



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.74 OF 2015

BETWEEN

BENSON WACHIRA MUTHIGA.....PETITIONER/APPLICANT

AND

NAIROBI CITY COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....2ND RESPONDENT

RULING

Introduction

1. The Respondents advertised for various positions in their thirteen departments through their website, www.nairobi.go.ke, sometimes in October 2014 and invited applications for suitably qualified candidates to apply. Subsequently, eighty three (83) candidates were shortlisted and invited for interviews on diverse dates between 12th January 2015 and 4th February 2015. The Petitioner, who claims to be a businessman and a resident of Nairobi County, allegedly thereafter wrote to the 1st Respondent on 15th January 2015 under **Section 68** and **96(1)** of the **County Governments Act** and requested to be supplied with the names and qualifications of the shortlisted candidates, copies of the minutes that led to the shortlisting of the candidates, list of the Members of the 1st Respondent who conducted the interviews, minutes of the interviews and a list of the successful candidates. He claims to have also sent a reminder of the same on 5th February, 2015.
2. It is now Petitioner's contention that the Respondents have failed to provide him with the requested documents and claims that he has a right under **Section 96(1)** of the **County Governments Act** and **Article 35** of the **Constitution** to be supplied with the said documents and that failure to be supplied with the said documents is a violation of his constitutional rights.
3. In the Chamber Summons Application dated 27th February 2015 he is seeking the following orders;

“(1) That this Application be certified as urgent and heard as a matter of urgency for the first instance and service be dispensed with.

(2) That this Honourable Court be pleased to grant the Petitioner Conservatory Orders by

way of Injunction restraining the Respondents whether by themselves or their agents from making any appointments pursuant to the advertisement of vacancies in its thirteen (13) departments until they supply the Petitioner with the requested documents namely copies of minutes which led to the short listing of the candidates, qualifications of the candidates who were short listed, list of members of the 1st Respondent who conducted the interviews, minutes of the interviews and Minutes of successful candidates until the inter party hearing and final determination of this Application and/or until further Orders of this Honourable Court.

(3) That the Honourable Court be pleased to order the 1st Respondent to supply the Petitioner with copies of minutes which led to the short listing of the candidates, qualifications of the candidates who were short listed, list of members of the 1st Respondent who conducted the interviews, minutes of the interviews and Minutes of successful candidates.

(4) That this Honourable Court do grant the Applicant Conservatory Orders by issuing such orders, directions and writs as may be necessary to safeguard and prevent the violation of the Applicant's fundamental rights and freedoms under the Constitution of Kenya.

(5) That the Applicant be at liberty to apply for further orders and/or directions as this Honourable Court may deem fit and just to grant.

(6) That the costs of this Application be provided for.”

The Petitioner's case

4. It is the Petitioner's case that as a Kenyan citizen and a person who does business with the Respondents, he is entitled to be given the information he has requested for. He claims that his fundamental rights will be violated if the 1st Respondent does not supply him with the information sought and he relies on the case of *Kahindi Lekalhaile & 4 Others vs Inspector General & Others Petition No.25 of 2015*, *Pius Atok Ewoton vs Hon. Joseph Koli Nanok & Others Petition, No.554 of 2013* and *Kituo cha Sheria & Another vs The Central Bank of Kenya & 2 Others Petition No.191 of 2011* where it was generally held that a person seeking to enforce **Article 35** of the **Constitution** had to establish that he had sought that information and it was denied.
5. It is also his fear that if the 2nd Respondent proceeds to employ the interviewed persons, he will be affected as a resident of the County of Nairobi because the process followed in the shortlisting and interviewing was in conflict with **Chapter Six** of the **Constitution**.
6. As regards the advertised position of the County Attorney, he claims that there is a possibility of the appointment of a person who is not qualified to hold the office and he claims that if the Respondents proceed to appoint the County Attorney their actions would be unconstitutional.
7. The Petitioner has therefore urged the Court to grant the orders sought.

The Respondents' case

8. In opposing the application, the Respondents filed Grounds of Opposition dated 5th March, 2015 which read as follows;

“(1)The Application and the Petition herein are entirely speculative, hypothetical, academic and present no real dispute or controversy relating to the recruitment process undertaken by the Respondents capable of attracting Court sanction in view of the Court

finding in, inter alia, the case of John Harun Mwau & 3 Others versus Attorney General & 2 Others, Nairobi HC Petition No.65 of 2011.

(2) The mandate of the Respondents under Article 235(1)(b) of the Constitution and Section 59(1)(b) of the County Government Act No.17 of 2012 ought not be unreasonably interrupted on the purported speculative, hypothetical, academic grounds advanced in the Application in view of the Supreme Court Ruling in the case of Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others (2014) eKLR.

(3) The process of recruitment of staff in the impugned position is still ongoing and no decision has been made yet by the Respondents to nominate or appoint one applicant or another thus the Applicant's contention that the Respondent may breach the Constitution in the recruitment process is farfetched.

(4) The Application patently fails to satisfy the legal principles and standards for enforcement of Article 35(1)(b) of the Constitution as restated in, inter alia, the case of Nairobi Law Monthly Company Limited versus Kenya Electricity Generating Company & 2 Others, Nairobi HC Pet. No.278 of 2011, that a citizen claiming a right to access information must not only show that the information is held by the person from whom it is claimed but also show that the information is sought for the exercise or protection of another right.

(5) The Application patently fails to satisfy the legal principles and standards, as restated in, inter alia, the case of Wycliff Indalu Adieno versus Attorney General & 2 Others, Nairobi HC Pet. No.315 of 2014, that an Applicant for conservatory orders under Article 23(2) (c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing, on a prima facie basis, that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened.

(6) There is no demonstrated infringed or threatened right peculiar to the Petitioner capable of protection by way of conservatory order. The locus of the Petitioner in instituting this Petition is wholly derived from the provisions of Article 258 of the Constitution to allegedly enforce compliance with the Constitution; the Petitioner does not claim to have unsuccessfully applied to the positions advertised by 1st Respondent to be considered for appointment but only seeks to allegedly enforce compliance with the Constitution in respect of Applications by third parties who are not parties to the Petition.

(7) The Application and the Petition are frivolous and an abuse of the Court process.”

9. It is the Respondents' case in addition that the Petitioner has not demonstrated a *prima facie* case with a likelihood of success that unless the conservatory orders sought are granted, there is a real danger that may be prejudicial to him. On that point, they rely on the case of **Wycliffe Indalu Adieno vs Attorney General & 2 Others Petition No.315 of 2014**.

10. The Respondents further claim that the Petitioner has not identified which right he seeks to enforce by the information he has sought and that **Chapter Six** of the **Constitution** is on leadership and integrity which is not an issue in the Petition at all. It is the Respondents' other contention that the right to access information under **Article 35(1)** of the **Constitution** is not an independent right and that the information sought must be required for the exercise or protection of any fundamental right or freedom. That in this case there is no right or fundamental freedom that has either been breached or is threatened by the Respondents and which the Petitioner will seek to protect by virtue of the information acquired. In any event, the Respondents submit that the information sought by the Applicant is unavailable as the recruitment process is ongoing.

11. It is also the Respondents' submission that the Application is a fishing expedition and an abuse of

the Court process and that it is within their mandate to recruit staff for the Nairobi City County.

12. On the recruitment of the County Attorney being allegedly unconstitutional because the Office of the County Attorney Bill, 2014 is pending in Parliament, the Respondents contended that the complaint in that regard was wholly hypothetical and on that submission reliance is made on the case of ***Commission for the Implementation of the Constitution vs National Assembly & 2 Others Petition No. 496 of 2013***.

For the above reasons, the Respondents pray that the Application be dismissed with costs.

Determination

13. I have considered the pleadings and written submissions made by the parties and I am of the view that the only issue for determination in this Application is whether the conservatory orders sought should be granted in circumstances such as are explained above.
14. In the case of ***Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others (2014) e KLR***, the Supreme Court explained the place of conservatory orders in our Constitutional dispensation as follows;

“Conservatory Orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the “prospects of irreparable harm occurring during the pendency of a case; or “high probability of success” in the applicants case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.” (Emphasis added)

15. In addition to the above, it is my understanding that in considering an application for conservatory orders, the Court is not called upon to make any definite finding either of fact or law as that is the province of the Court that will ultimately determine the merits of the Petition. (See ***Trade Union Congress of Kenya vs National Hospital Insurance Fund Petition No. 61 of 2015***.)
16. At this stage therefore the Petitioner is only required to establish a *prima facie* case with a likelihood of success and to demonstrate that unless the conservatory orders sought are granted there is a real danger which may be prejudicial to him. (See ***Muslims for Human Rights (MUHURI) & 2 others vs The Attorney General Petition No.7 of 2011***.) Further, in ***Centre for Rights Education and Awareness (CREAW) & 7 others vs the Attorney General Petition No.16 of 2011***, the High Court observed that in deciding whether to grant conservatory orders, the following factors were to be given considerations;
- a. The credentials of the Petitioner;
 - b. The *prima facie* correctness or nature of information available to the Court;
 - c. Whether the grievances expressed in applying for conservatory orders were genuine, legitimate, deserving and/or appropriate;
 - d. Whether an applicant had shown and demonstrated the gravity and seriousness of the dispute, and whether such an applicant had engaged in wild, vague, indefinite or reckless allegations against a respondent.
17. I am attracted to the above check list and will apply the above considerations in determining the Application before me and in that regard, the Petitioner has invoked **Article 35** of the

Constitution as well as **Section 96 of the County Governments Act** in support of his contentions. **Article 35** reads as follows;

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

(a) Information held by the State; and

(b) Information held by another persona 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.”

On the other hand **Section 96** of the **County Governments Act** provides thus;

“96 (1) Every Kenyan citizens shall on request have access to information held by any County government or any unit or department thereof or any other State organ in accordance with Article 35 of the Constitution.

(2) Every County government and its agencies shall designate an office for purposes of ensuring access to information as required be Subsection (1).”

18. In that context, the importance of the right to access to information cannot be overemphasized. As the Court observed in the case of *Famy Care Ltd vs Public Procurement Administrative Review Board and Another Petition No.43 of 2012*;

“The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.

The right of access to information is also recognized in international instruments to which Kenya is party. The declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples’ Rights (32nd Session, 17 – 23 October, 2002; Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African Charter on Human and Peoples’ rights which provides, “Every individual shall have the right to receive information.” The Commission noted that the right of access to information held by public bodies and companies, will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy.”

19. Similarly, in *Nairobi Law Monthly Company Ltd vs Kenya Electricity Generating Company & 2 Others Petition No.278 of 2011*, it was held as follows;

“...[T]he right to information is critical to and closely interlinked with the freedom of expression and of the media, and indeed with the enjoyment of all the other rights guaranteed under the Constitution. As the Constitutional Court of South Africa observed in the case of *Brummer vs Minister for Social Development 2009 (II) BCLR 1075 (CC)* relied on by the Petitioner.

“access to information is fundamental to the realization 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 ...”

The second consideration to bear in mind is that 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 require from the State.”

20. Having stated as above, I also note that for the right to access information to be justiciable, it must be demonstrated that the person seeking the information has sought the information and the same has been denied. (See *Nairobi Law Monthly Company Ltd vs Kenya Electricity Generating Company & 2 Others (supra)*.)
21. In the instant case, it cannot be denied that the Petitioner has demonstrated that he has sought certain information from the Respondents and that fact has not been denied. Can the orders sought be granted in such circumstances? Despite that fact I think not.
22. I say so because, firstly as regards prayers (2) and (3) of the Application I opine as follows;
- a. The prayers are vague and ambiguous and as such are incapable of being granted. In particular Prayer (2) seeks **“a conservatory order to restrain the Respondents from making any appointments to the advertised positions until he has been granted the information he has sought from the Respondents.”** How is this prayer to be granted while it fails to specify what the advertised positions are? On what grounds can this Court also grant the said prayer while all the Petitioner has said is that he is apprehensive that the Respondent would violate **Chapter Six** of the **Constitution** and without giving particulars of such a violation?
 - b. Secondly, I heard the Respondents on their part to contend that the recruitment process is underway. That fact has not been denied and so the information required may only be partly available. Court orders are never issued in vain or in a vacuum even if partly so.
 - c. Thirdly, in prayer (3) the Petitioner has sought **“a conservatory order by issuing directions and writs that may be necessary to safeguard and prevent the violation of his fundamental rights and freedoms.”** What of his rights are being violated and in which manner? How can the Court be expected to understand his case which he has failed to plead with precision? It is a laid down rule in constitutional litigation that a party seeking orders for enforcement of his constitutional rights must state with some degree of precision what Article or even sub-article of the Constitution has been violated and in which manner. (See *Annarita Karimi Njeru vs Republic (1976-1980) 1 KLR 14.*)
23. Lastly, the Petitioner has also prayed an order compelling the 1st Respondent to supply him with the information he has sought. It is now well established that for a party to enforce **Article 35(1) (b)** of the **Constitution**, it needs to show that the information is required for the exercise and protection of any right or freedom under the Bill of Rights. (See *Nairobi Law Monthly Company Ltd vs Kenya Electricity Generating Company & 2 Others (supra)*.) I did not hear the Petitioner to claim that any of his specific fundamental rights and freedoms have been violated and that he was seeking the information from the Respondents to protect the said rights and freedoms that had been violated. All I heard him to say was that he was fearful that **Chapter Six** of the **Constitution** which is on leadership and integrity would be violated as he was apprehensive that the 1st Respondent would be corrupt in the recruitment exercise. Where is *prima facie* evidence of that fact? I have seen none.
24. I have already stated that the Constitution is clear that **Article 35** of the **Constitution** can only be enforced if three ingredients are present namely; that a party must state what right he seeks to protect; what information is required for that purpose and how the information sought will assist him in enforcing that right or freedom. The Petitioner has failed in that regard. The only right he claimed has been violated was his right under **Article 35** of the **Constitution** which cannot be determined at this interlocutory stage but at the main Petition having heard the same on its merits.

Indeed, I have looked at his Petition and he has sought a declaration that his rights under **Article 35** of the **Constitution** has been violated and so the matter is live.

25.I also recall that one other issue was raised by the Petitioner; that in view of the County Attorney Bill which is currently pending in the National Assembly, the appointment of a County Attorney is unconstitutional. I am aware that the Petitioner raised that issue in submissions only but to my mind, that is an issue that cannot be determined at this stage of the proceedings and I do not have sufficient facts to determine it in any event.

26.I have said enough to show why the Application before me must fail. None of the orders sought can be granted at this stage and I have stated why.

27.In the circumstances, the Application dated 27th February 2015 is dismissed.

28.Costs will abide the determination of the Petition.

29.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Miss Said for Respondents

No appearance for Petitioner

Order

Ruling delivered.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 17/9/2015. Notice to issue.

ISAAC LENAOLA

JUDGE

11/9/2015