



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 60 OF 2014

MOHAMED AHMED MOHAMED.....1ST PETITIONER

NYAKINA WYCLIFE GISEBE.....2ND PETITIONER

VERSUS

DR. KHADIJAH KASSCHOON.....1ST RESPONDENT

SECRETARY, PUBLIC SERVICE COMMISSION.....2ND RESPONDENT

DR. KISA JUMA NGEIYWA.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. The Petitioner herein wanted the Court to determine the following questions:

- (a) Whether the 1st respondent should be held responsible for the illegal appointment of the 3rd respondent as acting Director of Veterinary Services.
- (b) Whether the 1st, 2nd and 3rd respondents should bear the responsibility of failing to stop the illegal appointment of the 3rd respondent as acting Director of Veterinary Services
- (c) Whether all administrative and legal actions done by the 3rd respondent since 1st October 2013 when he was irregularly appointed are binding.
- (d) Whether the 3rd respondent had a duty of reporting the irregular directive by the 1st respondent to the relevant authority (PSC) on his appointment as the acting Director of Veterinary Services as required by section 25 of the Public Officers Ethics Act
- (e) Whether the 1st and 3rd respondent conspired to defraud the government of Kenya through irregular payments for period of 9 months being allowances paid to Dr. Ngeiywa as Acting Director of Veterinary Services.
- (f) Whether the 1st respondent had and has powers to hire the 3rd respondent as acting Director of

Veterinary Services inline with the Public Service Commission Act and the Court Orders issued by Hon. Lady Justice Maureen Onyango on 23rd June, 2014 suspending a policy drafted by the 2nd respondent titled Policy on Decentralization of Human Resource Management in the Civil Service which purported to delegate the human resource function to various Ministries, to hire and fire, transfer and promote personnel under their Ministries.

(g) Whether the 1st and 3rd respondents are fit to hold public office.

2. Upon determination of these questions, the petitioner desires that the Court makes the following orders:-

(a) That the Honourable Court declare the 1st respondent responsible for the illegal appointment of the 3rd respondent as acting Director of Veterinary Services.

(b) That the Honourable Court to declare the 1st, 2nd and 3rd respondents responsible of failing to stop the illegal appointment of the 3rd respondent as acting Director of veterinary Services.

(c) That the Honourable Court declare that the 3rd respondent had a legal duty under Article 25 of the Public Officers Ethics Act to report to appropriate authority (PSC) that the 1st respondent has required him to act as the Director of Veterinary Services contrary to the Act.

(d) That the Honourable Court declares the 1st and 3rd respondent conspired to defraud the Government of Kenya through irregular payments for period of 9 months being allowances paid to Dr. Ngeiywa as acting director Veterinary Services.

(e) That the Honourable Court declares that all administrative and legal actions done by the 3rd respondent since 25th September 2013 when he was irregularly appointed Acting Director are not binding thus null and void.

(f) That the Honourable Court declares the 1st and 3rd respondents are un-fit to hold public office.

(g) That the honourable court declares that 1st respondent had and has no powers to hire the 3rd respondent as acting Director Veterinary Services inline with the PSC Act and the Court Orders issued by Hon. Lady Justice Maureen Onyango on 23rd June, 2014 suspending a policy drafted by the 2nd respondent titled Policy Decentralization of Human Resource Management in the civil service which purported to delegate the human resource function to various ministries, to hire and fire, transfer and promote personnel under their ministries.

(h) That the Honourable Court order that the 1st respondent should be held responsible for the illegal appointment of the 3rd respondent as acting Director of Veterinary Services.

(i) That the Honourable Court order that the 1st respondent should be held responsible for the illegal appointment of the 3rd respondent as acting Director of Veterinary Services.

(j) That the Honourable Court order that the 1st, 2nd and 3rd respondents bear the responsibility of failing to stop the illegal appointment of the 3rd respondent as acting Director of Veterinary Services.

(k) That the Honourable Court orders that the 3rd respondent had a duty of reporting the irregular directive by the 1st respondent to the relevant authority (PSC) on his appointment as the acting Director of Veterinary Services vide Section 25 of the Public Officers Ethics Act.

