



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 25 OF 2018

(Before Hon. Lady Justice Hellen S. Wasilwa on 31st October, 2019)

FREDRICK LISUTSA NAMUSENDE.....PETITIONER

VERSUS

PRINCIPAL SECRETARY

MINISTRY OF ENVIRONMENT AND FORESTRY.....1ST RESPONDENT

HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioner filed the Petition herein to challenge the failure by the Ministry of Environment and Forestry to deploy him to a duty station as well as reinstating his salary. He challenges the fairness, constitutionality and lawfulness of the decision. In particular, he seeks the following prayers-

- a. THAT the Ministry of Environment and Forestry deploys him without further delay and reinstates him on the payroll.*
- b. THAT the Ministry of Environment and Forestry compensates him for unfair treatment and loss of earnings including payments of his accumulated salary which has been withheld.*
- c. THAT he be awarded costs of this suit.*

2. The Petitioner's case is that on 23rd January 1989, he was confirmed as a permanent and pensionable employee. He rose through the ranks and in February 2004, he became the District Forest Officer of Lugari District. While at Lugari, the Pan African Paper Mills (EA) offered him the job of Forest Manager. He requested for a 2-year leave of absence from the Permanent Secretary, Ministry of Environment and Natural Resources through the Chief Conservator of Forests, to enable him take up the job. The PS informed the Directorate of Personnel Management of the same.

3. In the meantime, the Forest Department was replaced by the Kenya Forest Service vide the gazette notice of 29th November 2005. The staff of the department were automatically seconded to the Kenya Forest Service. They were deployed to the Kenya Forest Service on 1st February 2007. The staff were to undergo a suitability interview before placement. The interviews were advertised in the Daily Nation and thereafter the Petitioner was shortlisted to be interviewed for the position of Head of Forest Conservancy. He was interviewed but he was sent a regret letter informing him that he was unsuccessful and was advised to await a vacancy.

4. The Petitioner therefore continued to work at the Pan African Paper Mills (EA) Limited until July 2014, when the Kenya Forest Service completed the staff rationalization and he was released to the Ministry of Environment. He was cleared and released from his last posting at Lugari Forest Zone vide the letter dated 14th August 2014.

5. However, he was not absorbed by the Ministry. The Petitioner states that since August 2014, he has been travelling to western to follow up on his deployment which costs him KShs. 7,000.00 per return trip. Despite his plea to the Principal Secretary's office and the assistance of the Office of the Ombudsman to have him deployed, nothing has been forthcoming. He avers that the Ministry has failed to reinstate his salary despite him being their employee. It is his position that this action is unfair, improper, irregular, unconstitutional, unlawful and inappropriate.

6. The Respondents have opposed the Petition vide the Replying Affidavit of Henry Ndeto Nguti sworn on 22nd October 2018. They admit the facts of the Petition regarding the Petitioner's employment date, his career progression and the fact that he requested for 2 years unpaid leave.

7. They aver that the Ministry wrote the letter dated 23rd December 2004 to the Directorate of Personnel Management seeking authority to allow the Petitioner to take up an appointment with Pan African Paper Mills as a forest manager. The Petitioner took up the appointment on the premise that the approval would be granted. Due to an oversight, the letter regarding the Petitioner's 2-years' unpaid leave was not responded to. However, the Petitioner was deemed to be on secondment effective 10th November 2004 and his unpaid leave was supposed to end on 6th November 2006.

8. The Respondents contend that the Petitioner did not report back to work after the expiry of his unpaid leave and neither did he seek an extension. They further contend that he continued to work as the Forest Manager for Pan Paper Mills (EA) Limited without following the necessary procedures, a fact evidenced in the letters of 11th September 2004 and 6th April 2009 as submitted by the Petitioner.

9. It is the Respondents' case that since the Kenya Forest Department was made semi-autonomous by the Kenya Forests Act 2005, the Petitioner was therefore an employee of Kenya Forest Service and not the Ministry. As such, they are the rightful organ to address the issues raised by the Petitioner.

10. The Petition was disposed of by way of written submissions. The Petitioner filed his submissions on 15th July 2019 while the Respondents filed theirs on 18th September 2019.

Submissions by the Parties

11. The Petitioner submits that the Ministry acted improperly and irregularly in handling the entire process of secondment, deployment and there being lack of disciplinary action or documentation. It is his position that such administrative action violates the provisions of Articles 10, 27, 47 and 232 of the Constitution, sections 4, 5, 6 and 7 of the Fair Administrative Action Act and the rules of natural justice.

12. The Respondents submit that under section B.33 of the Human Resource Policy and Procedures Manual for Public Service, secondment of officers from civil service to other organizations is for a period not exceeding 3 years and must be approved by the Ministry of Public Service. As such, any request for extension of the secondment period from the host organization must be made to the authorized officer in writing one month before the before the scheduled period expires. As such, the Petitioner was supposed to return to the Ministry after the expiry of the 2-year period. In failing to do so, his employment relationship at the Pan Paper Mills was subsisting un-procedurally and unlawfully.

13. The Respondents further submit that the Petition is time barred having been filed outside the period stipulated in section 90 of the Employment Act and Section 3 (2) of the Public Authorities Act. The Petition was filed on 27th March 2018 yet the Petitioner's employment with Pan Paper Mills was terminated on 22nd September 2012. They rely on the cases of **Benjamin Wachira Ndiithi vs. Public Service Commission & Another [2014] eKLR** and **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**.

14. It is their submissions that the Petitioner has not specifically demonstrated how his constitutional rights were violated. They aver that the Petition is a reproduction of constitutional provisions.

15. Further, the allegations of breach lack any basis and is contrary to rule 10 of the ELRC Rules 2016 and Rule 10 (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules 2013. They rely on the cases of **Anarita Karimi Njeru vs. Republic [1976-80] 1 KLR 1272** and **Trusted Society of Human Rights Alliance vs. Nakuru Water and Sanitation Services Company Limited & Another [2013] eKLR**.

16. It is their submissions that the Petitioner is not entitled to costs as he has failed to prove his case on a balance of convenience.

17. I have examined all the averments and submissions of the Parties herein. The issues for this Court's determination are as follows:-

1. Whether this Petition is time barred.

2. Whether any rights of the Petitioner were infringed upon and by who.

3. Whether the Petitioner is entitled to prayers sought.

Time

18. This Petition was filed on 31/3/2018 by the Petitioner here seeking orders of this Court to correct the infringement of his rights since 2014. Indeed if this was an employment claim, this case would be time barred under Section 90 of the Employment Act 2007.

19. The claim by the Petitioner however is that there has been constitution inaction by the Respondents and therefore the issue of time has not crystalized.

20. I do agree that the Claimant's contention is that the Respondent have not acted on his issues as communicated to them. The Respondent

have not even terminated or dismissed the Petitioner for them to allege that time has run and expired. In the circumstances, I find the submissions that this Petition is time barred not true.

Infringement of rights

21. The Petitioner has averred that his rights under the Constitution have been infringed upon. He cites, in particular, his rights under Article 10, 27, 47 and 232 of the Constitution and Section 4, 6 and 7 of the Fair Administrative Action Act.

22. Article 10 of the Constitution deals with national value and principles of governance which states as follows:-

1) “The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them:-

a) applies or interprets this Constitution;

b) enacts, applies or interprets any law; or

c) makes or implements public policy decisions.

2) The national values and principles of governance include:-

d) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

e) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

f) good governance, integrity, transparency and accountability; and

g) sustainable development.

23. The Petitioner has not submitted how his rights under Article 10 of the Constitution have been infringed upon.

24. Article 27 of the Constitution on the other hand deals with equality and freedom from discrimination. The Petitioner has also not explained how his freedom has been curtailed or how he has been discriminated against.

25. Article 47 of the Constitution deals with fair administrative action wherein Article 47(1) states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

26. The Petitioner has complained that he has sought certain actions from the Respondent since 2014 but there is no communication about his position since he was seconded to Pan Paper Mills Limited. His salary has been withheld since then and he has not been posted or deployed.

27. From the documents supplied by the Petitioner, he was posted to Lugari District as District Forest Officer on 3/2/2004.

28. On 12/10/2004, the Petitioner wrote to the Permanent Secretary, Ministry of Environment and Natural Resources seeking for 2 years unpaid leave in order to take up a job he had been offered by Pan Paper Mills.

29. The Respondents have submitted that the Accounting Officer allowed the Petitioner to proceed on this secondment till 9th November 2006.

30. The Petitioner has submitted that in the intervening period, staff of the Forest Department were replaced by the Kenya Forest Service after the enactment of the Forest Act 2005 which was gazetted on 29th November 2005. The Act became operational on 1/2/2007. He avers that the Permanent Secretary deployed all staff in Forest Department including himself to Kenya Forest Service with effect from 1.2.2007.

31. He avers that he continued working for Pan Paper Mills (E.A) Limited as Kenya Forest Service (KFS) was unable to deploy him in any other capacity and in July 2014, he was released back to the Ministry of Environment, Water and National Resources.

32. He was also cleared and released for his last posting at Lugari (forest) Zone vide a letter KFS/ZM/L/3/1/2/V.11/5 dated 14/8/2014. His contention is that he reported to the Ministry and this was confirmed by the letter dated 23/9/2014 Ref No.EST/1989006774/74/2. Since then, the Petitioner avers that he has neither been absorbed back nor deployed and has never that been paid any salary since September 2012 when he left Pan Paper.

33. Given the chronology of events herein, the Respondent have not acted expeditiously as they ought to. They have not communicated to the Petitioner the true position of his status hence this case.

34. I do agree that the Respondent have been guilty of delay and not communicating the true position of Petitioner’s employment and neither

have they terminated his services.

35. It is my finding that the Respondents have infringed on Petitioner's rights to fair administrative action under Article 47 of the Constitution and also Article 35 on access to information.

36. I therefore find for the Petitioner and award him as follows:-

1. I direct that the Respondent forthwith reinstates the Petitioner to the payroll and deploy the Petitioner as prayed and with all his back pay with effect from 2012 September todate.

2. Costs of the Petitioner be paid by the 1st Respondent

Dated and delivered in open Court this 31st day of October, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mary Ongere holding brief Kinyua for Respondent - Present

Petitioner – Absent