



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CONSTITUTIONAL PETITION NO. 2 OF 2019

IN THE MATTER OF ARTICLE 22 [1] OF THE CONSTITUTION OF KENYA

AND;

IN THE MATTER OF ALLEGED CONTRAVENTION AND THREATENED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLE 1,2,6, 10, 19, 20,21,22,23,24 25,27,28,29,30,32,33,35,40,41,43,45,47,48,50,52,73,75,153,232,236,258,259, AND 260 OF THE CONSTITUTION OF KENYA, THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA

AND;

IN THE MATTER OF THE EMPLOYMENT ACT 2007, THE LAWS OF KENYA

AND;

IN THE MATTER OF SURVEY ACT, CAP 299 THE LAWS OF KENYA

AND;

IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS; THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS; THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS; THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS; AND IN THE MATTER OF THE DISCRIMINATION [EMPLOYMENT AND OCCUPATION] CONVENTION NO.111

BETWEEN

RACHEL MUTHEU NDAMBUKI.....PETITIONER

VERSUS

**1. CABINET SECRETARY, MINISTRY OF
LANDS AND PHYSICAL PLANNING**

1. PUBLIC SERVICE COMMISSION

2. ATTORNEY-GENERAL.....RESPONDENTS

Rika J

Court Assistant: Andrew Mwabanga

Njoroge & Katisya Advocates for the Petitioner

JUDGMENT

1. The Petition herein was filed on the 22nd February 2019. The Petitioner is a Public Officer, in charge of Survey Office, Taita Taveta County.
2. Her Petition is based on the facts disclosed in the face of the Petition; her Affidavit sworn on 22nd February 2019; and 15 documents contained in a list filed with the Petition.
3. She states, that in the years 2013/2014, the family of President Uhuru Kenyatta donated from its Gicheha Farm, within the County of Taita Taveta, 2224 acres of land, to resettle about 850 Squatters who were in occupation of the land.
4. Taita Taveta Survey Department, Land Adjudication Office Taveta and Lands Registry Taveta excised the 2,224 acres from Gicheha Farm, creating a Settlement Scheme known as Ziwani Settlement Scheme.
5. Each Squatter was entitled to 2 acres, with the rest of the land reserved for public utilities. By 2015, the Squatters had received titles to their respective portions.
6. The Petitioner was deployed as the Officer in charge of the Survey Office, Taita Taveta County, in 2017.
7. In the course of her work at the new station, the Petitioner learnt that 40 plots had not been properly allocated. Some genuine Squatters, who were identified from the outset, and who were in occupation of respective Plots, were allocated nothing.
8. Sometime in July 2018, the Deputy Taveta Sub-County Commissioner prepared a list of third parties, proposing that they be considered in fresh allocations of Ziwani Settlement Scheme. The Petitioner declined to be involved in this allocation, because third parties were not in the original list of beneficiaries; the Plots subject of the proposal of fresh allocation were already occupied by genuine Squatters; the occupants would have to be evicted to make way for the interlopers; these interlopers had not presented themselves physically at the Survey Office; the land had already been registered and the correct forum for arising disputes would be the Courts; and allocation would have been irregular as the exercise at Ziwani Settlement Scheme had been concluded.
9. On 29th August 2018, the Petitioner received a letter from Principal Secretary in the Ministry of Lands and Physical Planning, Dr. Muraguri, informing her, that he was in receipt of a letter from the Deputy County Commissioner Taveta Sub-County alleging that the Petitioner was illegally allocating Ziwani Settlement Scheme to third parties. She was required to respond to the Principal Secretary, about the allegations which characterized her as the main perpetrator of illegal allocations at Ziwani Settlement Scheme.
10. She responded. There was no further enquiry from the Principal Secretary. On 4th February 2019, she received a call from the Cabinet Secretary, Mrs. Farida Karoney, asking why the Petitioner was allocating Plots within Gicheha Farm, property of the Kenyattas. She informed Karoney that this was not the case. She had only visited Ziwani Settlement Scheme, in the company of Land Registrar Taita Taveta, to deal with complaints from Squatters. On 6th February 2019, the Petitioner received a letter from the Cabinet Secretary, transferring her to the Garissa Survey Office. The Petitioner states, this transfer was made on the influence of the Deputy Commissioner TaitaTaveta Sub-County, who lacks the mandate to deal with survey work.
11. The Petitioner submits that having been deployed from Mombasa to Taita Taveta in 2017, she expected to be transferred from Taita Taveta after 3 years. She feels she was discriminated against. Her family is in Mombasa. Transfer to Garissa would disrupt her family life. Garissa is insecure, particularly for her gender.
12. The Petitioner submits that the 2nd Respondent delegated its constitutional mandate to the 1st Respondent through an Instrument dated 30th June 2018. This is in contravention of Article 234 [5] of the Constitution, which restricts delegation of the 2nd Respondent's powers and functions to any Officer, Body or Authority in the Public Service. Article 260 defines State Officers to include Cabinet Secretaries, and excludes them from the definition of Public Service. The 1st Respondent's letter of transfer to the Petitioner was therefore issued without proper constitutional mandate.
13. It is submitted that the Delegation Instrument, confers power on Authorized Officer, to transfer Public Officers from one station to another, in their substantive capacity. The Petitioner was not transferred as Head of County Survey Department. All matters which do not fall under delegated authority, are submitted to the 2nd Respondent for its decision.
14. The Delegation Instrument requires the Authorized Officer to comply with all applicable laws. It establishes the Human Resource Management Advisory Committee [HRMAC], in every state department. Its functions include making recommendations on transfer of Public Officers. The 1st Respondent issued the letter of transfer without resort to the HRMAC.
15. The decision to transfer the Petitioner was arbitrary and contrary to Section 43[2] and [3] of the Public Service Commission Act No. 10 of 2017, which requires that where the Authorized Officer intends to transfer a Public Officer to another Office of a different designation, but of a similar grading, the Authorized Officer shall forward their recommendations and comments to the Commission, which shall decide whether the transfer shall be approved.

16. The letter of transfer violates the Petitioner's right to equality, freedom from discrimination and the right to human dignity, under Articles 27 and 28 of the Constitution. The Petitioner's professional calling and conscience, do not allow her to deny genuine Squatters land. Her freedom of conscience under Article 32[1] [3] and [4] has been violated. The complaint from the Deputy County Commissioner was not availed to the Petitioner in violation of Article 35 on right to information. Other Articles violated through the letter of transfer include Article 41, 47 and 50. Article 236 prohibits victimisation and discrimination against Public Officers on account of their having discharged their functions in accordance with the Constitution or any other law. The Article states that such Officers shall not be dismissed, removed from Office, demoted in rank or otherwise subjected to disciplinary action without due process of the law. The Petitioner submits that, the Respondents have failed to uphold the values of leadership and integrity under Article 10[2] [c] and Article 232 of the Constitution, on values and principles in the Public Service.

17. Against this background, the Petitioner prays the Court to grant the following Orders:

- a. A declaration that the 1st Respondent's letter dated 6th February 2019 is unconstitutional, invalid, null and void, and ultra vires the 1st Respondent's powers and authority.
- b. A declaration that the 2nd Respondent's delegation of functions to the 1st Respondent through the Delegated Instrument, dated 30th June 2018, is unconstitutional, ultra vires, null and void.
- c. A declaration that the 1st Respondent's letter dated 6th February 2019 and the process through which the decision was reached, violate or threaten the Petitioner's constitutional right to fair administrative action; right to equality, dignity and freedom from discrimination; right of access to information; right to fair labour practices; freedom of conscience; and right to security.
- d. A declaration that the 1st Respondent's actions and letter, violate and totally disregard the protection of the Petitioner as a Public Officer under Article 236.
- e. A declaration that the letter of 6th February 2019, violates [specified Articles of the Constitution, ranging from 1 to 260] and the 6th Schedule
- f. An order of Certiorari to remove to this Court, and quash the 1st Respondent's letter dated 6th February 2019 and all processes flowing from the said decision.
- g. A declaration that the Petitioner to continue discharging her duties as In-charge Survey Office, Taita Taveta, without undue interference.
- h. An order of Mandamus, to compel the 2nd Respondent to investigate and audit the human resources processes leading up to the issuance of the letter of 6th February 2019.
- i. Conservatory Order, restraining the Respondents or their agents, servants and any other persons acting on their direction or authority, from transferring or deploying, or taking any disciplinary action against the Petitioner, arising from or connected to the complaint letter issued by the Deputy County Commissioner, or in contravention of the Constitution and applicable Laws.
- j. General damages for damage to reputation, mental anguish, and psychological torture suffered by the Petitioner.
- k. Costs.

18. The Court issued a Conservatory Order on 22nd February 2019 upon the application of the Petitioner, staying the decision of the 1st Respondent to transfer the Petitioner to Garissa County, pending hearing of the Petition.

19. The 1st Respondent did not comply with the Orders of the Court, and in a Ruling dated 25th October 2019, the Court found the 1st Respondent to be in contempt.

20. The 1st Respondent was given time to purge the contempt, and her sentencing scheduled for 13th March 2020. She did nothing to purge contempt. She was fined Kshs. 250,000, and banished from the proceedings, until she paid the fine.

21. The Petition came up for hearing 6 months later- on 23rd September 2020. The State Counsel sought to have her Clients heard, submitting that the Principal Secretary in the Ministry of Lands, had now approved payment of the fine. The Court swiftly rejected the contemnor's entreaties, and ordered that the Petitioner proceeds *ex parte*.

22. The Petition is therefore unchallenged.

23. The Petitioner restated in her Submissions before the Court, the contents of her Petition, Supporting Affidavit and Bundle of Documents on record.

The Court Finds: -

24. The Petitioner was employed as a Surveyor by the Department of Surveys, in the Ministry of Lands and Physical Planning, on 26th

January 2006. She was initially posted to Kilifi District Survey Office.

25. She was transferred on 6th July 2017, from Survey Office Mombasa, to Survey Office Wundanyi. On 2nd August 2017, she was designated as the Officer In- Charge, Wundanyi Survey Office.

26. Wundanyi Survey Office falls within the County of Taita Taveta.

27. The Petitioner was involved, in her role as the In-Charge, with allocation of Land to Squatters, in Ziواني Settlement Scheme, a sub-division of Gicheha Farm which is property of the Kenyattas.

28. There are letters written by the Land Registrar Taita Taveta District, showing the settlement exercise resulted in some disputes. Some genuine Squatters who were identified from the outset, were denied their rightful titles, while 3rd Parties, sought to grab what was not intended for them. The 3rd Parties were being fronted by the Deputy County Commissioner, Taita Taveta Sub-County. The Petitioner was invited to the dispute settlement platforms by the Land Registrar. She stood her ground and conscientiously declined to advance the grabbing of land reserved for Squatters.

29. The Deputy County Commissioner, Taita Taveta Sub-County, encountered with a Public Officer who would not budge an inch, elected to write a malicious complaint against the Petitioner, addressed to the Principal Secretary in the Ministry. The actual complaint, as written by the Deputy Commissioner, was not availed to the Petitioner. It was alleged that the Petitioner was responsible for irregular allotments at Ziواني Settlement Scheme. After receiving the letter from the Principal Secretary calling on the Petitioner to explain the complaint, she replied on 31st August 2018. There was no further communication from the Principal Secretary.

30. But the Cabinet Secretary pursued the Petitioner, calling her over the matter, and culminating in the letter of transfer dated 6th February 2019. The Petitioner was transferred from Taita Taveta Survey Office. She was the Officer In-Charge. She was required to report to the Officer In-Charge, Survey Office Garissa. She was in effect being moved to Garissa in a lower position than she served at Taita Taveta. She was to subordinate herself at Garissa.

31. Coming close on the heels of the calls and letters from the Ministry Heads, over Ziواني Settlement, it can safely be concluded that the Petitioner was being moved because she was an impediment to certain vested interests, fronted by the Deputy County Commissioner.

32. Another Officer, called Justice Kiprono, was instructed to replace the Petitioner at Taita Taveta.

33. There are many Articles of the Constitution, which the 1st Respondent disregarded, in transferring the Petitioner. Principally, Article 236 was directly ignored. It states:-

“ A Public Officer shall not be: a] victimized or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or [b], dismissed, removed from Office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.”

34. The Petitioner was transferred and demoted in one fell swoop, because she discharged her survey role at Ziواني Settlement Scheme, in accordance with the Constitution and the Law. She protected genuine Squatters against deprivation of what the Settlement Scheme offered. She thwarted land grabbers. She acted in promotion and protection of constitutional order and rule of the law. She was transferred and demoted for it.

35. The Court agrees with the Petitioner that the 1ST Respondent violated also, her right to fair labour practices; right to equality and freedom from discrimination; freedom of conscience and the right of access to information; the right to fair administrative action; and the right to fair hearing. The Respondents failed to uphold the values of leadership and integrity listed under Article 10 of the Constitution. It is the view of the Court that the 1st Respondent similarly acted in violation of the International Conventions and Instruments, identified by the Petitioner.

36. The Court does not have any reason to disagree with the Petitioner’s Submission on delegation of authority by the 2nd Respondent, to the 1st Respondent. The letter of 30th June 2018 [delegated instrument], contravenes Article 234 [5] of the Constitution, which regulates the 2nd Respondent’s delegation of powers and functions. Cabinet Secretaries, are State Officers, under Article 260 of the Constitution. They are excluded from the definition of Public Service. Delegation under Article 234 [5] is only allowable to Officers, Bodies or Authorities in the Public Service. The 1st Respondent does not fall within the Officers, Bodies or Authorities contemplated by Article 234 [5] of the Constitution. Purported delegation of power and functions, which was the basis of her letter of 6th February 2019, was not founded on the Constitution.

37. The Cabinet Secretary, even if she had properly delegated authority, did not act in accordance with the delegation instrument. The Instrument requires under Section 11, that an Authorized Officer can only transfer a Public Officer from one station to another, in that Public Officer’s substantive capacity. There is no room for transfer and demotion in one move. Further, all matters which do not fall within delegated authority, shall be submitted to the Public Service Commission for its decision. The 1st Respondent made her own, unrestrained, unlawful and unconstitutional decision, without any approval of the 2nd Respondent. The 1st Respondent acted contrary to Section 43 of the Public Service Commission Act, which requires approval of the Commission is obtained.

38. Other infringement of the law relates to the lack of advice or complete non-involvement of the Human Resource Management Advisory Committee [HRMAC], in the transfer of the Petitioner. The 1st Respondent took an arbitrary decision to transfer the Petitioner, without resort to HRMAC in her department. The Constitution of Kenya does not envisage that executive power is exercised whimsically. Executive

functions must be exercised in accordance with the Constitution, relevant Legislation and Labour Instruments governing Public Service.

39. The Court is satisfied that the Petitioner merits the prayers sought. The Respondents have shown scant regard to the rule of law: first by their transfer of the Petitioner; second, by their disregard of the Conservatory Order; and third by compounding contempt of Court, by not meeting the fine imposed by the Court. The Court does not see what value is to be gained however, from giving a declaratory order, in terms of paragraph 64 [e] of the Petition. Similar declaratory orders, have been considered under other sub-paragraphs to paragraph 64. Paragraph 64 [[h] seeking an order of mandamus to compel the 2nd Respondent to investigate the human resource processes leading to transfer, is in the view of the Court not necessary. The remedies extended to the Petitioner for specific violations, are sufficient. There were multiple violations of a grave nature, suffered by the Petitioner, warranting general damages.

IT IS ORDERED: -

- a. It is declared that the 1st Respondent's letter to the Petitioner, dated 6th February 2019, is unconstitutional, invalid, null, void and ultra vires.*
- b. It is declared that the 2nd Respondent's delegation of functions to the 1st Respondent, through the Delegated Instrument dated 30th June 2018, is unconstitutional, ultra vires, null and void.*
- c. It is declared that the 1st Respondent's letter of 6th February 2019 and the process through which the decision was reached, violated the Petitioner's right o fair labour practices; right to equality and freedom from discrimination; right of access to information; freedom of conscience; and right to security.*
- d. It is declared that the 1st Respondent's letter of 6th February 2019 violated and totally disregarded the Petitioner's protection as a Public Officer, under Article 236 of the Constitution.*
- e. An order of Certiorari is hereby issued, to remove to this Court and to quash the 1st Respondent's letter dated 6th February 2019 and all processes flowing from the said decision.*
- f. The Petitioner shall continue discharging her duties as the In-Charge, Survey Office, Taita Taveta without undue interference.*
- g. The 1st and 2nd Respondents are restrained from transferring, deploying or taking disciplinary action against the Petitioner, arising from or connected to the complaint letter issued by the Deputy Commissioner Taveta Sub-County dated 30th August 2018.*
- h. The Respondents shall pay to the Petitioner General Damages assessed at Kshs. 3.5 million.*
- i. No order on the costs.*

Dated and delivered at Mombasa this 6th day of October 2020

James Rika

Judge