(l) That the Honourable Court orders that the 1st and 3rd respondents conspired to defraud the government of Kenya through irregular payments for period of 9 months being allowances paid to Dr. Ngeiywa as Acting Director Veterinary Services.

(m) That the Honourable Court orders that 1st respondent had and has no powers to hire the 3rd respondent as acting Director Veterinary Services inline with the PSC Act and the Court Orders issued by Hon. Lady Justice Maureen Onyango on 23rd June 2014 suspending a policy drafted by the 2nd respondent titled Policy on Decentralization of Human Resource Management in the Civil Service which is purported to delegate the human resource function to various ministries, to hire, and fire, transfer and promote personnel under their ministries.

3. The petition was supported by the affidavit of one Wycliffe Gisebe Nyakina who deponed in the main that:-

(a) That I am also the Secretary General of the Association of Human Resource Practitioners of Kenya (AHRPK), which is a registered Association of Human Resource Practitioners of Kenya, under the Societies Act, founded as a voluntary member's organization with the objective of promoting and developing the science and practice of human resource management in Kenya, industrial and human relations, staff management and employment administration.

(b) That the petition herein is part of the struggle to entrench the rule of law into the fabric of the state. Hence, there will be disastrous implications for the rule of law if this Honourable Court does not grant the orders sought in the Petition.

(c) That on 11th September, 2014, during KEJUDE Trust's latest bi-monthly Legal Café, a member raised the issue of the illegal appointment of Dr. Kisa Juma Ngeiywa as Director of Veterinary Services after reviewing the documentary evidence, KEJUDE members authorized the Petitioners to file the Petition herein to protect the rule of law.

(d) That on 26th September 2013, Dr. Khadijah Kassachoon, then Principal Secretary, State Department of Livestock, Ministry of Agriculture, Livestock and fisheries wrote a deployment letter to Dr. Peter M. Ithondeka directing him to report to the Office of the Cabinet Secretary at the Ministry's Headquarters as advisor on Disease Free Zone, Animal Identification and Traceability with immediate effect. At this time Dr. Ithondeka was on a lawful contract as Director of Veterinary Services having extended his years of service beyond the then mandatory retirement age of 55 years.

(e) That Dr. Ithondeka was to handover not later than 1st October, 2013.

(f) That on 25th September, 2013, Dr. Khadijah Kassachoon, the then Principal Secretary, State Department of Livestock, Ministry of Agriculture, Livestock and Fisheries purportedly deployed Dr. Kisa Juma Ngeiywa acting capacity as a Director of Veterinary Services awaiting substantive filling of the position by the Public Service Commission.

(g) That on 16th April, 2014, a whole seven (7) months later, the Public Service Commission wrote to the then Principal Secretary, State Department of Livestock. Ministry of Agriculture, Livestock and Fisheries, Dr. Khadijah Kassachoon but delined to approve the appointment of Dr. Kisa Juma Ngeiywa as acting Director of Veterinary Services.

(h) That on 2nd May, 2014 Dr. Kassachoon wrote to Dr. Ngeiywa informing him of his appointment by the Public Service Commission as the acting Director of Veterinary Services, which was a misrepresentation of facts.

(i) That the Department of Veterinary Services must have the rightly appointed personnel whose

ability is assessed by relevant authorities to enable the execution of the department's functions both professionally and with the prescribed UN standards as recognized by the World Organization for Animal health (OIE) General Council.

4. And further by the affidavit of Mohamed Ahmed Mohammed who deponed that:-

(a) That "seniority" means the relative seniority of public officers and, except as may be otherwise provided by the Commission or in the Regulations and that the 2nd respondent was the 17th person in seniority who could not have by-passed all of them to clinch the position of the acting director of veterinary services.

(b) That in the Public Service, seniority is key when it comes to promotions of its employees and that the 1st respondent violated the principle of seniority as stated in the PSC regulations of 2005.

(c) That the promotion of the 3rd respondent to the position of the acting director of veterinary services violated the dictates of seniority as spelled out in the Public Service Commission regulations, 2005.

(d) That the Public Service Commission regulations, 2005 on Notification of vacancies was never followed as required during the transfer of the 3rd respondent.

(e) That the transfer of the 3rd respondent violated PSC regulations, 2005 since its only the PSC that should approve any transfer of a public servant above job group "J" (Ref paragraph 3 (a) of letter Ref No. PSC/3/1/1/IV dated 9th April, 2014)

(f) That the placement of the 3rd respondent as the acting director of veterinary services violated the values and principles of public service including fair competition and merit.

5. In response to the petition, the 1st respondent deponed that:-

(a) That the decision to appoint the 3rd respondent in acting capacity was done in consultation and approval of the 2nd respondent as per the letter dated 16th April 2014 annexed by the petitioners.

(b) That I am advised by my advocates which advise I heed that the petitioners have no locus standi and have grossly failed to demonstrate any violation of the constitution or breach of fundamental rights and freedoms.

(c) That I am further advised by my advocates which advise I heed that if the petitioners feel there has been a violation of the orders issued by Hon. Justice Maureen Onyango in NRB IND. Court Petition No. 42 of 2014, the easiest thing would be to file an application for contempt of that suit.

6. In their joint submissions to the Court, the petitioners submitted that the 1st respondent should be held responsible for the illegal appointment of the 3rd respondent as acting Director of Veterinary Services since she had no legal authority to appoint or deploy the 3rd respondent. They further submitted that 1st, 2nd and 3rd respondents should bear responsibility for failing to stop the illegal appointment of 3rd respondent as acting Director of Veterinary Services since section 9 of the Leadership and Integrity Act, 2012 states that a state officer shall take personal responsibility for reasonably foreseeable consequence of any actions or omissions arising from the discharge of the duties of the officer. And further that section 35 (3) of the said Act provides that a state officer who acts under an unlawful direction shall be responsible for his or her action.

7. On the issue whether all administration and legal action done by the 3rd respondent since 1st October, 2013 should be nullified, they submitted that an act done in willful disobedience of the provisions of the law is an illegality and invalid to that extent.

8. Regarding the 3rd respondent, they submitted that he had a duty imposed by section 25 of the Public Officer's Ethics Act to report to the Public Service Commission that he had been appointed irregularly and against the provisions of Public Service Commission's Act.
9. The Petitioners further submitted that 1st and 3rd respondent indeed conspired through a fraudulent letter to defraud the government of Kenya for 9 month's being allowances paid to the 3rd respondent.
10. The 1st respondent on its part submitted that the petition was an abuse of the Court process and res judicata hence should be struck out. Counsel submitted that in JR 13 of 2014 the petitioner sought orders of certiorari to quash the decisions of the respondents as well as prohibition to stop the respondents from making any further decisions or directions. In both petitions the first three respondents are the same and revolve around the appointment of 3rd respondent as Director of Veterinary Services. According to counsel therefore, it follows that the petitioners was having two forums where they want the same issues determined and this to counsel amounted to abuse of the Court process.
11. Concerning locus standi, counsel for the respondent submitted that petitioners stated that they are members Kenyans for Justice and Development Trust which promoted democratic governance, economic development and prosperity and that the 2nd petitioner had stated he was the Secretary General of Association of Human Resource Practitioners of Kenya yet they exhibited no document of Trust or registration for such organization. Further the petitioners had not demonstrated in any way that they had a specific interest in the matter. Counsel urged the Court to consider the statement on locus standi made by the Court of Appeal in **Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others.**
12. On the issue of merits of the 1st respondent's decision, counsel submitted that the decision was informed by a letter dated 16th April, 2014 and in consultation and approval of the 2nd respondent. Further that the 1st respondent was acting in implementation of the Policy on Decentralization of Human Resource Management in civil service which Hon. Lady Justice Maureen Onyango suspended but the suspension came after the 1st respondent had acted.
13. The main issues to be determined in this petition seem to me to be only two.
 - (a) whether the appointment of the 3rd respondent as acting Director of Veterinary Services was illegal and the 1st respondent be held responsible.
 - (b) whether the Petitioners are the best persons placed to present the current petition. That is to say, do they have the locus standi to bring the application?
14. Regarding issue number one, by a letter dated 25th September, 2013, the 1st respondent appointed the 3rd respondent as Acting Director of Veterinary Service with effect from 1st October, 2013 until the post was substantially filled by the Public Service Commission. The appointment of the 3rd respondent in acting capacity was occasioned by the deployment of the substantive holder of the post of Director of Veterinary Services to the Ministry's Headquarters.
15. By a letter dated 16th April, 2014, the Public Service Commission wrote to the 1st respondent informing her that the commission had considered her recommendation that the 3rd respondent be appointed Acting Director Veterinary Services and instructed that the indent be forwarded to the commission for competitive filling through advertisements.
16. The 1st respondent consequently by a letter dated 2nd May 2014 informed the 3rd respondent that the Public Service Commission had approved his appointment as Acting Director Veterinary Services with effect from 1st January, 2014 until the post was substantively filled.
17. The letter from Public Service Commission (PSC) on plain construction did not disprove of the

appointment of the 3rd respondent as Acting Director Veterinary Services by the 1st respondent. All the letter did was to instruct the 1st respondent to forward urgently the indent to Public Service Commission for competitive filing. The letter in no way instructed the 1st respondent to withdraw the appointment of the 3rd respondent or raise any query over the appointment.

18. It is common practice in organizations especially public service to appoint individuals to act in positions left vacant for one reason or another until the substantive holder of the office is either appointed or recruited. The logic in this practice is to ensure continuity of operations where to keep such post vacant would occasion operational difficulties. The post of Director of Veterinary Services is crucial post in the Ministry of Agriculture, Livestock and Fisheries Development which could not have been left vacant without occasioning the department operational challenges. To this extent the Court finds that there was nothing illegal, fraudulent or unprocedural about the appointment. There is however the issue of when the appointment commenced or took effect.

19. The 1st respondent initially issued the 3rd respondent with a letter dated 25th September, 2013 informing him of his appointment with effect from 1st October, 2013. When the Public Service Commission responded on 16th April, 2014, the 1st respondent once more issued the 3rd respondent with a letter dated 2nd May, 2014 informing him that Public Service Commission had approved his appointment with effect from 1st January, 2014 until the post was substantively filed. The Court does not seem to understand the import and purpose of the second letter but nothing in the two letters compromises the otherwise noble and prudent administrative decision made by the 1st respondent.

20. On the second issue of locus standi, counsel for the 1st respondent has questioned the interest of the petitioners in the matter. According to counsel, whereas the petitioners claim they are members of an outfit known as Kenyans for Justice and Development Trust, no document had been exhibited in the petition to show the organization is registered and further the applicants failed to show the specific interest in the matter.

21. Under article 22 of the Constitution, every person has the right to institute Court proceedings claiming a right has been denied, violated or infringed or is threatened. The action may be commenced by such person directly or through a recognized agent or any other person acting in public interest.

22. The values and principles of Public Service are encapsued under article 232 of the Constitution. They include high standards of professional ethics, efficient, effective and economic use of resources, accountability for administrative acts and fair competition and merits as the basis of appointments and promotions. This article read together with article 41 on Labour Relations brings the principles of public service within the purview of chapter four of the Constitution hence by virtue of article 22, every person has a right to institute Court proceedings in the event of violation or threat of violation thereof. To this extent the petitioners had a locus standi to question the appointment of 3rd respondent by the 1st respondent as individuals without necessarily belonging to any society or association.

23. The Court has however found that there was no violation of the constitution, Public Service Code of Regulations and Leadership and Integrity Act by the 1st respondent in appointing the 3rd respondent as Acting Director of Veterinary Services.

24. The petition therefore fails on merit and the Court hereby declines to grant the orders sought with consequence that the petition is hereby dismissed with no orders as to costs.

25. It is so ordered.

Dated at Nairobi this 29th day of May 2015

Abuodha J. N.

Judge

Delivered this 29th day of May 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge