



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 370 OF 2013

BETWEEN

CLIFFORD KEYA PETITIONER

AND

ATTORNEY GENERAL..... 1ST RESPONDENT

THE CHAIRMAN SELECTION

PANEL TSC 2ND RESPONDENT

DR LYDIA NZOMO 3RD RESPONDENT

MR KIRAGU WA MAGOCHI 4TH RESPONDENT

PROF GEORGE GODIA 5TH RESPONDENT

MR ROBERT MASESE 6TH RESPONDENT

MR MBARAK SAID TWAHIR 7TH RESPONDENT

JUDGMENT

1. This is another petition that concerns the Teachers Service 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 Selection Panel for Chairperson and Members of the Teachers Service Commission (“the Panel”) constituted under **section 8** of the Act advertised for the vacant position of Chairperson of the Commission. The Panel received 29 applications from members of the public and shortlisted five persons for interview namely; Masese Robert Momanyi, Kiragu wa Magochi, Prof George Imbaga Godia, Mbarak Said Twahir and Lydia N. Nzomo.
3. The substance of the petitioner’s petition dated 16th July 2013 challenges three persons who were

shortlisted as follows;

- a. He alleges that in the initial selection process, the 3rd respondent, Dr Lydia Nzomo, had been interviewed for the post of chairperson but her name was not forwarded to the President because of integrity issues. Learned counsel for the petitioner, Mr Ondabu, argued that since her name was not forwarded, she had forfeited the right to be considered for the position and her inclusion effectively denied others a chance to compete for the position.
 - b. As regards the 4th respondent, Mr Kiragu wa Magochi, the National Assembly had rejected the name but the same he has now been shortlisted and would be considered for appointment for the second time.
 - c. As regards the Mr Simon Kavisi, the petitioner's claim is that no reason was advanced by the panel why he was not shortlisted for the interview once again yet he had been shortlisted amongst the initial applicants.
4. The application is opposed by the respondents. Mr Kaumba, learned counsel for the 1st respondent, argued that there was no evidentiary basis for the petition and that some of the matters had already been determined in ***Abdi Sitar Yusuf v Attorney General and Others Nairobi Petition No. 334 of 2013 (Unreported)***.
 5. I have considered the depositions, arguments and submissions and I take the following view of the matter. The court's duty in such circumstances is to address itself to the fidelity of the process to the Constitution and not to substitute itself as the decision making authority. Moreover the court takes into account that the process involves various actors who have responsibility to ensure that due process is followed and constitutional procedures are met (See ***Community Advocacy and Awareness Trust and Others v Attorney General Nairobi Petition No. 243 of 2011 (Unreported)*** at para. 94 and ***John Waweru Wanjohi and Others v Attorney General and Others Nairobi Petition No. 373 of 2012 (Unreported)***).
 6. I would be remiss if I did not state the constitution of the TSC posed special challenges which have been the subject of two decisions in which the court has endeavoured to ensure that the constitutional values and principles are met. In ***Abdi Sitar Yusuf v Attorney General (Supra)*** I stated, "[11] *The problem in this case must be approached from a practical point and the court is called upon to fall back to the values and principles that infuse governance articulated in Article 10 of the Constitution which includes good governance.*" And in my ruling of 15th July 2013 in the same case I observed that, "As I stated in my judgment, the issue concerning the TSC is one of transition and the Court must be guided by certain values including good governance in resolving the issues before it. It is the obligation of the court to ensure that institutions work and have such a capacity to fulfil their constitutional functions.
 7. It is in light of the above that I find as follows. As regards the 3rd respondent, no evidence of lack of integrity has been demonstrated. In any case, it is the Selection Panel, the President and the National Assembly, acting on any material before them to address the issue of integrity of any applicant. Nothing has been placed before this court to show that the institutions dealing with integrity have failed to act on any complaint or material concerning the integrity of the 3rd respondent. This is the import of ***Trusted Society of Human Rights Alliance v Attorney General & 2 Others, Nairobi Petition 229 of 2012 [2012] eKLR***. Moreover, merely because an applicant failed to be considered in a previous interview or was not shortlisted is not, of itself, a bar to subsequent application and consideration for the same position.
 8. It is correct to state that 4th respondent was rejected by the National Assembly when it was submitted after the initial selection process. The issue of rejection issue was dealt with in ***Abdi Sitar Yusuf v Attorney General and Others Nairobi Petition No. 8 of 2013 [2013]eKLR***. In that case the petitioner argued that the President could not re-submit names rejected by the National Assembly but could only submit "*fresh nominations from amongst the persons shortlisted and forwarded by the selection panel.*" The Court considered the matter and in a judgment delivered

on 25th March 2013 it stated, “[24] 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.” That case was limited to specific selection for a vacancy. The 4th respondent has however applied for reconsideration for vacancy which has come up once again and has been advertised. A previous rejection by the National Assembly is not, of itself, a bar to subsequent application. In any case, his name may be put to before the National Assembly for consideration and the Assembly is entitled to accept or reject that name.

9. As regards the one Symon Kavisi, his name was the subject of my order in **Petition No. 334 of 2013** and shortlisting was in compliance with the order issued to the effect that person shortlisted in the previous selection should also be shortlisted for consideration.

10. The result of the findings I have outlined above is that the petition lacks merit and it is hereby dismissed with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 22nd July 2013.

D.S. MAJANJA

JUDGE

Mr Ondabu instructed by Ondabu and Company Advocates for the petitioner.

Mr Kaumba, Litigation Counsel, instructed by the State Law Office for the 1st and 2nd respondent.

Mr Kinyua instructed by Mwenda Kinyua and Company and Company Advocates for the 3rd respondent.

Mr Sitima, Advocate, for the Teachers Service Commission.