



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Law Courts)**

**Petition 77 of 2013**

**MOHAMED OSMAN WAFRA**

**ABDULATIF ESAJEE**

**ABDUL BARY HAMID (suing as officials of  
JAMIA MOSQUE COMMITTEE).....PETITIONER**

**V**

**THE OFFICE FO THE PRESIDENT**

**OF THE REPUBLIC OF KENYA.....1<sup>ST</sup> RESPONDENT**

**THE PUBLIC SERVICE**

**COMMISSION.....2<sup>ND</sup> RESPONDENT**

**MINISTER FOR JUSTICE NATIONAL COHESION**

**AND CONSTITUTIONAL AFFAIRS.....3<sup>RD</sup>RESPONDENT**

**NATIONAL COHESION AND**

**INTEGRATIONCOMMISSION.....4<sup>TH</sup> RESPONDENT**

**COMMISSION ON IMPLEMENTATION OF**

**CONSTITUTION.....5<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioners in this matter challenge the appointment of the chairperson, vice chairperson and members of the Public Service Commission appointed by the President through **Gazette Notices Nos.**

460, 461 and 462 dated 9<sup>th</sup> January 2013.

2. The Public Service Commission (“the Commission”) is established under **Article 233** and consists of a chairperson, a vice chairperson, and seven other members appointed by the President with the approval of the National Assembly. The process of appointment is set out in the **First Schedule** to the **Public Service Commission Act, Act No. 13 of 2012**.

3. The following persons were duly appointed by the President, and approved by the National Assembly, to be chairperson, vice chairperson and members of the Commission; Margaret Kobia – Chairperson, Amb. Peter O. Ole Nkuraiya – Vice Chairperson, Michael N. Lokuruka, Patrick G. Gichohi, Lawrence Nyalle, Veronica Chemutai Birgen, Catherine Raini Omweno, Judith Emboyi Bwonya and Titus M. Ndambuki.

### **The Petitioners’ Case**

4. The ground for challenging the appointees is that the list of appointees did not have any person professing the Islamic faith and or individual from any county situated in the North Eastern Area of the Republic of Kenya. The petitioners complained that the Rift Valley region was the beneficiary of more than one Commissioner. They further complained that there were several able and qualified persons professing the Islamic faith who were shortlisted but were not considered for appointed.

5. The petitioners contend that the respondents violated the provisions of **Article 250(4)** of the Constitution which provides that, “*Appointments to Commissions and Independent Officers shall take into account national values referred in Article 10 and the principle that the compositions of the commission and offices, taken as a whole, shall reflect the regional and ethnic diversity of Kenya.*”

6. The petitioners also allege that the provisions of the **Public Service Commission Act** were violated in making the appointments. Their case is that the respondent failed to take into account the regional ethnic diversity by excluding persons of the Islamic faith. They seek the following reliefs;

- (1) *A declaration that the 1<sup>st</sup> respondent contravened provisions of Article 250(4) of the Constitution.*
- (2) *A declaration that members of the 2<sup>nd</sup> respondents are not properly constituted in terms of Article 250(4) of the Constitution.*
- (3) *An order quashing the decision of the 1<sup>st</sup> respondent to appoint members of the 2<sup>nd</sup> respondent as contained in Kenya Gazette Vol No. CXV-No. 4 Notice No. 462 dated 9<sup>th</sup> January 2013.*
- (4) *An order of mandamus directed against the 1<sup>st</sup> respondent compelling him to cause to publication of a corrigenda in order to effect the above orders.*
- (5) *An order of mandamus directing the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> respondents to comply with the law in the appointment of the Commissioners to the 2<sup>nd</sup> respondent.*
- (6) *An order that the 1<sup>st</sup> 3<sup>rd</sup> and 6<sup>th</sup> respondents pay the petitioner’s costs of this petition.*
- (7) *Any other orders as this Honourable Court shall deem just.*

7. The petition was supported by the affidavit of Mohamed Osman Warfa, the Chairman of the Jamia Mosque Committee, sworn on 7<sup>th</sup> February 2013 where he reiterated the allegation in the petition. He depones to the fact that the list of appointed Commissioners did not have any person professing the Islamic faith or an individual from any county situated in the North Eastern Kenya or a Muslim from any other Muslim dominated area within Kenya.

8. The case was also supported by written submissions filed on 16<sup>th</sup> May 2013 and supplement by oral submissions by their counsel, Mr Wachira.

### **Respondents' Case**

9. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by the Attorney General who opposed the petition through Grounds of Opposition dated 23<sup>rd</sup> April 2013. The respondents' core opposition to the petition is that Muslims as a religious group are not a marginalised community or group within the meaning of **Article 260**. They contend that the petitioners have not demonstrated that the appointments to the Commissions and offices taken as a whole have reflected the regional and ethnic diversity of the people of Kenya as required by **Article 250(4)**. They argue that the petitioners have only given an example of one Commission and even in that one Commission they have alleged non-compliance with religious rather than regional or ethnic diversity as expressly stated in **Article 250**.

10. Learned counsel for the respondents, Mr Bitta, submitted that the selection and appointment of the Commissioners is a process involving consultation between the President and the Prime Minister and approval by Parliament which are political arms of government mandated to ensure compliance with the requirements of the Constitution including **Article 250** and the court should not intervene in this process which is political in nature.

11. The 4<sup>th</sup> respondent, the National Cohesion and Integration Commission (NCIC), through its counsel, informed the court that though no relief was claimed against it, its interest was to request the court to give guidance to authorities appointing Commissioners and Independent offices for future compliance with the Constitution.

### **Determination**

12. The petition calls for examination of the process to see whether it is conducted in a manner that meets the constitutional objectives. The process of selection of PSC Commissioners is elaborately set out in the **First Schedule** to the **Public Service Commission Act**. It is a process that is intended to be open, transparent and engender public participation. The **First Schedule** provides for the appointment of a selection panel which is required to call for interested applicants through public advertisement. It shortlists qualified candidates, interviews them and thereafter presents a list of the top candidates to the President for appointment. The Schedule also provides for the approval by the National Assembly for the Commissioners appointed by the President.

13. I agree with the submission by Mr Bitta that the institutions and persons involved in the selection and appointment are duty bound to pay attention to and give effect to the provisions of the Constitution and unless it is shown that there is a violation of the Constitution and the statute, the court should not intervene. In the ***Evans Nyambega Akuma v Attorney General and Others Nairobi Petition No. 164 of 2013 (Unreported)*** I stated that, “[15] *It is not for the court to re-examine these allegations and make its own conclusion. The duty of the court in reviewing the process of appointment is to ensure that it meets the test of legality. I emphasize what I stated in the cases of John Waweru Wanjohi & Others v the Attorney General & Others, Kipngetich Maiyo & Others v the Kenya Land Commission Selection Panel Nairobi consolidated Constitutional Petitions Nos. 373 of 2012 and 426 of 2012 (Unreported)*, concerning appointments to the National Land Commission, “*The Court must of course be careful not to usurp the powers and functions of the various constitutional and statutory bodies ...*” *These bodies have carried out their functions in accordance with the prescribed procedures and I am satisfied that in this case the process meets constitutional muster.*” There is nothing in the petition and deposition to demonstrate that the entire process did not comply with the Constitution and the law.

14. The nucleus of the petitioners' case rested on the allegation that there was a breach of **Article 250(4)**. In order to prove non-compliance with this provision, the petitioner bears the burden of showing that the Commissions and independent offices, taken as a whole, do not reflect ethnic diversity. In ***John Waweru Wanjohi & Others v the Attorney General & Others, Kipngetich Maiyo & Others v the Kenya Land Commission Selection Panel (Supra)***, a similar issue was raised in reference to the National Land

Commissions, the Court stated, “[65]The petitioners complain that the Kalenjin Community was under represented in the Commissions that had been constituted contrary to **Article 250(4)**. The petitioners cited two commissions to make its case; that is the Independent Electoral and Boundaries Commission (IEBC) and the Commission on the Implementation of the Constitution. In my view, the Commissions cited are not the only commissions established under the Constitution and the law. There are other Commissions established in the Constitution like the Judicial Service Commission, the Salaries and Remuneration Commission, the Public Service Commission, the Teachers Service Commission, National Human Rights Commission and others whose membership was not put into the matrix of the petitioners’ complaint. I also take judicial notice of the fact that the other Commissions continue to be constituted. I consequently find that no merit in this argument.”

15. Likewise in this case, the petitioners have not provided any evidence of the composition of the other Commissions and Independent offices. Without such evidence, the Court cannot proceed to carry out an inquiry to interrogate compliance with **Article 250(4)**.

### **Disposition**

16. For the reasons I have set out above the petition be and is hereby dismissed with no order as to costs.

**DATED** and **DELIVERED** at **NAIROBI** this 31<sup>st</sup> day of May 2013

**D.S. MAJANJA**  
**JUDGE**

Mr Wachira instructed by Ali and Company Advocates for the petitioners.

Mr Bitta, Principal State Counsel, instructed by the State Law Office for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents.

Mr Ochieng’ instructed by Michael, Daud and Associates for the 4<sup>th</sup> respondent