



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 8 of 2013

ABDI SITAR YUSUF.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

SELECTION PANEL OF TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

CLERK TO THE NATIONAL ASSEMBLY.....3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner has brought this case to challenge the manner in which the Chairperson and members of the Teachers Service Commission have been appointed.
2. The Teachers Service Commission is established under **Article 237** of the Constitution. In order to operationalise the Act, Parliament enacted the *Teachers Service Commission Act, (Act No. 20 of 2012)*. The Act commenced on 31st August 2012.

The Procedure

3. **Section 5(1)** of the *Teachers Service Commission Act* (“the Act”) provides that the chairperson and eight other members of the Commission shall be appointed in accordance with the Constitution and the provisions of **section 8** of the Act.
4. **Section 8** of the Act sets out the procedure for nominations and appointment to the Commission. The part material to this case provides;
 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.*
 - (2) *The selection panel constituted under subsection (1) shall consist of— 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 Principal Secretary in the Ministry responsible for public service or his representative;

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

(f) two persons, one man and one woman, nominated by the cabinet Secretary representing the interests of registered teachers.

(f) one person nominated by a recognized association of private schools; and

(h) A prominent educationist not serving in Government appointed by the Cabinet Secretary

(3) A person appointed under subsection (1) (f) shall not be a serving official or member 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 as soon as is reasonably practicable 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).[Emphasis mine]

The facts

5. The petitioner and the respondents, represented by the office of the Attorney General do not dispute the facts giving rise to the petition and they are as follows.
6. In accordance with its mandate under the Act, the Selection Panel for the Appointment of Chairperson and Members of the Teachers Service Commission in its report dated 18th October 2012 recommended for appointment as Chairperson of the Commission three candidates; Mr Kiragu wa Magochi, Mr Simon Musyimi Kavisi and Mr Ismail Buro Hassan. It also recommended for appointment five candidates for the three vacancies for member of the Commission; Mr Cleopas Tirop, Dr Salome Wanjiku Gichura, Mr Fredrick Haga Ochieng, Mr Adan Sheikh Abdullahi and Mr James Kahindi Ziro.
7. Thereafter, the President in consultation with the Prime Minister nominated Mr Kiragu wa Magochi as the Chairperson and Mr Fredrick Haga Ochieng, Mr James Kahindi Ziro and Mr Adan Sheikh Abdullahi as members and the names were communicated to the National Assembly for consideration. The candidates were considered by the Departmental Committee on Education, Research and Technology (“the Departmental Committee”) and in its report dated 2nd January 2013, the Committee recommended that the names be approved. On 3rd January 2013 when the names were submitted to the House, they were rejected.
8. After the rejection of the names, the decision was conveyed to the President. The President in consultation with the Prime Minister submitted a fresh list of nominees for approval by the National Assembly pursuant to **section 8(11)** of the Act. The fresh list submitted contained the following names Mr Kiragu wa Magochi as the Chairperson and Mr Fredrick Haga Ochieng, Mr Cleopas Tirop and Mr Adan Sheikh Abdullahi. The names were forwarded to the Departmental Committee for consideration and by its report dated 9th January 2013, the Committee recommended that the National Assembly approved the nominees. On 9th January 2013, the National Assembly approve the nominees as recommended by the Committee.

The issue for determination

9. Although the petitioner has raised questions regarding whether the appointments made were consistent with national values and principles of governance and the principles of diversity, the parties agreed that the central issue for determination necessary to conclude the matter concerns the interpretation of **section 8(11)** of the Act and its effect on the appointments made so far.

The arguments

10. According to the petitioner, once the National Assembly rejected the name of the first set of nominees, it was not open for the President in consultation with the Prime Minister to renominate the same person who had been rejected. Mr Ondieki, counsel for the petitioner, argued that the operative word in **section 8(11)** was “*fresh nomination*” which meant that the President and Prime Minister had to go back to the list presented by the Selection Panel and return with an entirely new slate of candidates for consideration by the National Assembly.
11. Mr Kaumba, counsel for the respondents, urged the court to take a contextual view of the provisions of **section 8(11)** of the Act while taking into consideration of the circumstances in play during the Parliamentary debates. Among the reasons for rejection of the first list can be found in the Departmental Committee report dated 9th January 2013, the Committee noted that, “*The House on Thursday, January 3, 2012 debated and subsequently rejected the report of the Committee on the consideration of the nominees to Teachers Service Commission citing among other; lack of consideration of regional balance and meritocracy in the appointment.*” Counsel noted that the debates are clear that this observation did

not affect all the candidates for consideration.

12. Mr Kaumba urged the Court to take into account the legislative debate and take a broad view of the functions and responsibilities of the National Assembly and hold that the second list constituted a fresh list. This argument, he submitted, was buttressed by the fact that the National Assembly actually approved the fresh list despite the fact that only one new name had been inserted.

Determination

13. The issue for determination is whether the President could submit the same names that had been rejected by the National Assembly for approval and whether these names constituted “**fresh nominations**” within the meaning of **section 8(11)** of the Act.

