



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

PETITION NO.502 OF 2013

BETWEEN

BRIAN WEKE.....1ST PETITIONER

JAPHET MURIIRA MUROKO.....2ND PETITIONER
AND

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

THE SELECTION PANEL KENYA NATIONAL HUMAN RIGHTS

AND EQUALITY COMMISSION.....2ND RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 16/10/2013 relates to the process and the lawful procedure for the appointment of the Chairperson and members of the Kenya National Commission on Human Rights (hereinafter “KNCHR”).
2. The Petitioners, Brian Weke and Japheth Muriira Muroko have styled themselves as “ordinary Kenyan citizens charged with the duty and responsibility of safeguarding the Constitution of the Republic” and seek the following orders;

“1) A declaration that the President has no powers and or discretion to decline and or refuse to forward a list of candidates to the National Assembly, shortlisted by the Selection Panel appointed under Section 11 (1) and (2) of the Kenya National Commission on Human Rights Act, No.14 of 2011 for consideration for either approval or rejection.

2) A declaration that the Hon. Attorney-General has no powers under the Act to reconstitute a selection panel and advertise for fresh applications for the position of Chairperson and member of the KNCHR other than in the manner contemplated under Section 11(10), (11) & (12) of the Kenya National Commission on Human Rights Act, No.14 of 2011.

3) A declaration that the advertisement for fresh applications to the position of Chairperson and member of the KNCHR, shortlisting, interviewing and re-submission of a fresh list to the President for nomination and for onward transmission to the National Assembly for

reconsideration for approval or rejection CANNOT be done by a separate or reconstituted panel within the meaning of Section 11 (11) of the Kenya National Commission on Human Rights Act, No.14 of 2011.

4) *An order of Mandamus directing the Hon. Attorney General to forward the names of the three (3) names of the persons shortlisted to the position of Chairperson and the eight (8) members of the KNCHR as provided under Section 11(5) and to advise H.E. The President to, within seven (7) days of the orders of this Court, to submit the said names of the persons shortlisted, as nominees to the said Commission as Chairperson and members respectively for consideration for approval or rejection by the Nation Assembly in terms of Section 11(6) of the Kenya National Commission on Human Rights Act, No.14 of 2011.*

5) *An order of permanent injunction does issue restraining the Hon. Attorney-General, or any person, body, entity or office or officer acting on his behalf (except in accordance/compliance with the KNCHR Act, No.14 of 2011 and the Constitution) from advertising, continuing to advertise, calling for any fresh applications, interviewing, short listing and or making any recommendations to the President for purposes of being nominated afresh, any persons or candidates for the position of Chairperson and members of the Commission to the KNCHR and further restraining H.E. The President from receiving any list other than the list last forwarded to him by the Selection Panel or yet to be forwarded to him, for purposes of being forwarded to the National Assembly for approval or rejection in compliance with the Kenya National Commission for Human Rights Act, No.14 of 2011.*

6) *Cost of the Petition be awarded to the Petitioners.”*

Factual Background

3. The background to this matter is uncontested because as shall be seen later, the Respondent only filed Grounds of Opposition and Submissions in response to the Petition and did not in any way challenge the facts as narrated by the 1st Petitioner in his Affidavit in support of the Petition sworn on 16/10/2013. I should however caution that I will only summarise what facts I consider relevant as the said Affidavit is full of legal arguments as opposed to facts which is what an Affidavit should ideally and properly contain.
4. In any event, apparently what happened was that on 26th November 2012, the term of office of the previous Chairperson and three other Commissioners of the KNCHR came to an end and only one Commissioner was left in office. His term came to an end on 4th January 2014 hence the urgency of these proceedings.
5. Prior to that, the process of recruitment of the Chairperson and members had commenced but **H.C. Petition No.385 of 2012, Consortium for the Empowerment & Development of Marginalised Communities & Others vs The Chairman, the Selection Panel for Appointment of Chairperson and Commissioners to KNHRC & Others** had been filed and the process was halted by Mabeya J. who issued conservatory orders in that regard on 5/9/2012.
6. On 28/9/2012, Mumbi Ngugi, J. varied those orders and directed that the Selection Panel be permitted to re-advertise and commence the process of recruitment of the Chairperson of the KNCHR but left the orders against recruitment of members of the Commission in force until the above Petition was heard and determined.
7. On 16/8/2013, the learned Judge dismissed **Petition No.385 of 2012** and in doing so, stated *inter alia* that “*there was no basis for impugning the decision of the Selection Panels ...*” to shortlist certain candidates for interviews for the said positions.
8. The Affidavit in support at this point of narration becomes extremely difficult to understand as nowhere is it explained what happened after the dismissal of the Petition save that one line is

