August 2018, she received a transition letter from permanent and pensionable terms to contract terms of service. She was required to select her preferred option and she too, selected Option 1: transition to a 5-year contract and payment of gratuity at the end of the contract period with no exit package.

The Petitioners received re-designation and re-deployment letters dated 20<sup>th</sup> December 2018 wherein they were re-designated to Principal Surveillance & Enforcement Officers and re-deployed to Nyeri and Nyanza respectively. They were aggrieved by their re-designation and transfer as according to them it was tantamount to a demotion. They filed their respective Petitions seeking the following orders:

- a) A declaration that the is (sic) opaque, egregious, clandestine, capricious, whimsical and contrary to articles 10, 27, 28, 41, 47, 50, 73 and 236 of the Constitution of Kenya 2010 hence unconstitutional and consequently null and void.
- b) An order to set aside the letter dated 20<sup>th</sup> December 2018.
- c) A permanent order of injunction restraining the Respondent by either itself, employees, servants and/or agents from stopping the salary and allowances of the Petitioner.
- d) A permanent order of injunction restraining the Respondent either by itself, employees, servants and/or agents from debarring the Petitioners ingress and egress from their offices situated at the Energy Regulatory Commission Eagle Africa Centre, Longonot Road Upper Hill and from intimidating, harassing or interfering with the performance of their duties as an employee of the Respondent.
- e) A permanent order of injunction restraining the Respondent by either itself, employees, servants and/or agents from taking any

disciplinary action against the Applicant.

f) In the alternative and without prejudice to the aforesaid, the Petitioner to be paid option 2: Exit from Commission, Transition Option Selection.

g) General damages for the constitutional violations of the Petitioners' fundamental rights.

h) The Court do issue any other Orders and give such directions as it may deem fit to meet the ends of justice.

i) Costs of the Petition.

j) Interest on the above at Court rate.

It is the Petitioners' case that in March 2016, the Director General Mr. Pavel Oimeke made derogatory remarks directed at them. The 1<sup>st</sup> Petitioner further avers that Mr. Oimeke has done everything to portray her as incompetent and disrespectful but no disciplinary action has been taken against her. That this has caused her psychological torture.

It is the petitioner's case that they did not receive the new contracts when other senior managers received theirs. The 1<sup>st</sup> Petitioner made several enquiries regarding her contract but nothing was communicated. That on 21<sup>st</sup> December 2018, the Director General informed them that they had been re-designated and re-deployed to the newly created Enforcement and Consumer Directorate. They were advised to pick their letters communicating the same.

They wrote letters to the Director-General appealing the decision but had not received any response at the time of filing their respective petitions. They aver that the Respondent had made attempts to hinder them from performing their duties by denying them access to their offices, blocking them from using or accessing email and threatening them with disciplinary action and stoppage of salary.

It is the Petitioners' position that the re-designation and re-deployment was malicious and ill intended as they do not possess the right qualifications for the positions they have been assigned to hence they would not perform their duties as required. They aver that it is contrary to their ambition and career paths. They further aver that the new position is a job grade lower than their re-designated job grades. Further, that they are required to report to the Deputy Director, Enforcement and Consumer Protection who is in the same job group as their current positions.

They posit that the Respondent has breached their fundamental constitutional rights and freedoms by discriminatorily re-designating and re-deploying them and by failing to follow due process. As such, their rights under Articles 10, 20, 27, 41, 47 and 50 were breached.

They urge this court to declare that their rights and fundamental freedoms were breached and to grant them the orders sought.

The Respondent opposed the Petition vide the Replying Affidavit of Eunice Ayodo. It is the Respondent's case that it created the Directorate of Enforcement and Consumer Protection on 1<sup>st</sup> July 2018. As such there was need for capacity building which would be necessitated through re-designation and re-deployment of staff pursuant to section 2.22 of the Human Resource Policy and Procedures Manual of May 2018.

Consequently, the Board approved the Petitioners' re-designation and re-deployment as the Principal Surveillance and Enforcement Officers and they were to report to the Director, Enforcement and Consumer Protection who was at Job Grade 2. Their job grade, salary and benefits were to remain the same and they would also enjoy other benefits such as transport and subsistence allowance.

The respondent avers that the position the petitioners have been re-designated to is not technical. It is a managerial position where the Petitioners will offer advisory and oversight services and coordinate staff. The Petitioners would have experts such as an engineer, a lawyer, a petroleum expert, administrative assistant and environmental health and safety expert at their disposal. It is also their position that the Petitioners' claim of lack of knowledge is dishonest as they have attended technical courses on regulation.

It is the Respondent's case that the Petitioners' appeals were received outside the deadline of 21<sup>st</sup> December 2018 that was communicated in their appointment letters. As such, their appeals were rejected and they were informed that they were required to report to work by 14<sup>th</sup> January 2019. The respondent avers that the Petitioners never picked their letters forcing the Respondent to send the same vide registered post.

The Respondent maintains that the process of re-designation was fair and due process followed. The Respondent urges this Court to dismiss the Petition with costs.

### **Contempt of Court Application**

On 11<sup>th</sup> April 2019, the petitioners filed an application in which they seek the following orders:

a. Spent.

b. That the Cited Parties be committed to civil jail and detained in prison for a term of 6 months or such other period as the Court will deem fit or both fine of Kshs.5,000,000 and imprisonment for contempt of the Court Orders made on 22<sup>nd</sup> January 2019 by this

court.

- c. That the property of the Respondent be sequestrated (sold) in default of payment of the fine that the court may impose on them.
- d. Such other further or consequential orders as may seem fair and just to the Court.
- e. That the Cited Parties to pay the costs of this Application personally.

The grounds in support of the application are that the respondent had disobeyed court orders of 22<sup>nd</sup> January 2019 as extended on 14<sup>th</sup> February 2014 without objection from the respondent by which the Court ordered status quo be maintained. In the applications, they cite **Pavel Robert Oimeke** the Director General and **James Muithya Kilonzo**, the Acting Director of Corporate Services, as the contemnors. The applications are based on the grounds that the Respondent and the cited parties have wilfully declined to suspend the letters of redeployment and re-designation of the Petitioners' as ordered by the court on 22<sup>nd</sup> January 2019 in complete disobedience of the said orders as extended on 14<sup>th</sup> February 2019. They aver that the orders were issued in the presence of the Respondent's counsel who did not object.

The Petitioners aver that they have been hindered from performing their duties. That they have not been assigned duties, their communication to the Respondent's members of staff has been ignored and they have been denied training opportunities. It is the Petitioners' position that the Respondent's disobedience is wilful and deliberate and they have failed to comply with numerous demands from the Petitioners' counsel to obey the Courts orders.

The Petitioners urge this Court to grant the orders sought.

The Cited Parties have opposed the Application vide the Replying Affidavit of the 1<sup>st</sup> Cited Party, **Pavel Robert Oimeke**. It is their position that the instant Application is an abuse of court process.

The 1<sup>st</sup> Cited Party avers that this Court clarified status quo to mean that the Petitioner does not take up any new posting pending the *inter partes* hearing of the Application. It is his position that the Petitioners have not taken any new posting and designation as was outlined in the suspended deployment letter of 20<sup>th</sup> December 2018.

It is their position that the Petitioners have not demonstrated to this Court how they are in contempt of the orders issued on 22<sup>nd</sup> January 2019.

The Petitioners filed Supplementary Affidavits for the purpose of producing this Court's order of 22<sup>nd</sup> January 2019 as an annexure, because their Advocate had inadvertently omitted to annex the same to the Supporting Affidavits of 9<sup>th</sup> April 2019.

The Application was heard in open Court and thereafter counsels for the parties filed their written submissions.

#### **Submissions by the Parties**

Okwe Achiando, counsel for the Petitioners, submitted that the Cited Parties were in contempt because the orders issued by this Court were disobeyed in light of the actions complained of by the Petitioners in their affidavits, and which have not been controverted or rebutted. Further, the Contemnors have not disputed service of the orders.

Counsel for the Petitioners relied on the cases of *Teacher Service Commission vs. Kenya National Union of Teachers & 2 Others [2013] eKLR*, *Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR*, *Africa Management Communication International Limited vs. Joseph Mathenge Mugi & Another [2013] eKLR*, *Christine Wangari Chege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR*.

Counsel urged this Court not to accord the contemnors a hearing until they purge their contempt and that the orders against the 2<sup>nd</sup> Respondent be granted as he has not filed a response.

Mr. Mbai, Counsel for the Contemnors, clarified that the 1<sup>st</sup> Cited Party swore his Affidavit on behalf of himself and the 2<sup>nd</sup> Cited Party. He submitted that the orders that "*status quo be maintained*" meant that the Applicants were not to report to their stations of redeployment, and which post they were yet to take. That both Applicants were in Nairobi and reported to work daily.

Counsel further submitted that the breach alleged has to be precise and proved on a higher balance of probability. It was his position that the Applicants had not demonstrated the actions that amounted to contempt.

It was also his submissions that these Applications were filed with the aim of delaying the hearing of the Petitions and that the Respondent continued to suffer as the two offices remained vacant. He urged the Court to dismiss the Applications with costs.

#### **Analysis and Determination of Petition**

After analysing the evidence before this Court and taking into consideration the pleadings presented by the parties, the issues for determination are whether the Petitioners' re-designation and re-deployment was fair and lawful, whether the Cited Parties are in contempt and whether the Petitioners are entitled to the prayers sought.

## **The Re-designation and Re-deployment of the Petitioners**

Eunice Ayodo averred that the re-designation and re-deployment was necessitated by the national government's directive that the Respondent opens up five regional offices in Kisumu, Mombasa, Eldoret, Nyeri and Marsabit for licensing of projects and supervision. However, she averred at paragraph 26 of her Affidavit that a report from the baseline study of the Respondent's culture revealed that the Petitioners' departments were the main contributors to the negative culture and that their performance was dismal despite various reprimands and trainings. That this necessitated the Respondent's decision.

From the evidence, it is clear that the Petitioners' re-designation and re-deployment was done due to their purported negligent performance of their duties. Since the decision had adverse impact on the Petitioners they ought to have been informed of the reasons for such decision and given an opportunity to present their case before the decision was taken. This was not done. Instead, the respondent camouflaged this action as a re-designation based on the National Government's directive to open registry offices.

Further, they ought to have been notified that their job grade, job description and duties would change and consulted, before the terms were changed. Again, this was not done. Section 10(5) of Employment Act provides that:

***“Where any matter stipulated in subsection (1) change, the employer shall in consultation with the employee revise the contract to reflect the change and notify the employee of the change in writing”.***

The terms of service of the petitioners were further changed from permanent and pensionable to 5 year fixed term contracts without consultation. It is further clear from the evidence on record that the petitioners were re-designated to a job in Grade 3. The Respondent's argument that they would earn the same salary cannot justify its actions. The Petitioners were to report to the Deputy Director, Enforcement and Consumer Protection. He was not of job grade 2 as alleged by the Respondent but of job grade 3 as indicated in the Respondent's Career Guidelines. Further, the Petitioners re-designation was to a lower job grade 4 and not 3 as stipulated by the parties.

Whether or not the Petitioners deserved to be demoted, the proper procedure in law ought to have followed. The court in ***Ronald Kampa Lugaba -V- Kenol Kobil Limited [2016] eKLR*** held that:

*“...The Respondents have in their evidence stated that the reduction in salary was commensurate with work being done but it's this Court's finding that the reduction in salary and demotion is against Section 10(5) of Employment Act...”*

I find the Respondent's arguments that the Petitioners would serve in managerial positions dishonest. The duty specifications of the Petitioners new positions indicated that some of their duties touched on engineering. The Petitioners have no expertise in engineering or other technical areas. They have expertise on public relations and human resource which were highly unlikely to aid them in the performance of their new duties. They appealed to the Respondent citing the same reasons, but their appeals were never heard. The Respondent's argument that it rejected the appeals because it received them late is not convincing bearing in mind that the letters of appearance dated 28<sup>th</sup> December 2018.

I also note that the re-designation letter is dated 20<sup>th</sup> December 2018 while paragraph 4 of the letter indicates that the appointment was to commence on 15<sup>th</sup> November 2018. This is proof that the Respondent had pre-meditated intentions against the Petitioners.

In view of the foregoing, I find that the Petitioners have proved their case of infringement of their rights under Articles 41(1), 47, 236 as well as breach of Section 10(5) of the Employment Act. As such, their re-designation and re-deployment was unlawful, unconstitutional and unfair.

## **Contempt of Court Application**

The elements that must be proved to make a case for civil contempt

were outlined in the case of ***North Tetu Farmers Company Limited -V- Joseph Nderitu Wanjohi [2016] eKLR*** as:

- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;
- b. The Defendant had knowledge of or proper notice of the terms of the order;
- c. The Defendant has acted in breach of the term of the order; and
- d. The Defendant's conduct was deliberate.

This Court issued orders on 22<sup>nd</sup> January 2019 to the effect that *status quo* between parties be maintained. This meant that the letters of 20<sup>th</sup> December 2018 were suspended pending the hearing and determination of the Application. As such, the Applicants were to report to their stations and go about their duties as if they had not received the said letters.

The Applicants have attested that they went back to their previous designation before the issuance of the letters of 20<sup>th</sup> December 2018. However, they stated that they were unable to perform their duties due to interference from the Respondent and the cited parties.

The 1<sup>st</sup> petitioner stated that Eunice Ayodo, the Principal Human Resource Officer, had sent her an email informing her that the said Eunice had been directed not to engage or report to the 1<sup>st</sup> petitioner in any work-related matters. However, the annexure relied upon is an email from Eunice informing the 1<sup>st</sup> petitioner that her trainings, workshops and conferences had been suspended until further notice. Although this email raises certain questions, it is not sufficient to hold the cited parties in contempt. Further, the 1<sup>st</sup> petitioner's assertions are watered down by the emails of Antony Kiarie Kamau and Agnes Naliaka Wachie who sent their appraisal and objectives, respectively, for her approval.

The 2<sup>nd</sup> petitioner's case is that she was blocked from accessing Eunice Ayodo's email, was denied access to newspapers and was side lined in decision making despite being the Manager Human Resource Manager. Indeed, there is an email from Microsoft Outlook informing her that her message could not be delivered because she did not have permission to send it and was directed to seek permission from the admin. Previously, she had been able to send emails to Eunice. This was not denied by the cited parties.

Further, there is an email from Patrick Lolung, sent to the 2<sup>nd</sup> petitioner among other recipients, on 20<sup>th</sup> February informing them that there would be new employees. However, this email alone is not sufficient to prove that the 2<sup>nd</sup> petitioner had indeed been sidelined from the recruitment process of those employees bearing in mind that before 22<sup>nd</sup> January 2019, she had not been to her station.

The Court in **North Tetu Farmers Co. Limited vs. Joseph Nderitu Wanjohi [2016] eKLR** cited the case of **Gatharia K. Mutikika vs Baharini Farm Ltd** where it was held as follows-

*"The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. ..."*

In view of the foregoing, it is very difficult for this Court to establish if indeed the impugned actions were committed and with the intent of disobeying court orders and under the instructions of the cited parties. Additionally, from the 1<sup>st</sup> Applicant's petition, it is clear that the actions complained of were undertaken before the issuance of the impugned orders.

The Court in **North Tetu Farmers Co. Limited vs. Joseph Nderitu Wanjohi [SUPRA]** while citing the case of **Peter K. Yego & Others vs Pauline Nekesa Kode** observed that the applicant in contempt proceedings must prove beyond peradventure that the Respondent is guilty of contempt. I am of the view that the petitioners have not proved their case for contempt to the required standards. The Application is therefore dismissed.

## **Orders**

Having proved their case on a balance of probabilities, the Petitioners are entitled to the following orders-

- a) A declaration that the Respondent's decision was contrary to Articles 10, 27, 28, 41, 47, 50, 73 and 236 of the Constitution of Kenya 2010.
- b) Owing to the apparent strained relationship between the Respondent and the Petitioner, it will not be possible for them to work with their employer. It is the view of the Court that the Petitioners should be allowed to exit the Respondent under option 2: Exit from Commission, Transition Option Selection.
- c) In addition I award them General damages in the form of compensation equivalent to six (6) months' gross pay for the constitutional violations of the Petitioners' fundamental rights.
- d) The application to cite **Pavel Robert Oimeke** the Director General and **James Muithya Kilonzo** for contempt is dismissed.
- e) Costs of the Petition is awarded to the Petitioners.
- f) Interest shall accrue from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JULY 2019**

**MAUREEN ONYANGO**

**JUDGE**