



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 474 OF 2016**

**DR WILFRIDA ITOLONDO.....PETITIONER**

**VERSUS**

**THE PUBLIC SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By an Amended Petition dated 16<sup>th</sup> November, the the petitioner sought orders as follows:

**“PETITIONER PRAYERS 16<sup>TH</sup> NOVEMBER 2016 ORDERS THAT:**

- a) *That a declaration is hereby issued that the 1<sup>st</sup> respondent is bound to apply the provisions of the Constitution and particularly Articles 2, 3, 10, 27, 35, 73 and 232 in the on-going process of the recruitment of the Chairperson of the Ethics and anti-corruption Commission.*
- b) *That a declaration is hereby issued that the 1<sup>st</sup> respondent erred in failing to publish the names of the applicants for appointment to the position of the Chairperson of the Ethics and anti-Corruption Commission according to the advertisement and re-advertisement of 7<sup>th</sup> September 2016 and 10<sup>th</sup> October 2016.*
- c) *That a declaration is hereby issued that the petitioner and other applicants have a right to be told why they did not qualify to be shortlisted for the position of the chairperson of the Ethics and Anti-Corruption Commission.*
- d) *That a declaration is hereby issued that the Petitioner and all other applicants for appointment to the position of the Chairperson for the Ethics and anti-corruption Commission have a right to be given information with regards to why they qualified or did not qualify to be shortlisted for interviews for the position of a chairperson for the Ethics and Anti-Corruption Commission.*
- e) *That a declaration is hereby issued that the 1<sup>st</sup> respondent has the obligation to publish the names of all the applicants who responded to the advertisement and re advertisement in the Daily Nation newspaper of Wednesday, 7<sup>th</sup> September 2016 and of Monday, 10<sup>th</sup> October 2016*

respectively for the position of the Chairperson of the Ethics and Anti-Corruption Commission.

f) That a declaration is hereby issued that the 1<sup>st</sup> respondent has the obligation to serve the petitioner with recommendations the Ethics and Anti-Corruption Commission made about her.

g) That a declaration is hereby issued that all applicants who met the minimum requirements for the position of the chairperson of the Ethics and Anti-Corruption Commission have a right to be given the opportunity to appear before the interviewing panel to be interviewed.

h) That a declaration is hereby issued that the 1<sup>st</sup> respondent has No power to introduce and implement amendments in the Act without going through the right procedure.

i) That a declaration is hereby issued that the shortlisting panel violated the Constitution as averred herein.

j) That the Honourable Court be pleased to issue an order of mandamus compelling the 1<sup>st</sup> respondent to interview all qualified applicants who met the minimum requirements for appointment as Chairperson of the Ethics and Anti-Corruption.

k) That the Honourable court be pleased to issue any other or further remedy that the Honourable court shall deem fit to grant.

l) That the Honourable Court be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> respondents to pay the costs of this petition.”

2. The Petition was supported by the Affidavit of the petitioner sworn on 16<sup>th</sup> November 2016.

3. The Respondents filed Grounds of Opposition dated 18<sup>th</sup> November 2016 as follows:

**“GROUNDS OF OPPOSITION DATED 18<sup>TH</sup> NOVEMBER 2016**

1. That the application and petition herein are an abuse of the court process. They are misconceived, unfounded and otherwise an abuse of the court process.

2. That the application/petition as drafted are omnibus, imprecise and lacks sufficient detail of the alleged specific violations; and to that extent they contravenes the principles espoused in **Anarita Karimi Njeru** case (1976-1980) KLR 1272 and they are therefore an abuse of the court.

3. **That apart from Article 232 of the Constitution looking beyond fair competition and merit as consideration for any public appointment, Article 232(g) calls for the tampering of merit/competition with diversity and equitable distribution of opportunities; (sic)**

4. That the application does not espouse any special circumstances that can warrant the issuance of the interlocutory orders.

5. That it is in the public interest that the recruitment process is allowed to run to completion because the EACC is a Constitutional Commission whose main function as set out under Article 79, is the implementation of Chapter Six [6] pm leadership and integrity.

6. That the petitioners/applicants application does not raise constitutional issues.”

4. In addition, the respondents filed a replying affidavit sworn by Ms. Alice A. Otwala the Secretary/Chief executive Officer of the 1<sup>st</sup> Respondent on 17<sup>th</sup> November 2016 setting out their case, as follows:

**“REPLYING AFFIDAVIT OF ALICE A. OTWALA DATED 17<sup>TH</sup> NOVEMBER 2016**

3. That it is true that the 1<sup>st</sup> respondent advertised for the position of chairperson of the Ethics and Anti-corruption Commission and indeed the applicant did tender her application for the same.
4. That although the 1<sup>st</sup> respondent proceeded to request for more applications from the public, it considered all the applications in totality including those of the applicants who submitted their requests in response to the first call for applications.
5. That contrary to the applicant’s assertions, the 1<sup>st</sup> respondent did publish the names of all the applicants in its website including the applicant. **(annexed and marked AO1 is the publication)**
6. That in the same breath, the 1<sup>st</sup> respondent did also publish a list of candidates who were shortlisted for the said position. **(annexed and marked AO2 is the publication of the shortlist)**
7. That according to the annexed publication of candidates shortlisted for the position of chairperson of the EACC, the interviews for the position were slated to take place on the 17<sup>th</sup> of November 2016, and which are currently on going.
8. That in light of paragraph 7 above, the applicant’s notice of motion application is overtaken by events by dint of the fact that the interviews for the position that she is seeking to stop is already on going and the said recruitment will be concluded before her application is heard and determined.
9. That the respondent diligently analyzed all the applications it received vis-a-vis the position and concluded that the shortlisted candidates’ qualification exhibited more for the position than the applicant did.
- 10. That it is true that the applicant, like most of those who sent their requests to be considered for the position met the minimum requirement but the respondent had to look for more from all the applicants so as to arrive at the shortlist.**
11. That the applicant is not known to any member of the respondent’s short listing panel and hence cannot claim to have been left out of the shortlist for reasons other than for her qualifications.”

**Submissions**

5. The petitioner and Counsel for the Respondents, Mr. Moimbo Momanyi then made oral submissions on the 18<sup>th</sup> November 2016 and Judgment was reserved for 21<sup>st</sup> November on the basis of the urgency of the matter.
6. The parties submitted on the main petition rather on an interlocutory motion filed therein seeking among others relief a temporary injunction staying the recruitment exercise where interviews for the position were scheduled for the 17<sup>th</sup> November 2016. The necessity for amendment of the Petition to delimit the Petition from the interlocutory Notice of Motion resulted in the interviews proceeding on the scheduled date while the petition came up for hearing on the 18<sup>th</sup> November 2016.

**The Parties respective cases**

7. Briefly, the petitioner’s case is that she is qualified for the public service e position of Chair of Ethics and Anti-Corruption Commission (EACC) and that the respondent’s failure to shortlist her for interview without giving her reasons therefor offended her constitutional right to information under Articles 35, 47 and 232 of the Constitution. The petitioner took issue with a note deemed as amending the requirements for the position under the Ethics and Anti-Corruption Commission Act, appearing on the newspaper advertisement of October 10, 2016, that –

“N.B. The following are encouraged to apply:

(i) Persons with disabilities, the marginalized and the minorities.

(ii) Those at top level management positions and have track record in fighting corruption.”

8. The petitioner also objected to a report in *The Standard* newspapers that indicated that the Chairperson of the 1<sup>st</sup> respondent had said that the position of chair of Ethics and Anti-corruption Commission had been re-advertised because the majority of the applicants lacked the necessary experience to fight corruption and that the applicants did not meet the integrity and experience threshold. She therefore prayed that the report of the EACC on the petitioner be released.

9. Relying on the High Court (Odunga, J.) decision in *Trusted Society for Human Rights Alliance & 3 Ors. v. Judicial Service Commission & Anor.* [2016] eKLR, the petitioner urged that all applicants who met the basic minimum qualification for the advertised position should be interviewed.

10. For the Respondent, the shortlisting for the position in EACC by the 1<sup>st</sup> Respondent was defended on the provision of Article 232 as requiring more than fair competition and merit into diversity and equitable distribution of opportunities, and on a public interest in early completion of the recruitment of chair of the Constitutional Commission. It was conceded however, that the petitioner met the minimum qualifications for the position.

11. The respondent urged the court to disregard newspaper reports as of little evidential value.

12. It was also objected the petition was overtaken by events as the interview exercise sought to be stopped had already been done on 17<sup>th</sup> November 2016.

### **Issues**

Upon the submissions, pleadings and evidence before the Court the question for determination in the petition were narrowed down to –

- a. Whether the 1<sup>st</sup> respondent violates an applicant’s right to information by failing to give reasons as to why she has not been shortlisted for interview for an advertised position.
- b. Considerations of the principles of public service under Article 232 may with regard to recruitment be done at the shortlisting stage without giving a party an opportunity to be heard.
- c. Whether the court may make an order interfering with the recruitment exercise after the interviews for an advertised public service position have been conducted.

### **Determination**

14. Article 232 of the Constitution provides that recruitment in public service fair completion and merit be the basis of appointments and promotions, with a rider that diversity and equal opportunity be upheld, as follows:

“232. (1) *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.***

*(2) 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.*

*(3) Parliament shall enact legislation to give full effect to this Article.”*

15. The same Article recognises the need for accountability and transparency in public service. See Article 232 (1) (e) and (f) of the Constitution.

16. In similar terms Article 35 of the Constitution provides for provision of information held by public bodies as follows:

***“35 (1) Every citizen has the right of access to—***

***(a) information held by the State; and***

***(b) information held by another person and required for the exercise or protection of any right or fundamental***

***freedom.***

***(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.***

***(3) The State shall publish and publicise any important information affecting the nation.”***

17. Fair administrative acts and decisions are a constitutional requirement of Article 47 of the Constitution, which is in terms as follows:

***“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) 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.***

(3) 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.”

## **Findings**

18. The respondents conceded that the petitioner met the minimum requirements for the appointment to the position of Chair of EACC and although reference was made to the consideration of other matters and allusion to Article 232 criteria of diversity and equitable distribution of employment opportunities, no evidence was adduced as to the matters that such consideration involved to enable an objective assessment.

19. Moreover, the 1<sup>st</sup> respondent did not inform the applicant as to the reasons for her disqualification despite her meeting the minimum requirements for the position. The Court does not act on newspaper reports and cannot speculate that the petitioner was disqualified for reasons of lack of integrity or lack of adequate experience as reported in *The Standard* of 11<sup>th</sup> October 2016. As no reason was given to the petitioner for failure to make the shortlist and no reason was offered in reply to the petition before court, save for the vague reference to looking for “*more from all the applicants so as to arrive at the shortlist*”, the Court must find the petitioner’s exclusion from the interview list as unreasonable and unjustified.

20. Article 35 right to information is a general right for all citizens to information held by the State which does not have particular application in this petition by the Petitioner seeking information relevant to her job application. However, the failure to give reasons and opportunity to the petitioner to respond to any issue that may have been raised by EACC as to the integrity of the Petitioner, which the interview would have facilitated, violated the petitioner’s rights to fair administrative action under Article 47 of the Constitution.

21. Although, the Respondent is entitled pursuant to Article 232 to consider diversity and equitable distribution of job opportunities such consideration should ideally be done after interviewing all candidates who meet the minimum qualifications. Where however, such considerations of diversity and equity are in affirmative action compelling, the public advertisement should so notify the public and in disqualifying those who otherwise meet minimum qualifications give the Article 232 reasons.

22. The interview is a sure way of giving Article 47 compliant and procedurally fair method of recruitment as it affords the applicant an opportunity to respond to any issues which may have been raised against their candidature by relevant agencies including the EACC.

23. The petitioner was entitled to any reports given by the agencies relating to her candidature as part of a procedurally fair process of recruitment to enable her respond or contradict the reports.

## **Conclusion**

24. The Court finds that the 1<sup>st</sup> Respondent violated the petitioner’s right to fair administrative action with respect to the administrative exercise of recruitment for the position of Chair of EACC for whose minimum qualification the applicant met and for not giving her the reasons for her failure to make the shortlist and, consequently, for denying her an opportunity to address or respond to any adverse reports or Article 232 considerations of diversity and equitable distribution of job opportunity.

25. Public interest requires observance of the Rule of law with regard to Article 47 and 232 of the Constitution and the short delay in the full composition of the EACC that relief in this petition may occasion is necessary and justified.

### ***Appropriate relief***

26. Under Article 23 (3) of the Constitution, the Court is enjoined to grant relief appropriate to the situation before it as follows:

*“(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.”***

27. In fashioning an appropriate relief for this case, the Court notes that even though the interviews for the position of the Chair of the Ethics and Anti-corruption Commission were held on the 17<sup>th</sup> November 2016, no nominations have been made for subsequent appointment by the appointing authority. There remains to be done acts upon which the court order may act upon to stay the process of recruitment in breach of the petitioner’s rights.

### **Orders**

28. For the reasons set out above, the Petitioner’s amended petition is allowed to the extent that in failing to shortlist the applicant for interview for the position of the Chair of the Ethics and Anti-corruption Commission, the Respondents were unreasonable and contravened the petitioner’s right to fair administrative action under Article 47 of the Constitution.

29. Accordingly, the Court grants an order of prohibition against the 1<sup>st</sup> Respondent from nominating and recommending to the President for appointment, any candidate for the position of Chair of the Ethics and Anti-corruption Commission without interviewing and considering the petitioner herein Dr. Wilfrida Itolondo for the position.

30. In addition, the Court grants the petitioner’s prayer to attend the interview by an order of mandamus to compel the 1<sup>st</sup> Respondent to interview the applicant and consider her application among those of other candidates who have been interviewed for the position.

31. As the Court was not afforded opportunity to examine the facts as to the qualifications of all other applicants, the Court cannot and do not make any orders as relates to the other candidates who applied for the position but were not shortlisted for the interviews, as prayed by the Petitioner.

32. This being a public-interest litigation, there shall be no order as to costs.

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF NOVEMBER 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

**Dr. Wilfrida Itolondo, Petitioner in Person.**

**Mr. Moimbo Momanyi, Litigation Counsel, for the Respondents**