



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT AT NAIROBI**

**PETITION NO 2 OF 2015**

**IN THE MATTER OF THE JUDICIAL SERVICE ACT**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT**

**AND**

**IN THE MATTER OF THE INFRINGEMENT, VIOLATION AND DENIAL OF**

**FUNDAMENTAL RIGHTS & FREEDOMS UNDER ARTICLES**

**19,20,21,22,23,27,28,29,30,31,32,35,36,38,40,41,43,47,48,50,236 OF THE CONSTITUTION**

**OF KENYA**

**AND**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS UNDER ARTICLE 23 OF THE**

**CONSTITUTION OF KENYA 2010**

**BETWEEN**

**FRANCIS KAKAI KISSINGER ..... PETITIONER**

**VERSUS**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

Mr. Kwengu for the petitioner

Mr. Issa Mansur for the respondent

**JUDGMENT**

1. The petitioner filed a petition dated 5<sup>th</sup> January 2015 seeking the following orders *inter alia*;
  1. a permanent injunction do issue, restraining the respondents, their agents, employees, servants and or any person claiming and or deriving title from the respondents from removing the applicant employment as Deputy Chief Registrar based on the proceeding of 28<sup>th</sup> July 2014;
  2. an order to compel the respondents to pay the applicant all his monthly salary outstanding and to continue making regular payments of the full salary as per the letter of appointment;
  3. an order of permanent injunction do issue, restraining the respondent, their agents, employees, servants and or any person claiming and or deriving title from the respondent from recruiting a new Deputy Chief Registrar of the Judiciary on the basis of advertisement of 23<sup>rd</sup> December 2014;
  4. a declaration that the advertisement of the position of Deputy Chief Registrar of the Judiciary on 23<sup>rd</sup> December 2014 is illegal, null and void;
  5. that an order of certiorari be issued to bring into this court and to quash the letter of removal dated 17<sup>th</sup> December 2014;
  6. an order of certiorari be issued to bring into this court and to quash the proceedings dated 28<sup>th</sup> July 2014;
  7. a declaration that the respondent violated the rights of the petitioner as set out herein;
  8. an order of mandatory injunction to compel the respondent to forthwith reinstate the applicant to his employment as a Deputy Chief Registrar of the judiciary;
  9. a declaration that the petitioner is entitled to compensation for unlawful termination and loss of employment and violation of his constitutional rights and the same be paid within 30 days from the date of the order;
  10. costs of the petition;
  11. any other or further orders, writs and directions the Honourable court considers appropriate and just to grant for the purpose of the enforcement of the petitioner's fundamental rights and freedoms.
2. The application is premised primarily on the ground that the Judicial Service Commission (hereinafter JSC) failed to provide the petitioner with all the documents and witness statements that formed the basis of the allegations of gross misconduct against the petitioner therefore the disciplinary process was flawed.

### **Facts of the petition**

3. On 5<sup>th</sup> January 2015, the petitioner's employment as the Deputy Chief Registrar of the Judiciary DCRJ was terminated.
4. DCRJ was appointed by a letter dated 15<sup>th</sup> January 2011. On 23<sup>rd</sup> January 2012, the petitioner was appointed chairman of the Judiciary Tender Committee (JTC) by the JSC.
5. DCRJ states that he was informed by the Chief Registrar of Judiciary (CRJ) that the appointment as chairperson of JTC was a '*personal appointment.*' It is the petitioner's case that there was no nexus between the petitioner's appointment as DCRJ and the position of the chairperson.
6. On 25<sup>th</sup> October 2013, JSC appointed the petitioner as acting Chief Registrar of the Judiciary and was designated the accounting officer by the then cabinet secretary National Treasury.
7. On 31<sup>st</sup> March 2014, the petitioner received a letter from the Hon. Chief Justice with seven allegations of gross misconduct requiring the petitioner to respond within seven days.
8. On the same day, the petitioner was interdicted from service to pave way for investigations on half salary.
9. The petitioner was charged with gross misconduct particularized as follows;
  - i. Irregular awards by the Judiciary Tender Committee contrary to section 26(2)(6) of the Public Procurement and Disposal Act and Public Procurement and Disposal Regulations, 2006 and as a result, the Judiciary incurred unpaid bills in the sum of Kshs.98,894,911.00;
  - ii. Lack of evidence of contractual awards for Local Service Orders (LSOs) by the Judiciary Tender Committee; which awarded LSOs in the sum of Kshs.12,696,033.00;
  - iii. Retrospective procurement approvals contrary to Regulation 27(2) of the Public Procurement and

