



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 152 OF 2018

IN THE MATTER OF: ARTICLES 2(5),(6), 10, 19, 20, 21, 22, 23, 27, 28, 29, 160(2)(a), 165, 172, 236, 258, 259(1),(3) AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLE 47 OF THE CONSTITUTION AND SECTIONS 3, 4, 5, 6 & 7 OF THE FAIR ADMINISTRATION ACTION ACT (2015) AND ARTICLE 159(2)(d) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ACCESS TO INFORMATION ACT

ARTICLE 23(1) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

INTERNATIONAL COVENANT ON ECONOMIC AND SOCIAL RIGHTS

ARTICLE 25(1) OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

AFRICA CHARTER ON HUMAN AND PEOPLES RIGHTS

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN ARTICLE 12

INTERNATIONAL LABOUR ORGANISATION GENERAL COMMENT NO. 14 ON THE RIGHT TO HEALTH, COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

ILO GUIDELINES ON HIV/AIDS IN THE WORKPLACE

AND

IN THE MATTER OF: SECTION 5 OF THE PENSIONS ACT

AND

IN THE MATTER OF: SECTIONS 12, 41, 43 & 45 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT NO. 20 OF 2011, SECTION 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT RULES

AND

IN THE MATTER OF: JUDICIAL SERVICE ACT SECTION 5, 8, 32(3) AND RULES 25(1-11) OF THE 3RD SCHEDULE

BETWEEN

NML.....PETITIONER

JUDGMENT

1. On or around 22 May 2014, the Registrar of the Magistrates Court wrote to the NML (Petitioner) who was then serving as a Senior Principal Magistrate to inform her of complaints raised by the Law Society of Kenya, Western region on pending judgments and rulings; and pronounced summary judgments and rulings not reduced into writing (reasoned), and directing that she submits a report on all pending judgments and rulings from all the stations she had served in and proceed on 30 days leave to complete the preparation of the judgments and rulings.
2. Upon receipt of the letter, the Petitioner replied on 30 May 2014 listing about 59 cases with pending judgments and rulings. She promised to clear the judgments and rulings.
3. On 22 August 2016, the Chief Registrar (2nd Respondent) wrote to Petitioner to inform her of her interdiction.
4. The reason given for the interdiction was that the Petitioner had 204 pending judgments/rulings. It was stated that some of the judgments had been pending for over a year.
5. On the same day, the 2nd Respondent sent a charge to the Petitioner and requested her to respond within 21 days.
6. The Petitioner responded to the charge on 13 September 2016. The Petitioner gave an elaborate response to the charge.
7. On 25 January 2017, the Judicial Service Commission (1st Respondent) granted the Petitioner an oral hearing and on 9 February 2017, the Chief Justice wrote to the Petitioner to notify her of her dismissal from service.
8. The Petitioner then sought legal advice and on 1 March 2017, her then legal advisers filed an Appeal with the 1st Respondent against the dismissal (the legal advisers were informed was not successful through a letter dated 13 July 2017).
9. On 21 March 2017, the Respondents furnished the Petitioner's legal advisers with a copy of the Hansard of the disciplinary hearing.
10. On 31 December 2018, the Petitioner moved the Court under certificate of urgency to challenge the dismissal, and the Petition was certified as urgent and the Respondents were directed to file a response by close of 5 February 2019 (the Registrar of the 1st Respondent filed a replying affidavit in opposition to the Petition on 8 February 2019).
11. When the Petition came up for directions on 7 February 2019, the Court directed the parties to file some documents which were missing from the record.
12. The Petitioner was directed to file and serve further affidavit and submissions before 15 February 2019 while the Respondents were directed to file and serve their submissions before 1 March 2019 ahead of highlighting on 6 March 2019.
13. The Petitioner filed her further affidavit, submissions and Issues for determination on 19 February 2019 while the Respondents filed their submissions on 5 March 2019.
14. The submissions were highlighted on 6 March 2019 and on 1 July 2019.
15. The Petitioner identified some 6 Issues as arising for determination while the Respondents had listed some 8 Issues for the determination of the Court in the replying affidavit (in the submissions, the Respondents reduced the Issues to 6). Save for language, the Issues are broadly the same.
16. The Court will agree with the Respondents that the Petition was needlessly repetitive and general and did not comply with the drafting strictures set out in the *Anarita Karimi Njeru v R* (1979) 1 KLR 54 decision. The verbosity was repeated in the submissions.

Functional Jurisdiction of 2nd Respondent in the discipline of judicial officers

17. Issues 1 and 2 as raised by the Petitioner and Issue 1 as proposed by the Respondents in the submissions spoke to the role of the Chief Registrar in the disciplinary process of judicial officers.
18. In challenging the jurisdiction of the 2nd Respondent, the Petitioner contended that in terms of Article 172(1) of the Constitution and section 32 of the Judicial Service Act as read with section 25 of the Third Schedule thereto, the Chief Justice, in the exercise of his statutorily delegated authority was expected to make inquiries before framing a charge and before escalating the case to the Judicial Service Commission, in order for the Commission to decide whether to initiate disciplinary proceedings.
19. Further, the Petitioner asserted that in terms of section 16 of the Third Schedule, it was the mandate of the Chief Justice to interdict a judicial officer after satisfying him/herself that public interest required such a decision, and that the Chief Registrar could not purport to

usurp or perform the function.

20. Citing the cases of *William Chepkwony v County Government of Kisii* (full citation/copy not provided) and *Macfoy v United Africa Co. Ltd* (1961) 2 AI ER 1169, the Petitioner submitted that the interdiction and framing of the charge by the 2nd Respondent was null and void.

21. The Respondents were of the contrary view.

22. According to the Respondents, disciplinary control over judicial officers was a function of the 1st Respondent which Parliament had seen fit to delegate to the Chief Justice for purposes of initiation of a disciplinary process, and that because there was a *power vacuum* at the material time, the powers reverted to the 1st Respondent.

23. In this respect, the Respondents drew the attention of the Court to the Supreme Court decision in *In the Matter of the National Land Commission* (2015) eKLR to urge that delegation of functions does not amount to transfer of functions.

24. In furthering the view, the Respondents took the position that under the *doctrine of necessity*, and anchored on functional mandate given to the Chief Registrar by section 8 of the Judicial Service Act to be *responsible for the overall administration and management of the judiciary; to give effect to the directions of the Chief Justice and to be responsible for efficient management of day to day operations and administration of human resource in the judicial service*, the 2nd Respondent being third in administrative hierarchy (after the Chief Justice and Deputy Chief Justice) could exercise the delegated powers in the interest of efficiency and fair administration.

25. It was further contended that the 2nd Respondent being aware of the limitations of her functional mandate, only forwarded the case to the 1st Respondent. It was categorically denied that the 2nd Respondent usurped powers which did not belong to her.

26. According to the Respondents, the Chief Registrar acted pursuant to her role as Secretary of the 1st Respondent and therefore did not usurp a mandate which did not belong to her.

27. It is not in dispute that when the Petitioner was interdicted and was issued with a charge on 22 August 2016, the office of the Chief Justice/Chairperson of the Judicial Service Commission was vacant. The Chief Justice in office then had left office on 16 June 2016.

28. However, save for the indication in the letter from the Registrar of the Magistrates Court dated 22 May 2014, the Respondents did not produce any material to suggest that inquiries, as contemplated by section 25 of the Third Schedule of the Judicial Service Act, were made.

29. Equally, no material was placed before the Court that the Chief Justice had framed the charges put to the Petitioner under the hand of the 2nd Respondent.

30. Of interest, and the Respondents did not explain is why the 2nd Respondent saw it fit in the name of efficient administration and management to interdict the Petitioner some 2 years after the letter from the Registrar, Magistrates Courts (the Chief Justice had left office only 2 months before the interdiction).

31. In disciplinary control over judicial officers, the Chief Justice exercises powers directly delegated by statute.

32. The Statute has not provided that the Chief Registrar could exercise some of the functions delegated to the Chief Justice in the absence of the office holder.

33. Even assuming that disciplinary control is ultimately a function of the Judicial Service Commission and taken as a given that a principal can delegate, there was no evidence placed before the Court that the Commission, being aware of the *vacuum in office* had delegated or required the Chief Registrar to exercise the functions.

34. It is correct that the office of the Chief Registrar has been given general statutory responsibility *for the overall administration and management of the judiciary; to give effect to the directions of the Chief Justice and to be responsible for efficient management of day to day operations and administration of human resource in the judicial service*.

35. It is also correct that disciplinary control is broadly an administrative and management function.

36. However, in respect of judicial officers, the same statute in vesting disciplinary control in the Judicial Service Commission and the Chief Justice has withdrawn or restricted that function from the office of the Chief Registrar. The general legal provision must yield to the special legal provision (*lex specialis derogate generali*).

37. The Court, therefore, finds the suggestion by the Respondents that the Chief Registrar, being number 3 in the judicial administrative chain and also serving as Secretary to the Judicial Service Commission could perform functions delegated to the Chief Justice during a vacancy in the office, unattractive. Not only unattractive but repulsive.

38. In interdicting the Petitioner and framing the charges, the Chief Registrar was acting *ultra vires* her Constitutional and statutory mandate, and the Court so finds.

39. Having come to that conclusion, it would not be legally prudent to the Court to address its mind to the other questions proposed and submitted on by the parties in their submissions in order not to tie the hands of the Respondents or prejudice any other legal challenges by the

Petitioner.

Conclusion and Orders

40. The Petitioner sought 15 orders and/or declarations.

41. Some of the declarations as framed by the Petitioner were so verbose and overbroad that if they were allowed as drafted would lead to unintended or overbroad consequences.

42. The Court will in lieu of the orders sought issue orders and declarations in amended form as follows

i. A declaration that the Chief Registrar has no jurisdiction under the Constitution and/or Judicial Service Act to interdict and/or frame a charge against a judicial officer

ii. A declaration that the Chief Registrar's action to interdict and frame charges against the Petitioner was *ultra vires* her Constitutional and statutory jurisdiction, and functions and amounted to a usurpation of the jurisdiction and functions of the Judicial Service Commission and the Chief Justice.

iii. A declaration that the process leading to and the dismissal of the Petitioner from the office of Senior Principal Magistrate was void *ab initio*.

iv. An order that the Judicial Service Commission and the Chief Justice do commence and conclude afresh the disciplinary process against the Petitioner within 60 days.

43. The Court further orders that the Petitioner be deemed as having been on interdiction on half salary from 22 August 2016 up to date of conclusion of the fresh disciplinary process.

44. Petitioner to have costs.

45. The Court regrets that it could not deliver this judgment on 27 September 2019 as earlier scheduled due to other official commitments.

Delivered, dated and signed in Nairobi on this 11th day of October 2019.

Radido Stephen

Judge

Appearances

For Petitioner Mr Okemwa instructed by Okemwa & Co. Advocates

For Respondents Mr Odongo instructed by Gumbo & Associates, Advocates

Court Assistant Lindsey