



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

PETITION NO. 233 OF 2013

BETWEEN

ALBERT MULINDI.....PETITIONER

AND

THE PUBLIC SERVICE COMMISSION(PSC).....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. On 4th June 2013, I delivered a Judgment in Petition No.263 of 2013 – Consumer Federation of Kenya (COFEK) vs Public Service Commission & Anor. In that Judgment, I declared, *inter-alia*, that the 1st Respondent in that matter, had properly conducted itself in the manner that it recruited and recommended to the President, persons for appointment as Principal Secretaries pursuant to **Article 155(3) of the Constitution.**
2. The present Petition had been filed earlier and when Dr. Khaminwa, learned advocate for the Petitioner appeared before me on 6th June 2013, I pointed him to that decision and having read it, he was of the view that he needed to distinguish it although both Petitions dealt with almost the same issues of fact and law. I obliged and proceeded to hear parties on those distinguishing factors.

Petitioner's Submissions

3. In the Amended Petition dated 31st May 2013 and in Submissions by Dr. Khaminwa, only two fundamental issues are raised viz;
 - i) that the persons who currently occupy the position of Permanent Secretary “*were given a raw deal in the entire process of appointment*” aforesaid.
 - ii) that, in any event, the process of recruitment of Principal Secretaries was premature.
4. The argument by the Petitioner is that regarding sitting Permanent Secretaries, that they were appointed by the President under the Repealed Constitution and only he can properly remove them from office. In any event, that since they are lawfully in office, the 1st Respondent cannot subject them to a shortlisting or interview process like other persons who are seeking appointment as Public Secretaries. The reasoning of the Petitioner is that because the presidency is “*a continuous*”

thing [it] cannot fall vacant” and that “the current Permanent Secretaries who are discharging their duties as Principal Secretaries ought to have been best considered for the continuance of their office and for smooth transition to take place.”

5. The second argument is that at the time the recruitment process for Principal Secretaries was being undertaken, the Executive was not fully constituted as the offices of Cabinet Secretaries had not been filled and therefore any recruitment could only be properly undertaken with them in office.
6. For the above and other reasons that I consider irrelevant to the issue I am required to determine, the Petitioner seeks the following orders;

“a) A declaration that the process of advertisement, the shortlisting interviewing process and the transmission of names of suitable candidates for appointment as Principal Secretaries as purportedly conducted by the Public Service Commission is premature and fundamentally violates the entire Constitution. ,

b) A declaration that the process of advertisement, the shortlisting, interviewing process and the transmission of names of suitable candidates for appointment as Principal Secretaries as purportedly conducted by the Public Service Commission is premature and cannot properly be conducted unless his Excellency the President sets up an existing Executive Structure within the meaning of Article 130, 131, and 132 of the Constitution.

c) A declaration that the process of advertisement, the shortlisting, interviewing process and the transmission of names of names of suitable candidates for eventual appointment as Principal Secretaries as purportedly conducted by the Public Service commission was ultra-vires the Constitution and the law.

d) Without prejudice to prayer (a) and (b) above, a declaration to issue to the effect that Serving Permanent Secretaries as persons with tremendous experience in public service who have served diligently, loyally and with dedication and zeal for a considerable period of time ought to be included and given priority in the Shortlisting and interviewing of any Candidates for the position of Principal Secretaries especially during the transitional period the country is undergoing.

e) A declaration that the ongoing process of advertisement, the shortlisting, interviewing process and the transmission of names of suitable candidates for appointment as Principal Secretaries as purportedly conducted by the Public Service Commission violates the Petitioner's Constitutional rights to Fair Administrative Action that is expeditious, efficient, lawful, reasonable and procedurally fair as guaranteed by Article 47 of the Constitution.”

Respondents' Submissions

7. The Respondents take the view that all the issues raised in the present Petition were fully adjudicated upon in Petition No.263 of 2012 and that regarding current Permanent Secretaries, their positions were rendered redundant by the Constitution, 2010. That any person, including a Permanent Secretary, who desired to be appointed a Principal Secretary had to apply and be appointed under the Constitution, 2010 and had to go through a process designed by the 1st Respondent to that end.
8. Further, that the said Permanent Secretaries were not discriminated against and in fact some of them applied for and were indeed recommended for, appointment as Principal Secretaries.
9. Regarding the institution of the Presidency, that any presidential prerogative can and should only be exercised within the confines of the Constitution and in the present instance, the President could not circumvent the Constitution and automatically appoint sitting Permanent Secretaries as

Principal Secretaries without following the procedure set out in the same Constitution.

10.I did not capture any arguments by the Respondents on whether the whole process was premature for lack of a Cabinet and Cabinet Secretaries.

11.In any event, the Respondents seek that the Petition be dismissed with costs.

Determination

12.The issue of sitting Permanent Secretaries was partly addressed in Petition No.263/2013 where I stated as follows at paragraph 17;

“Other issues raised in the Petition including the issue of sitting Permanent Secretaries do not require more than the following answer; no names were supplied, no evidence was tendered in support of the complaint and the statement from the Bar that ‘they are fearful of disclosing their identities’ is not sufficient to warrant any finding by this Court.”

