



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

CONSTITUTIONAL PETITION 515 OF 2017

CHRISPINE OTIENO OWIYE.....PETITIONER

THE SELECTION PANEL FOR

APPOINTMENT OF MEMBERS

OF THE COMMISSION (IEBC).....1ST RESPONDENT

THE HON. ATTORNEY GENERAL...2ND RESPONDENT

JUDGMENT

1. **Chrispine Otieno Owiye**, the petitioner, is an advocate of the High Court of Kenya. He submitted an application for the position of member of the Independent Electoral and Boundaries Commission, **IEBC**, after vacancies had been advertised in October 2016. On 15th November 2016, the Selection panel for appointment of member of IEBC **the 1st respondent**, published names of 31 candidates who had been shortlisted for interviews out of 765 applicants but the petitioner's name was not among those shortlisted for interview and no reason was given for not shortlisting him.

2. The petitioner averred that he is an advocate of 12 years standing, with commendable experience as a public prosecutor and judicial officer having served as a principal magistrate, has knowledge and experience in management, electoral dispute resolution, electoral code of conduct, electoral security, risk assessment investigation and persecution of election offences and policy strategy formulation. He stated that he had a legitimate expectation that having applied for the position; he would be given reasons for not being shortlisted.

3. The petitioner contended that failing to include his name and or communicate reasons for the decision to exclude him from the interview; the 1st respondent violated his rights and fundamental freedoms enshrined in Articles 10, 35, 47 and 73 of the Constitution as well as international treaties ratified by Kenya and general rules of international law.

4. Based on the above grounds, the petitioner filed a petition dated 7th December 2016 seeking the following reliefs;

a) A declaration that failure to communicate the reasons for the decision by the 1st respondent in writing breaches the petitioner's constitutional right and freedoms under Articles 35, 47, 48, 50 and 73 of the constitution of Kenya 2010.

b) An order of certiorari to bring into this honourable court for purposes of being quashed the decision of shortlisting of candidates communicated by the press release dated 22nd day of November 2016 declining, failing or refusing to shortlist the petitioner.

c) An order of mandamus directing and compelling the 1st respondent to process all applications that were received from eligible applicants, include the name of the petitioner among the interviewees and conduct the interview of the petitioner in strict conformity with the Constitution and devoid of any prejudices and discrimination.

d) An order of prohibition to prohibit the 1st respondent from carrying on with the process of interviews and from making recommendation to the president on the persons to be appointed as IEBC commissioners.

e) An order in terms of Section 11(1) of the Fair Administration Act 2015 declaring that the 1st Respondent through its current

office bearers has failed in its Constitutional obligation and has acted unconstitutionally in the ongoing process of recruitment of the IEBC commissioners.

f) Conservatory orders before the hearing and determination of the petition to prohibit the 1st respondent from undertaking the process of interviews of the shortlisted candidates and making any recommendations to the president.

g) Exemplary damages.

h) Costs

i) Any other relief the court deems fit.

2nd Respondent's Response

5. The 2nd respondent filed grounds of opposition dated 14th February 2017 and filed on the same day, contending that the petitioner has failed to demonstrate in any manner whatsoever how the respondents had violated his Constitutional rights; that the facts set out in the petition do not raise any Constitutional issue either for enforcement of fundamental rights and freedoms or interpretation of the Constitution; that the petitioner should not be granted damages sought as he has not demonstrated how the 2nd respondent had failed to discharge his constitutional duties thereby breaching his fundamental rights and freedoms; that the petitioner's interpretation of the Constitution is misleading, misconceived and self-serving; that the amended petition lacks merit, is hopeless, presumptive and an abuse of the Court process; and that the amended petition is frivolous to the extent that it does not raise a cause of action against the 2nd respondent hence it should be dismissed.

Interested Party's Response

6. ***Abdalla Mohammed Kamwana, the interested party***, filed a replying affidavit in support of the petition sworn on 4th April 2017. ***Mr. Kamwana*** deposed that the 1st respondent advertised vacancies for chairperson and members of the ***IEBC***; that on 24th October 2016 he also applied for the position of member of the ***IEBC*** and that on 16th November 2016, the 1st respondent published names of those shortlisted for interviews but excluded his name. The interested party deposed that the 1st respondent did not disclose the criteria it used to decide the people to shortlist or not shortlist including the applicants for the positions they had applied for.

7. ***Mr. Kamwana*** further deposed that on 5th November 2016 he wrote to the 1st respondent seeking information on the criteria used in shortlisting and not shortlisting applicants but did not received a response before interviews were conducted on 28th November 2016. He also deposed that on 22nd November 2016, he sought information from the 1st respondent on the criteria used for shortlisting applicants for the position of members of ***IEBC*** and minutes of its deliberations showing reasons why he was not shortlisted for interviews but none was given.

Petitioner's Submissions

8. ***Mr. Ochich***, learned counsel for the petitioner, submitted highlighting their written submissions dated 21st March 2017, that the petitioner was not listed for interview and no reasons were given for it. Learned Counsel contended that when the petition was filed on 17th December 2017, interviews were still on going. He therefore, abandoned prayers (b), (c), and (d) in the amended petition. Learned Counsel submitted that ***Article 10(2) (c)*** of the Constitution is clear on national values and principles of transparency and accountability which were not observed by the 1st respondent.

9. Submitting on Article 35 of the Constitution, Learned counsel contended that the petitioner should have been informed of the reasons why he was not shortlisted for the interview. He also argued that the petitioner should have been informed of the reasons in writing. Regarding Article 47, learned counsel submitted that the petitioner was entitled to an expeditious, efficient and lawful administrative action which was not the case. He contended therefore, that the 1st respondent violated Article 47 of the Constitution as a result of which the petitioner is entitled to exemplary damages.

10. Counsel relied on the decision in the case of ***Daniel Musinga t/a Musinga and Co Advocates v Nation Newspaper Ltd*** [2005] eKLR where Ksh 10 million was awarded as exemplary damages. He also relied on other authorities in their list of authorities and prayed for grant of the reliefs sought in the petition.

Interested Party's Submissions

11. ***Mr. Lempaa***, learned counsel for the interested party, associated himself with the submissions made by ***Mr. Ochich*** on behalf of the petitioner, and added that there is no violation of a right without a remedy. Counsel relied on the case of ***Haither Haji Abdi & another v Southdown Developers Ltd & others*** [2012] eKLR

12. Learned counsel urged the Court to take into account the fact that the 1st respondent failed to defend the petition hence it should be deemed to have ran away with a trait of violation of rights of citizens. He contended that state officers hold positions in trust for taxpayers and information they hold should be given when sought in terms of Article 35(1) of the Constitution. ***Mr. Lempaa*** relied on the decision ***Republic of South Africa v M&G Media*** CCT03/11 [2011] ZACC2) for the submission that Constitutional guarantees of the right of access to information gives effect to accountability, responsiveness and openness in the conduct of public affairs He also relied on the case of ***Brunner v Minister for Social Development & Others (CCT25/09)*** [2009] ZACC 21 and ***Nairobi Law Monthly Company Ltd v The Kenya Electricity Generating Co Ltd & 20 Others*** [2013] eKLR among other decisions.

2nd Respondent's Response

13. **Mr. Sekwe**, learned counsel for the 2nd respondent submitted, highlighting their written submissions in opposition of the petition, that in his view, prayers (e) and (f) are also spent leaving only prayers (g) on exemplary damages for determination. Learned counsel submitted that the 1st respondent called for submission of applicants by persons interested to serve as members of **IEBC**; that the notice was clear that only the shortlisted applicants would be contended; that the 1st respondent received applications including those of the petitioner and interested party and that only 36 out of 765 applicants were shortlisted for interviews.

14. According to **Mr. Sekwe**, the petitioner moved the Court under Article 35 of the Constitution and later amended the petition to seek exemplary damages which was not the correct approach. Counsel submitted that if the petitioner was aggrieved by the 1st respondent's action, he should have moved the Court for orders of access to compel the 1st respondent to give the information but not file a petition for damages. Regarding exemplary damages, learned counsel submitted that they are not grantable because they are primitive in nature and further that the petitioner did not prove that they are grantable.

15. It was **Mr. Sekwe's** contention that the 1st respondent did not violate the petitioner's right; that the 1st respondent had many parties to deal with and could not give reasons to all the applicants who did not make it to the shortlist. He relied on the case of **Andrew Omtatah Okoiti v Attorney General & Others** [2011] eKLR and **Lucas Omoto Wamari v Attorney General & Another** [2014] eKLR for the submission that in order to grant exemplary damages, the court must be satisfied that violation was deliberate and caused harm and suffering to the petitioner. He argued that the petitioner did not show how his rights were violated or even that indeed he had suffered damage. He urged that the petition be dismissed.

Determination

16. I have carefully considered this petition, the response thereto and submissions by counsel for the parties. I have also taken into account the authorities relied on by both sides. Two issues arise for determination in this petition, namely; whether the petitioner's rights were violated, and depending on the answer to the above issue, whether the petitioner is entitled to damages, exemplary or otherwise.

17. The petitioner applied for the position of member of **IEBC** following advertisement of vacancies by the 1st respondent, a selection panel that had been set up to recruit members of IEBC. He submitted his application but was shortlisted for interviews. He sought reasons why he was not shortlisted but none was given to him. He filed this petition for a declaration of violations of his constitutional rights relying on Articles 10, 35 and 47 of the Constitution as the basis for justifying his claim for violation of rights and damages.

18. The petition was supported by the interested party who stated that he also applied for the same position but was neither shortlisted nor given reasons despite having sought them. He therefore agreed with the petitioner that there was violation of their right of access and deserves compensation.

19. The 2nd respondent denied violation of the petitioner's rights, pointing out that the 1st respondent had made it clear that only those shortlisted would be contacted. It was also contended that the 1st respondent was, in any case, dealing with hundreds of applicants within a short timeline hence it could not deal with individual applicants.

20. This petition hinges, principally, on the right of access to information under Article 35(1) of the Constitution. Access to information is a constitutional right, one of the foundations of the values and principles of governance in Article 10(2) of transparency, openness and accountability in the conduct of public affairs. Article 35(1) decrees that every citizen has a right to access information held by the state or state organs or anybody where the information is required for purposes of enforcing a right.

21. In the case of **Katiba Institute v President's Delivery Unit & 3 others** [2017] eKLR, this court stated that *"the importance of this right was fully appreciated by the drafters of our Constitution and they dutifully included Article 35 to make this right attainable as the foundation for an open, responsive, accountable and democratic government and its institutions. The Constitution therefore, grants citizens' access to information as a constitutional right and only the same Constitution can limit that access."*

22. In the South African case of **President of Republic of South Africa v M&G Media** (supra) the constitutional court of South Africa stated of the importance of the right of access;

"[10]. The constitutional guarantee of the right of access to information held by the state gives effect to "accountability, responsiveness and openness" as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."

23. In **Brummer v Minister for social Development and others** (supra), the same court had the following to say on the importance of the right of access;

"[62] The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."

[63] Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”

24. Closer home in the case of *Nairobi Law Monthly Limited v The Kenya Electricity Generating Company & 2 others* (supra), the Court stated;

“[56]... State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a)....they cannot escape the constitutional requirement that they provide access to such information as they hold to citizens.”

25. Flowing from the above decisions, is the fact that the right of access is a fundamental right that cannot be ignored by the state or its organs and is essential in a democratic state for the fulfillment of the desire for open, accountable and transparent discharge of public duties.

26. The right of access is however dependent on certain parameters. A person who desires to access, must seek to access information held by the state or state organ or any other person and does not have to give reasons for seeking to access. This is so because as was stated in *Nairobi Law Monthly limited v The Kenya Electricity Generating Company & 2 others* (supra), **“the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information. Thus, the State has a duty not only to proactively publish information in the public interest-this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the State to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the State”**

27. Parliament enacted **Access to Information Act, 2016** which sets the conditions for access; that is, a person seeking access must first write to the state or state organ responsible seeking information and the Act gives the time limit within which the information should be given. Section 5 of the Act requires the public entity concerned to facilitate access to information held by it. Section 8, states that a citizen who wants to access information must do so in writing giving sufficient details and particulars that will enable the public officer appreciate the information requested.

28. The Act is also clear that the information should be given without delay and at no fee, notwithstanding reasons for access. Section 9 gives timeline of 21 days for a decision on access to be made and communicated. The public officer should state whether the information sought is available and whether it will allow access.

29. That being the case, where the state, state organ or the person supposed to disclose information fails to allow access, the person seeking access has the right to move the Court for an order of access and, if the Court is satisfied that indeed failure to allow access was without a reasonable cause, it may make appropriate orders to facilitate access. The fundamental point here is that the person must have satisfied the procedure for access before turning to Court for assistance.

30. The petitioner states that having not been shortlisted he had a legitimate expectation that he would be supplied with written reasons on why he was not shortlisted. He also stated that even after seeking reasons none was given thus the 1st respondent violated his constitutional right.

31. I have perused the petitioner’s affidavit sworn on 7th December 2016 in support of the petition and in particular paragraph 12 thereof where he deposes that his legitimate expectation upon making the application was not met because neither written reasons, criteria for shortlisting, marking scheme nor the minutes were provided to him or made available for access. At paragraph 13 of the affidavit, he deposes that the 1st respondent remained stoic, adamant and refused to give written reasons despite demand.

32. The petitioner attached a copy of the letter **“C 005”**, dated 28th November 2016 from the petitioner’s advocate addressed to the Secretary of the 1st respondent detailing the information sought. It related to; (1) shortlisting criteria and or marking scheme applied; (2) written reasons why the petitioner was not shortlisted and, (3) minutes that occasioned the petitioner’s disqualification. He states at paragraph 12 that no response was given.

33. I have looked at the referenced letter **“C 005”** and from the copy attached to the affidavit, there is no receiving stamp or any other mark signifying that the letter was delivered and received by the 1st respondent. Where a petitioner complains that he has been denied the right of access, it is incumbent upon him to satisfy the Court that request for information was made and delivered but the state organ or person required to give information ignored the request for access.

34. From the attached letter, it is not possible to tell whether indeed the request for information was delivered and received but the state organ failed or neglected to act on it in compliance with the Constitution and the law. Evidence on delivery is important because after receipt of the request for access, the person required to allow access has 21 days from the date of receipt of the request to make and communicate his decision as required by section 9 of the Act.

35. On that basis therefore, it is difficult for this Court to make a finding of fact, first, that indeed the 1st respondent which, is no longer in existence anyway, failed to act as required of it by the constitution and the law and, therefore, violated the petitioner’s constitutional right. Secondly, if a party fails to get a response on his request for access, he is entitled to move the Court for an order compelling the defaulting party to allow access. At this stage the petitioner has to satisfy the Court that indeed he complied with the procedure for access but the state organ declined to allow access. If satisfied that indeed there is a deliberate refusal to allow access, the court would issue an order directing the state organ to allow access and make any other appropriate orders. In the absence of evidence that the demand was delivered, this Court is unable to agree with the petitioner that his rights were violated.

36. Regarding damages, I also note from the record, that the petitioner was to file an amended petition within 14 days but none was filed. This means the petition on record is that dated 7th December 2016. The petitioner's counsel abandoned prayers (b), (c) and (d) during the hearing leaving prayer (a) which means there is no prayer for damages, exemplary or otherwise. Given the scenario, this petition is unfounded. It follows that the petition has no legs to stand on the rest of the prayers having been abandoned and are not available for determination. As there is no prayer for damages, general or exemplary, it will be unnecessary to deal with the second issue.

37. For the above reasons, the petition dated 7th December 2016 has no merit and is dismissed with no order as to costs.

Dated, Signed and Delivered at Nairobi this 31st Day of July 2018

E C MWITA

JUDGE