- Disposal Regulations, 2006;
- iv. Failure to report direct procurement to the Public Procurement Oversight Authority as stipulated in Regulation 62(2) of the Public Procurement Disposal Regulation;
  - v. Failure to exercise due diligence and comply with Public finance Regulations Act in the leasing of premises;
  - vi. Direct procurement of second hand furniture;
  - vii. Authorizing pre-payments for pre-fabricated court houses in the sum of Kshs. 82,737.000.00.
10. On 3<sup>rd</sup> April 2014, the petitioner wrote to the Honourable Chief Justice confirming receipt of the letter of 31<sup>st</sup> March 2014 and also requesting to be supplied with documents and witness statements that JSC intended to rely on.
11. On 11<sup>th</sup> April 2014, the petitioner wrote to the Hon. the Chief Justice responding to the allegations of gross misconduct under protest as he had not been supplied with documents and witness statements thus preventing him from being able to respond effectively.
12. On 23<sup>rd</sup> June, 2014, the petitioner received two further allegations of gross misconduct as follows;
1. While performing his duties as chairman of the Judicial Tender Committee;
    - a. He led the committee to award a tender to Knight Frank (K) Ltd. Contrary to the requirements of section 2.10 of the Tender Document that required prices to be quoted in Kenya Shillings as the quotation of Knight Frank was made in US dollars.
    - b. According to section VI of the Tender document, the premises sought by Judiciary were to be in a serene and secure location and in good condition, ready to be occupied and not in post construction state or requiring major reconstruction or renovation. The tender was however awarded to Knight Frank (K) Ltd. Who then leased out the Elgon Place Property which was still under construction and this *“caused loss of public funds paid in form of rent in advance awaiting completion of the construction.”*
  2. The petitioner failed to exercise due diligence in the Tender committee and awarded a contract to Timsales Limited for construction of prefabricated court houses in Mavoko where the Judiciary did not have its own land for the construction.
13. On 24<sup>th</sup> June 2014, the petitioner requested for documentation supporting the two additional allegations, but the letter was not responded to. On 1<sup>st</sup> July 2014, the petitioner responded to the two additional allegations under protest.
14. On 3<sup>rd</sup> July 2014, the petitioner expressed his inability to prepare for the disciplinary committee hearing as he had not been supplied with documents and witness statements. Pheroze Nowrojee SC also wrote recapping the petitioner’s concerns.
15. On 11<sup>th</sup> July 2014, at the disciplinary hearing before the Human Resource Management Committee, the chairman of the committee, Rev. Samuel Kobia made an undertaking that the committee would supply all the relevant documents.
16. The list of documents requested for by the claimant is found in the various letters of request written to the JSC and attached to the petition.
17. On 12<sup>th</sup> July 2014, the petitioner wrote to the respondent listing down the documents he had been requesting for. The letter is marked ‘FKK 25.’
18. On 15<sup>th</sup> July 2014, the respondent wrote to the petitioner stating that it would supply a list of documents it had relied on in framing allegations 3, 7 and 9. No document was however supplied with regard to allegations 6 and 8.
19. By a letter dated 17<sup>th</sup> July 2014, the petitioner wrote to the respondent reminding them of their undertaking to supply the requested documents within 24 hours but this was not heeded.
20. That notwithstanding, the disciplinary hearing scheduled for 28<sup>th</sup> July 2014 before the Human Resource Management Committee proceeded despite pleas by the petitioner and his counsel for the same to be adjourned pending the grant of the requested documents.
21. As a result of the above, the petitioner was unable to take any further part in the disciplinary

- hearing. 'FKK 28' is a copy of the Hansard Verbatim Report.
22. On 17<sup>th</sup> December 2014, the respondent wrote to the petitioner informing him that he had been found guilty of gross misconduct and was summarily dismissed by a unanimous decision of the commission. See 'FKK32.'
23. On 29<sup>th</sup> December 2014, the petitioner wrote to the respondent requesting for a review of its decision on the following grounds;
- i. the entire due process in his case was never followed;
  - ii. the documents that were forwarded to him by the CRJ were documents in relation to the procurement committee of which he was not a member;
  - iii. The nine allegations against him were of victim nature as he was punished single handedly over decisions of the tender committee which decisions are collegial in nature;
  - iv. No single member of the tender committee or witness was called to give evidence against him to the contrary or implicating him of having influenced the tender process as chairman;
  - v. The petitioner responded to all the nine (9) allegations without documents inspite of the various requests for the same but was never furnished with the same.
24. The respondent then advertised the position of DCRJ without any further reference to the petitioner, hence this suit.
25. The petitioner prays that the petition be upheld by the court and the various prayers granted.

### **Replying Affidavit**

26. The respondent replied to the petition vide a replying affidavit of Winfrida Mokaya sworn to on 30<sup>th</sup> January 2015 and filed on 2<sup>nd</sup> February 2015.
27. The nub of the response by JSC is that section 32 of the Judiciary Service Act, 2011 provides for the appointment, discipline and removal of judicial officers and staff as provided for in the Third Schedule of the Act. The JSC is mandated to constitute a committee or panel for purposes of appointment and disciplining of judicial officers and other judicial staff.

The Third Schedule of the Judiciary Service Act, 2011 makes provision relating to the appointment, discipline and removal of judicial officers and staff. Part VIV of the Third Schedule provides for the discipline of judicial officers and staff.

28. In terms of the aforesaid provisions, JSC by a letter dated 31<sup>st</sup> March 2014, informed the petitioner that during his tenure as chairman of the Judiciary Tender Committee he had failed to discharge his duties diligently by acting contrary to the Public Procurement and Disposal Act, 2005, public Procurement and Disposal Regulations, 2006 and the Public procurement and disposal (Amendment) Regulation 2013. The letter set out in detail the allegations of gross misconduct set out herein before in this Judgment and the petitioner was given opportunity to show cause why severe punishment should not be administered against him.
29. Regulation 19 of the Third Schedule to the Judiciary Service Act, 2011 provides for dismissal as one of the punishment that may be inflicted on a judicial officer as a result of the disciplinary proceedings.
30. The chronology of events set out by the petitioner is not in dispute. The petitioner was interdicted on 31<sup>st</sup> March 2014. On 3<sup>rd</sup> April 2014, the petitioner requested the JSC to provide him with documents relied on in framing the allegation in order to enable him to prepare a response.
31. On 11<sup>th</sup> April 2014, the petitioner submitted his response to the notice to show cause.
32. Contrary to what is stated by the petitioner on 30<sup>th</sup> April 2014, the JSC provided the petitioner with a copy of the special internal audit report on unpaid bills totaling Kshs.178,314,638.00 dated 22<sup>nd</sup> January 2014.
33. The respondent states that the petitioner's charges were premised on the special internal audit report dated 22<sup>nd</sup> January 2014, produced and marked 'WM13'.
34. On 23<sup>rd</sup> June 2014, additional charges were preferred against the petitioner. The letter set out in detail the allegations of gross misconduct that had been levelled against him and gave him an

- opportunity to show cause why severe punishment should not be meted against him.
35. The extra charges are already set out in this judgment. The extra charges arose from and were not limited to the special audit report of the JSC and the Judiciary.
  36. That the petitioner was notified that disciplinary hearing would be held on 11<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> 2014. On 1<sup>st</sup> July 2014, the petitioner submitted his response to the further notice to show cause.
  37. By a letter dated 3<sup>rd</sup> July 2014, the petitioner reminded JSC that he had not been provided with the documents he had requested for though he had submitted his response to the additional charges.
  38. By a letter dated 10<sup>th</sup> July 2014, the petitioner's advocate Pheroze Nowrojee, SC sought an adjournment of the disciplinary hearing.
  39. On 11<sup>th</sup> July 2014, the disciplinary hearing did not proceed as the petitioner's advocate sought adjournment and requested for copies of documents in support of all the allegations of gross misconduct to be availed to the petitioner.
  40. The adjournment was granted and the petitioner was directed to write to the CRJ with a list of additional documents required as the JSC had already supplied the petitioner with all the documents requested by the letter dated 30<sup>th</sup> April 2014 [page 3 & 6 of the verbatim report].
  41. By letters dated 12<sup>th</sup> July 2014 and 17<sup>th</sup> July 2014, the petitioner requested for copies of the documents to enable him prepare his response. By a letter dated 15<sup>th</sup> July 2014, JSC provided the petitioner with all the documents requested for except for the documents that the petitioner had failed to hand over.
  42. The disciplinary hearing took place on 28<sup>th</sup> July 2014 when the petitioner was accompanied by advocate Paul Nyamodi. Verbatim report of the JSC HRM committee disciplinary hearing on 28<sup>th</sup> July 2014 is produced and marked 'WM-23'.
  43. The advocate for the petitioner requested for adjournment since JSC had not furnished the petitioner with the documents requested for. The petitioner was informed that the documents the petitioner was requesting for had been handed over by him. [Hansard report page 113]. The petitioner admitted that there were documents that could not be availed as the former CRJ had not handed them over. The petitioner concluded that he was aware that the documents he was requesting for were not in the custody of the respondent. [page 11 Hansard report].
  44. The committee adjourned to consider the matter and ruled that the allegations of gross misconduct levelled against the petitioner were premised on the internal special audit report dated 22<sup>nd</sup> January 2014, the external special audit report dated May 2014, and the documents previously availed to the petitioner. The committee informed the petitioner that there were no witness statements to be furnished and it would be guided by the provisions of section 25(5) of the Third Schedule of the Judicial Service Act, 2011. The petitioner was assured that the disciplinary hearing would proceed based on the documents already availed to him [page 20 – 22 of the Hansard report].
  45. The petitioner through his advocate then opted not to participate any further in the disciplinary hearing [page 22 – 23]. The respondent submits that the allegation by the petitioner that he was not accorded a fair hearing has no basis.
  46. That the committee proceeded to determine the allegations against the petitioner together with the responses to the notices to show cause and recommended appropriate action against the petitioner based on available evidence which showed that the petitioner was guilty of gross misconduct on all the charges preferred against him.
  47. The respondent submits that in terms of section 27(3) of the Public Procurement and Disposal Act, 2006, the liability of the Tender Committee is both personal and collective. That the chairman of the committee and DCRJ has a higher responsibility of ensuring compliance and cannot hide behind decisions of the committee. That the petitioner did not act in the best interest of the Judiciary. Further the petitioner failed in his duty to assist and co-operate with JSC as required under section 42 of the Judicial Service Act, and the petition has no merit and should be dismissed.
  48. By letter dated 29<sup>th</sup> December 2014, the petitioner requested the JSC to review its decision to dismiss him from service. The Judicial Service Act does not have a provision for review and the review was without merit.

## Determination

49. The issues for determination are;

- i. Whether the petitioner was dismissed from service for a valid reason;
- ii. Whether the dismissal was effected in terms of a fair procedure.
- iii. Whether the petitioner is entitled to the remedies sought;

### Issue (i) and (ii)

The court will consider the two issues together.

50. The court has considered the pleadings, depositions and submissions filed by the parties and has come to the following conclusions of law and fact;

1. The JSC fully complied with the provisions of the Judicial Service Act, 2011 including the Third Schedule in charging the petitioner with various counts of gross misconduct.
2. The petitioner was lawfully suspended by the Hon. the Chief Justice from service pending the hearing and determination of the charges against him in terms of Regulation 15 of the Third Schedule.

(iii) The petitioner was given opportunity to show cause in writing why he should not be punished for the alleged offences and the petitioner duly submitted an explanation to all the charges.

(iv) The petition was provided with all the essential documents necessary to defend himself against the charges and the petitioner admitted during the disciplinary hearing that the few documents that were not available had not been handed over by the former CRJ when she left office. It is the court's finding that the respondent did not unduly hinder the petitioner in preparation of his defence against the charges against him. To this extent the respondent did not violate Articles 41 and 47 of the Constitution as alleged or at all.

(v) It is also the court's considered view that, it was unnecessary for the petitioner to abandon the disciplinary hearing on the basis of non-provision of documentation to assist in his defence. The non-co-operation with the disciplinary committee in this regard was misguided on the part of the petitioner.

51. In **Kenya Revenue Authority Vs. Menginya Salim Mungai; Civil appeal No. 108 of 2009**, the Court of Appeal held as follows on the fairness of disciplinary hearings;

*“There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures, provided that they achieve the degree of fairness appropriate to their task, it is for them to decide how they will proceed.”*

52. In the present case, the disciplinary procedure is well laid out in the Judicial Service Act, 2011 and in particular section 32 and the Third Schedule, Regulations 15, 17(2), 19, and 25 to the Act.

53. It is the court's considered view and finding that JSC followed this procedure to the letter unlike in the case of the former CRJ Gladys Boss Shollei.

### Right to access information

54. The court is satisfied that the allegations against the petitioner were premised on the internal special audit report dated 22<sup>nd</sup> January 2014 and the external special audit report dated May 2014. That these documents were availed to the petitioner. Section 35 of the constitution which provides the right to access information is in this case fettered by section 23 of the Judicial Service Act, 2011 which provides that a judicial officer undergoing disciplinary proceedings shall not be entitled to copies of office orders, minutes, reports or recorded reasons for decisions.

55. In the case of **Nairobi law monthly -vs- Kenya [2013] eKLR**, it was stated;

*“as correctly submitted by the 1<sup>st</sup> interested party and the amicus curae the reasons for non-disclosure must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognized that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information.”*

56. In this case, the only reason proffered for failure to provide information to the petitioner prior to the hearing of the disciplinary hearing was non-availability of reports that had been retained by its ex-officers. The Hansard proceedings of the disciplinary hearing and the letter of dismissal with reasons were revealed to the petitioner and are part of the petition itself.

57. This matter does not impact the decision to dismiss the petitioner at all in the court’s view.

58. The position of the DCRJ led to the petitioner’s appointment to the position of chairman of the Judiciary Tender Committee.

One cannot extricate the responsibilities of the petitioner while working in either of the capacities. In both positions, the petitioner owed the respondent duty of care in the performance of his duties and was bound by the relevant constitutional, statutory and regulatory provisions in the discharge of his duties.

59. Section 43(1) of the Employment Act, provides

*“in any claim arising out of termination of a contract, the employer shall be required to give the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”*

On the other hand the Act provides under section 47(5) that;

*“for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”*

60. Accordingly, it is the court’s finding that the respondent has justified the reasons for the dismissal of the petitioner and therefore, the petitioner has failed to prove on a balance of probabilities that his dismissal from employment by JSC was wrongful or unfair.

61. The court has already noted that JSC followed strictly the procedure set out in the Judicial Service Act, 2011 and in particular Schedule 3 thereof.

62. Accordingly, the respondent has satisfied the requirements of section 45 of the Employment Act which provides that termination of employment must be for a valid reason related to the employee’s conduct, capacity or compatibility or based on the operational requirements of the employer and the employment must be terminated in accordance with a fair procedure.

63. In the final analysis, the petition lacks merit and the same is dismissed with no order as to costs.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of May, 2016.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**