



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

**PETITION NO.403 OF 2014**

**BETWEEN**

**WYCLIFFE GISEBE NYAKINA.....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**SELECTION PANEL FOR APPOINTMENT OF CHAIRPERSON**

**AND MEMBERS TEACHERS SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner, Wycliffe Gisebe Nyakina, has filed this Petition claiming that the President of the Republic of Kenya, H.E. Uhuru Kenyatta, has violated the provisions of **Articles 10, 47 and 232** of the **Constitution and Sections 7 and 8(11)** of the **Teachers Service Commission (hereinafter ‘TSC’) Act** in regard to the appointment of persons to the office of Chairperson of the TSC. In his Petition dated 8<sup>th</sup> August 2014, he seeks the following orders as against the 1<sup>st</sup> Respondent;

***“(a) A declaration that the Petitioners’ right to protection of the law under Article 27 and 47 of the Constitution have been denied, infringed, violated and/or threatened.***

***(b) Order of Prohibition to prohibit the 2<sup>nd</sup> Respondent from receiving and considering any applications for the purpose of recommending such persons for appointment as Chairperson of the Teachers Service Commission.***

***(c) Order of Certiorari to issue to remove to this Court Gazette Notice No.5431 and quash it.***

- d. ***Order of Mandamus compelling the 1<sup>st</sup> Respondent to expeditiously nominate one person from the Kamunge Panel shortlist of candidates, who has not previously been rejected by the National Assembly, for appointment as Chairperson of the Teachers Service Commission.***

*(e) Any other relief that this Court may deem just and appropriate to safeguard the fundamental rights and freedoms contained in Articles 27 and 47 of the Constitution in relation.”*

### **The factual background to the Petition**

2. The factual background to this matter is uncontested because as shall be seen later, the Respondent filed only Grounds of Opposition in response to the Petition. I therefore proceed on the premise that the facts are unchallenged and I shall apply them as pleaded by the Petitioner. – see **Prof. J. Oloka-Onyango & Others vs AG, Constitutional Petition No.8 of 2014** per the Constitutional Court of Uganda.
3. What therefore happened was that on 21<sup>st</sup> September 2012, in exercise of his powers under **Section 8(1)** of the **Teachers Service Commission Act (hereinafter the ‘Act’)**, retired President, H.E. Mwai Kibaki in consultation with the then Prime Minister, Rt. Hon. Raila Odinga, as was then required of them, declared vacancies in the offices of Chairperson and members of the TSC. He simultaneously set up a selection panel chaired by Dr. James M. Kamunge (**hereinafter the ‘Kamunge Panel’**) for the purposes of selecting suitable candidates for appointment as Chairperson and Members of the said Commission. The Kamunge Panel carried out its mandate and on 8<sup>th</sup> October 2012, pursuant to the provisions of **Section 8(6)(d)** of the **Act** it forwarded to the President the names of Mr. Kiragu wa Magochi, Mr. Simon Musyimi Kavisi and Mr. Ismail Buro Hassan as the persons eligible for appointment as chairperson and specifically, the President nominated Kiragu wa Magochi for the said position of Chairperson.
4. On 3<sup>rd</sup> January 2013, the National Assembly debated the list of the persons nominated for appointment and it rejected all the nominees including the Chairperson. On 9<sup>th</sup> January 2013, the Education, Research and Technology Committee of the National Assembly resubmitted the name of Kiragu wa Magochi to the National Assembly again which name was once more rejected.
5. As a result of the above, the Kamunge Panel carried out a fresh selection exercise and forwarded a list containing the names of Dr. Lydia Kilonzo, Mr. Kiragu wa Magochi, Prof. George Imbanga Godia, Mr. Simon M. Kavisi, Mr. Mbarak Said Twahir, Mr. Robert N. Masese and Mr. Ismael Buro Hassan as eligible for appointment as members of the TSC to President Uhuru Kenyatta. In addition, that list also included the names of the persons who had been shortlisted in the initial list pursuant to the orders of Majanja, J. issued on 15<sup>th</sup> July 2013 in **Petition No. 334 of 2013, Abdi Sitar Yusuf vs Attorney General and 2 Others.**
6. The President once again nominated Mr. Kiragu wa Magochi as Chairperson of TSC and forwarded his name to the National Assembly for approval. The National Assembly for the second time rejected the nomination.
7. Consequent upon the rejections aforesaid, by a Gazette Notice No.4877 dated 16<sup>th</sup> July 2014, the President constituted a Panel chaired by Prof. Karega Mutahi (**hereinafter the ‘Mutahi panel’**) to select suitable candidates for appointment as members of the Commission. The President, by a further Gazette Notice No.5431 dated 4<sup>th</sup> August 2014 empowered the Mutahi Panel to select suitable candidates for appointment as Chairperson. Subsequently, the Mutahi Panel invited applications from interested persons for the said positions and it is that decision which necessitated this Petition.