13.In the present Petition, it is argued that all Permanent Secretaries are entitled to have their names forwarded by the 1st Respondent for appointment or rejection by the President. That argument in my view is unsupported by any law or even precedent Counsel for the Petitioner relied on the theory of the infallibility of the Presidency to argue that past appointments are automatically validated by the Constitution, 2010.The infallibility or otherwise of the Presidency as an Institution is not the subject of the present proceedings. The conduct of the President, the Public Service Commission and the National Assembly with regard to the appointment of Principal Secretaries is regulated, not by a theoretical framework around the Presidency but by the express provisions of **Article 155(3)** of the **Constitution**.That Article obligates the Public Service Commission to “*recommend*” persons for appointment as Principal Secretaries and the President effects the “*appointment*” subject to “*approval*” by the National Assembly.

14.The issue of the process by which the PSC “*recommends*” persons for “*appointment*” by the President was fully addressed in Petition No.263/2013 and I adopt the same position and specifically the finding that neither this Court nor the Petitioner can purport to direct or control the PSC as long as it acts within its statutory and constitutional mandate.

15.Further, **Section 22** of the **Repealed Constitution** provided for the appointment of Permanent Secretaries and it states as follows;

“(1) The President may appoint such number of permanent secretaries as he may determine.

(2) There shall be a permanent secretary to the Office of the President.

(3) Where the Vice-President or any other Minister has been charged with responsibility for a department of Government he shall exercise general direction and control over that department and, subject to that direction and control, every department of Government shall be under the supervision of a permanent secretary.

(4) The office of a permanent secretary shall be an office in the public service.

(5) Two or more Government departments may be placed under

the direct supervision of one permanent secretary and Government department may be placed under the supervision of one or more permanent secretaries or two or more permanent secretaries.” (Empasis added)

16. The process of appointment, under the **Repealed Constitution** was quite different and it is obvious why. As to whether the Permanent Secretaries appointed under **Section 22** aforesaid, automatically qualified for “*recommendation*” for “*appointment*” by the President, I completely fail to see the rationale for that proposition. **Schedule 6** of the Constitution provides the transitional mechanism from the Repealed Constitution to the Constitution, 2010. The Petitioner has been unable to point me to any provision in that Schedule which provides for the position as argued. On my part, reading that Schedule, neither **Section 31** nor **Section 33** thereof which provide for continuity of Constitutional Offices seem to apply to Principal Secretaries in the manner suggested by the Petitioner.

17. In any event, it is now a matter of public knowledge that some Permanent Secretaries applied for, and were shortlisted for interviews to fill the positions of Principal Secretaries. Annexures “C” and “D” to the Supporting Affidavit sworn by the Petitioner on 8th May 2013 is clear in that regard. I can for example pick out the names of Dr. Bitange Ndemo and Ambassador Ruth Solitei as some of the current Permanent Secretaries who applied for the positions. **If that be so, which Permanent Secretaries is the Petitioner purporting to represent?** None of the Permanent Secretaries who never applied for the positions has stated why he or she failed to do so. Granted, the **Constitution, 2010** generally allows any person to sue on behalf of another but surely, employment is personal to an individual and if one is aggrieved by an employment process, whether another sues on his behalf or not, he is obligated to state his position in that regard. In that case I reiterate what I stated in Petition No.263 of 2013; that a Court cannot engage in speculative generalities when evidence based on real facts are easily obtainable. Neither should a Court engage in an academic exercise where no real dispute exists and which it is called upon to determine. A Court acts on real facts and the law applicable, as opposed to theorizing on circumstances and events that do not exist. I therefore agree with Steve Ouma in his book, **“A Commentary on the Civil Procedure Act, Cap.21”** where he states at page 14 that;

“Courts are to decide only 'cases' or 'controversies'. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy, as opposed to an opinion advising what the law would be upon a hypothetical set of facts.”

The author's statement is an apt expression of my view of the Petitioner's approach in this matter and I decline the invitation to pontificate in a vacuum.

18. Alongside the above issue is the live question whether some Permanent Secretaries never applied for the position of Principal Secretary but were nonetheless recommended for appointment by the President. Attractive and ripe for determination as the issue may be, parties never addressed me on it and had it been raised, I would have delved into it and given a firm determination one way or the other. Suffice it to say that I have perused the list of 2088 Applicants (Annexure “C”) and the names of Mutea Iringo and Eng. Karanja Kibicho appear as numbers 1163 and 86 respectively. That is all I can say of that issue.

19. On the question whether the recruitment of Public Secretaries was premature, the issue is moot. The process has been undertaken, the Cabinet is in place and in fact, recruitment was made based on a structure of Government unveiled by the President. Each office of Principal Secretary was therefore pegged to an existing office of Cabinet Secretary. I did not understand the Petitioner's case at all in this regard and that is all to say because I also fully addressed the issue in Petition No.263 of 2013.

Conclusion

20. It is clear to me that after the delivery of the Judgment in Petition No.263 of 2013, the issues

raised in that case which are similar to those raised in the present case, should have been put to rest. To my knowledge, no appeal has been preferred against that decision and as I have shown above, nothing new arises from the present Petition and which would require me to depart from the prior decision.

21. In the event, I see no merit in the Petition before me and it is hereby dismissed.

22. As to costs, the Petitioner has purposed to act in a bid to “*safeguard the Constitution*” (paragraph 1 of the Petition), in public interest, public good and in furtherance of **Article 10** of the **Constitution, 2010**. My suspicions aside as to who he was really acting for, I see no reason to penalize him with costs.

23. In the event, let each party bear its own costs.

24. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 21ST DAY OF JUNE, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Njenga holding brief for Dr. Khaminwa for Petitioner

Mr. Mohamed holding brief for Mr. Njoroge for Respondents

Order

Judgment duly delivered.

ISAAC LENAOLA

JUDGE

21/6/2013