repeated often;

That “His Excellency the President has declined and or refused to submit names of persons shortlisted for the position of Chairperson and members to the KNCHR inspite of three interviews conducted by Eric Mutua led Selection Panel carried out in the year 2012 (sic)” The dates of those three interviews and the names of shortlisted candidates are not given. What I have however seen in that regard is a Public Announcement in the “Daily Nation” of 23/8/2012 indicating the names of shortlisted candidates and their dates for interviews. The results of those interviews and the dates of transmittal of the selected candidates to the President are all unclear. Whether the interview mentioned in the announcement was the first, second or third is also unclear.

9. Some assistance in filling that gap was however given by Miss Munyi representing the Respondent who submitted as follows;

“a) That the first Selection Panel did not find any suitable candidate(s) for the position of Chairperson as required by **Section 15** of the Act and therefore recommended for re-advertisement of the post of Chairperson.

b) That the Selection Panel, however, found eight (8) candidates eligible for the position of members and forwarded the names to the Principals on 30/8/2012 for nomination of three (3) as members and transmission to the National Assembly before appointment.

c) That in the meantime, the Consortium for the Empowerment and Development of Marginalised Communities and others filed a Petition in the High Court on 3/9/2012 being **Petition No.385 of 2012** against the Chairperson of the first Selection Panel and the Minister for Justice, National Cohesion and Constitutional Affairs challenging the selection process as unfair and inequitable to the minority and marginalised communities as required under the **Constitution, 2010**. (sic)

d) That the High Court by its Interim Orders directed that the post of the Chairperson be re-advertised as recommended by the Selection Panel and issued a restraining order halting the appointment of the three (3) Commissioners until the Petition was heard and determined.

e) That a second Selection Panel was constituted and conducted interviews on 28/12/2012. The Selection Panel forwarded three (3) names to the principals for nomination of one person and subsequent transmission to the National Assembly for approval.”

10. It would seem from the above therefore that on 28/12/2012, prior to the 2013 General Elections, three names were submitted to the then President and Prime Minister for appointment of one person as Chairperson of the KNHCR and it is unclear what happened to the process of appointment of the three members of the KNCHR after **Petition No.358 of 2012** was dismissed, but generally I gather from Submissions made that the process was also completed.

11. What then triggered the present Petition? On 23/10/2012, one Ms. Catherine Omweno, styling herself as the Acting Chairperson, Selection Panel for the Appointment of Chairperson/Member, KNCHR, put out a Public Announcement stating that certain persons had been shortlisted for interviews to be conducted on 25th and 28th October 2013 for the positions of Chairperson and member of KNCHR respectively.

12. It is that latter process that moved the Petitioners to rush to Court and on 24/10/2013, I granted conservatory orders stopping the conduct of those interviews temporarily which orders I confirmed on 16/12/2013 pending this judgment.

The Case for the Petitioners

13. I have read the Supporting Affidavit by Brian Weke aforesaid and a Further Affidavit by Japheth

Muriimi Muroko, the 2nd Respondent sworn on 23/10/2013 as well as Submissions by Mr. Oluoch, learned Counsel for the Petitioners. They make the simple point that once names of selected candidates for the positions of Chairperson and members of the KNCHR were forwarded to the President, “*he has no discretion under the law to decline to nominate*” persons to such positions and that “*the law only contemplates a situation in which names may be approved or rejected by the National Assembly but not the President*”.

14. That therefore the process of reconstitution of the Selection Panel and re-advertisement of the positions aforesaid is a blatant breach of the law and that the President's decision flies in the face of the principle of separation of powers and is a serious affront to the powers and functions of the National Assembly.

15. Further, that a plain reading of **Section 11(11)** of the **KNCHR Act, No.14 of 2011** would reveal that even if the National Assembly were to reject the list of nominees, the new list must come from the original list drawn by the Selection Panel under **Section 11(5)** of the **Act** and not by a fresh selection process. That even if a fresh selection process were to be allowed, it would have to be conducted by the same Selection Panel and not by a freshly reconstituted Panel.

16. That the Petitioners therefore seek the orders as elsewhere reproduced above in order to expeditiously recreate the now dormant and yet important watchdog, KNCHR.

Case for the Respondents

17. As I said earlier, the Respondent filed Grounds of opposition on 30/10/2013 and for clarity's sake, I deem it fit to reproduce them verbatim. They are as follows;

“1) That the Petition militates against the constitutional principle of the Rule of Law and good governance.

2) That the Petition seeks to compel the Government to be in breach of the Law contrary to the ethos of constitutionalism.

3) The Petition is thus an abuse of the Court process and should be dismissed with costs”

18. Submissions in furtherance of the above Grounds were filed on the same day and I have elsewhere above reproduced some of the facts that are relied upon and I only accepted them because of the poor and untidy narration of facts by the Petitioners. I say so, with respect to both Counsel, because I doubt that either took the drafting of their pleadings seriously in this case and it is frustrating to have to piece together simple facts from all documents, including Submissions, where none of those facts have been put forward in any Affidavit on record.

19. Be that as it may, the Respondent's answer is that indeed the President failed to act on the list submitted by the Selection Panel because he had run out of time to do so. That therefore “*... the Courts would be guilty of usurping the Constitution and the Rule of Law were it to order that the President to appoint the Chairperson and members of the commission despite clear lapse of time. (sic)*

That accordingly, and in view of uncontested facts on the selection process, the law obliges the President to move the process forward by appointing a new Selection Panel without undue delay to conduct the selection of the chairperson and members of the Commission.”

20. Sadly, the Law that obligates the President to appoint a new Panel was not provided to this Court, simple as the issue has been made to look, a view I do not share.

Case for the Interested party

21. The KNCHR was enjoined as an Interested Party and its submissions were limited to the making of

the point that unless a decision is rendered one way or the other, the Commission's operations would come to a halt by 4/1/2013 as there would be no Chairperson or Commissioner in office by that day to constitute the Commission.

Determination

22. The facts as I have pieced together would lead to the conclusion that after interviews for the positions of Chairperson and members of KNCHR, the Selection Panel forwarded a number of names to the President for appointment and later for approval by the National Assembly. Miss Munyi in her submissions reproduced above clearly stated that those facts are uncontested and went further to frame the issue for determination as follows;

“Whether the President should proceed to nominate the Chairperson and the three(3) members of the Commission despite the clear lapse of time”

23. I agree with that approach and in answering the question, I must necessarily begin by referring to **Section 11** of the **KNCHR Act** which provides as follows;

“(1) Whenever there is a vacancy in the Commission the President shall, within fourteen days of the occurrence of the vacancy, convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.

(2) The selection panel convened under subsection (1) shall consist of;

(a) one person nominated by each of the following bodies—

(i) the Office of the President;

(ii) the Office of the Prime Minister;

(iii) the Ministry responsible for matters relating to justice;

(iv) the Ministry responsible for matters relating to gender and social development;

(v) the Public Service Commission;

(vi) the Law Society of Kenya; and

(vii) the National Council for Persons with Disabilities; and

(a) two persons nominated by the Association of Professional Societies in East Africa.

(3) The selection panel shall, subject to this section, determine its own procedure, and the ministry responsible for public service shall provide it with such facilities and such other support as it may require for the discharge of its functions.

(4) The selection panel shall, within seven days of its convening, invite applications from qualified persons and publish the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.

(5) The selection panel shall within seven days of receipt of applications under subsection (4) consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and eight persons qualified for appointment as members of the Commission and shall forward the names of the selected candidates to the President for nomination.

(6) Until after the first general election after the commencement of this Act, the President in

consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and four persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.

(7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and may approve or reject any nomination.

(8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.

(9) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate the decision of the national Assembly to the President to submit fresh nominations.

(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).

(12) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.

(13) In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.

(14) After the first elections after the commencement of this Act, the member of the selection panel under subsection (2) (b) shall be replaced by a representative of the Public Service Commission.

(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.”

24. Reading the above **Section** in the context of the Petition before me, the following facts emerge;

i) **Sections 11(1) – (5)** were complied with by the Selection Panel.

ii) **Section 11(6)** was not complied with prior to 4/3/2013 when the General Elections were held and the office of Prime Minister ceased to exist.

iii) The reason for non-compliance was because Mumbi Ngugi, J. in respect of the office of Commissioner of KNCHR, on 28/9/2012 issued orders stopping the recruitment process until her judgment in **Petition No.358 of 2112** which Judgment was delivered on 16/8/2013. It is unclear why the Chairperson was not nominated before 4/3/2013 but it matters not because as at the date of filing the Petition, the President had not done so.

iv) A Selection Panel with an Acting Chairperson, one Catherine Omwano re-opened the recruitment process and shortlisted candidates for interviews on 25th and 28th October 2013. It is unclear from the disjointed facts before me whether indeed the Selection Panel envisaged under **Section 11(2)** of the Act was indeed reconstituted and which body Catherine Omwano

represented and what happened to one Eric Mutua, Chairman of the Selection Panel and who was representing the Law Society of Kenya under **Section 11(2)(a)**.

v) **Section 11(15)** provides for situations where the strict timelines set by the Act are not met and any extension of time shall be by a Gazette Notice extending the time by a period not exceeding 21 days and it is obvious that this provision was never invoked partly because of the existing Court order.

25. With those facts in place, I should quickly dispose of the argument that without a Prime Minister, the President could not act alone and was obligated to commence the whole process afresh. That limb of Miss Munyi's Submission was unsupported by any law and no other party addressed me on the question. It must be remembered however that the office of the Prime Minister was a creature of **Section 3** of the **National Accord and Reconciliation Act, 2008**. **Section 6** of that Act provided that the Coalition Government, which included the Prime Minister, would stand dissolved once the Tenth Parliament was dissolved which in fact happened prior to the elections of 4/3/2013 and in accordance with **Section 3(2)** of the **Sixth Schedule** to the **Constitution, 2010**. **Sections 6** and **7** of the **Sixth Schedule** then provide as follows;

“(6) Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the National Government or the Republic under this Constitution.

(7) (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

(2) If, with respect to any particular matter -

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer,

the provisions of this Constitution prevail to the extent of the conflict.”

26. Reading all the above provisions together and without belabouring the point, **Section 11** of the **KNCHR Act** gave certain obligations to the President in consultation with the Prime Minister. Once the office of Prime Minister ceased to exist, the obligations placed on the President under the Act do not cease to exist and in adapting them to the existing circumstances, common sense would also dictate that he can act solely. That is all there is to say on that matter.

27. Turning back to the issue at hand, what options were open to the President once he received the names of shortlisted candidates for nomination? Under **Section 11(6)**, he had, from the date of receipt of the list, 7 days to nominate one person as Chairperson and four persons as members of the Commission. He did not do so and instead opted to begin the whole process afresh and no law was quoted to support his stance. He did not for example invoke **Section 11 (15)** and extend time for submitting the names to the National Assembly once Mumbi Ngugi, J. declared the process of shortlisting as lawful. Had he been advised to do so, this Petition would not have been filed and the process would have continued under **Section 11(7)** of the Act.

28. Was his option to reopen the process lawful therefore? Clearly not. The President, like all other State officers, took an oath to uphold the Constitution and the Laws of Kenya. His actions must always be guided by that oath. Convenience is never part of that oath and where the law is clear and lacks ambiguity, it must be followed. In that regard, the words in **Shore vs Wilson (1842) 9, CI & Fin 355**

ring true. The learned Judge stated as follows;

“The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves”

29. The words were adopted with approval by Majanja J. in **Abdi Sitar Yusuf vs Attorney-General & 2 Others [2013] eKLR** where the learned Judge stated as follows;

“Where the words themselves are ambiguous, the Court may also consider the context of the work or words and in this respect I adopt the words of Justice Lenaola in Charles Omanga & Anor vs Independent Electoral and Boundaries Commission & Anor Nairobi Petition 2 of 2012 (unreported) that 'It is also a Rule of interpretation as I understand it, that the “context” of a Statutory provision must be explored to get its real meaning-see S vs. Makwanyane & Others CCT/3/94 (Constitutional Court of South Africa). That context includes the purpose and scope of a Statute and within certain limits, its background ...'.”

30. Applying all the above holdings to this case, **Section 11** was elaborately worded to grant the Selection Panel certain duties, the President other duties and the National Assembly certain duties. Time frames were also created to ensure that none falters and none delays the appointment process. Taking into account factors beyond anyone's expectation, **Section 11 (15)** was created to grant the President the power to extend time but for a limited period to avoid procrastination on his part. None of the bodies and offices above can be directly faulted for the initial delay but certainly after the judgment in **Petition No.358 of 2012**, the President should have invoked **Section 11(15)** and moved the process forward but, instead, he chose a convenient but unlawful process by restarting the whole process. He acted outside the law and this Court has the obligation to point him to the right direction.

Conclusion

31. Having set out the correct procedure to be followed, it follows that looking at the prayers in the Petition and even with the inelegance of pleadings, prayers (1) (2) and (3) are merited. Regarding prayer 4, the Hon. The Attorney-General has no role to play under **Section 11** of the **Act** and it is to the President that any orders must be directed. I say so also because **Section 59** of the **Interpretation and General Provisions Act, Cap.2** provides as follows;

“Where in a written law a time is prescribed for doing an act

or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.”

32. Although there is no formal application for extension of time, this Court can *suo motu* extend the time between the events contemplated by **Section 11(5)** and **(6)** of the **Act** and appropriately direct the President to invoke **Section 11(15)** of the **Act** and jumpstart the process of appointment of the Chairperson and members of the KNCHR. Prayer (5) is merely academic and once prayers (1) (2) and (3) are granted, it is rendered superfluous.

33. In the event and for the above reasons, the following are the final orders to be made;

“1) A declaration that the President has no powers and or discretion to decline and or refuse to forward a list of candidates to the National Assembly, shortlisted by the Selection Panel appointed under Section 11 (1) and (2) of the Kenya National Commission on Human Rights Act, No.14 of 2011 for consideration for either approval or rejection.

2) *A declaration that the Hon. Attorney-General has no powers under the Act to reconstitute a selection panel and advertise for fresh applications for the position of Chairperson and member of the KNCHR other than in the manner contemplated under Section 11(10), (11) & (12) of the Kenya National Commission on Human Rights Act, No.14 of 2011.*

3) *A declaration that the advertisement for fresh applications to the position of Chairperson and member of the KNCHR, shortlisting, interviewing and re-submission of a fresh list to the President for nomination and for onward transmission to the National Assembly for reconsideration for approval or rejection CANNOT be done by a separate or reconstituted panel within the meaning of Section 11 (11) of the Kenya National Commission on Human Rights Act, No.14 of 2011.*

4)(a) *The President of the Republic of Kenya shall within 21 days of this order, exercise powers conferred on him by Section 11(15) of the KNCHR Act and extend time for the exercise of powers under Section 11(6) of that Act and nominate one person from the list submitted by the Selection Panel for the Appointment of the Chairperson and Member of KNCHR as such Chairperson and Four persons as members before forwarding the said names to the National Assembly.*

(b) *The National Assembly shall thereafter deal with the matter in accordance with Section 11(7) - (13) of the KNCHR Act.*

5) *Since the Petitioners were litigating in public interest, let each Party bear its own costs.*

33.Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 21ST DAY OF JANUARY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Lando holding brief for Mr. Kamau for Interested Party

No appearance for the Petitioner

Miss Munyi for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE