



IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 54 OF 2015

JOY BRENDA MASINDE.....PETITIONER

VERSUS

LAW SOCIETY OF KENYA.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Before this court is the petition dated 25th September 2015 through which the petitioner **Joy Brenda Masinde** prays for the following:-

- “(a) A declaration that the action of the respondent are brazen, illegal, egregious, discriminatory and in violation the petitioner’s constitutional rights;**
- b. A declaration that the actions for the respondents above have out rightly violated the rights of the petitioners under Article 27, 47 and 48 of the Constitution;**
- c. A declaration that the decision by the respondents to provide additional qualifications for the post of Chief Executive Officer/Secretary of the Law Society of Kenya is against the Law Society of Kenya Act hence ultra vires;**
- d. An order of certiorari to remove into this honourable court for the purpose of it being quashed the decision by the respondents to provide additional qualifications for the post of Chief Executive Officer/Secretary of the Law Society of Kenya and the advertisement dated 20th August, 2015.”**

The petition was supported by the affidavit of the petitioner of even date. Upon service of the petition the 1st respondent being **Law Society of Kenya** filed a Notice Preliminary Objection dated 1st October 2015. The same was heard and disposed of through the ruling of this court dated 19th October 2015. Thereafter the 1st respondent filed a replying affidavit dated 26th October 2015 and sworn by the sitting Secretary/Chief Executive Officer **Mr. Apollo Mboya**. The 2nd respondent being **The Hon. Attorney General** filed their memorandum of appearance on 4th October 2015 but did not file any documents in response to the petition.

The petition arises from an advertisement placed by the 1st respondent in the Daily Nation Newspaper of

Thursday August 20th 2015 inviting applications for the position of Secretary/CEO of the Law Society of Kenya. The said advertisement indicated that in order to be appointed an applicant required the following qualifications:-

- i. **The applicant must be in possession of Bachelor of Laws Degree – it was indicated that an advanced degree would be an added advantage;**
- ii. **The applicant must be an advocate of the High Court of Kenya of not less than ten (10) years standing;**
- iii. **The applicant must be a Certified Public Secretary (CPS) with at least five (5) years standing;**
- iv. **The applicant must have experience and knowledge in management.**

The petitioner who expressed an intention to submit her application for the post of Secretary/CEO, objected to the qualifications set out in the impugned advertisement on the basis that specifically the requirement that an applicant be a CPS of five (5) years standing was unlawful as it was not a qualification for the position of Secretary/CEO provided for by Section 26(4) of the **Law Society of Kenya Act, Act No. 21 of 2014**. Section 26(1) of the Law Society of Kenya Act provides that:-

“26(1) There shall be a secretary to the council who shall be the Chief Executive of the society and in charge of the secretariat of the society.”

Section 26(4) of the same Act which sets out the qualifications for appointment as Secretary/CEO provides as follows:-

“A person shall be eligible for appointment as the secretary to the society if that person –

- a. **is an advocate of the High Court of Kenya with at least ten years experience, and**
- b. **Meets the requirements of Chapter Six of the Constitution.”**

The petitioner therefore challenges the legality of the 1st respondent’s advertisement of 20th August 2015, on the basis that it contained an additional requirement, outside of the requirements set out by Section 26(4) of the Act. The petitioner argued that the 1st respondent has no power to prescribe additional qualifications outside of those provided by statute. The petitioner finally asserted that this additional requirements was discriminatory towards herself and others like her who did not hold a CPS of five years and violated her rights under Article 27 of the Constitution. As a result the petitioner prayed for the reliefs sought in her petition.

In his replying affidavit dated 26/10/2013 the sitting Secretary/CEO contended that the petitioner was not one of the seven (7) applicants who had responded to the advertisement and therefore she clearly had no interest in the advertised position. He further contended that it was a matter of common knowledge and urged the court to take judicial notice of the fact that the duties of Secretary/CEO of the Law Society of Kenya includes filing of statutory returns, record taking and certification as provided by **Section 15 of the Certified Public Secretaries Act Cap 534, Laws of Kenya**. It was therefore not only logical but was also pertinent that the holder of that position be a CPS. He finally averred that a CPS was **not** an additional requirement but was rather only an attribute for the ideal candidate. As such he concluded that this petition did not raise any constitutional issue but was merely an attempt to scuttle the appointment process.

Following directions by the court both sides filed their written submissions. On 5/11/2015 the parties appeared before me in order to highlight those written submissions. **Mr. Kipkoech** advocate appeared for the petitioner whilst **Mr. Biko** argued on behalf of the 1st respondent.

Counsel for the petitioner submitted that the 1st respondent was a statutory body and was therefore subject to the rule of law and was obliged to act only within the limits of the Law Society of Kenya Act. Counsel submitted that Section 26(4) of the said Act provided for only two (2) qualifications for appointment to the position of Secretary/CEO. First was that a person be an advocate of at least ten years standing and

secondly that one meet the requirements of Chapter six of the Constitution of Kenya. The 1st respondent therefore had no powers to provide for any extra qualification outside of the two set out in statute. On this basis the impugned advertisement was ultra vires and must be quashed.

Counsel for the petitioner also submitted that the impugned advertisement unlawfully excluded the petitioner and others like her who did not hold the CPS qualification from submitting their applications for the post of Secretary/CEO. This action of the 1st respondent amounted to discrimination and contravened Article 27 of the Constitution. The decision made by the 1st respondent to include this additional qualification was therefore illegal and was for quashing.

For the 1st respondent it was submitted that the petitioner had no locus standi in the matter as she had not submitted any application for consideration for the post of Secretary/CEO. In addition the petitioner was said to have failed to demonstrate precisely how her rights had been violated. It was further submitted that Section 26(3) of the Law Society of Kenya Act conferred upon the 1st respondent the mandate to appoint the Secretary/CEO to the Society and to define his functions. As the employer it follows that he 1st respondent has the powers to determine and decide what qualifications the ideal candidate ought to possess.

Counsel argued that the Secretary/CEO being the Chief Executive of a corporate body with capacity to sue and be sued needed to possess the qualities stipulated in the Certified Public Secretaries Act. This was therefore not a discriminatory requirement but was one merely intended to ensure the competence of the person appointed. The court was urged to interpret the CPS requirement as an ideal and not a mandatory requirement.

I have arefully considered the submissions made by both parties in this matter. I have equally perused the material placed before me. My determination is as follows.

The 1st respondent made lengthy submissions challenging the competence of the petitioner to file this petition. The issue of the locus standi of the petitioner was raised in the preliminary objection dated 1st October 2015, which I dismissed in my ruling of 19/10/2015. I found in that ruling that the petitioner as a Kenyan citizen did have a right to file this petition on behalf of herself and on behalf of the public. Similarly I did in my ruling of 19/10/2015 determine the question of whether the petition disclosed a substantive issue for determination or whether it disclosed a violation of any right. These issues having already been determined are now '**res judicata**' and I will not pronounce myself a second time over the same issues.

The petition herein raised two main issues for determination:-

1. Did the 1st respondent violated the petitioner's constitutional rights?
2. Is the prayer for an order of certiorari merited?

I will proceed to consider and determine each of the above issues individually.

Did the 1st Respondent violate the Petitioner's Constitutional Rights?

The question to be answered here is whether in prescribing additional requirement for the position of Secretary/CEO the 1st respondent violated the petitioner's rights. The petition claimed that the actions of the 1st respondent infringed her rights to equality and freedom against discrimination under Article 27 of the Constitution, her right to fair administrative action under Article 47 and her right to access to justice under Article 48. However, a thorough perusal of both the petition itself and the submission in support thereof reveal that no tangible and/or persuasive grounds were advanced to support the petitioner's contention that her rights as protected by Articles 47 and 48 of the Constitution were in any way violated. The petitioner was never at any time subjected to any administrative actions by the 1st respondent for which she was denied a fair hearing neither was she denied access to justice within the meaning of Article

47 of the Constitution. I find that these two claims failed to meet the threshold of a constitutional petition as set out in the case of **Anarita Karimi Njeru vs Attorney General (No.1) [1979]KLR 154** and restated in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013]eKLR**. The petitioner totally failed to articulate the grounds upon which she relied and failed to demonstrate the manner in which these particular rights had been infringed by the actions of the 1st respondent. Therefore this ground of the petition must fail.

It was claimed that the petitioner's right to equality and freedom against discrimination under Article 27 were infringed. It was submitted that in adding the extra requirement for appointment as Secretary/CEO the 1st respondent unlawfully excluded persons who were otherwise qualified from applying for the petition. Article 27(4) and (5) of the Constitution provides:-

“(4) The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

Discrimination is defined in the **International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (No.111** as follows:-

“For the purpose of this convention the term discrimination includes –

- a. **any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;**
 - b. **such other distinction exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers' and workers' organizations where such exist, and with other appropriate bodies –**
2. **Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination”** (my own emphasis).

In the case of **Peter K. Waweru vs Republic [2006]eKLR** the court defined discrimination as follows:-

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

From the above authorities it emerges that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex creed etc or due to unfair practice and without any objective and reasonable justification.

In this case the distinction was predicated upon academic qualification. The 1st respondent argued that in order to properly discharge the functions of Secretary, it was essential that the appointee be a CPS of five

years standing. In other words the 1st respondent being the employer and cognizant of the job description felt that the ideal candidate ought to be a holder of CPS of five years standing. This is a distinction which is based on job preference and/or performance. It is not unreasonable for the 1st respondent to declare what qualifications they believe an ideal candidate should hold. In a similar way the impugned advertisement indicates that whilst a Bachelor of Laws Degree remains the minimum requirement an advanced degree would be an added advantage. A statement of preference with regard to the qualification the ideal candidate should possess is not in my view unfair or illegitimate. The job market currently is cut-throat. Only the best or best qualified will succeed. This is the reality of competition in a capitalistic society. The mere expression of the preferred qualifications for the ideal candidate does not amount to discrimination under Article 27 of the Constitution as it is not premised on any of the grounds stated on or contemplated by Article 27(4) nor can the stated preference be said to amount to an illegitimate consideration. I therefore disallow prayers (a) and (b) of this petition.

The key question is whether the 1st respondent acted properly in making this preferred qualification a mandatory one for all interested applicants.

Is the prayer for orders of Certiorari Merited?

The substance of the petition's claim was that the 1st respondent did not have powers under the Law Society of Kenya Act to impose the requirement of CPS 5 years standing on the applicants. The petitioner was therefore invoking this court's supervisory jurisdiction over any person or body performing a public function. The 1st respondent being a statutory body established under Article 3 of the Law Society of Kenya act is subject to the judicial review jurisdiction of this court. The scope of Judicial Review was stated in **The Commissioner of Lands vs Kunste Hotel Ltd Civil Appeal No. 234 of 1995**, as concerning only the decision making process and that the court is not required to enquire into the merits of that decision. In **Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300**, it was held while citing **Council of Civil Unions vs Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** that:-

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direct of the District Executive Committee, when the power to do so are vested by law in the District Service Commission ... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision,. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards on to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.” (my own emphasis)

Section 17 of the Law Society of Kenya Act creates ‘**The Council**’ which is the governing body of the 1st respondent as per section 17(1) of the Act. It is this Council which is vested with the powers under Section 26(2) to appoint the Secretary. Section 26(2) provides:-

“The secretary shall be appointed by the Council through a transparent and competitive recruitment process.”

Section 26(4) of the Law Society of Kenya Act provides:-

“(4) A person shall be eligible for appointment as the secretary to the society if that person –

- a. is an advocate of the High Court of Kenya with at least ten years experience, and**
- b. meets the requirements of Chapter Six of the Constitution.”** (own emphasis).

Thus the statute which forms the basis for the qualifications required of the role of the post of secretary/CEO lists **only** two (2) such qualifications. Yet in the impugned advertisement dated 20th August 2015 the 1st respondent added a third qualification being that an applicant for the position of secretary/CEO must additionally be a CPS holder of five years standing. The use of the word ‘**shall**’ in Section 26(4) makes this a mandatory requirement. Section 26(4) states that in order to be ‘**eligible**’ for appointment as secretary/CEO an applicant is required to meet **only** the two stated qualifications. The term ‘**eligible**’ is defined in **Blacks Law Dictionary 9th Edn** as:-

“fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege or status.”

Contrary to the submissions by the 1st respondent this additional qualification was not expressed to be merely as an ideal qualification in the way that an advanced degree was expressed to be an added advantage. Rather this additional CPS qualification was stated as a mandatory minimum requirement for consideration for the post advertised. Thus a person **not** in possession of a CPS of five years standing was deemed not eligible to apply. It was therefore a requirement that determined whether or not a person would apply for the position.

In **Githu Mungai & Another vs Law Society of Kenya & Another [2015]e KLR** it was held that where a body has been established by statute (such as the Law Society of Kenya) then that body must act in accordance with the powers conferred upon it and cannot allocate itself powers even when it feels those powers are necessary to enable it perform its functions. The court stated:-

“In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In Republic vs Kenya Revenue Authority Ex Part Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530, it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others, and based on East African Railways Corp. vs Anthony Sefu Dar-es-Salaam HCCA No.19 of 1971 [1973] EA, Courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

Consequently, where the law exhaustively provides for the jurisdiction of a body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Further, courts will not be rubber stamps of the decisions of administrative bodies. However, if Parliament gives great powers to statutory bodies, the courts must allow them to exercise it. The Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law.”

The 1st respondent’s powers as donated by Section 26(4) of the Law Society of Kenya Act was to appoint as secretary/CEO persons who have qualified as for the Act in a transparent and competitive recruitment process. The 1st respondent **did not** have the power under the Act to determine the minimum qualifications for secretary/CEO or to set out the threshold of competence or eligibility. It was submitted that a CPS was an essential qualification for the Secretary/CEO of the Law Society. It was argued that the person holding this position would be required to file and submit returns on behalf of the society amongst other duties. This may well be the case. However, if it was intended that a CPS be a mandatory requirement for the holder of that position, then nothing would have been easier than to have this specifically stated in Section 26(4). The minimum qualifications were clearly set out in statute. In

selecting the ideal candidate out of the pool of interested applicants all of whom possess the minimum statutory qualifications the 1st respondent are however, at liberty to take into consideration any additional qualification that may give one candidate an edge over the other candidates and proceed to appoint a suitable candidate on the basis of that additional qualification. This I believe would maintain the spirit of the Act and Article 73(2)(a) of the Constitution which provides for selection on the basis of personal integrity, competence and suitability as one of the guiding principles of leadership and integrity.

Accordingly I find that in making it a mandatory requirement for appointment as Secretary/CEO, that an applicant must in addition to the requirements set out in Section 26(4) be a CPS of not less than five years standing the 1st respondent acted outside of its statutory mandate. This additional requirement was made ultra vires their powers and must be quashed.

Based on the foregoing I hereby grant prayers (c) and (d) of this petition. Costs are awarded to the petitioner.

Dated in Nakuru this 27th day of November, 2015.

MAUREEN A. ODERO

JUDGE

PRESENT:

Mr. Kipkoech for petitioner

Mr. Biko for the 1st respondent