



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.398 OF 2014

BETWEEN

**LEGAL ADVICE CENTRE *aka* KITUO CHA
SHERIA.....PETITIONER**

AND

**THE HON. ATTORNEY GENERAL.....1ST
RESPONDENT**

**THE CABINET SECRETARY FOR THE NATIONAL TREASURY.....2ND
RESPONDENT**

AND

**COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC).....1ST
INTERESTED PARTY**

**THE NATIONAL COHESION AND INTEGRATED COMMISSION.....2ND
INTERESTED PARTY**

JUDGMENT

Introduction

1. The Legal Advice Centre, better known as Kituo Cha Sheria, (hereinafter, “**Kituo**”) is a Non-Governmental organization which has stated in its Petition dated 8th August 2014, that its objectives include fighting for social justice, constitutionalism and the rule of law as well as engagement in public interest litigation.
2. In the Petition aforesaid, Kituo alleged that under **Section 67(1)** of the **Public Private Partnerships Act** (hereinafter, “**the Act**”), a committee known as the Petition Committee is established (hereinafter, “**the Committee**”). Its functions include, *inter alia*, to consider all Petitions and complaints submitted by private entities during the process of tendering and the

entering into of any project under the Act. The Chairperson of the Committee ought, under that law, to have the same qualification as a Judge of the High Court and members thereof, who must be four in number, should have such experience and knowledge as the Cabinet Secretary, in consultation with the Director of the Public Private Partnerships Unit (hereinafter “**the Unit**”), shall consider appropriate.

3. The Petition in that regard challenges the nominations for appointment by the 2nd Respondent, the Cabinet Secretary for the National Treasury, of the following persons as members of the Petition Committee;

- i. James Muruthi Kihara – Chairperson
- ii. Paul Karekezi – member
- iii. Charity Muiya Ngaruiya – member
- iv. Isaac Kitpanui Bondet – member
- v. Jackline Chepkemoi Kimeto – member
- vi. Stanley Kinuthia Kamau – member

4. Kituo’s complaints with regard to the appointments are that;

- a. Despite its letter of 17th July 2014 seeking information as to the suitability of all the above named persons to hold membership in the Committee, the 2nd Respondent has failed, refused and/or neglected to supply that information in violation of **Article 232(1)(c) and (f) of the Constitution.**
- b. Paul Karekezi is of Rwandese origin and all the other nominees hail either from the Kikuyu or Kalenjin ethnic Communities, and no other community, in violation of **Article 232(1)(h) and (i) of the Constitution** as to the need to ensure ethnic diversity in public service appointments.
- c. Jackline Chepkemoi Kimeto has pending disciplinary proceedings before the Advocates Disciplinary Tribunal and is therefore unfit to hold public office under **Chapter Six, Articles 10(2) (a) and 232(1)(a) of the Constitution.**
- d. The 2nd Respondent failed to involve the public in the nomination and appointment of the members of the Committee and thereby acted contrary to the expectations of **Article 232(1) (d) of the Constitution.**
- e. The 2nd Respondent did not ensure that eligible members of the Public were given an opportunity to present themselves for consideration for nomination and appointment to the Committee in violation of the equal opportunities provision in **Article 27 of the Constitution.**

5. For the above reasons, Kituo now seeks the following orders;

(a) A declaration that to the extent that the 2nd Respondent vide the impugned Gazette Notice has appointed members of two ethnic communities to a public office, this is a violation of the provisions of Article 232(1)(h) and (i) of the Constitution of Kenya 2010.

(b) A declaration that to the extent that the Cabinet Secretary has failed to involve the public in the process of appointment of the members of the Committee, Article 232(1)(d) of the Constitution of Kenya 2010 has been violated.

(c) A declaration that to the extent that the 2nd Respondent has appointed one Jackline Chepkemoi Kimeto, who has pending disciplinary issues before the Advocates Disciplinary Tribunal, the provisions of Chapter 6 of the Constitution, as well as Articles 232(1)(a) of the Constitution of Kenya 2010 have been violated.

(d) A declaration that to the extent that the 2nd Respondent refused, failed and or

neglected to supply the Petitioner with the information sought in the letter dated July 17, 2014 the provisions of Article 232(1)(e) & (f) of the Constitution were violated.

(e) A declaration that to the extent that the 2nd Respondent did not ensure that all eligible members of the public were given opportunity to present themselves for consideration for the appointments aforesaid, the equal opportunity provisions in Article 27 of the Constitution were violated.

(f) A declaration that owing to the constitutional violations specified in prayers a – e above, the decision of the 2nd Respondent contained in Gazette Notice No.4476 dated 3rd June 2014 and carried in the Kenya Gazette Issue of 04.07.2014 is invalid within the meaning of Article 2(4) of the Constitution of Kenya 2010.

(g) An order in the nature of Judicial review by way of certiorari bringing into this Honourable Court and quashing the decision of the 2nd Respondent contained in Gazette Notice No.4476 dated 3rd June 2014 and carried in the Kenya Gazette Issue of 4/7/2014.

(h) Costs of and or incidental to this Petition.

(i) Such other or further orders as this Court may grant.

Petitioner's Case

6. In support of its Petition, Kituo relied on the Affidavit of Gertrude Angote, its Executive Director, sworn on 8th August 2014 together with annexures. In addition, Mr. Ongoya, learned Counsel appearing for Kituo made submission as follows;
7. On whether the ethnic composition of the Committee has met the constitutional criteria, he stated that whereas it cannot be expected that each ethnic community in Kenya ought to be represented in the Committee, there is need for **dispersal and diversity** in it and once the same has not been shown, then **Article 232(h) and (i)** of the Constitution was violated.
8. Further, that **Article 19(2)(a)** of the **Constitution** envisages competitiveness in public service appointments and where there is none, as was the case in the present Petition, then the appointments must be invalidated. Reliance in that regard was placed on the decision of Mabeja J. in **Bungoma H.C. Petition No.2 of 2014.**
9. On the allegation that Jackline Chepkemoi Kimeto lacks integrity, reliance was placed on the decision of **Benson RiithoMureithi (no citation given).**
10. Lastly, Mr. Ongoya stated that whereas in his Replying Affidavit the 2nd Respondent claimed that he had consulted, among others, the Law Society of Kenya (LSK) prior to the nominations for appointments, LSK has denied that any such consultation took place and further, that the 2nd Respondent has failed to explain why he avoided either such consultations or the need to subject the nominations to the process of public competition.
11. That therefore the orders sought elsewhere above ought to be granted.

Respondents' Case

12. The Attorney General as well as the Cabinet Secretary, National Treasury, filed a Replying Affidavit sworn on 20th August 2014 by Henry Rotich, the current holder of the office of the 2nd Respondent. In it, he deposed that;
 - i. He has the discretion under **Section 67** of the **Act**, to appoint members of the Committee in

- consultation with Members and Director of the Unit, a body competitively appointed under the same Act.
- ii. The Committee is a specialized unit that requires technocrats in the field of public private partnerships and procurements while also having the ability to resolve disputes arising from the procurement process.
 - iii. Those appointed to the Committee underwent a stringent vetting mechanism and succeeded as opposed to others who did not.
 - iv. In compliance with **Article 67** aforesaid, he made public consultations with the Unit and its Director before engaging with other bodies such as the Chartered Institute of Arbitrators (Kenya Chapter), the Law Society of Kenya, the Institute of Engineers of Kenya and the office of the Attorney General. He allegedly did so by having face to face consultations with representatives of those organizations.
 - v. Each of the persons nominated to sit on the Committee received the approval and recommendation of their professional bodies and they were nominated only after their professional credentials and academic qualifications were found to be impeccable.
 - vi. Under **Article 31(c)** of the **Constitution**, the right to privacy is protected and if personal details regarding members of the Committee had been released without their consent, that right would have been violated.
 - vii. The Court should not be swayed into making assumptions as to ethnic origins based on the names of the nominees and thereby perpetrate negative ethnicity.
 - viii. Paul Karekezi, said to be a Rwandan, is in fact a Kenyan citizen with a Kenyan passport.
 - ix. The Court would be breaching the principle of separation of powers if it intervened in a matter that is reserved for his discretion and exercised within the realm of the Executive in the National Government.
 - x. He did not ignore the Petitioner's request for information but sought advice from the 1st Respondent in view of the legal issues attendant to it and before he had received such advise, Kituo rushed to Court with the present Petition.
13. In a further Affidavit sworn on 16th October 2014, the 2nd Respondent deponed that as regards consultations with the Law Society, one Dr. Ronoh Tumusing, Legal Expert at the Public Private Partnership Unit consulted the Law Society of Kenya vide a telephone call and confirmed that none of the nominees had pending disciplinary cases with the said Society. That in doing so, he was aware that there is no requirement in law that consultation must always, and in all circumstances, be reduced into writing.
14. In his oral submissions, Mr. Obura, learned State Attorney reiterated the above matters as pleaded by the Respondents and added that there is no evidence that **Article 232** had been breached in any way or as alleged by Kituo.
15. Further, that it would be impossible to have all ethnic communities represented in every Statutory Committee and that the ethnic balancing act must take into account the fact that other Ministries have other committees that in their membership would balance any ethnic imbalances in the Committee under scrutiny.
16. For the above reasons, the Respondents seek that the Petition be dismissed with costs.

1st Interested Party's Case

17. The 1st Interested Party, by an Affidavit sworn on 7th October 2014 by its Chairman, Mr. Charles Ayako Nyachae and in submissions by its Counsel, Mr. Wafula, did not oppose or support the Petition but asked the Court to be guided, in whatever decision it makes, by the provisions of **Articles 10(1), 27 and 232** of the **Constitution** all which provide for the national values and principles of, *inter alia*, inclusiveness, non-discrimination, fair competition and merit as a basis for appointment and promotion as well as representation of Kenya's diverse communities at all levels of public service appointments. In that regard, it submitted that it is upon the 2nd Respondent to satisfy the Court that in making the impugned nominations, he took all the above values and principles into consideration.

18. Mr. Wafula cited the decision in **Milka Atieno vs Richard Kariuki and Anor [2012]eKLR** in making the submission that the cited national values and principles are binding on all persons and State agencies.

Determination

19. Before distilling the issues for determination, certain facts must be set out by way of background. They are firstly, that **Section 67** of the **Act** provides as follows;

“(1) There is established a committee to be known as the Petition Committee which shall consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under this Act.

(2) The Petition Committee shall consist of –

- a. ***the chairperson who shall be a person qualified for appointment as a judge of the High Court of Kenya;***
- b. ***four other persons with such knowledge and experience as the Cabinet Secretary shall, in consultation with the unit, consider appropriate; and***
- c. ***the unit director.***

(3) The members of the Petition Committee shall hold office for a term of three years and shall be eligible for re-appointment for one further term.

(4) Where a Petition is based on an administrative decision of the Committee, the unit or the contracting authority, such petition for a review of the decision shall be made within fifteen days from the date of the decision in the prescribed form.

(5) The decision of the Committee shall be final and binding on both parties.

(6) The Cabinet Secretary may by regulations, provide for the procedure for determining a Petition under subsection (1).”

20. Secondly, by **Gazette Notice No.4476 of 4th July 2014**, the 2nd Respondent made appointments to the Committee. The said Notice read as follows;

“GAZETTE NOTICE NO.4476

THE PUBLIC PRIVATE PARTNERSHIPS ACT

(No.15 of 2013)

APPOINTMENT

IN EXERCISE of the powers conferred by Section 67(2) of the Public Private Partnership Act, 2013, the Cabinet Secretary for the National Treasury appoints –

James Muruthi Kihara – Chairperson

Paul Karekezi

Charity Muiya Ngaruiya

Isaac Kiptanui Bondet

Jackline Chepkemoi Kimeto

Stanley Kinuthia Kamau

to be members of the Petition Committee for a period of three (3) years with effect from the 30th May, 2014

Dated the 3rd June, 2014

HENRY K. ROTICH

Cabinet Secretary, for the National treasury”

21. Thirdly, Kituo by a letter dated 17th July 2014 from its advocates, M/s Ongoya and Wambola Advocates, wrote to the 2nd Respondent and sought information of the nature earlier set out. The letter gave him seven days to provide the information failure to which legal action would be taken against him.
22. On 4th August 2014, Dr. Kamau Thugge, Principal Secretary in the 2nd Respondent’s office wrote to Kituo and stated that legal guidance in line with **Article 156** of the **Constitution** had been sought from the Attorney General and that as soon as such guidance had been obtained, a response would be given to the issues raised in the letter aforesaid. The Petition herein was filed on 8th August 2014 before any such response had been given.
23. In that context, the issues falling for determination are;
- i. Whether the 2nd Respondent had failed and or neglected to supply Kituo with the information sought in the letter dated 17th July 2014 and whether therefore **Article 232(1)(e)** and **(f)** of the **Constitution** had been breached.
 - ii. Whether the ethnic composition of the Committee was in violation of **Article 232(1)(d)** of the **Constitution**.
 - iii. Whether the 2nd Respondent failed to involve the public in the process of nomination and appointment of members of the Committee and whether **Article 232(1)(d)** of the **Constitution** was thereby violated.
 - iv. Whether the 2nd Respondent failed to ensure that all eligible members of the public were given an opportunity to present themselves for consideration for nomination and appointment as members of the Committee and whether the equal opportunity provisions of **Articles 27** and **232(1)(i)** of the **Constitution** were thereby violated.
 - v. Whether Jackline Chepkemoi Kimeto, a member of the Committee has pending disciplinary issues

with the Law Society of Kenya and whether therefore by dint of **Chapter Six** and **Article 232(1)(a)** of the **Constitution**, she is unfit to sit as such member of the Committee.

vi. Whether Kituo is entitled to the Prayers in the Petition including on costs.

Whether the 2nd Respondent failed and or neglected to supply Kituo with the information it sought and whether Article 232(1)(e) and (f) of the Constitution had been breached

24. In the letter dated 17th July 2014, Kituo had sought the following specific information;

(a) The detailed curriculum Vitae of all the persons appointed pursuant to the foregoing gazette notice.

(b) The respective ethnic/community representations of each of the persons appointed pursuant to the foregoing gazette notice.

(c) Any information received from stakeholders on the suitability of each of the above persons to hold public office within the framework of Chapter 6 of the Constitution of the Republic of Kenya on leadership and integrity, and including information received from the various professional associations or organization of each of the persons on their standing in their respective professions.

(d) The element of public participation and any mechanism of appointment that afforded members of the general public who were eligible an equal opportunity to avail themselves of the opportunity.”

25. In the same letter, M/s. Ongoya and Wambola Advocates acting for Kituo gave notice as follows;

“Take notice, that if we do not receive the said information within a period of seven (7) days from the date of this notice, we have firm and unequivocal instructions to proceed to Court to compel release of the same at your peril as to costs and other incidentals attendant to the said Court action. Be informed accordingly.”

26. The letter was received on 17th July 2014 by both Respondents and on 4th August 2014, the 2nd Respondent responded by a letter, written by the Principal Secretary in his office, which was received by the said Advocates on 8th August 2014, the same day the present Petition was filed.

27. In that context, **Article 232(1)(e)** provides as follows;

“(1) The values and principles of public service include—

(a) ...

(b) ...

(c) ...

(d) ...

(e) accountability for administrative acts.”

28. Can it be said that the 2nd Respondent violated the above Article? I think not. I say so because he responded to the letter and stated partly as follows;

“As soon as the Attorney General furnishes us with the requested Counsel, we shall respond substantively to your requests for information”

29. Three days after the above letter was written, the Petition was filed and so he had no opportunity to take any further action. In that regard, I have perused the **Public Service (Values and Principles) Bill, 2014** and although not enacted as a law, the thinking of the drafters of the said Bill as regards accountability for administrative acts has been captured in **Section 9** thereof. That thinking includes the expectation that a public officer is to ensure accountability in the following terms;

“(1) Every public officer shall be accountable for his or her administrative acts.

(2) The public service, a public institution or an authorised officer shall ensure the accountability of a public officer by-

(a) keeping an accurate record of administrative acts of public servants in each public institution;

(b) requiring every public officer to maintain an accurate record, of their administrative acts;

(c) maintaining a record of relevant documents prepared by a public officer; and

(d) establishing a mechanism to address complaints arising out of the administrative acts of a public officer.”

In the present Petition, it has not been shown that the 2nd Respondent failed to keep records relating to the information sought by Kituo. The complaint is that he failed to release that information as demanded by Kituo. The 2nd Respondent however, stated that he was unsure of the implications of releasing private information to a third party and so he sought the advise of the Attorney General on the subject but before he received such advise, the Petition was filed. That explanation is reasonable and I am unable to find that in those circumstances, he had **“failed and or neglected”** to supply the information as he was not given reasonable and sufficient opportunity to do so. **Article 232(1)(e)** expects transparent accountability on the part of an office and/or officer in the public service but where no reasonable opportunity to abide by that Article is given, and where the complaining party may itself have acted in haste, no adverse finding can fairly be made against the officer or office. The above issue must therefore be answered in the negative.

Whether the ethnic composition of the Committee was in violation of Article 232(1)(h) of the Constitution

30. Kituo has alleged that all the members of the Committee, save Paul Karekezi, hail from the Kikuyu and Kalenjin ethnic communities and such a composition was in violation of **Article 232(1)(d)**. On Paul Karekezi, the allegation that he was not a Kenyan citizen is no longer an issue and no submission was made in that regard by Mr. Ongoya because in his Replying Affidavit, the 2nd Respondent annexed a copy of Mr. Karekezi’s Kenyan Passport Number A1777213 showing that although he was born in Butarama, Rwanda, his nationality was Kenyan.

31. In any event, **Article 232(1)(d)** of the **Constitution** provides as follows;

“(1) The values and principles of public service include—

(a) ...

(b) ...

(c) ...

(d) ...

(e)

(f) ...

(g) ...

(h) *representation of Kenya's diverse communities.*"

32. What then does “**diversity**” mean and how is the above principle expected, practically and reasonably, to be effected?

33. “**Diversity**” has been defined to mean be “**when many different types of things or people are included in something**”; see Cambridge Advanced Learner’s Dictionary, Third Edition. The word therefore has a plain and unqualified meaning and in the instant Petition, **Article 232(1)(h)** presupposes that one of the principles of public service is the inclusion of Kenya’s diverse communities in appointments. How is that to be done in a committee such as the Petition Committee which has only six members when Kenya has in excess of fifty ethnic communities?

34. Before I answer that question, the 2nd Respondent raised the issue whether in fact there is sufficient evidence that in fact only two communities were represented in the Committee. Kituo has in that regard argued that three of the members are Kikuyus and three are Kalenjins. No evidence was tendered to support that allegation and Kituo has not addressed the issue at all. Having so said, can the name of a person be sufficient evidence of his ethnic origin? I think not and the Court cannot presume that Ngaruiya is necessarily a Kikuyu and Bondet is necessarily a Kalenjin. In addition, it has been said time and time again that it is not enough to allege that a particular Article of the Constitution has been contravened without giving evidence of the manner it has been violated; see Annarita Karimi Njeru vs AG (1976 –1980) 1 KLR 1272 and Trusted Society for Human Rights Alliance vs AG & Others H.C Petition No.229 of 2012.

35. I say so well aware that Kituo does not also know the ethnic communities of the members of the Committee and that is why it sought the information from the 2nd Respondent and I will address that specific issue shortly.

36. But suppose I am wrong and in fact three of the members of the Committee are Kikuyus and an equal number are Kalenjins. Has the Constitution been violated by that fact?

37. I have read the decision of Majanja J. in Mohamed Osman Warfa & Others vs The Office of the President & Others H.C Petition No.77 of 2013. In that case, the complaint by the Petitioners was that the appointment of members of the Public Service Commission by the President did not “*have any person professing the Islamic faith and on individual from any County situated in the North Eastern Area of the Republic of Kenya*”.

38. In dismissing the Petition before him, the learned Judge stated as follows;

“The nucleus of the Petitioners’ case rested on the allegation that there was a breach of Article 250(4). In order to prove non-compliance with this provision, the Petitioner bears the burden of showing that the Commissions and independent offices, taken as a whole, do not reflect ethnic diversity. In John Waweru Wanjohi & Others vs The AG & Others, Kipngetch Maiyo & Others vs The Kenya Land Commission Selection Panel, a similar issue was raised in reference to the National Land Commissions, the Court

stated, ‘the Petitioners complain that the Kalenjin community was under represented in the Commissions that had been constituted contrary to Article 250(4). The Petitioners cited two commissions to make its case; that is he Independent Electoral and boundaries Commission (IEBC) and the Commission on the Implementation of the Constitution. In my view, the commissions cited are not the only commissions established under the Constitution like the Judicial Service commission, the Salaries and Remuneration Commission, the Public Service commission and others whose membership was not put into the matrix of the Petitioners’ complaint. I also take judicial notice of the fact that the other commissions continue to be constituted. I consequently find that no merit in this argument.

Likewise in this case, the Petitioners have not provided any evidence of the composition of the other Commissions an independent offices. Without such evidence, the Court cannot proceed to carry out an inquiry to interrogate compliance with Article 250(4).”

39.The Judge was making the point that it is not enough to allege that one public body has a skewed ethnic composition without bringing evidence that the said anomaly applies to all related bodies.

In the instant case, where is the evidence that the 2nd Respondent, in making the nominations and appointments within his docket, has favoured only the Kikuyu and the Kalenjin ethnic communities.

40.Earlier in the same judgment, the Judge had expressed himself as follows;

“I agree with the submission by Mr. Bitta that the institutions and persons involved in the selection and appointment are duty bound to pay attention to and give effect to the provisions of the Constitution and unless it is shown that there is a violation of the Constitution and the Statute, the Court should not intervene. In the Evans Nyambega Akuma vs AG and Others Nairobi Petition No.164 of 2013 (unreported) I stated that ‘it is not for the Court to re-examine these allegations and made its own conclusion. The duty of the Court in reviewing the process of appointment is to ensure that it meets the test of legality. I emphasize what I stated in the cases of John Waweru Wanjohi & Others vs the AG & Others, Kipngetch Maiyo & Others vs The Kenya Land Commission Selection Panel Nairobi consolidated constitutional Petitions Nos.373 of 2012 and 426 of 2012 (unreported), concerning appointment to the National Land commission, the Court must of course be careful not to usurp the powers and functions of the various constitutional and statutory bodies ...these bodies have carried out their functions in accordance with the prescribed procedures and I am satisfied that in this case the process meets constitutional muster. There is nothing in the Petition and deposition to demonstrate that the entire process did not comply with the Constitution and the law.”

41.I agree with the learned judge and further, Mumbi Ngugi J. in Consortium for the Empowerment and Development of Marginalised Communities & Others vs Chairman the Selection Panel for appointment of chairperson and Commissioner to the Kenya National Human Rights Commission, H.C Petition No.385 of 2012 had this to say on the same question;

”As correctly argued by the Respondents, the Constitution has now divided the Country into 47 Counties, so that the administrative units known as provinces or regions on which this Petition is based are no longer in existence. Would regional diversity require that all the 47 Counties have representation in every commission? Does consideration of regional and ethnic diversity demand that every tribe in Kenya is represented in every institution that is established under the Constitution in order for the institution to be deemed to have been constituted in compliance with the Constitution? What happens, were that argument to be carried to its logical conclusion, when an institution under the Constitution requires only a specific, limited, number of persons, in this particular cases, only five positions?”

The learned Judge answered the above questions by stating that;

“Happily, with regard to constitutional commissions and independent offices, the Constitution itself provides an answer in Article 250(4), which is worth setting out again;

Appointments to commissions and independent offices shall take into account the national values mentioned in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya (Emphasis added).

I believe that the operative words in this provision are ‘taken as a whole’, implying that one cannot take a single constitutional commission or independent office and argue that because a particular region or ethnic group has not been represented, or the appointee(s) are not from particular ethnic groups or regions, then there has been a breach of the Constitution. To hold otherwise is to lead to an absurdity, and to make the composition of any commission or appointment to an office well-nigh impossible.”

42. The learned Judges above both raised the absurdity of attempting, in every appointment, to ensure that the whole ***“face of Kenya”*** is reflected. Mumbi Ngugi J. went further to suggest that a wholesome view of the public service ought to be taken before complaints can genuinely arise about ethnic imbalance. In addition, **Article 232** must be read wholistically so as to understand its import. It has set out a number of principles to be applied including ethnic diversity but alongside it are issues of equal opportunity for men and women, persons with disabilities, fair competition and merit etc. Where then is the evidence that if all the above principles are invoked, then the members of the Committee are not fit to sit in the said Committee? None has been submitted. I am unable, even on the merits of the claim of lack of ethnic diversity to find in favour of Kituo and will answer the above issue in the negative.

43. In finalizing my determination of the above issue, I will have to agree with Mumbi Ngugi J. in the dicta in the **Consortium Case (supra)** where she stated as follows;

“It is a regrettable illustration of the divisions, within our society that while the Petitioners in the case of John Waweru Wanjohi & Others vs AG (Supra) as consolidated with Kipnetich Maiyo & Others vs The Kenya Land Commission Selection Panel and Others were complaining about over-representation of persons from the Northeast and Coast and members of the Muslim faith in the National Land commission, the Petitioners in this case are complaining about the exclusion of the same communities.”

She went on to add;

“Hopefully, the day will come when the people of Kenya will begin to look at institutions, not to check who is from which ethnic or religious community, but to see whether the institution is serving the people of Kenya, regardless of their ethnic or social origin, or their religious persuasion, efficiently, competently and with integrity. It is also our hope as a society. I believe that the day will come when one is appointed to public office, not because of his or her ethnic or social background or religious belief, but on the basis of this or her competence, suitability for the job and personal and professional integrity as Article 73 of our Constitution demands of holders of public office.”

She then concluded as follows;

“In the event, before we reach that happy dawn, the constitutional requirement is that

he should be regional and ethnic diversity in the composition of constitutional commissions and independent offices, 'taken as a whole'. There is no requirement, and it is humanly impossible in any event, to have every shade of differences in Kenya represented in every commission. There is therefore no basis for impugning the decision of the Selection Panel in this matter, particularly so in the absence of any evidence from the petitioners that would justify interference by the Court with the Selection Panel's decision, and in light of the fact that persons from the North east and Coast of Kenya are clearly well represented in other constitutional commissions."

44. I adopt the above words as if they were mine and noting the prominent role that ethnicity plays in conflicts within Kenya, negative ethnicity should not be propagated in the guise of constitutional litigation. Every appointment should not attract criticism based on an ethnic outlook. At the same time, those charged with discretion to nominate or appoint persons to public office(s) must never do so with a skewed ethnic balance in favour of either their own tribesmen or those of their seniors. To do so would only create hatred and tension in the public service. Diversity, balance, merit, rights of the marginalized including affirmative action, must be approached holistically in the entire service.

45. For the above reasons, I am unable to answer the above question in favour of Kituo and will instead answer it in the negative.

Whether the 2nd Respondent failed to involve the public in the process of Appointment of members of the Committee and whether Article 232(1)(d) was violated

46. Article 232(1)(d) of the Constitution provides as follows;

"(1) The values and principles of public service include—

(a) ...

(b) ...

(c) ...

(d) involvement of the people in the process of policymaking"

47. The Article envisages public participation in "policy making" and not specifically in appointments. Public participation as a concept is however a national value in **Article 10** of the Constitution and this Court has in a number of cases set the criteria and parameters of public participation. Mr. Ongoya did not submit on this issue and save for a reference to both **Articles 10(2)(a)** and **232(1)(d)**. Ms. Angote in her Affidavit in support of the Petition said nothing of the issue and none of the other Parties addressed it at all. How the principle of public participation was violated is therefore a matter I am unable to delve into and would only cite **Annarita Karimi Njeru (supra)** to find that where no clear evidence of alleged violation of the Bill of Rights or any part of the Constitution is properly tendered, it is very difficult for a Court to make any determinate findings on such a matter.

48. In the event, the above issue must be answered in the negative.

Whether the 2nd Respondent failed to ensure that all eligible members of the Public were given an opportunity to be appointed as members of the Committee and whether Article 27 and articles 232(1)(i) of the Constitution

49. Article 232(1)(i) provides as follows;

"(1) The values and principles of public service include—

(a) ...

(b) ...

(c) ...

(d) ...

(e)

(f) ...

(g) ...

(h)

(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.”

50. Kituo stated that the above provision should be read together with **Article 27** of the **Constitution** (no specific provision was cited but I presume that the principle of non-discrimination was the one in issue). In the Petition, the further argument made was that the 2nd Respondent did not allow persons who were eligible for appointment to put forth their names and qualifications for consideration. No other submission was made on the point save Mr. Ongoya’s abstract question as to **“whether the Cabinet Secretary facilitated a participatory State”** in the appointments.

51. In the above context, **Section 67** of the **Act** grants the 2nd Respondent the discretion to appoint members of the Committee but no specific mechanism for doing so is given. In fact the Section provides that as to the qualifications of the nominees, he shall consult the Unit Director in doing so.

52. How should statutory discretion be exercised? What is the power of the Court to interfere with such discretion and is a public announcement of the existence of a vacancy in the Committee necessary?

53. As can be seen from a plain reading of **Section 67** aforesaid, no specific requirement is made that the 2nd Respondent ought to advertise for the said position and it would be an expensive and tedious exercise if every such appointment is subjected to public scrutiny. **Section 67** obligates the 2nd Respondent to **“consult”** with the relevant unit on the appointments as opposed to **“advertise”** the existence of vacancies in the Committee. All evidence points to the fact that he did so and in addition, I have seen a copy of a memo dated 4th October 2013 in which the 2nd Respondent was advised by the Director of the Unit aforesaid that **“Section 67 of the Act does not require competitive recruitment as a procedure for appointing members of the committee.”** I have no reason to fault the soundness of that advice despite the submissions by Kituo to the contrary.

54. Further, by letter dated 8th October 2013 addressed to the Chairman, Chartered Institute of Arbitrators – Kenya Branch, the 2nd Respondent partly wrote as follows;

“Because the primary mandate of the Petition Committee is disputes settlement, the Public Private Partnerships Unit would like to identify possible names from among your highly experienced members for appointment consideration by the Cabinet Secretary.

For that reason, we would be deeply obliged if you could expeditiously provide us with a list of your members who fit the 5 main categories indicated above to facilitate our appointments process.

Should you wish to seek any form of clarification of this letter, do not hesitate to call me on the numbers indicated on this letter.”

55. The import of the above actions is that although the 2nd Respondent was only obligated to consult the unit Director, he went further to consult a body that he envisioned had the expertise to guide him on the exercise of his discretion. While it is unclear what input the Institute of Arbitrators made in the eventual list of nominations, the fact of the action having been taken must be looked at as an exercise of due diligence on the part of the 2nd Respondent.

56. I am also satisfied that his reasoning that the committee required people with specific expertise is sound and Kituo has not shown that on their merits, any of the nominees has no capability to undertake his/her duties in the Committee.

57. For the above reasons, I hold and find that there was compliance with **Section 67** aforesaid and I see no need to overturn the 2nd Respondent’s decision to appoint members of the Committee on the ground that he did not subject the appointment process to competition.

58. I will address the issue of non-consultation with the LSK here below.

Whether Jackline Chepkemoi Kimeto is unfit to sit in the Committee and whether Chapter Six and Article 232(1)(a) of the Constitution was violated

59. It is uncontested that Ms. Kimeto is an advocate of the High Court of Kenya. At paragraph 12 of her Affidavit in support of the Petition, Ms. Angote deposed that Ms. Kimeto has “***pending disciplinary issues before the Advocates Disciplinary Tribunal***”. As to the “***issues***”, nothing was said of them.

60. In his Affidavit of 16th October 2014, the 2nd Respondent at paragraph 5 deposed that one, Dr. Romoh Tumusing, Legal Expert at the Unit had consulted LSK and was informed that none of the nominees to the Committee, including Ms. Kimeto, had pending disciplinary issues. On that assurance, he appointed the said person to the Committee. The LSK by letter dated 3rd September 2014 has however denied such consultation and has also denied that the 2nd Respondent or his agent consulted it prior to the nominations. Two issues arise from the above matters;

61. Firstly, where is the evidence that Ms. Kimeto has pending disciplinary issues? What issues? Not one document has been exhibited by Kituo to this serious allegation. How then can this Court find whether or not **Chapter Six** of the **Constitution** and or **Article 232(1)(a)** has been violated? (see **Annarita Karimi (supra)**)

62. Secondly, LSK has denied that it was consulted on any aspect of this Petition and that by stating that he had done so, the 2nd Respondent had committed perjury.

63. On that issue, my answer is that since the more crucial aspect of the question under consideration has not been properly addressed by Kituo, the second issue, important as it may sound, requires little consideration for obvious reasons; the substratum of the issue having collapsed, any peripheral questions are merely academic.

64. Having said so however, pending issues of a disciplinary nature where no culpability and sanction have been established, can hardly be the basis for disqualification to hold public office. I say so because the decision in **Trusted Society Alliance for Human Rights (supra)** has not settled that issue and until the Supreme Court does so in the appeal on the matter, the jury is still out regarding that issue.

65. For the above reasons, I am unable to hold that Ms. Kimeto is unfit to hold public office and Kituo is at liberty to pursue that matter once there is sufficient evidence to prove its allegations. I am also aware that contrary to the submissions by Mr. Ongoya, in her decision in **Benson Ritho Muriithi vs J. W. Wakhungu & Anor [2014]eKLR**, Mumbi Ngugi J. did not declare that the subject of the Petition was unfit to hold public office. In that case the Learned Judge found that no inquiry had been made as to the suitability of the subject to hold public office. The position in this Petition is wholly different and I have said why.

66. The above issue must therefore be answered in the negative.

Whether the Prayers in the Petition can be granted

67. From what I have said above, and having addressed each of the issues raised in the Petition, it is obvious that none of the Prayers in the Petition can be granted.

Conclusion and Disposition

68. This Petition raised a number of issues relating to the public service. Although important, Kituo, with respect, approached them very casually and with little evidence to back its allegations. In fact, had it pursued the information that it had sought from the 2nd Respondent and used it as a basis of attack, the Petition may have had life breathed into it. As it ended up being, the speculative nature of the pleadings tied the Court's hands and sadly, no serious finding can be made in favour of Kituo. The Respondents must however note that the fact that this Petition has failed does not mean that the matters raised are idle because their future actions in the same context will attract sanction if not conducted within the Law.

69. In the end, the Petition must and is hereby dismissed with no orders as to costs for reasons that Kituo was pursuing the issues raised in public interest.

70. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MARCH 2015

ISAAC LENAOLA

JUDGE

In presence of:

Kariuki – Court clerk

Mr. Oburah for Respondent

Miss Otieno holding brief for Mr. Ongaja for Petitioner

No appearance for Interested Party

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE