



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

PETITION NUMBER 2 OF 2019

IN THE MATTER OF: ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: AN ALLEGED CONTRAVENTION AND THREATENED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 1, 2, 6, 10, 20, 21, 22, 24, 25, 27, 28, 29, 30, 32, 33, 35, 40, 41, 43, 45, 47, 48, 50, 52, 73, 75, 153, 232, 236, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA 2010, THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF: EMPLOYMENT ACT OF 2007

AND

IN THE MATTER OF THE SURVEY ACT, CAP 299 LAWS OF KENYA.

AND

IN THE MATTER OF THE NATIONAL PUBLIC SERVICE COMMISSION ACT NO. 10 OF 2017

AND

IN THE MATTER OF ARTICLES 1, 2, 6, 7, 8, 10, 16 (1), 17, 18, 19, 23, OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

AND

IN THE MATTER OF ARTICLES 2, 3, 4, 18, 19, 23 AND 26 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 4, 5, 6, 7, 9, AND 12 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF ARTICLES 1, 2, 3, 4, 5, 6, 7, 8, 15, 16, 17 AND 18 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

AND

IN THE MATTER OF ARTICLES 1, 2, AND 3 OF THE DISCRIMINATION (EMPLOYMENT AND OCCUPATION) CONVENTION NO. 111

BETWEEN

RACHEL MUTHEU NDAMBUKI.....PETITIONER

VERSUS

CABINET SECRETARY, MINISTRY OF

LANDS AND PHYSICAL PLANNING.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Njoroge & Katisya Advocates for the Petitioner

Attorney General for the Respondents

RULING

1. On 22nd February 2019, the Court issued interim conservatory order, as prayed by the Petitioner, staying the decision of the 1st Respondent contained in a letter dated 6th February 2019. The 1st Respondent, deployed the Petitioner to Garissa Survey Department.

2. The letter of 6th February 2019 reads: -

“It has been decided that you be transferred from Taita Taveta Survey Office, to Garissa Survey Office due to service need.

You are therefore required to report to the Officer In-Charge, Survey Office, Garissa for assignment of duties, with immediate effect after proper handing over to your Supervisor.

By a copy of this letter, the Officer In-charge, Survey Office, Garissa is requested to confirm to this office the exact date you report for duty”

3. The order was served upon J.W. Njogu, Deputy Chief State Counsel in the Ministry of Lands.

4. The Petitioner holds, or held at the time transfer decision was communicated, the position of Officer In-charge, Taita Taveta Survey Field Office.

5. On 10th May 2019, after conservatory order had issued, the 1st Respondent transferred one Justice Kiprono Korir, to Taita Taveta Survey Field Office, as the Officer In-charge.

6. The Petitioner states she took maternity leave. While she was on maternity leave, Justice Kiprono Korir broke into the Petitioner’s Office on 16th July 2019, took possession of the Office, and all documentation therein.

7. The Petitioner has filed two Affidavits with relevant documents, supporting her position.

8. Against this backdrop, the Petitioner filed an Application on 8th August 2019, seeking the following Main orders:-

ii. The Honourable Court be pleased to find the Cabinet Secretary, Ministry of Lands and

Physical Planning, Ms. Farida Karoney, in contempt of the Orders granted on 22nd February 2019.

iii. The Honourable Court be pleased to order that the said Cabinet Secretary, be arrested and committed to civil jail for a term not exceeding 6 months.

iv. The Honourable Court be pleased to order that the said Cabinet Secretary should not be heard until she purges the contempt.

9. The 1st Respondent opposes the Application, through the Affidavit of now Chief State Counsel J.W. Njogu, sworn on 18th September 2019.
10. Counsel posits that the order was not served on the Cabinet Secretary in person. The 1st Respondent has not disobeyed the order.
11. The Petitioner's transfer remains stayed. She has not been moved or reported to any other station.
12. Justice Kiprono Korir, Principal Land Surveyor was transferred from Nairobi to Taita Taveta Survey Office, and is senior to the Petitioner.
13. On 14th June 2019, the Petitioner was not in office. Her office was locked. Justice Kiprono Korir could not access the office. The Petitioner was contacted by phone. She declined to avail the Office Key.
14. The matter was reported to the Sub-County Security Committee, who authorized breaking of the lock, to allow Justice Kiprono Korir, access the Office.
15. Chief State Counsel J.W. Njogu, acknowledges that at the time of swearing his Affidavit, the Petitioner was still on maternity leave. Her transfer remains stayed.
16. The Application was heard on 19th September 2019. Parties underscored the contents of respective Affidavits on record.

The Court Finds:-

17. Service of the order was made upon the Chief State Counsel Ministry of Lands and Physical Planning.
18. This was proper service made to the Cabinet Secretary, service having been effected on her Chief State Counsel.
19. It is clear that the Cabinet Secretary opted to disregard the order, and send her appointee Justice Kiprono Korir to take over as Officer In-Charge, Survey Field Office, Taita Taveta.
20. The Chief State Counsel concedes in his Affidavit on transfer of Justice Kiprono Korir. He goes further to concede that the Petitioner's Office was broken into by Justice Kiprono Korir with the aid of local state apparatus. The office was taken over forcibly, while the Petitioner was away on maternity leave.
21. This evidence suggests that Justice Kiprono Korir physically took over the office occupied by the Petitioner. It is illogical to submit, as submitted by the 1st Respondent, that the Petitioner's transfer has not been implemented. She was effectively forcibly removed from her station, despite the existence of an order from the Court, conserving her position at Taita Taveta.
22. The behavior of the 1st Respondent, Cabinet Secretary Ms. Farida Karoney mirrors the behavior of other Cabinet colleagues in a long chain of cases involving the Executive, in which orders of the Court have been contumaciously flouted. These cases culminated in several decisions of Superior Courts, in what may be in general, characterized as *Miguna Miguna Contempt of Court Decisions*.
23. In Court of Appeal of Kenya, ***Fred Matiangi, the Cabinet Secretary Ministry of Interior and Co-ordination of National Government v. Miguna Miguna & 4 Others [2018] e-KLR***, the Court emphatically stated:

“When Courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for a party, be he high or low, weak or mighty, and quite regardless of standing in society, to decide whether or not to obey, to choose which to obey and which to ignore, or to negotiate the manner of his compliance.”
24. These strong words, were directed at Dr. Fred Matiangi and are as much relevant to his Cabinet Sister Farida Karoney in this Petition.
25. The 1st Respondent cannot choose how to implement the conservatory order issued by this Court. She cannot fill the Petitioner's position at Taita Taveta with another Officer, effectively jettisoning the Petitioner, while still holding to have complied with the order.
26. The Court finds the 1st Respondent in Contempt of Court.
27. Before the 1st Respondent can be sentenced in the manner proposed by the Petitioner, the Court is of the view that she ought to have an opportunity to purge contempt.
28. This view is based on the fact that most of the aggravating actions of the Cabinet Secretary, have taken place while the Petitioner is on maternity leave. The Petitioner has not had the chance to confront Justice Kiprono Korir eyeball to eyeball, and assess whether he is beyond persuasion, in leaving Petitioner's Office to the Petitioner, until this petition is finalized.
29. The Court seeks to protect its dignity and integrity of its proceedings, by ensuring there is compliance. This can be achieved without

hasty sentencing of contemnors. An opportunity for purging of the contempt, creates a window, for Parties in contempt, to rethink the slippery path they have taken.

IT IS ORDERED:-

a) The 1st Respondent is found to be in Contempt of Court.

b) The 1st Respondent is granted an opportunity to purge the contempt by:

(i) Reversing in writing, the transfer of Justice Kiprono Korir as the Officer In-Charge, Survey Field Office – Taita Taveta.

(ii) Communicate in writing to the Petitioner, that she remains Officer In-Charge, Survey Field Office – Taita Taveta, until further orders of the Court.

(iii) Ensure the Petitioner takes physical occupation of her office upon her return from maternity.

(iv) Parties shall move the Court as soon as practicable, to confirm that 1st Respondent has purged contempt, or to take a date for her sentencing.

Dated and delivered at Mombasa this 25th day of October, 2019.

James Rika

Judge