14. One of the principles of statutory interpretation is that the words of a statute must be given their plain and ordinary meaning. This principle was elucidated in the old case of *Shore v Wilson (1842) 9 CI & Fin 355, 565* where it was stated that, “**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; and that in such a case evidence dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible..... The true interpretation, however of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by no other means can language of the instrument be made to speak the real mind of the party.**”

15. Where the words themselves are ambiguous, the court may also consider the context of the word or words and in this respect I adopt the words of Justice Lenaola in *Charles Omanga and Another v Independent Electoral And Boundaries Commission and Another Nairobi Petition 2 of 2012 (Unreported)*, ‘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...’

16. According to the *Concise Oxford English Dictionary (2011)*, the word “**fresh**” means “**previously not known or used; new or different.**” It follows therefore that the list containing “**fresh nominations**” must be one that does not contain names rejected by the National Assembly.

17. The provisions of **section 8** of the Act are intended to promote transparency, accountability and good governance by enhancing the values of competence, diversity and other values of the public service contained in **Articles 10, 232 and 250**. These values demand that each nominating and appointing authority within the statutory scheme act as a check and balance on each other. The manner of exercising this authority by the National Assembly is by approval or rejection of nominees. In *Community Advocacy and Awareness Trust and Others v Attorney General Nairobi Petition No. 243 of 2011 (Unreported)*, I observed that, “[94]The process ... must also be seen as a process of checks and balances intended to achieve the objectives of the Constitution. Each stage of the process constitutes a check and balance on the other. Each authority charged with responsibility to make a decision has a margin of discretion which it is bound to exercise in accordance with the Constitution and the law.” (See also *John Waweru Wanjohi and Others v Attorney General and Others Nairobi Petition No. 373 of 2012 (Unreported)*)

18. According to **section 8(11)** of the Act, the National Assembly is entitled to reject all or any nominee.

Once the all the nominees were rejected, it was not open to the President in consultation with the Prime Minister to submit “**fresh nominations**” which contained the person so rejected by the National Assembly.

19. Counsel for the Attorney General requested the Court to consider the debates in the Hansard that led to the rejection of nominees. Such a course is fraught with difficulty as members of the National Assembly express diverse views on a subject and asking the court to pick and choose particular reasons or make a judgment as to what it meant requires the court to immerse itself into shark infested political waters. The words of the statute and the expression of a resolution leave no ambiguity as to the legislative intent and its responsibility in the nomination and approval process. In considering the place of Hansard material in ascertaining intention of Parliament, the House of Lords in **Hollinshead v Hazleton**[1916] **1 AC 428 at 438** stated, “*It is well established that in a Court of law the motives which influenced the Legislature in passing any particular enactment, or the purposes or objects it desired to effect, can only be legitimately ascertained from the language of the enactment itself viewed through the light of the circumstances in reference to which that language was used...The reports of the debates leading up to the passing of it cannot be looked at. The same rule of construction must, I think, be applied to the resolutions passed by either House of Parliament. When these motives, purposes or objects are not, expressly or impliedly, revealed in language of the Legislature or its statute, or by either of the Houses of Parliament in that of its resolutions so viewed, it is, I think, wholly illegitimate to surmise or conjecture what those unrevealed motives, purposes, or objects may have been, and to construe and apply the statutes or resolutions as if they had been indicated.*” Although this rule has been modified in recent times, for purposes of this case, it remains correct.(See also **Fisher v. Bell** [1961] **1 QB 394**, **Dockers Labour Club and Institute Ltd v Race Relations Board** [1976] **AC 285**, **Davis v Johnson** [1979] **AC 264** and **R v HM Treasury: ex p Smedley**[1985] **QB 657**).

20. The statutory mandate of National Assembly is to **approve** or **reject** the nominees. The approval or rejection is expressed in a resolution. It is not for the court to gather the intention of members of the august House from the debates to decide what the resolution meant or which candidate was thereby excluded or included in the resolution to reject or approve. The court can only look to the resolution and in this particular case the clear and unequivocal decision of the National Assembly was one to reject the nominees.

21. The rejection of the nominees by the National Assembly left the President with one duty, that is to “**submit fresh nominations from amongst the persons shortlisted and forwarded by the selection panel under subsection (6).**”

Conclusion and disposition

22. The principle of the rule of law is enshrined in **Article 10** which sets out the National values and principles of governance. The President and legislature are bound to act by all statutory enactments and when called upon to pronounce upon the legality of any acts, the court must express fidelity with the rule of law (see **Amony Thomas Amfry v Minister for Lands Nairobi Petition No. 6 of 2013 (Unreported)**).

23. In this case the statutory provisions admit no ambiguity and the resolution leave no doubt. It was well within the province of the legislature to reject any or more of the nominees but its manifest intention was to reject all nominees and by doing so it limited the hand of the President.

24. In the circumstances, I find and hold that the submission of a list, in so far as it contained names of persons rejected by the National Assembly did not constitute “**fresh nominations**” and was therefore in breach of **section 8(11)** of the **Teachers Service Commission Act** and is to that extent set aside.

25. The 1st respondent shall bear the costs of the petition.

DATED and DELIVERED at NAIROBI this 25th day of March 2013

D.S. MAJANJA

JUDGE

Mr Ondieki instructed by Ondieki and Ondieki Advocates for the petitioner.

Mr Kaumba, Litigation Counsel, instructed by the State Law Office, for the respondents.

Mr A. Sitima instructed by the Teachers Service Commission.