### **The Petitioner’s Case**

8. Mr. Muriuki for the Petitioner claimed that under **Section 8** of the **Act**, once the process of recruitment of the Chairperson of TSC had begun and a name is forwarded to the National Assembly for approval and the nominee is rejected, Then the President under **Section 8(11)** of the **Act**, must submit a fresh name from the list submitted to him and that there is therefore no room

for a new panel to be set up. He thus submitted that the provisions of **Section 8(11)** has been contravened by the appointment of a new panel to interview persons for appointment Chairperson of TSC.

9. It was Mr. Muriuki's further submission that the life of the Selection Panel under **Section 18(3)** of the **Act** was to last until the time of appointment of a Chairperson and therefore to date the Kamunge Panel is still in office and is the lawful recruitment panel for that purpose. That the President has no powers under the Act to constitute the Mutahi Panel to shortlist interview and select a person eligible for appointment as Chairperson and such the appointment of that Panel also violates the orders issued by Majanja, J. on 25<sup>th</sup> March 2014.
10. He further claimed that to make matters worse, one Prof. Godia who had been shortlisted and interviewed for the position of Chairperson is now the Vice Chairperson of the Mutahi Panel which fact would lead to a conflict of interest and that on the whole, the Selection Panel was invalid and the orders sought above should be granted.

### **The Respondents' submission**

11. The Attorney General on his behalf and on behalf of the Mutahi Panel opposes the Petition through the Grounds of Opposition dated 18<sup>th</sup> August 2014 which state that;
12. The Petition is *res judicata* and that in view of the orders in **Petition No.334 of 2013**, the functions of the Kamunge Panel have been overtaken by events since no appointments were made within the strict time frames provided for under **Section 8** of the **Act** and that the Petition is therefore an abuse of the Court process.
13. That TSC has not been constituted fully and although **Article 250** of the **Constitution** states that a Commission must have at least 3 members, TSC has only one member and this is because the Kamunge Panel had failed to finalize the recruitment process and thus it was necessary to set up a fresh panel for that reason, which panel would survive until the appointments have been made and that it was therefore in the wider public interest to nominate a fresh panel since the Kamunge Panel had died a natural death.
14. He also submitted that the TSC has been dormant because the constitutional threshold for appointment of its members has not been met and so the action by the President of expanding the selection panel chaired by Prof. Karega Mutahi was both necessary and lawful.
15. It was his further position that the matter is *res judicata* as Majanja, J. in **Abdi Sitar Yusuf vs Attorney General and 2 Others (supra)** had dealt with all the issues now being raised by the Petitioner in this Petition.
16. He finally submitted that it had not been demonstrated and no evidence had been tendered to show that Prof. Godia was a nominee of the Kamunge Panel and was ineligible to sit in the Mutahi Panel.
17. Mr. Njoroge, Co-Counsel with Mr. Kuria added that teachers' rights are being violated because of all the Court cases in place and that under **Article 259** of the **Constitution** no selection panel should be invalidated as none was meant to operate in perpetuity. He claimed that none of the Petitioner's rights had been breached and that the Petition ought to be dismissed with costs.

### **Determination**

18. I will start by determining the allegation that the Petition is *res judicata* in view of the decision in **Abdi Sitar Yusuf vs Attorney General and 2 Others (supra)**.
19. The law on *res judicata* in civil law is clear as seen from the provisions of **Section 7** of the **Civil**

**Procedure Act Cap 21 Laws of Kenya.** This Section provides thus;

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

These principles were extensively discussed in **Omondi v National Bank of Kenya Ltd and Others (2001) EA 177** and **Karia and Another v the Attorney General and Others (2005) 1EA 83**.

As to the applicability of the principle of *res judicata* in constitutional matters this Court recently stated in **Okiya Omtatah Okoiti & Another vs The Attorney General and Another Petition No. 593 of 2013** as follows;

***“Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of *res judicata* can and should only be invoked in constitutional matters in the clearest of cases and where a party is re-litigating the same matter before the Constitutional Court and where the Court is called upon to re-determine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights-based litigation and the reason is obvious.”***

20. I reiterate the sentiments above and I must also state that while the Courts in constitutional litigation must apply the principle of *res judicata* sparingly, they must also be vigilant to guard against litigants who are clearly evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the same Court. That being my finding and looking at the Petition before me, I do not think that it is *res judicata* and I will say why shortly.
21. It is obvious that the parties are not the same in the Petition before me as with those in **Abdi Sitar Yusuf vs Attorney General and 2 Others (supra)**. Secondly, it is also clear that the issues in this Petition are not the same as those in that other suit. This is because the Petitioner in **Abdi Sitar Yusuf vs Attorney General and 2 Others (supra)** had challenged the issue of appointment of members to the Commission under **Section 8** of the **Act**. In the current Petition, Mr. Muriuki stated right from the outset that the Petitioner was challenging **Section 8(11)** of the **Act** in regard to the appointment of the Chairperson to the Commission and that the said Section has been contravened by the inclusion of the mandate of the selection of the Chairperson in the mandate given to the Mutahi Panel. To my mind therefore those are different issues and the principle of *res judicata* does not apply in that regard.
22. Having said so, and looking at the Petition again, there is only issue of determination, i.e. whether the Mutahi Panel has the mandate to recruit the Chairperson of the TSC and as a corollary to that issue whether the Gazette Notice No.5431 of 2014 is unlawful.
23. It is not contested that the Kamunge Panel carried out its mandate of the selection of the persons to fill the offices of Chairperson and Members of the Commission. Having carried out the shortlisting and interviews, it forwarded three names to the President for nomination of one person as Chairperson of TSC. The President, as is his mandate, nominated Mr. Kiragu wa Magochi as the Chairperson of the Commission but the nomination was rejected by the National Assembly. Following Majanja’s, J. orders in **Abdi Sitar Yusuf vs Attorney General and 2 Others (supra)**, the Kamunge Panel carried out a fresh selection exercise and forwarded three names of persons eligible to be appointed as Chairperson of the Commission to the President. Again, the President nominated Mr. Kiragu wa Magochi as Chairperson and for the second time the National Assembly

rejected that nomination.

24. The Petitioner now claims that the President instead of nominating a name out of the three names already submitted to him, has instead and in violation of **Section 8(11)** of the **Act**, appointed a new Selection panel for the selection of the Chairperson and Members of the Commission and that therefore Gazette Notice No. 5431 of 2014 is unlawful.

25. I have duly considered the rival arguments placed before me and the law as regards the appointment of the Chairperson and Members of the Commission is found at **Section 8** of the **Act** which states as follows;

***“(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.***

***(2) The selection panel constituted under subsection (1) shall consist of—***

***(a) a chairperson not being a public officer appointed by the President;***

***(b) the Cabinet Secretary in the Ministry responsible for matters relating to education or his representative;***

***(c) the Attorney General or his representative;***

***(d) the Cabinet Secretary in the Ministry responsible for public service or his representative;***

***(e) one person nominated by the Federation of Kenya Employers;***

***(f) two persons, one man and one woman, nominated by the registered trade unions representing the interests of registered teachers;***

***(g) one person nominated by a recognised association of private schools; and***

***(h) a prominent educationist not serving in Government appointed by the Cabinet Secretary.***

***(3) A person appointed under subsection (2)(f) shall not be a serving official of the nominating union.***

***(4) The chairperson shall convene the first meeting of the selection panel within seven days of his or her appointment.***

***(5) The selection panel shall, within seven days of convening, invite applications from persons who qualify for nomination and appointment as chairperson or member of the Commission by advertisement in at least two daily newspapers of national circulation.***

***(6) The selection panel shall within seven days of receipt of applications under subsection (5)—***

***(a) consider the applications to determine their compliance with the provisions of the Constitution and this Act;***

(b) *shortlist the applicants;*

(c) *interview the shortlisted applicants; and*

(d) *submit the names of three qualified applicants for the position of chairperson and thirteen qualified applicants for the position of a member to the President.*

(7) *The President shall, within seven days of receipt of the names forwarded under subsection (6), nominate one person and eight others for appointment as chairperson and members of the Commission and forward the names to the National Assembly for approval.*

(8) *The National Assembly shall, within twenty one days of its sitting, consider each nomination received under subsection (7) and approve or reject any of them.*

(9) *Where the National Assembly approves the nominees, the Speaker of the National Assembly shall, within five days forward the name of the approved applicants to the President for appointment.*

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

(11) *Where the National Assembly rejects any nominee, the Speaker shall within five days communicate its decision to the President and request the President to submit fresh nominations from amongst the persons shortlisted and forwarded by the selection panel under subsection (6).*

(12) *If the National Assembly rejects any or all of the subsequent nominees submitted by the President for approval under subsection (10), the provisions of subsections (5) and (6) shall apply.*

(13) *The panel shall stand dissolved upon the appointment of the chairperson and members under subsection (10).*

(14) *Where the provisions of subsection (11) apply, the panel shall continue to exist but shall stand dissolved upon the requisite appointments being made.”(Emphasis mine)*

26. The provisions of **Section 8(11)** of the **Act** are plain and clear and require no more than a literal interpretation. The President, upon rejection of any nominee, is supposed to resubmit another name to the National Assembly from among the names shortlisted and forwarded to him by the Selection Panel, in this case the Kamunge Panel. The President upon any nominee being rejected by the National Assembly cannot constitute another Selection panel to carry out the selection of the Chairperson and it would be a clear contravention of the Act and the Constitution if he did so. In fact nowhere does **Section 8** of the **Act** provide for the constitution of a new selection panel. The provisions of **Section 8(12)** makes it clear that when the name of the subsequent nominees made by the President in accordance with the provisions of **Section 8(11)** have been rejected, the same Selection panel shall jumpstart the process in accordance with the provisions of **Sections 8 (5) and (6)** of the **Act**.

27. Reading all the above provisions together and without belaboring the point, **Section 8(13)** and **(14)** of the **Act**, reproduced elsewhere above, is crystal clear that the Kamunge Panel would remain in office until the Chairperson and Members of the Commission have been appointed. I therefore must agree with Mr. Muriuki in that regard and the lame arguments by the Respondent cannot be sustained.

28.Regarding the prayer that the Petitioner’s fundamental rights and freedoms as enshrined in **Articles 27 and 47 of the Constitution** have been violated, no submission whatsoever was made in that regard and in any event where such a claim is made with no particulars, then the Court is left with no choice but to dismiss such a claim – See **Anarita Karimi Njeru vs AG 1976-1980(1)KLR 14.**

29.As for the appointment of Prof. Godia as a member of the Mutahi Panel while he was allegedly a candidate for the position of Chairperson of TSC, no facts to support that claim have been placed before the Court to determine the veracity of the same. In any event, Prof. Godia is not one of the three persons whose names were forwarded to the President and from whom he must nominate a Chairperson for approval by the National Assembly. That issue is therefore of no consequence to the determination of this Petition.

### **Conclusion**

30.Having set out the correct procedure to be followed, it follows that the President did not have powers to appoint the Mutahi Panel with the mandate of carrying out the shortlisting and interviewing of persons for the position of Chairperson to the Commission. The only option the President has in law is to nominate a person from among the names forwarded to him by the Kamunge Panel and excluding the name of Mr. Kiragu wa Magochi who has since been rejected twice by the National Assembly. To include his name would obviously serve no purpose and it would be unlawful in any event.

31.This matter caused me some concern; why is the law, plain and unambiguous, being so casually ignored? Why is the TSC being left in a state of dormancy for so long? What interests are being pursued in that dormancy and who is the beneficiary of a stagnant TSC? Why are teachers being left in an environment where their policy making and disciplinary body is as dead as the proverbial dodo? I have no answers to the above questions but what I am certain about is that the President ought to move with haste and comply with the clear procedure that I have outlined above.

32.In the event and for the above reasons the Petition succeeds in terms of prayers (b), (c) and (d) of the Petition which are re-worded as follows;

***(a) An order of Prohibition is hereby issued to prohibit the 2<sup>nd</sup> Respondent from receiving and considering any applications for the purpose of recommending such persons for appointment as Chairperson of the Teachers Service Commission.***

***(b) An order of Certiorari is hereby issued to remove to this Court, Gazette Notice No.5431 of 4<sup>th</sup> August 2014 and the same is hereby quashed.***

***(c) An order of Mandamus is hereby issued compelling the 1<sup>st</sup> Respondent to expeditiously cause the nomination by the President of one person from the list already submitted to him by the Kamunge Panel and which person has not previously been rejected by the National Assembly, for appointment as Chairperson of the Teachers Service Commission.***

33.I am satisfied that the Petitioner has brought this Petition in public interest and therefore there shall be no order as to costs.

34.Orders accordingly.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF AUGUST, 2014**

**ISAAC LENAOLA**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF AUGUST, 2014**

**FRANCIS GIKONYO**

**JUDGE**

**In the presence;**

Kinyua – Court clerk

Mr. Murenda for Muguku for Petitioner

**Court**

Judgment read Open Court in the presence of Counsels for the parties.

**FRANCIS GIKONYO**

**JUDGE**

**29/8/2014**

**Mr. Kuria**

Give us certified copies of judgment to enable us advise our clients accordingly.

**Court**

1. Parties shall be provided with certified copies of the Judgment on payment of requisite Court fees on the same.

**FRANCIS GIKONYO**

**JUDGE**

**29/8/2014**