



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

PETITION NO. 456 OF 2015

KOECH KEMBOI.....PETITIONER

VERSUS

HALAKHE WAQO.....1ST RESPONDENT

MICHAEL MUBEA.....2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION3RD RESPONDENT

RULING

Introduction

1. By his Notice of Motion dated 16th October 2015, the Petitioner, who simply describes himself as “a citizen” and no more, sought the following orders, among others:

(iii) THAT conservatory orders be issued restricting the Respondents from recruiting new members of staff pending the hearing of this Application *inter partes*.

(iv) THAT the recruitment process currently underway be stopped pending the hearing of this application *inter partes* and thereafter the pending the hearing and determination of this Petition.

(v) THAT conservatory orders be issued restricting the Respondents from recruiting new members of staff pending the hearing of the Petition.

Petitioner’s case

2. The Petitioner’s case can be retrieved from the affidavit sworn on 16th October 2015 in support of the Petition. The case may be neutrally stated as follows.
3. The 3rd Respondent which is a Constitutional Commission under Chapter Fifteen of the Constitution by virtue of the provisions of Article 79 of the Constitution is currently not properly constituted. The 1st and 2nd Respondents who head the secretariat of 3rd Respondent are however engaged in the duty of recruiting some 172 staff for the 3rd Respondent Commission, yet under Article 252 only the Commission may undertake such a process. As it were the Commission is not properly constituted as there are no commissioners in office.

4. The Petitioner contends that if the recruitment process is allowed to go on then the Respondents would be in violation of both section 18 of the Ethics and Anti-corruption Act (Cap 65A) (“**the EACC Act**”) as well as Article 252 (1) of the Constitution.
5. The Petitioner had also raised integrity issues of the 2nd Respondent but abandoned that line of claim following revelations that there was a court order issued in JR Misc. Civil Appeal no. 378 of 2015 restraining the reproduction of any reports touching on the questions of the 2nd Respondent’s integrity as had been published by the Commission on Administration Justice.

Respondents’ case

6. The Respondent’s case may be gathered from the two Replying Affidavits by the 1st Respondent and one David K. Ruto The Affidavits were sworn on 28th October 2015 and 30th October 2015 respectively.
7. Briefly, the Respondents contend that the 3rd Respondent is a body corporate with perpetual succession capable of operating even in the absence of the Commissioners. The Respondents also contend that both Sections 11 and 16 of the EACC Act respectively detail the duties and functions of the Commissioners and the Secretary /CEO who heads the Secretariat. That following a job evaluation exercise undertaken by the 3rd Respondent, the 3rd Respondent approved for implementation a strategic plan. The strategic plan involved also the development of human resource to assist in carrying out the 3rd Respondent’s mandate.
8. The 1st and 2nd Respondents then contend that the recruitment of additional staff now challenged by the Petition is simply an implementation of the decision of the 3rd Respondent Commission. In support of this contention the Respondents have exhibited an extract of a resolution from minutes of a meeting of the 3rd Respondent held on 3rd September 2013.

Arguments

9. The application was orally urged before me on 4th November 2015. Mr. Stephen Ongaro appeared for the Petitioner while Mr. Fred Ngatia together with Mr. D. Ruto appeared for the Respondents.

Petitioner’s submissions

10. Mr. Ongalo stated that at issue is the constitutionality of the advertisement placed for jobs with the 3rd Respondent Commission and the ultimate recruitment of such staff by the Respondents. Referring to Article 250 of the Constitution, Mr. Ongalo argued that the 3rd Respondent was not properly constituted or was not constituted at all as there are no commissioners presently in office.
11. Consequently, concluded counsel, the tasks heaped upon the 3rd Respondent under Article 252(1) of the Constitution could not now be performed. Under Article 252 (1) (c) recruitment of staff is one of the tasks of an independent commission. Counsel also submitted that for the current staff of the 3rd Respondent Commission, the amendments to the Ethics and Anti-Corruption Commission Act (EACC Act) in particular section 6 thereof provided for their vetting by the Commission once the new Commissioners are recruited. By implication, added counsel, it was only the commission and not its secretariat that could employ or vet and/or terminate any employees engagement. Counsel urged the court to grant the orders as there was a threat of infringement or violation of the Constitution.

Respondents’ submissions

12. Mr. Ngatia urging the Respondents’ case, submitted that the recruitment is not being undertaken by the 1st and 2nd Respondents but rather the 3rd Respondent. According to counsel, Article 253 of the Constitution gave the 3rd Respondent a distinct legal authority. It is a body corporate capable of being sued and suing as well. It has perpetual succession and for that reason even the death or vacation of office by the Commissioners who are the office holders would still see the survival of

- the commission as a legal entity. Mr. Ngatia submitted that the legal entity never became extinct.
13. For these propositions, Mr. Ngatia relied on the cases of **Karmam Swami Rao & Another v Kurnool Sanskruth Vidyadana 1968 AIR 147** as well as the two lexicons; **Blacks Law Dictionary** and the **Major Law Lexicon** at pages 4491 and 5058 respectively. Counsel also relied on the company law treatise **Gower & Davies' Principles of Company Law 9th Edition** paragraph 2-10.
 14. Mr. Ngatia further submitted that even where the commissioners are in office their role is limited to policy making and not the daily running and management of the commission. Citing Sections 11(6) and 16 of the Ethics and Anti-Corruption Commission (EACC) Act counsel asserted that the day to day administration and management of the affairs of the 3rd Respondent Commission lay with the secretary who was not only the Chief Executive Officer but also the accounting officer and who had powers to recruit staff.
 15. In concluding, Mr. Ngatia urged the court to take note of the two conflicting positions by the parties and deny the Petitioner, who counsel termed 'a busy body', the chance of denying deserving Kenyans the much sought opportunity of employment. Mr. Ngatia added that the Petitioner had no public law grievance known in law and it would be important to allow the Commission to continue operating. Additionally, the Respondents urged that the application as well as the Petition should not be allowed as there had been delay in filing the same. The questioned advertisement having been made on 18th September 2015 the Petition was only filed on 22 October 2015, over one month later.
 16. Finally, it was also stated that if the court granted the orders sought, the same court would simply stall the promotion of devolution as the process of devolving the Respondent Commission was underway.

Petitioner's rejoinder

17. In a short rejoinder the Petitioner's counsel contended that all that the Petitioner was seeking to do was to protect the Constitution which was under threat of violation. The Petitioner was consequently not a 'busy-body' as alleged by the Respondents but a person with an interest in ensuring that there was no violation of the Constitution, so submitted counsel.

Analysis and Determinations

18. It would be important to firstly point out that the Petitioner abandoned its claims on issues of the integrity of the 2nd Respondent. This is by reason of the court orders made in High Court Judicial Review Misc. Application No. 378 of 2015. The Petitioner's case for a conservatory order now lies solely on the Constitutional provisions and not on any issues touching on the 2nd Respondent's integrity.
19. Secondly, I must also point out that at this stage of the proceedings, I am dealing with an intermediary application for conservatory orders. I am not and indeed should not be set to make any definitive or conclusive findings of fact or law. I need only review both facts and law along the principles now well settled when dealing with applications for conservatory orders.
20. A number of cases have laid out the principles applicable when the court is faced with an application for conservatory orders. The principles are now relatively well settled. In the recent case of **Kenya Small Scale Farmers Forum –v- Cabinet Secretary Ministry of Education Science and Technology NBI HCCP No. 399 of 2015 [2015] eKLR** the court stated as follows as concerns applications for conservatory orders:

[30]... the principles which govern a court considering an application for interim or conservatory relief [are considered] to be the following:

- *The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is*

- potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.*
- *The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.*
 - *If the conservatory order is not granted, the Petition or its substratum will be rendered nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.*
 - *The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya’s decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.*
 - *The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.*

21. I would perhaps add as was correctly pointed out by Mr. Ngatia that whilst exercising my discretion I must balance the conflicting positions taken by the parties and, as may be necessary, invoke the doctrine of proportionality: see also Odunga J in **Kevin K Mwiti & 2 Others –v- Kenya School of Law & 2 Others [2015] eKLR.**

22. On the basis of the above principles and having read the Petition as well as the supporting affidavit and also the affidavits filed in opposition, I must ask myself the singular question as to whether the Petitioner is deserving of the conservatory orders sought. In answering this question and following the principles laid out above, the court is not to be engaged in an element based inquiry.

23. Not every single element of the principles need be proven. Rather the totality of the facts should guide the court. Of course, once there is a demonstration of a prima facie case with a likelihood of success, the principles should emerge then with ease and even where a prima facie case is not shown the court would still be possessed with the discretion. As was stated by Ojwang J (as he then was) in **Suleiman v Amboseli Resort Limited [2004] 2 KLR 589**, the court should always opt for a lower risk of injustice rather than a higher one especially where factors appear even.

24. Before determining the sole issue though, it would be appropriate to reserve the same and address two prelude-like issues raised by the Respondents in the course of the oral arguments. Firstly, the Respondents stated that the Petitioner was a ‘busy-body’ with no legal grievance. Secondly, the Respondents stated that the Petitioner was guilty of delay in bringing the claim and that such delay meant that the court could not hear the Petition or the application. The latter, especially, needed to be dismissed forthwith.

A busy-body ?

25. In the case of **Attorney General of Gambia –v- Njie [1961] AC 617**, Lord Denning described a busy body in litigation as a person with “no genuine grievance or concern”. Mr. Ngatia, advocating for the Respondents, also came close to using the same words in his description of the Petitioner’s status in these proceedings. The Petitioner denies that he is a busybody.

26. I have looked at the Petition as drawn. I also heard the arguments advanced on behalf of the Petitioner and I have considered the same wholly. When I read **Article 258 (1)** of the Constitution more closely, I am convinced that the Petitioner had the right to institute these proceedings.

27. **Article 3(1)** of the Constitution dictates that every person has an obligation to respect, uphold and defend the Constitution. On the other hand **Article 258 (1)** allows every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. A closer reading of both Articles would reveal that one need not suffer any personal prejudice but may come to court out of a genuine grievance and concern that there is a threat of violation, if not a violation, of the Constitution. As I understood the Petitioner, that is the core of the Petitioner’s claim rather than that there is a denial or violation of the petitioner’s

- fundamental right or freedom.
28. As I am not convinced that the Petition herein has been filed for personal gain or out of an ill motive, I see no reason why the Petitioner should be dubbed a 'busy body'. He has the requisite standing under the universal **Article 258** of the Constitution to institute this Petition: See **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**. In my view, the Petitioner is a citizen with a genuine concern and grievance.

A question of delay

29. It was the Respondents' contention also that the Petitioner was guilty of delay and that the court ought not to entertain both the application and the Petition. The delay complained of was some odd thirty days. The Respondents invited qualified Kenyans to apply for jobs with the 3rd Respondent Commission on 18th September 2015 and the Petition was only filed on 22 October 2015 after a whole month had lapsed, so submitted Mr. Ngatia.
30. There is no doubt that in matters constitution an aggrieved party should move with alacrity: see **Attorney General of Uganda v Omar Awadh & 6 Others EACJ No. 2 of 2012** and also **Lt Col. Peter Ngari Kagume & Others v Attorney general HCCP No 128 of 2006**. I am however also conscious of the fact that the Constitution is silent on the time frame within which constitutional litigation ought to be commenced. As was stated by Lenaola J in the case of **Gitau Njau & 9 Others v The Attorney General HCCP No. 340 of 2012**:

“ ...it is ideally prudent to institute proceedings as early as possible from the time the alleged breach occurs for obvious reasons but I am clear in my mind that there is no limitation period imposed...by the Constitution”

31. Thus where delay has been alleged the Court has the discretion to determine whether the course of justice would be better served if the delay is excused. The court must consider whether there has been delay as would render the proceedings an abuse of the judicial process : see the Privy Council's opinion in the Trinidad & Tobago case of **Durity v Attorney General [2002] UKPC 20**. It all depends on the circumstances and facts of each case.
32. In my view, in the circumstances of this case, the stated delay of some thirty days was not inordinate and inexcusable. Besides the issue raised as to the competence of the 3rd Respondent Commission to actually recruit staff in the absence of commissioners is relatively weighty and substantial to warrant the Petition and, *a posteriori* , the intermediary application being determined on their respective merits. The interests of justice in the circumstances of this case would be better served if the application is determined minus the hiccups of alleged delays.

The conservatory orders sought

33. I now come to the reserved issue. Has the Petitioner met the criteria warranting the grant of a conservatory order?
34. The Petitioner's argument is clear-cut and undemanding to understand. The gist of the Petitioner's case is that any action by the 3rd Respondent in the absence of Commissioners is null and void.
35. It is stated that the 3rd Respondent Commission is enjoined under Article 252 of the Constitution to recruit its own staff. For the Commission to so act it must have at least three Commissioners in office so advances the Petitioner whilst referring to Article 250(1) of the Constitution. In the instant case, there is the undisputed fact that not even a single commissioner is in office. The 3rd Respondent consequently cannot employ staff by acting through the 1st and 2nd Respondents.
36. The Respondents on the other hand contend, firstly, that even in the absence of the Commissioners, the Commission operates and functions. Secondly, it is also the Respondents' case that the daily management and administration of the 3rd Respondent Commission is with the Secretariat of the 3rd Respondent. That secretariat is headed by the 1st and 2nd Respondents and consequently the day to day affairs of the 3rd Respondent is within the mandate of the Secretariat , including the recruitment of staff. The Respondents also contend that they are merely

implementing the decision of the 3rd Respondent to recruit additional staff.
37. The Petitioner has alleged that the Constitution is threatened with violation. In particular, it is the Petitioner's view that Article 252 is about to be abused and violated as it will not be the Commission engaging and employing staff but rather the secretariat of the Commission. Article 252 of the Constitution, in its relevant context, states as follows:

252(1). Each Commission and each holder of an independent

Office-

- a. ...
 - b. ...
 - c. **shall recruit its own staff; and**
 - d. **may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.**
- al. On the other hand Sections 3 & 11 of the EACC Act state as follows:

3. Establishment of the Commission

(1) There is established an Ethics and Anti-Corruption Commission.

(2) In addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to—

(a) acquire, hold, charge and dispose movable and immovable property; and

(b) do or perform all such other things or acts for the proper discharge of its functions under the Constitution, this Act or any written law, as may lawfully be done or performed by a body corporate

(3) The Commission shall ensure access to its services in all parts of the Republic in accordance with Article 6(3) of the Constitution.

39. Article 253 of the Constitution, which is referred to in Section 3 of the EACC Act provides thus:

253. Each Commission and each independent office-

- a. **Is a body corporate with perpetual succession and a seal; and**
- b. **Is capable of suing and being sued in its corporate name.**

40. With regard to the Secretariat headed by the 1st Respondent with the 2nd Respondent deputizing, Section 16 of the EACC Act partly provides as follows:

16 Secretary to the Commission

(1)-(5)...

(6) The Secretary shall, in the performance of the functions and duties of office, be responsible to the Commission.

(7) the Secretary shall be—

(a) the Chief Executive Officer of the Commission;

(b) the accounting officer of the Commission; and

(c) responsible for

(i) carrying out the decisions of the Commission;

(ii) day-to-day administration and management of the affairs of the Commission

41. It is to be noted that the EACC Act was recently amended through the enactment of the Ethics and Anti-Corruption Commission (Amendment) Act, No 12 of 2015. The amendments did not however affect either Section 3 or Section 11 of the EACC Act. The amendments however ensured that any future Commissioners of the 3rd Respondent Commission would serve only on part time basis. Of relevance however in my view to the current application is also section 6 of the Ethics and Anti-Corruption (Amendment) Act which provides as follows:

6. (1) Every person who, immediately before the commencement of this Act, was an employee of the Commission, shall, upon such commencement, continue to serve in his or her respective position in accordance with the contract of employment:

Provided that the Commission shall, within the period of one year after the appointment of Commissioners under this Act, using criteria determined by the Commission, vet such employee to ensure that he or she is fit and proper to continue serving as such.

(2) The services of any person who fails to meet the vetting criteria established by the Commission under this section shall be terminated in accordance with the contract of employment.

42. It is a consideration through interrogation and interpretation of the above Articles 250, 252 and 253 of the Constitution together with Sections 3 and 11 of the EACC Act which will have to be undertaken wholly and minutely at the full trial of the Petition. At the moment the simple question is whether the Petitioner has established a prima facie case when he advances the argument that the Commission cannot take any action in the absence of its own commissioners and that any such action taken is null and void.

43. The question as to the composition of the 3rd Respondent Commission in the absence of some or as in this case all, of its commissioners has been previously considered by this court. **Majanja J in African Centre for International Youth Exchange v Ethics and Anti-Corruption Commission & Another HCCP No. 334 of 2012[2012]eKLR** stated as follows:

“[38.] This case highlights the challenges faced in the transition process, where uncertainties may be created by litigation and by the mere fact that processes required to effect the transition are controlled by human beings and not machines. The Court is required to consider all the facts and more importantly to address itself to the objects and intent of the Constitution. Article 259(1) requires that the Constitution be interpreted in a manner that promotes, its purposes values and principles, advances, the rule of law, human rights and fundamental rights and freedoms in the bill of rights and permits development of the law and contributes to good governance.

[39.] The Ethics and Anti-Corruption Commission is the foundation upon which Chapter Six of the Constitution is built. It is the body required to superintend and enforce the provisions of Chapter Six and the Leadership and Integrity Act, 2012 which is the legislation giving effect to Chapter Six. Therefore, any approach to this issue should be to secure the institution rather than diminish its capacity. In the words of Article 259, the approach must be one that meets the Constitutional purposes and objectives and fosters good governance.”

44. It is to be noted that the Court (Achode J) had also earlier in **Ruth Muganda v Kenya Anti-Corruption Commission and Director of Public Prosecutions Nairobi HC Misc. Crim. Appl. No. 288 of 2012** considered the same issue as to the composition of the 3rd Respondent and had

stated as follows:

“[45] Thus this Court is alive to the fact that the envisaged transitional period prescribed in the statute could not foresee all transitional challenges, bearing in mind possibilities of litigation as in the case here affecting the appointment of the chairman and therefore assumption of office by members of the Commission.

[46] A purposive approach to this issue requires the Court, in the spirit of the Constitution, to promote the continuing and intended objects and functions of the Commission throughout the transitional process as opposed to extinguishing its existence.”

45. Ngugi J was later in the case of **Eng Michael Sistu Mwaura Kamau v Ethics and Anti-Corruption Commission & 3 Others HCCP No 230 of 2015[2015]eKLR** to cite the two cases of **African Centre for International Youth Exchange v Ethics and Anti-Corruption Commission & Another (supra)** and **Ruth Muganda v Kenya Anti Corruption Commission & Another (supra)** with approval for the proposition that the 3rd Respondent Commission continues to subsist and function notwithstanding an absence of commissioners. In my view, that seems to be in line with the principle of corporate personality of the 3rd Respondent enshrined under Article 253 of the Constitution. That too, was in line with the circumstances of the two decisions.
46. It is to be noted that Ngugi J’s finding was an intermediary one at an interlocutory stage without the benefit of a full interrogation. It is also to be noted that in **African Centre for International Youth Exchange v Ethics and Anti-Corruption Commission & Another (supra)**, Majanja J was tasked with the issue of contracts of employment of staff seconded by the Public Service Commission but not recruited by the 3rd Respondent Commission during the transition period between the new and the old Constitutions. Majanja J held that the secondment of staff to the 3rd Respondent Commission by the Public Service Commission was not inconsistent with the Constitution during the transition period. Achode J was also faced with a situation of transition from the old to the new Constitution.
47. The current transition is apparently different. There is no constitutional transition. There are however no commissioners in office even though the Public Service Commission has set the process of their recruitment rolling. The advertisement for their recruitment was placed in the media on 24 September 2015(see annexure KK-1 to the Petitioner’s Supporting Affidavit). The process is ongoing, presumably. In the meantime the secretariat of the Commission led by the 1st Respondent also commenced the recruitment of new staff members to the EACC.
48. In my preliminary view, even though the Commission continues to exist pursuant to Article 253 of the Constitution, both the Constitution as read together with the Ethics and Anti-Corruption Act, Cap 65A Laws of Kenya seem to outline what the secretariat can do as well as what the Commissioners, and then indeed, the Commission can do. Some functions and duties are the recluses of the Secretariat, others are reserved for the Commissioners and then finally the Commission. The line appears thin but it does appear discernible and not merely out of perception.
49. It cannot be said in my view that the Secretariat as headed by the 1st and 2nd Respondents can do anything that the Commission is mandated to do. The almost dichotomic provision of functions and roles under the statute would make little sense. I would take the preliminary view that even the setting and establishment of a corporate entity does not allow its officers and employees to do everything in the absence of shareholders or directors.
50. I have been unable to immediately discern anywhere in statute where the secretariat is expressly empowered to recruit staff to the 3rd Respondent Commission. Even when the Respondents state that the 1st and 2nd Respondents together with the Secretariat have the responsibility of day to day administration and management of the affairs of the Commission, I am not convinced at this stage that recruitment of staff would fall into the day to day administration and management affairs of the commission.
51. A cursory reading of Article 252 of the Constitution as well as Sections 11, 16 and 18 of the EACC Act would appear to reveal that it was always the intention of the draftsmen that the Commissioners are involved in the recruitment of staff to the Commission. This preliminary view should be further buttressed by Section 6 of the Ethics and Anti-Corruption (Amendment) Act

- 2015 which provides for the new commissioners once recruited and within one year of assuming office to vet all employees of the Commission and ensure that they are fit to continue serving the 3rd Respondent. The employees to be vetted are those in employment as of 3rd September 2015, the date of commencement of the Ethics and Anti-Corruption (Amendment) Act.
52. It is apparent that any employees to be engaged by the secretariat after 3 September 2015 and in the absence of the Commissioners will not be vetted. This, in my view, would certainly not augur well with the intention of both the Constitution as well as the Ethics and Anti-Corruption (Amendment) Act. Read together both seem to suggest that the Commissioners ought to have employees they believe can assist in executing the Commissioners mandate.
53. I consequently hold the view that the Petitioner has established a prima facie case with a likelihood of success. His case is not merely potentially arguable.
54. I was urged to find that the Petitioner will suffer no prejudice but rather that it will be the public suffering as prospective job seekers will lose out if any conservatory orders are granted.
55. I do not think so.
56. Having found that there is a likelihood that the Constitution will be violated, I would also deem it that the wider public interest is likely to be affected. Not only will this be through the possible violation of the Constitution and statute but by the fact that newly appointed Commissioners may find themselves marooned with staff who may not be suitable but whom they cannot get rid of under Section 6 of the Ethics and Anti-Corruption (Amendment) Act. I am also cognizant of the fact that recruitment of Commissioners is already underway and if completed sooner, they may then together join forces with the secretariat and recruit the new staff members.
57. Finally, it was also argued that the Respondents are merely implementing duties assigned to them by the Commission and further that there is need to recruit staff to help accomplish the mission of the 3rd Respondent Commission.
58. I have seen and read the resolution relied upon by the Respondents to support this contention. It is clear that there were Commissioners in office when the resolution was passed. It is however unclear why the Respondents did not commence the implementation then or even whilst the Commissioners were still in office. It is even less clearer why it took the 1st and 2nd Respondents over two years to kick-off the implementation and only doing so after the amendments to the EACC Act on 3rd September 2015, with the knowledge that such staff would not be vetted by the ultimate employer, the Commissioners to whom they would be answerable either directly or indirectly.

Conclusion

59. In the end, I am satisfied that the Petitioner has made out a prima facie case and that if conservatory orders are not granted then the Petition may be rendered nugatory.
60. I also view it that if the conservatory orders are not granted and the Petition succeeds, the 3rd Respondent Commission will then have to be inundated with termination of employment contracts and this may itself lead to a deluge of law suits against the Commission. The cost of settling and fending off such suits would have to be borne by the public. Public interest would not favour such a situation. In my view, it would be more proportionate to keep in abeyance the recruitment process, more so as I did not hear the Respondents argue that the 3rd Respondent Commission is completely short-handed. Besides, if the 3rd Respondent is short of staff, the Public Service Commission may always be called upon under Section 18(2)(b) and 18(3) of the EACC Act to second staff from other sectors of the public service.

Disposal

61. I am conscious that the process of recruiting Commissioners is underway. That process if finalized sooner may have an impact on the instant Petition. By way of final disposal, I answer the reserved question as to whether the Petitioner is entitled to a conservatory order in the affirmative and make the following orders:
- a. There will be issued an order prohibiting the Respondents from undertaking any recruitment of staff pursuant to the advertisement of 18th September 2015 pending hearing

and determination of the Petition herein.

- b. There will be liberty granted to either party to apply should the circumstances change by way of Commissioners taking office with the 3rd Respondent Commission prior to the hearing and determination of the Petition herein.

Costs

62. The costs of the application are in the court's discretion and ordinarily should follow the event. I however see no reason why the costs should not be reserved to abide the ultimate outcome of the Petition. They are so reserved.

63. Orders accordingly.

Dated, signed and delivered at Nairobi this 25th day of November 2015

J.L. Onguto

JUDGE

Delivered in the presence of:

..... ***for the Petitioner***

..... ***for the Respondents***

C/Clerk: