



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**PETITION NO. 23 OF 2014**

**SEVERINE LUYALI ..... PETITIONER**

**VERSUS**

**THE MINISTRY OF FOREIGN AFFAIRS**

**AND INTERNATIONAL TRADE .....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY,**

**MINISTRY OF FOREIGN AFFAIRS**

**AND INTERNATIONAL TRADE .....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**THE COMMISSION ON THE ADMINISTRATIVE**

**JUSTICE, “OFFICE OF THE OMBUDSMAN” .....INTERESTED PARTY**

**JUDGEMENT**

**Introduction**

1. This matter concerns the rights of the Petitioner Severine Luyali relating to her employment as the first Counsellor at the Kenya High Commission in South Africa and the same consists of two distinct claims. The first one concerns the Petitioner’s employment at the Kenya High Commission in South Africa (SA). The second one, relate to the violation of the Petitioner’s constitutional rights by the failure of the respondent in following fair administrative procedure in recalling the Petitioner back to head office without due regard to her extension of duty in SA.

2. The Petitioner is the employee of the 1<sup>st</sup> respondent, Ministry of Foreign Affairs and International Trade (Ministry) who was recalled back to the Head office of the Ministry by the 2<sup>nd</sup> re<sup>sp</sup>ondent as the Cabinet Secretary in the Ministry while the 3<sup>rd</sup> respondent is the principal government legal advisor. The Interested Party is an independent commission pursuant to Article 59(4) of the Constitution and with the mandate to investigate any conduct in state affairs or any acts or omission in public administration in any sphere of government and complaints of abuse of power, unfair treatment, and manifest injustice, unlawful, oppressive and unresponsive official conduct.

**Case against respondents**

3. By an application dated the 2th April 2014, the petitioner moved the court for the following orders:

- i. *That this application be certified as extremely urgent and heard ex parte in the first instance*
- ii. *That pending the heading of this instant application inter parties, this court do issue a conservatory order restraining and/or preventing the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves or through their agents and/or servants from recalling/redeploying /releasing the Petitioner/Applicant from the Kenya High Commission to the Headquarters of the Ministry of Foreign Affairs and International Trade or any other state department thereto*
- iii. *That pending the hearing of this instant application inter partes this court do issue a conservatory order restraining and/or preventing the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves or through their agents and/or servants from withholding any payments and/or expenditure allocations properly due and owing and/or to be incurred by the Petitioner and her family during the course and in relation to the petitioner's tour of service in the High Commission in South Africa.*
- iv. *That pending the hearing and determination of the Constitutional Petition filed herein this court do issue conservatory order restraining and/or preventing the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves or through their agents and/or servants from recalling/redeploying/releasing the petitioner/Applicant from the Kenya High Commission to the Headquarters of the Ministry of Foreign Affairs and international Trade or any other state department thereto.*
- v. *That pending the hearing and determination of the Constitutional Petition filed herein this court do issue a conservatory order restraining and/or preventing the 1<sup>st</sup> and 2<sup>nd</sup> respondents either by themselves or through their agents and/or servants from withholding any payments and/or expenditure allocations properly due and owing and/or to be incurred by the Petitioner and her family during the course and in relation to the petitioner's tour of service in the High Commission in South Africa.*

4. The application was supported by the affidavit of the Petitioner, in which she deposed that she was assigned duties at the Kenya High Commission in SA on 5<sup>th</sup> October 2009 as second Secretary for a term of 4 years and the tour of duty was to end on 5<sup>th</sup> October 2013 but before this end of tour, in March 2013, the petitioner requested for an extension through the then Permanent Secretary with the 1<sup>st</sup> respondent. The request was that the tour of duty be extended to December 2014 and thereafter further consideration to December 2015 and on 22<sup>nd</sup> March 2013, the 1<sup>st</sup> respondent wrote to the Petitioner with reference to her request of 18<sup>th</sup> March 2013 and approved an extension to October 2014. The petitioner relied on the approval given by the 1<sup>st</sup> respondent to reorganise her affairs while in SA especially keeping her child in school there to avoid disruptions. Despite the approval of extension being given until October 2014, the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 4<sup>th</sup> December 2013 unilaterally and without notice or giving reasons dispatched their letter to the Petitioner dated 3<sup>rd</sup> December 2013 notifying her that she had been recalled and to report back to the 1<sup>st</sup> respondent in Nairobi on or before 12<sup>th</sup> December 2013. This directive was in conflict with the approval and extension granted on 22<sup>nd</sup> March 2013 and the same done in violation of the law as this cancelled the tour of duty by one year and the same done with notice of eight (8) days only. On 4<sup>th</sup> December 2013 the petitioner wrote to the respondents with reference to the extension of duty already granted and on 4<sup>th</sup> December 2013, the respondents accorded the petitioner three (3) months' notice as from 6<sup>th</sup> December 2013 within which time to depart from the High Commission. Subsequent to this response, the Petitioner on 17<sup>th</sup> December 2013 did request the respondent's to abide by their letter of extension of 22<sup>nd</sup> March 2013 so as to end her tour of duty in October 2014 noting that from the extension, she had reorganised her life while in SA. On 14<sup>th</sup> March 2014, the Petitioner returned to her office after return from Kenya where she had travelled to bury her mother and received communication from the 2<sup>nd</sup> respondent informing her that she had been redeployed to the 1<sup>st</sup> respondent's headquarters in Nairobi and was to report immediately. On 2<sup>nd</sup> April 2014 the Petitioner was asked to report back to head office on 16<sup>th</sup> April 2014 and noting the injustice being committed the Petitioner wrote to the IP on 10<sup>th</sup> April 2014 and noting the issues and complaint the IP on 16<sup>th</sup> April wrote to the respondent's and sought to have parties maintain the status quo as the matter was under their investigations. This was ignored by the respondents who gave the petitioner an ultimatum to report back by 1<sup>st</sup> May 2014

prompting her to seek court orders as herein on 30<sup>th</sup> April 2014. That unless the orders sought are not granted the Petition will be frustrated as there are arguable issues to be addressed while the status quo is maintained.

5. It is the petitioners' case that the respondent is in violation of both her constitutional and legal rights and will be prejudiced by the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondent in recalling her back to the head office, redeployment or in any other manner if released from her tour of duty in SA.

### **The respondent's reply**

6. Through the Replying Affidavit of the 2<sup>nd</sup> respondent dated 12<sup>th</sup> May 2014 and reply that the 1<sup>st</sup> respondent is the body mandated by the executive to manage foreign policy, bilateral and multinational relations through the missions and embassies abroad while the Public Service Commission (PSC) has the mandate of establishing and abolishing offices in the public service, appointing persons and developing the human resources in the public service. A public officer can be posted to work in any station at any time with no exception when need arises and hence there is no permanent deployment to a specific station or department. For the 1<sup>st</sup> respondent to ensure effective services, different officers are sent to the foreign missions and embassies including the petitioner and by the Kenya Foreign Service Regulations 2000, the respondents have regulations provide that any officer can be posted to serve any mission outside the country as the service is required and such an officer can be given 3 to 9 months to prepare oneself for a transfer. The petitioner was employed by PSC in 1996 as an Executive Officer II and deployed to the 1<sup>st</sup> respondent and thus subject to the rules and regulations thereto. In 2001 to 2005 the petitioner was sent to the Kenya Mission in Sweden and was recalled back to Kenya until 2009 when she was posted to the current duty station in South Africa and the terms of the posting were set out for the officer per the Kenya Foreign Service Regulations 2000. The posting had a time limit but could still be varied based on work performance exigencies of duty or other reasons of indisposition. The petitioner was thus aware that the posting was for 48 months and could be varied any time. The tour of duty ended on 4<sup>th</sup> October 2013, the petitioner requested for extension for reasons of pregnancy and child education which was given consideration and the same extended to October 2014 after which the petitioner was to report back to the headquarters. This extension was not a guarantee that where there was a legitimate expectation the petitioner could remain at the posting until October 2014 as she was still accountable to the respondents.

7. Due to exigencies of duty the respondents recalled the petitioner in December 2013 to report back by 12<sup>th</sup> December 2013 and upon her protest on the short notice, the respondent granted a 3 months extension to report back by 6<sup>th</sup> March 2014. All relocation arrangements were done and funds made available to the Petitioner. Upon the demise of the petitioner's mother, she was granted 10 days compassionate leave to attend to the burial rites and her stay extended by 10 days to facilitate smooth return back to the headquarters and she accepted her allowances thereto. On 16<sup>th</sup> April 2014, the IP wrote to the respondents on a complaint lodged by the petitioner to which extensive responses were given but the petitioner never reported back as directed by the respondent's. The respondents wrote to the petitioner directing her to report back by 1<sup>st</sup> May 2014 to avoid misapplication of public funds and further ensure the respondents do not incur unwarranted public expenditure which would raise audit queries as there was and still is no reason to incur public expenditure on behalf of the petitioner as she is supposed to be working at the ministry headquarters in Nairobi. The petitioner hence on 25<sup>th</sup> April 2014 accepted the payment of the transfer and shipment allowance that was condition precedent to the petitioner's smooth departure from the foreign mission. The contention by the petitioner that her child education in South Africa will be disrupted is not a good reason to seek extension of posting as there are similar schools in Kenya that can offer similar education system where the child can smoothly transit with no disruptions. The respondents have acted in good faith, offered the required assistance as a good employer and all allowances paid to the petitioner to enable her move back to headquarters for duty. The rushing to court by the petitioner on 30<sup>th</sup> April 2014 was done long after the respondents had finalised with all payments for relocation. On 9<sup>th</sup> May 2014, the petitioner refunded back the relocation allowance, the orders sought herein were actuated by malice, in bad faith and through misrepresentation to the court and meant to stifle the smooth running and exercise of administrative functions of the respondents despite the petitioner

having been dully informed of the decision to have her relocate to the headquarters. The petitioner has not demonstrated what prejudice or inconvenience that will be caused to her if the conservatories orders are not granted as the reason given are immaterial and inapplicable in the circumstances and the court cannot intervene as this is an administrative matter best handled by the PSC as the employer. There is not particular grievances articulated in the petition, she has come to court without clean hands and in the interests of justice, the orders sought in the petition should be declined.

### **Hearing**

8. When the matter came up for mention and directions on 29<sup>th</sup> May 2014, all the parties agreed to proceed with the hearing of the main petition as the issues outlined in the Notice of Motion and the grounds of the same form part and grounds of the Petition. Court allowed the hearing of the petition so that the matter could be dealt with substantively at the hearing. All the parties were allowed to file their written submission with regard to the Petition.

9. The petition was heard on the 5<sup>th</sup> June 2014. Each party made their extensive submissions in this regard. The petitioner through Ogeto Advocate relied on the written submission dated 27<sup>th</sup> May 2014, the List of Authorities filed on 19<sup>th</sup> May 2014. The respondent relied on their written submissions dated 3<sup>rd</sup> June 2014, Further Affidavit filed on 27<sup>th</sup> May 2014 and the IP relied on their written submissions dated 3<sup>rd</sup> June 2014.

### **The Petition**

10. Apart from the orders sought by the petitioner in the Notice of Motion, the petitioner further seeks the following reliefs in the main Petition dated 29<sup>th</sup> April 2014;

- a. *Pending the hearing and determination of this petition conservatory orders be issued in terms of the Notice of Motion application filed herewith.*
- b. *That the perpetual mandatory injunction and/or the prerogative of prohibition do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondent's either by themselves or through their agents and/or servants from recalling/redeploying/releasing the Petitioner from the Kenya High Commission to the Headquarters of the Ministry of Foreign Affairs and International Trade or any other department thereto before October 2014.06.12*
- c. *That a perpetual mandatory injunction and/or the prerogative order of prohibition do issue restraining and/or prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondent's either by themselves or through their agents and/or servants from withholding any payments and/or expenditure allocations properly due and owing and/or to be incurred by the petitioner and her family during the course and in relation to the petitioner's tour of service in the High Commission in South Africa.*
- d. *That the decision of the 1<sup>st</sup> and 2<sup>nd</sup> respondents to recall/redeploy/release the petitioner from the Kenya High Commission to the Headquarters of the Ministry of Foreign Affairs and International Trade be quashed by an order of certiorari;*
- e. *A declaration that the Petitioner's tour of duty or periodic of service ion the Kenya High Commission in South Africa runs up and until 31<sup>st</sup> October 2014;*
- f. *That the respondent be condemned to pay the costs of this petition; and*
- g. *Any other order and or directions that this court may deem fit to grant.*

### **Petitioners' Case**

11. The petitioner submitted that she was assigned the duty of First Counsellor in the Kenya High Commission in South Africa for four years from 5<sup>th</sup> October 2009 and was extended to end in October 2014. She reorganised her life and family affairs but on 3<sup>rd</sup> December, the 1<sup>st</sup> and 2<sup>rd</sup> respondents revoked the extension without any justifiable cause or reason. The respondent's in the exercise of their powers in deploying the petitioner and decisions can be questioned as the court has supervisory powers over administrative actions by public officers where there are allegations of unfairness, unreasonableness

and breach of due process. Article 23(3) of the Constitution provides that in any proceedings brought for the enforcement of the bill of rights, a court may grant appropriate relief including a declaration of rights, an injunction and conservatory orders and relied on the case of *Diana Kethi Kilonzo versus Independent Electoral and Boundaries Commission and 10 Others [2013] eKLR* where the court held that where a party is aggrieved the court may will step in and provide appropriate relief as required by Article 23(3) of the Constitution. The court is therefore properly seized of the matter to safeguard constitutional rights of the petitioner.

12. The respondents have violated constitutional rights of the petitioner being **Article 50(1)** as there deployment steps taken before this action were unlawful and in total disregard of natural justice, no fairness was applied by the 2<sup>nd</sup> respondent toward the petitioner or due process and the rule of law. Upon receipt of the Court order dated 30<sup>th</sup> April 2014, the respondent wrote to the petitioner on 6<sup>th</sup> may 2014 threatening disciplinary action. **Article 41** of the Constitution was violated where the respondent failed to give the petitioner reasons of the decisions affecting her employment which was in breach of fair labour practice. The petitioner had a valid reason to seek extension of duty in South Africa as her son is in a school system that varies with the system of schooling in Kenya. The petitioner referred to the case of *Peter Kariuki and 16 others versus Kenya Agricultural research Institute [2013] eKLR* where the court held that fair labour practices include provisions for basic fair treatment of employees, procedures for collective representation as work and policies that enhance family life.

13. The respondent violated Article 47 of the Constitution as in the exercise of their administrative powers, the 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to give reasons for their decision. The respondents have the power to transfer the petitioner but the same must be exercised in a lawful manner and not be arbitrary. The petitioner's tour of duty had been granted and when this was varied, no reasons were given even when she expressed her reasons for seeking for such extension. In this case, the 1<sup>st</sup> and 2<sup>nd</sup> respondent's decision to redeploy the petitioner was contrary to Article 232 and 236 as they were not transparent in their administrative action and did not follow the tenets of due process as held in *Marbury versus Madison 5 U.S 137 [1803]* that when legislation impose on an officer a duty, the officer cannot at his discretion sport away the vested rights of others.

14. The petitioner applied for extension of duty which was granted and the same was revoked without reason. The extension created a legitimate expectation upon the petitioner that her tour of duty would last until October 2014 and based on this expectation she reorganised her life and family around this date. The petition's expectation was within the extension period her son's education would be minimally disrupted and relied on the case of *A. M. Msagha versus Chief Justice of Kenya and 7 others [2006] eKLR* the could held legitimate expectation is but one variant aspect of the duty to act fairly and natural justice is but a manifestation of a broader concept of fairness. The respondents were therefore expected to act within this legitimate expectation enforceable in law.

15. The respondent was in breach of natural justice as they denied the petitioner the right to be heard before making a decision that was detrimental to her legitimate expectation that the tour of duty would be as was already granted. The decision was unilateral and arbitrary and in beach of the constitutional duty bestrode upon the respondents. There was a binding undertaking that the extension of duty to the petitioner had been granted and could not be revoked without proper basis. This was as held in the case of *Githunguri versus Republic [1986] eKLR* that official undertakings given officially must be honoured and members of the society are entitled to an orderly and tranquil life and not be subjected to vicissitudes of law especially when there have been no subsequent fresh events to justify it.

### **Respondent's case**

16. The respondents submitted from the outlined facts of the case, the petitioner have no justiciable labour dispute for the determination of the court. The terms of engagement in the public service are that a public officer can be posted to work in any station at any time with no exception when need arises and hence there is no permanent deployment to a specific station or department. The 2<sup>nd</sup> respondent in exercise od delegated power by the PSC deployed the petitioner to South Africa for 4 years with set terms

in line with Kenya Foreign Service Regulations 2000 that such service was temporary assignment with specific terms and responsibilities and duties and therefore the tour of duty could be varied depending on circumstances. The posting was not absolute and the petitioner was aware that she could be recalled any time or be redeployed in another station before the end of the 4 years on 4<sup>th</sup> October 2013. Before this end date the petitioner sought for an extension which was granted but later varied based on the discretion of the respondents noting that period of service and tour of duty was temporary and thus recalled the petitioner on the grounds that there are regulations which provide that a serving officer irrespective of marriage can be deployed to any mission subject to exigencies of the service on good notice normally 3 months and not more than 9 months. There is therefore no dispute between the respondents and the petitioner for determination of the court. There is no constitutional issue for determination as the Employment Act read with the Constitution sets out the rights of an employee which rights if violated are capable of adversely affecting the petitioner and causing a permanent departure in her life such as dismissal, termination or retirement.

17. The petitioner was posted to the South Africa foreign mission on an assignment and not on contract. In assignments there is no conditions subject of breach unlike in a contract and there is no threat to the petitioner's rights as hers was a deployment a normal practice in public service. There is no loss of a benefit or privilege threatened as the contract of employment with the respondents is still in place. Had the extension not been granted, there would have been no duties for the petitioner to undertake in the mission of duty and to allow the petitioner to remain in her station of choice will set a bad precedent to other officers bound to be deployed any time when need arises. In the case of **John Harum Mwau versus Attorney General Misc 890 of 2001** the court held that a court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical in the absence of real dispute between the parties before it as the court would be engaging in an academic exercise.

18. That the petitioner is guilty of material non-disclosure and is seeking justice with unclean hands in that since December 2013 she was aware of the recall order by the 2<sup>nd</sup> respondent, head of mission commenced relocation preparations and when the petitioner resumed duty after her compassionate leave, more days were added factoring the period away and was at all material times that there were such processes for the relocation and despite the good faith on the part of the respondents the petitioner acted in bad faith when she failed to disclose to the Court on 30<sup>th</sup> April that all allowances had been paid for her relocation. The petitioner failed to report back to headquarters on 16<sup>th</sup> April 2014 without giving any reasons, despite her release and payments, nothing was stated and this was meant to defeat the course of justice and on this basis the conservatory orders should be declined. In the case of **Bahadurali Ebrahim Shamji versus Al Noor Jamal and 2 others, Civil Appeal 2010 of 1997** where the Court of Appeal held that;

19. Article 47 of the Constitution on fair administrative action is that such action must be with exercised within reasonable advance notice, reasonable opportunity and the subject party being given a chance to be heard. In this case, the respondents did not violate this right, the deployment of the petitioner was within the scope of duty and no benefit or right that she will lose by being reassigned duties. There was good notice of the recall and a reasonable period was given to prepare for relocation.

20. Double expectation is double-edged to serve both ways where the responsibility of posting and management of staff in the 1<sup>st</sup> respondent lies with the 2<sup>nd</sup> respondent in accordance with powers conferred by PSC to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The petitioner had been to other foreign missions in Sweden and was recalled when her duty term ended and posted to the current duty station. There was no legitimate expectation created by the respondents that the petitioner was to remain in her station of choice even where there was sufficient notice revoking the extension given. The assertion by the petitioner that her son should be allowed to remain in school in South Africa is not a legitimate reason to seek to extend duty as there are similar schools in Kenya.

21. That the orders sought are not efficacious in the circumstances as the petitioner being an employee of the government, it would be in the interests of justice that orders sought not be granted in order to save on the employer/employee relationship. The court should strike a balance in enhancing the co-existence

of the two parties as if the orders are granted, they will cripple the operations of the respondents. The matters are administrative suitably handled through internal mechanisms and in the interests of justice that the internal procedures of intervention and appeal to the PSC be given an opportunity to process the same for good relations of the parties.

22. That the court should exercise its discretion in the matter judiciously noting the petitioner has failed to disclose material facts when she initially came to court seeking conservatory orders. The orders should be declined in the public interest, performance of duty and enhancing good administration that overweighs the personal interest of the Petitioner to remain in South Africa.

### The Interested Parties' case

23. The IP on the part submitted on two issues being that there was a legitimate expectation on the petitioner when extension of tour of duty by the respondent was granted and that the administration action of the respondent to recall the petitioner was not fair as it amounted to administrative injustice. In this regard the IP relied on the case of **CCU versus the Minister for Civil Service [HL 1984] 1985 1 AC 375** and **Republic versus City Council of Nairobi exparte Kenya Taxi Cabs Association [2010] eKLR**.

24. A legitimate expectation arise where a decision made affect the other person by depriving her of some benefit or advantage which has in the past been permitted and legitimately expected to be permitted and to continue unless there is communication of a rational ground for withdrawal and that there is assurance from the decision maker that the decision will not be withdrawn without advance reasons for the withdrawal. A legitimate expectation arises from a promise or representation given on behalf of a public body. In this case the 1<sup>st</sup> respondent informed the petitioner on 22<sup>nd</sup> March 2013 that the tour of duty had been extended for one year to October 2014, this decision was rescinded on 3<sup>rd</sup> December 2013 and no reasons were given for the same. When communication was received by the petitioner on 22<sup>nd</sup> March 2013, a legitimate expectation arose that she would enjoy the benefits and advantages of such position until October 2014. The respondent may have had reasonable and valid reasons to retract from their position but to do so they ought to have communicated to the petitioner some rational grounds for withdrawing the earlier decision of extension of tour of duty and then given the petitioner a chance to comment of the withdrawal of the extension. Even though transfers, relocation and recall area allowed, the same must be exercised within a context that is valid and reasonable based on the legitimate expectation of the officer subject to such measures.

25. Decisions made or an act carried out in the public service is now regulated by Article 47 of the Constitution, meant to promote and protect administrative justice in regard to administrative action that affects individuals. Article 47 of the Constitution has various ingredients that need to be observed any time a public body or public/state officer takes an administrative action which are that administrative action ought to be delivered expeditiously, efficiently, lawfully, reasonably and following fair procedure. Where a fundamental right is likely to be adversely affected by an administrative action, that person has a right to be given reasons for the action. In this case the administrative action of the respondent fell short of the fair administrative action as envisaged and expressly provided for by Article 47 of the constitution. This action is subject to oversight by the Court where there is deprivation of some benefit unlike in a case where it is an administrative and staff matter where the Court cannot intervene. The court can intervene where an administrative decision is made either illegally, irrationally or fraught with procedural impropriety, unfair, unconstitutional or for any other justifiable reason that has been embraced in the rapidly developing administrative law.

26. The Industrial Court has jurisdiction over matters outlined under section 12 of the Industrial Court Act relating to employment and labour relations and can made appropriate orders as sought by the petitioner.

### Analysis and determination

I have framed key issues for determination as follows;

- a. Whether the recall of the petitioner by the 1<sup>st</sup> and 2<sup>nd</sup> respondent from her tour of duty is in breach of petitioner's rights under the Constitution or other relevant laws
- b. The extent of the right of fair labour practice under **Article 41** of the Constitution
- c. Whether the order sought should be granted.

27. I have considered the pleadings, depositions and submissions made for and on behalf of the parties. Several issues were canvassed in both the pleadings and oral submissions. I will first deal with the preliminary issue raised by the respondents that there is no justiciable labour dispute and or issue herein for the Court to determine, that the petitioner as a public officer can be posted to work in any station at any time with no exception and when need arises can be deployed as there is no permanent deployment.

28. I will go beyond the question raised by the respondent on the lack of a justiciable labour dispute and relook at the same together with the jurisdiction of the industrial court. Both parties admit that the petitioner is a public servant under the PSC and serving at the 1<sup>st</sup> respondent and currently on tour of duty at the Kenya High Commission in South Africa. Within this context, the petitioner was granted an extension of her tour of duty which extension has been revoked and has been recalled back by the 2<sup>nd</sup> respondent as the accounting officer for the 1<sup>st</sup> respondent. There thus exists an employer and employee relationship between the parties herein and the questions that arise as to whether this recall should be effected or not forms the substantive question to be addressed herein. Whether there is a justiciable claim or not also go to the question as to what extent a right sought can be enforced by a Court or not and the idea behind a justiciable right as under the Bill of Rights is that decisions affecting basic rights and liberties should be reviewed by an institution standing outside the policies sphere, namely the judiciary. Therefore where a party claim that a right as under the Bill of Rights and in this case a right anchored under Article 41 of the constitution has been violated or is under threat of violation, the Industrial Court must conform to the provisions of Article 23(1) and (3) of the Constitution;

23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

...

***(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—***

***(a) a declaration of rights;***

***(b) an injunction;***

***(c) a conservatory order;***

***(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***

***(e) an order for compensation; and***

***(f) an order of judicial review.***

29. Courts enforcing the Bill of Rights may on occasion impose positive duties on the state of public official as all rights have a cost. These are rights as under Article 41 and where the industrial Court finds and violation of an employee or employer rights can order in damages or compensation as the case may be to address the unfair labour practice. This just reconfirms that indeed, claims under Article 41 of the Constitution are justiciable, capable of being enforced as under Article 23 of the Constitution or under the various employment law and within the jurisdiction of the Industrial Court.

30. The question of justiciability also go to the core of the jurisdiction of this court as this is an employment matter that falls within the jurisdiction of the Industrial Court. The Industrial Court as constituted under the **Industrial Court Act, 2011** is competent to interpret the Constitution and enforce fundamental rights and freedoms in matters arising from disputes falling within the provisions of **Section 12** of the **Industrial Court Act, 2011**. (See **United States International University (USIU) v Attorney General Nairobi Petition 170 of 2012, George Onyango v Board of Directors of Numerical Machining Complex Ltd & 2 others, Petition No. 417 of 2012**).

### **Whether there was a violation of the Petitioner's rights**

30. Unlike the former Constitution which did not recognize and protect the rights of employee, the Constitution now has explicit provisions which provide a foundation for the rights of workers/employees. The preamble and the provisions on national values and principles contained in **Article 19** lays emphasis on dignity, human rights and social justice for all persons. In giving effect to the provisions of the Constitution and the Bill of Rights, the place of employees must be articulated as required by **Articles 41** that Every person has the right to fair labour practices and reasonable working conditions that must be seen in the context of Article 2(2) where No person may claim or exercise State authority except as authorised under this Constitution. In the context that the petitioner is a public officer working In a public body, any action taken by the petitioner in her service or any decision taken by the respondent as the employer with regard to the employment of the petitioner, such action must conform to both constitutional provisions as well as the legal requirements there. How the petitioner is to act and is treated by the employer must be assessed with the yardstick of the constitution and the employment law

31. The Constitution also provides a window for enforcement and enrichment of the rights and freedoms of employees through the application of international law principles, treaties and conventions Kenya has ratified. This is through the provisions of **Article 2(5)** and **(6)**. The International Labour Organization (ILO) Conventions applicable to Kenya and the UN Global Compact where fair procedure, reasonableness and consultation are made the core principles to the employer/employee relationship.

32. The petitioner moved the court seeking for conservatory orders upon the respondent's decision to revoke her tour of duty that had been granted on 22<sup>nd</sup> October 2013. This tour of duty was to end in October 2014 but before this could take effect to the full, on 3<sup>rd</sup> December 2013 the petitioner was recalled back to the Ministry headquarters and stated;

...

*RECALL TO REPORT BACK TO THE MINISTRY HEADQUATERS*

...

*Further to out letter Ref. No.96026167/(115) of 22<sup>nd</sup> march 2013, this is to convey the decision of the Authorised officer to calling you back to the ministry headquarters immediately ad in any case not later than by 12<sup>th</sup> December, 2013. Accordingly you are hereby required to hand over all government/Mission assets which may be in your possession before you leave the Mission for further instructions.*

...

33. To this communication, the petitioner made a reply on 4<sup>th</sup> December 2013, noting her circumstances and further that she had re-organised her life based on the extension given by the respondents and that;

*The time given for me to report back to Headquarters is unfeasible because I have a family and cannot prepare to depart in less than a week. Besides, the Foreign Service Regulations; B”(3) provides: “subject to exigencies of the service, an officer shall*

*normally be given three-month's notice prior to the end of the tour of duty to prepare himself for transfer".*

*7. I therefore wish to request that you reconsider this matter with a view to allowing me complete my one-year extension period.*

34. on 6<sup>th</sup> December 2013, the respondent in what seem to be a reply to what the petitioner stated in her letter of 4<sup>th</sup> December 2013 state;

...

*In view of the concerns raised, I am pleased to inform you that the Authorised officer has considered and your request and therefore granted you three (3) months from the date of this letter to allow you to prepare to report back to the headquarters by 6<sup>th</sup> March 2014.*

35. This communication by the respondents and extension of time by 3 months can find basis in the letter of the High Commissioner, Amb. Patrick Wamoto, who on 4<sup>th</sup> December 2013 noted that the mission has a financial shortfall and could not afford to facilitate the relocation of the petitioner, Further on 24<sup>th</sup> December 2013, the High Commissioner outlined to the respondents that there were three other officers that were due for relocation after their recall inclusive of the petitioner and he was thus requesting for a budgetary advance to facilitate this process. There is no reply to this communication by the high Commissioner but On 11<sup>th</sup> March 2014, the High Commissioner does write to the respondents seeking to know if there will be replacement of the officers to be relocated inclusive of the petitioner as there was a house and lease that required to be confirmed or released and the respondent only replied to this communication on 9<sup>th</sup> April 2014 that the issues raised by the High Commissioner would be addressed at an appropriate time. As this was happening the petitioner requested for compassionate leave that was granted for 10 days and on 28<sup>th</sup> April 2014 the High Commissioner wrote to the 2<sup>nd</sup> respondent with regard to the Petitioner;

*I am pleased to release the above named officer on 31<sup>st</sup> March 2014 to report back to headquarters on completion of her tour of duty but she seems not to have completed her packing and freighting of her personal effects due to the disruption in her departure arrangements, occasioned by the sudden death of her mother and travel home on 10 emergency days leave from 4<sup>th</sup> March 2014.*

*This is to therefore seek authority for her to be in station for an extra 10 days to enable her finalize her departure arrangements and leave on 16<sup>th</sup> April 2014.*

36. The 10 days requested for by the High Commissioner for the benefit of the petitioner were approved by the respondents vide letter dated 2<sup>nd</sup> April 2014. The petitioner was to relocate by 16<sup>th</sup> April 2014. However on 16<sup>th</sup> April 2014, the IP lodged a complaint for the petitioner to the respondents based on ground similar to what the petitioner had raised in her letter to the respondents dated 4<sup>th</sup> December 2013. The IP raised their concerns with the respondents that the petitioner had been granted an extension of tour of duty, this was revoked without giving reasons and without due consideration to the fact that the petitioner had a child in school, the notice given by the respondents on 3<sup>rd</sup> December 2013 was too short contrary to the 3 months basic minimum for such recall and that the decision to revoke the extension fell short of the fair administrative action guaranteed to the petitioner under the Constitution. The IP sought a review of the respondent's decision to enable the petitioner serve under her station until October 2014. On 22<sup>nd</sup> April 2014, the 2<sup>nd</sup> respondent replied to the IP noting that the recall of the petitioner was an administrative action done in accordance with the Foreign Service Regulations as and the Code of Regulations and the petitioner was expected to report back as directed. On 30<sup>th</sup> April 2014, the respondents wrote to the IP

noting that the petitioner was to report back to headquarters on 1<sup>st</sup> May 2014.

37. This then formed the summary background to the court orders granted on 30<sup>th</sup> April 2014 giving conservatory orders to the petitioner.

38. There is now a fundamental shift in the labour relations environment in Kenya with the enactment of the Employment Act, 2007 and the Constitution, 2010. Employees, without distinction as to whether they are in the public or private sector now enjoy a protective labour environment that was not always the norm before. Employers both in the public and the private sphere enjoy rights now regulated under the law and the Constitutions. But things were not always like this. There is therefore the major change. Where employers had developed regulations, policies and guidelines before 2007 and 2010 with regard to the new labour laws and the Constitution, there is now an urgent call to go back and realign these regulations, policies and guidelines so as not to be left behind by the fast growing labour sector that will seriously be undermined by employers who fail to adjust or make appropriate changes to reflect the changed circumstances for the employee.

39. The fundamental shift now incorporate what the Industrial Court has interpreted to be before an employer can take any action, positive or negative on an employee, there is need for Fair procedure, reasonableness and consultation. Even where there is a benefit given to an employee, fair procedure entail that that employee be reasonably to made aware that such a benefit has been conferred and the reasons for such a benefit. On the other hand where an adverse decision is made by the employer, a similar requirement is expected to follow as a matter of law. This mode of things finds good justification even in a case like this one where the employer is a state department and the employee is a public officer. Actually, the measure for ensuring fair procedure and consultation is higher for such bodies and officer based on Article 10 of the Constitution that outline the same as;

*Article 10(2) provides that the national values and principles of governance include—*

*(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.*

40. The Constitution does not end at Article 10, it goes further to state how state officer to apply fair administrative action and the ambit within which their decisions are to be applied. Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and under sub-article (2) it is provided that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Sub-article (3) provides that Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall (a) provide for the **review of administrative action by a court** or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

41. Article 73 (1) provides that authority assigned to a State officer (a) is a **public trust** to be exercised in a manner that (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

42. As a final point in this regard, Article 232 (1) stipulates that; the values and principles of public service include (a) high standards of professional ethics; (b) efficient, effective and economic use of resources; (c) responsive, prompt, effective, impartial and equitable provision of services; (d) involvement of the people in the process of policy making; (e) accountability for administrative acts; (f) transparency and provision to the public of timely, accurate information; (g) subject to paragraphs (h) and

(i), fair competition and merit as the basis of appointments and promotions; (h) representation of Kenya's diverse communities; and (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of (i) men and women; (ii) the members of all ethnic groups; and (iii) persons with disabilities.

43. Sub-article (2) provides that the values and principles of public service apply to public service in (a) all State organs in both levels of government; and (b) all State corporations.

44. With regard to labour relations and employment matters, there is now a legal duty on an employer to give an employee reasons or reason for any action taken being matters the employer genuinely believed to exist and which caused the employer to take such action. It does not end there as the employer, even where there is a genuine reason or reasons to give to the employee with regard to any action taken the same must be assessed as to its validity, fairness and reasonableness. It goes even further as where an employee who feels aggrieved by such action and there is a reason or reasons given which the employee believes to be genuine, such complaint must be lodged with the industrial Court and what is crucial to assess if the procedure applied by the employer while arriving at the subject action or decision.

45. The respondents submitted that what they did with regard to the petitioner was an administrative action that was not subject to legal action as under the PSC regulations, they could recall the petitioner to serve in any department. There was no permanent deployment. However the Constitution now creates a mechanism where administrative power can be reviewed through a judicial review, while providing individuals with justiciable rights to claim relief from the effects of unfair administrative action. The Constitution requires the administration, public officer and state officials to act in accordance with fundamental principles of justice and rationality and prohibits the legislature from allowing any departure from these principles. Administrative action is therefore part of the wider exercise of public power that when analysed or reviewed must find reasoning to any challenge of invalidity of administrative action and find basis in lawfulness, fair procedure and reasonableness.

46. As late as at the time the parties herein came for the hearing of the petition and submissions closed, the respondents failed to outline as to the reason or reasons for which the administrative decision to revoke the extension of the petitioner tour of duty was made. In the affidavit of the 2<sup>nd</sup> respondent dated 12<sup>th</sup> May 2014 at paragraph 14;

*That further to the foregoing, the said order clearly set out terms in line with the Kenya Foregoing Service Regulations 2000 that; foreign service was a temporary assignment with specific time bound responsibilities and duties and therefore the tour of duty could be varied depending on various issues including performance, exigencies of duty, indiscipline or otherwise reasons of indisposition.*

47. The 2<sup>nd</sup> respondent despite going that far fails to state what the reason or reasons as to why the petitioner's extension of tour of duty was revoked. Was it due to her performance, exigencies of duty, indiscipline or other reasons of indisposition? These, the petitioner was denied and even the court, was equally denied.

### **The right of fair labour practice**

48. The Constitutional provisions outlined above and the cited extracts are made in an effort to reproduce the forgoing articles of the Constitution in order to be able to place them in the context of the petitioner's contention that they have been violated with reference to her and in order to understand in what way and to what extent. In other words this Court is called upon at this point to interpret the Constitution in favour of the petitioner and if persuaded come to the conclusion that the rights have been violated to such an extent that it warrants grant of conservatory orders sought.

49. With regard to fair labour practice this court in ***Elizabeth Washeke and 62 Others versus Airtel Networks and Another, Cause No. 1972 of 2012*** that As far as the issue of fairness of a labour practice, regard must be had to the Employment Act, 2007. For the vast majority of employees, whether in the

public of private sectors, the provisions of this legislation, rather than the Bill of Rights, provides the principle guarantees of fair labour practices. It is only for those persons not covered by the respective employment legislations (members of the disciplined forces) that afford a degree of protection that would otherwise be denied.

*Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public.*

50. In this case, despite the respondents not giving the petitioner reasons for the revocation of the extension of duty, with the intervention of the High Commissioner, there were extension as noted above, on 28<sup>th</sup> April 2014 the High Commissioner wrote to the 2<sup>nd</sup> respondent with regard to the Petitioner;

*I am pleased to release the above named officer on 31<sup>st</sup> March 2014 to report back to headquarters on completion of her tour of duty but she seems not to have completed her packing and freighting of her personal effects due to the disruption in her departure arrangements, occasioned by the sudden death of her mother and travel home on 10 emergency days leave from 4<sup>th</sup> March 2014.*

*This is to therefore seek authority for her to be in station for an extra 10 days to enable her finalize her departure arrangements and leave on 16<sup>th</sup> April 2014.*

51. The Petitioner does not contest these presentations by the High Commission in her pleadings or submission. As much as the respondents are applying rules and regulations that date back to 2000 in a changed environment with regard to the applicable laws and the Constitution, as the employer, the respondents still retain the rights to give an employee lawful and proper command which is within the scope of duty to obey, as issued by the employer or a person placed in authority over the employee. Where the petitioner was ready to move and relocate as indicated and not contradicted or contested as of 16<sup>th</sup> April 2014, the petitioner did not relocate and opted to refund back the relocation funds advanced to her. The essence of public service and the tenets bestowed upon the respondents to ensure do not end with them only, these constitutional expectations outlined under Articles 10, 73 and 232 and more fundamentally Article 41 with regard to fair labour practices to all officers in public service. The petitioner is therefore equally bound as a public servant to act in good faith, ensure good industrial/work relations with the employer and obey lawful orders as issued by the employer even in a case where the employer is a public body. Even in a case where the petitioner had a valid expectation to the nature that the tour of duty would not end until October 2014, when the employer reviewed the letter of protest and concerns as noted in the letter dated 4<sup>th</sup> December 2013, there was an extension of duty by 3 months which was a reasonable period where the petitioner as a diligent employee was expected to re-organise her life and family so as to attend to her allocated duties. It does not only require an employer to act in good faith, the employee is equally bound by the same rule, to act with outmost due diligence and in good faith toward the directives issued by the employer.

### **Whether the order sought should be granted**

52. During the subsistence of this matter in Court, the Petitioner had enjoyed interim orders date 30<sup>th</sup> April 2014 to date, a period of over 8 weeks. With the granting of the interim conservatory orders, noting substantive remains for the court to address apart from the subsistence of the petitioner while on tour of duty.

### **Conclusion**

In view of the foregoing and the powers conferred on the Court and set out under Section 12 of the Industrial Court as read together with Article 162(2) and 165 of the Constitution; and in the interests of justice to ensure fair labour relations between the parties herein I make the following orders:

- i. **The Court varies the 1<sup>st</sup> and 2<sup>nd</sup> Respondents recall/redeployment/release of the petitioner from the Kenya High Commission in South Africa to the Headquarters of the Ministry of Foreign Affairs and International Trade or any other state department thereto;**
- ii. **The Notice period for the recall/redeployment/release of the petitioner from her tour of duty from the Kenya High Commission in South Africa is extended by four (4) weeks from the date hereof;**
- iii. **During the four (4) weeks extension period the respondents will make any payments and/or expenditure allocations properly due and owing and/or to be incurred by the Petitioner and her family during the course and in relation to the extension of petitioner's tour of service in the Kenya High Commission in South Africa.**
- iv. **The petitioner is awarded 50% costs herein.**

Delivered in open Court at Nairobi and dated this 18<sup>th</sup> Day of June 2014

**Mbaru**

**JUDGE**

In the presence of

Court Assistant: Lilian Njenga

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[1] See Johan De Waal, Iain Currie, G. Erasmus *the Bill of Rights Handbook* (4th ed. 2001) Juta, 391.