



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**JUDICIAL REVIEW NO. 15 OF 2016**

(Before Hon. Lady Justice Hellen S. Wasilwa on 23<sup>rd</sup> October, 2018)

FELISINA WANJIRA NDWIGA.....APPLICANT

VERSUS

PUBLIC SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The Application before Court is one dated 14/6/2018 filed by the Applicant herein on 18/6/2018 seeking orders that the 1<sup>st</sup> Respondent be restrained by themselves, their servants, agents and/or employees from filing the position of the Applicant herein (Senior Assistant Director of Immigration Services – Job Group Q) pending the filing and determination of an intended appeal by the Respondents.

2. She also seeks orders that the 1<sup>st</sup> Respondent should not appoint and/or recruit any interviewed candidates to take up the position of the Applicant pending hearing and determining of an intended appeal of the Respondent.

3. In the alternative, she seeks the Court orders her placed under interdiction pending the hearing and determination of an intended appeal by the Respondents.

4. The Application is grounded on the following reasons that:-

*a) The 1<sup>st</sup> Respondent has commenced interviews for the Position of the Applicant herein, Senior Assistant Director of Immigration Services with effect from 11/6/2018 to 12/6/2018 despite an order for reinstatement of the Applicant into Public service.*

*b) The first Respondent had earlier on advertised for 8 positions of Senior Assistant Director of Immigration Services vide advert N0.39/2017 dated 25/5/2017. The same was stayed vide Court orders dated 26/7/2017.*

*c) The Applicant upon illegal dismissal from service instituted the instant matter challenging her removal from service and vide a judgment delivered on 21/9/2017 by Honourable Lady Justice Wasilwa the Applicant was reinstated.*

*d) The Respondents, being aggrieved by the decision of the Court filed Notice of Appeal against this Court's Judgment.*

*e) The Respondents since filing of the Notice of Appeal dated 5/10/2017 have not filed record of Appeal despite supply of certified proceedings by the Court.*

*f) The filling of the position of the Applicant by the 1<sup>st</sup> Respondent without any security will render the Court decree nugatory and hence the urgency of the matter.*

5. The Application is also supported by the Supporting Affidavit of the Applicant sworn on 14.6.2018 and filed in Court on 18/6/2018 where she reiterates the averments made in the above grounds.

6. She further avers that the Respondent re-advertised position of Senior Job Group G, sanctioned interviews to go on to fill the position of

Applicant despite pendency of an intended appeal by the Respondent.

7. It is her contention that if this is allowed, then it will be to her detriment and her decree will be null and void. The Applicant further contends that the Respondents have filed a Notice of Appeal but no appeal has been filed.

8. The Respondent have filed Civil Appeal NAI 115/2018 seeking extension of time to file an appeal out of time and now before this Court are two applications for contempt and for stay. The Applicant contends that the Respondent is intent on delaying tactics so as to fill the Applicant's position and therefore render the decree unenforceable and lock out the Applicant from employment.

9. The Respondents on their part filed an application before Court seeking stay which stay orders were denied. The Respondents opposed the Application before Court. They contend that the Applicant has no interest in the position as hand which is the position she previously occupied and which position she can no longer be reinstated into as the Court's judgement delivered on 21/9/2017 at paragraph 68 is very clear and states as follows:-

***“However, given the position she occupied in the service and given that some of the officers who sat on the Ministerial Human Resource Advisory Committee (MHRAC) that recommended her dismissal still work in the same Ministry, it would be a frosty situation if I reinstated her in the same position. I therefore make a finding that she forthwith be re-engaged in the public service and preferably in a different ministry but on the same rank”.***

10. The Respondent also contend that this Court has no jurisdiction to hear and determine this Application as the Court is functus officio having heard to conclusion this matter and having already rendered a judgement.

11. On whether the Applicant should be placed on interdiction, the Respondents submit that this matter should be lodged and be heard at the Court of Appeal where the Respondent had already filed a pending appeal.

12. I have considered the averments and submissions of the Parties. Indeed, I rendered a judgment in this matter on 21/9/2017 and as stated at paragraph 68 (supra) of the said judgement, I made it clear that the Claimant should be re-engaged in the public service and preferably in a different Ministry but on the same rank.

13. It is therefore clear that from this judgement, the Claimant will not be required to occupy the advertised position of Senior Assistant Director of Immigration Services – Job Group Q which she formerly occupied.

14. I ordered her re-engaged in the service. It is therefore my position that she no longer has an interest in the above mentioned position. Her application to bar the Respondents from filling the vacancy in question is therefore not tenable.

15. On the issue of whether I can grant further orders putting her on interdiction, I do not believe I can review my orders from re-engagement to have her placed on interdiction because the matter in currently before the Court of Appeal.

16. Having fully rendered myself in this case by delivering a judgment and even subsequent rulings, it is my finding that this Court is now functus officio and I decline to grant any other orders/directions.

17. Costs will abide the outcome of the Appeal.

**Dated and delivered in open Court this 23<sup>rd</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Oyugi for Respondent – Present

Applicant in person - Present