



IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 158 OF 2014

BETWEEN

NATIONAL ASSOCIATION OF PARENTS.....PETITIONER

AND

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

OFFICE OF THE PRESIDENT.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. This is another petition concerning the Teachers Service Commission (“the Commission”) constituted under the provision of **Article 237** of the Constitution and operationalized under **Teachers Service Commission Act (Act No. 20 of 2012)** (“the Act”).
2. The petitioner in the petition dated 8th April 2014 seeks the following reliefs;
 1. *This Honourable Court be pleased to declare the intended selection of another panel by the 2nd Respondent under Section 8 of the TSC Act illegal and unconstitutional.*
 2. *This Honourable Court be pleased to order reinstatement of the original panel to complete its legal mandate.*
 3. *This Honourable Court be pleased to grant a declaration that any acts decisions and/or resolutions of the 1st Respondent under Article 237 of the Constitution and Section 4 of the TSC Act from 31st August 2012 to date are illegal, unconstitutional, null and void.*
 4. *This Honourable Court be pleased to grant a permanent injunction restraining the 1st Respondent from operating unless and until properly and legally constituted.*
 5. *This Honourable Court be pleased to grant a declaration that all disciplinary actions against teachers under Section 34 of the TSC Act No. 20 of 2012 since 31st August 2012 to date are unconstitutional, illegal, null and void.*
 6. *This Honourable Court be pleased to issue an order compelling the 1st respondent to submit a Report to the President and to Parliament for the year ending 30th June 2013 and the same be*

- published and publicized as required under Article 254 of the Constitution of Kenya 2010.*
7. *Such other orders as this Honourable Court shall deem just.*

Issue framed for determination

3. In view of the delay in constituting the Commission, the parties agreed that the petition would be disposed of by dealing with and determining one issue, that is, ***“whether a fresh Selection Panel should be constituted to initiate the process of appointment of vacancies, the chairperson and five members.”***

Facts and Submissions

4. The parties have filed depositions; the petitioner relied on the affidavit of Musau Ndunda, its Secretary General, sworn on 8th April 2014, the 1st respondent filed an affidavit sworn on 14th April 2014 by Ibrahim Gedi Mumin, the Senior Deputy Director in Charge of Administration and Joseph Kanja Kinyua, the Chief of Staff and Head of the Public Service swore and affidavit on 16th April 2014 to oppose the case on the 2nd and 3rd respondent’s behalf.
5. From the deposition filed and for purposes of these proceedings the following matters are common ground;
 - a. There are six vacancies; one for Chairperson and five members of the Commission.
 - b. The Chief of Staff and Head of the Public Service has issued indicated that a Selection Panel under the **Act** will be formed to fill the five vacancies.
 - c. A Selection Panel for appointment of Chairperson and members of the Commission headed by James Kamunge was appointed by **Gazette Notice No 13556** dated 21st September 2012 (***“the Kamunge Panel”***).
 - d. The Commission as currently constituted operates with three members.
6. Mr Muli, counsel for the petitioner, submitted that the **Kamunge Panel** had not completed its mandate as some of the shortlisted candidates’ names have never been forwarded by the President to Parliament for approval or rejection. He urged that it was important that the rule of law be followed as **section 8** of the **Act** was clear that the Panel would be extinguished only when it completes its task.
7. Mr Njoroge assisted by Mr Sekwe argued that the petitioner’s case lacks merit as the vacancies sought to be filled by the new Selection Panel are those vacancies that arose after the **Kamunge Panel** was appointed and hence **section 8** of the **Act** requires that a fresh Panel be constituted. Ms Ruto, counsel for the Commission, relied on the deposition of Ibrahim Gedi Mumin which supported the State’s arguments.

Determination

8. I have considered the brief arguments supported by the written submissions and I take the following view of the matter. **Section 8(1)** of the **Act**, which is relevant to these proceedings and which deals with the appointment process of the Chairman and members of the Commission provides as follows, ***“8(1) Within fourteen days of the commencement of this Act, or whenever a vacancy arises in the Commission, the President in consultation with the Prime Minister shall by notice in the Gazette declare a vacancy and constitute a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.”*** It is worth noting that the provisions as to consultation of the Prime Minister have since lapsed following the first General election under the Constitution.
9. **Section 8** of the **Act** has been the subject of the Court’s interpretation in several cases some of which were cited by the parties; **Leonard Njogu v Attorney General and Teachers Service Commission Nairobi Petition No. 479 of 2012 [2012]eKLR**, **Abdi Sitar Yusuf v Attorney**

General and Others Nairobi Petition No. 8 of 2013 [2013]eKLR, Abdi Sitar Yusuf v Attorney General and Another Nairobi Petition No. 334 of 2013 [2013]eKLR and Clifford Keya v Attorney General and Others Nairobi Petition No. 370 of 2013 [2013]eKLR.

10. The case germane to the issue of the five commissioners whose terms expired in 2013 is the case of **Leonard Njogu v Attorney General and the Teachers Service Commission (Supra)**. In that case the court dealt with the issue whether the Commissioners who were in office and whose terms were to expire in the year 2013 ought to have been removed by the promulgation of the Constitution. The Court stated as follows, “[23] According to Josephine Maundu, the Commission under the provisions of the repealed **Teachers Service Commission Act (Chapter 212 of the Laws of Kenya)**, there were five serving commissioners whose terms are set to expire on 30th June 2013. The 2nd respondent, through its counsel, Mr A. Situma, drew the Courts attention to the provisions of **section 51(2)** of the Act which he submitted saved the terms of the five Commissioners holding office and also the provisions of the **Sixth Schedule (The Transitional and Consequential Provisions)** to the Constitution. [24] I think this issue is resolved by the provisions of **section 31(2)** of the **Sixth Schedule** to the Constitution [25] This provision is to be read with **section 50(1) and (2)** of the Act [26] The five Commissioners are persons holding public office established by law within the meaning of the **section 31(2)** of the **Sixth Schedule** and continue to do so and act in that office by virtue of the **section 31(2)**. In the circumstances they are properly in office and their position cannot be impugned.”
11. That case confirmed that the five members were properly in office and that their terms would expire on 30th June 2013. It is these Commissioners’ positions that now need to be filled. By the time the positions became vacant, the **Kamunge Panel** was already in existence having been formed in 2012. It is therefore as clear as day that the **Kamunge Panel** pre-dates the five vacancies occasioned by the retirement of the five members. I therefore find that the Panel contemplated by **section 8(1)** of the Act in these circumstances is a new Panel and not the **Kamunge Panel**. In any case in **Abdi Sitar Yusuf v Attorney General Nairobi Petition No. 334 of 2012 [2013]eKLR**, the Court noted that, “[8] ... Five vacancies are as a result of the members whose terms has come to an end and all parties are agreed that the appointment of these five members is to be done by constituting a panel under **section 8** of the Act.” The same case dealt with the position of Chairperson of the Commission. The Court directed that, “The position of Chairperson shall be advertised and a Selection Panel constituted under section 8 of the Act shall proceed to consider applications in accordance with the Act.” Nothing further can be said on the matter.
12. In respect of the issue framed for determination, I find and hold that the selection of the five members of the Commission shall be by a fresh Selection Panel constituted for that purpose under **section 8(1)** of the Act. For the avoidance of doubt and in light of the cases I have cited, the **Kamunge Panel**, has no mandate in regard to the five vacancies.
13. Finally, I think it is important to lay one matter to rest. The argument underlying these proceedings and in particular prayers 3, 4, 5 and 6 of the petition is that the Commission lacks or lacked capacity to make any decisions or resolutions due to the fact that it has not had the full complement of the Commissioners. This argument lacks merit for several reasons. First, the Commission is a corporate body with perpetual succession under **Article 254(a)** of the Constitution. It therefore continues to exist notwithstanding a vacancy in its membership. Second and in accordance with **Article 250(1)** of the Constitution, it has the minimum of three Commissioners required for it to operate. Third, in giving effect to the provisions of the Constitution, the Court should not undermine the existence of a constitutional body by interpreting the Constitution in a manner that will cause chaos within the education sector, violate the right of the citizen to education and create a situation where good governance is undermined. It is in the interests of the public at large that the long delayed appointment of the Chairperson and members of the Commission is completed without delay.

Disposition

14. For the reasons I have outlined above, the petition is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 17th day of April 2014

D.S. MAJANJA

JUDGE

Mr Muli instructed by Laichena Mugambi and Company Advocates for the petitioner.

Ms Ruto, Advocate, instructed by the 1st respondent.

Mr Njoroge, Chief Litigation Counsel, with him Mr Sekwe, Litigation Counsel, instructed by the State Law Office for the 2nd and 3rd respondent.