



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**  
**AT NAIROBI**  
**PETITION NO. 3 OF 2014**  
**(FORMERLY NAIROBI H.C. PET. NO. 21 OF 2014)**

**CLIFFORD KEYA ..... CLAIMANT**

**VERSUS**

**CABINET SECRETARY MINISTRY OF LAND,**

**HOUSING AND URBAN DEVELOPMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY**

**GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**Mr. Ondabu for the Petitioner**

**Mr. Njoroge for the Respondents**

**RULING**

1. The Petitioner in the Petition dated 17<sup>th</sup> January 2014, sued the Cabinet Secretary Ministry of Land, Housing and Urban Development, The Public Service Commission and The Honourable Attorney General seeking orders that;

- a. this Court to declare unconstitutional the promotion, appointment and or deployment of staff of the Ministry of Land, Housing and Urban Development.
- b. this Court do issue a declaration that the transfer of staff of the Ministry of Land, Housing and Urban Development is the duty of the National land Commission and not the Cabinet Secretary.
- c. the Respondent do pay the cost of the Petition together with interest thereof.
- d. any other or such further relief that this Court may deem fit and just to grant.

2. Simultaneous with the Petition was filed a notice of motion on a certificate of urgency seeking conservatory orders in the following terms:

- i. that pending the hearing and determination of this application, the Court be pleased to issue a conservatory order directed to the 2<sup>nd</sup> Respondent restraining it from promoting, appointing and or

deploying public officers in the Ministry of Land, Housing and Urban Development, as per the 1<sup>st</sup> Respondent's letter dated 10<sup>th</sup> January 2014 and subsequently pending the hearing and determination of this petition.

3. The Application is supported on grounds found on the face of the Notice of Motion to wit, interalia;
  - a. that on 10<sup>th</sup> January 2014, the 1<sup>st</sup> Respondent wrote a letter to the chairperson of the 2<sup>nd</sup> Respondent proposing to promote, appoint and deploy Public officers of the Ministry of land, Housing and Urban Development.
  - b. that the proposal contravenes the provisions of **Article 232(1)(g)** of the Constitution of Kenya, as read with **Article 236**.
4. Furthermore, making such a proposal personally contravenes the guiding principles of leadership and integrity as enshrined under **Article 73(2)(c)** and if acted upon would contravene **Articles 153(4)** and **Article 155(2)** of the Constitution.
5. That under **Section 12(2)** of the **Land Registration Act No. 3 of 2012** it is envisaged that the Chief Land Registrar who has been appointed by the 1<sup>st</sup> Respondent should be subjected to the rigorous process of competitive recruitment and being vetted by the Public service Commission which has not happened.
6. That the action by the Cabinet Secretary amounts to usurpation of the functions of the Principal Secretary in the Ministry and therefore, unlawful and unconstitutional.
7. That it is in the interest of justice and fair play that the conservatory order sought above be issued to stop the 2<sup>nd</sup> Respondent from implementing the recommendation by the 1<sup>st</sup> Respondent contained in the letter dated 10<sup>th</sup> January 2014.
8. The Application is also supported by the Affidavit of Clifford Keya the Petitioner herein which materially supports the aforesaid grounds.
9. The letter dated 10<sup>th</sup> January 2014 recommending the proposed changes is annexed to the Affidavit and marked "**CK1**".
10. The letter is by **Hon. Charity Kaluki Ngilu**, the Cabinet Secretary to **Prof. Margaret Kobia**, the Chairperson Public Service Commission and partly read;

**"Further to our meeting in your offices on 10<sup>th</sup> January 2014 where the above matter was deliberated at length I hereby present the revised proposals of the staff changes within the Ministry. Please see Annex one attached."**

11. The annex contained list of employees for appointment including;
  1. Acting Chief Land Registrar under **Article 234(2) (a) (ii)** of the Constitution and **Sections 12 and 13** of the **Land Registration Act No. 3 of 2012**;
  2. heads of Directorate;
  3. heads of Departments in the Directorate of land;
  4. staff changes in the Lands Directorate;
  5. staff changes in the Housing, Urban Development and Public works Department.
12. The 2<sup>nd</sup> Respondent, The Public Service Commission filed a replying affidavit deposed to by **Alice Atieno Otwala**, its secretary. She admits that the Commission received the letter dated 10<sup>th</sup> January 2014 from the 1<sup>st</sup> Respondent, the Cabinet Secretary. Subsequently, the Commission met on 15<sup>th</sup> January 2014 but did not make any appointments.

13. That on 20<sup>th</sup> January, 2014, the principal Secretary, Ministry of Lands, Housing and Urban Development requested for replacement of officers who had been transferred from the Ministry by the Central Human Resource management Committee on 17<sup>th</sup> January 2014.
14. That the Commission in its meeting of 21<sup>st</sup> January 2014 appointed the officers named thereof on acting capacity for a period not exceeding three (3) months or until the positions are filled competitively through advertisement whichever is easier.
15. That the indents for the advertisement of the posts have been forwarded to the Commission by the Ministry and the same will be advertised and positions filled competitively in terms of **Article 232**.
16. That the Commission has not made any appointment of the Chief Land Registrar as it is aware of the provisions of **Section 12** of the **Land Registration Act 2012** and the same will be advertised and done competitively and applicants vetted.
17. That the notice of motion has therefore been overtaken by events.
18. The Petitioner / Applicant did not file any supplementary Affidavit to join issues with the respondent in respect of all these material averments contained in the Replying affidavit.
19. The Court has no reason therefore to doubt the evidence contained in the Affidavit of the Secretary to the Public Service Commission to the effect that all the officers of the 1<sup>st</sup> Respondent will be competitively recruited in a transparent manner and in terms of the principle of transparency and fair play contained in the Constitution and the **Land Registration Act, 2012**.

### **Injunctions**

20. For the Court to grant the interim Conservatory orders sought, the Petitioner/Applicant must satisfy the threshold established in the matter of **Giela V. Casman Brown [1975] EA 358** as follows:
  - a. that applicant must establish a prima facie case with a probability of success;
  - b. that Applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by an award of damages; and
  - c. if the Court is in doubt it should decide the application on the balance of convenience.
21. At this stage of the proceedings, the Court is minded not to venture into the merits of the matter. See **Mrao V. First American Limited and 2 others [2003] KLR**.
22. Having considered the competing facts placed in the supporting and Replying Affidavit, noting that no supplementary Affidavit was filed to deny or join issues deposed to in the replying affidavit. And while having regard to the authorities placed before the Court by the parties, the Court is not persuaded that a *prima facie* case has been established to warrant the grant of the interim conservatory order sought. After all, if the Respondents go ahead and appoint officers in contravention of the Constitution and the relevant statute nothing would be easier than to declare such appointments unconstitutional and therefore null and void.

Accordingly, the Application is dismissed with costs.

**Dated and Delivered at Nairobi this 11<sup>th</sup> Day of June 2014**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**