



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

PETITION NO.502 OF 2013

BETWEEN

BRIAN WEKE.....1ST PETITIONER

JAPHETMURIIRA MUROKO.....2ND PETITIONER

AND

**THE HON. ATTORNEY GENERAL.....1ST
RESPONDENT**

THE SELECTION PANEL KENYA NATIONAL HUMAN RIGHTS

AND EQUALITY COMMISSION.....2ND RESPONDENT

RULING

1. Before me is an Application dated 16/10/2013 seeking orders *inter-alia* that the 1st Respondent should be restrained by himself or any body, entity, office or officer acting on his behalf from advertising, continuing to advertise, calling for any fresh applications, interviewing, short-listing and/or making any recommendations to the President for appointments to the office of Chairperson and member of the Kenya National Commission on Human Rights. (KNCHR).
2. I should state from the outset that from the contents of a Further Affidavit filed by the 2nd Petitioner yesterday, the said process is at the interview stage which interviews are scheduled to commence on 25/10/2013 and so that is the process that I should or should not stop, by this Ruling.
3. In any event when parties appeared before me on 23/10/2013, I declined to grant any interim conservatory orders but directed learned State Counsel to seek instructions and file any response by today. No response was filed and Miss Munyi for the 1st Respondent instead sought 7 days to file a substantive response to the Application.
4. Because of the danger of the Petition being rendered nugatory should the interview and subsequent processes continue, Mr. Oluoch for the Applicant sought interim conservatory orders stopping the scheduled interviews for the following reasons;
 - i) that contrary to the provisions of **Section 11** of the **Kenya National Commission on Human Rights Act, No.14 of 2011**, a new selection Panel led by an Acting Chairperson, one Catherine

Omwenso was constituted to conduct interviews for the position of Chairperson and member of KNCHR.

- ii) that Candidates who have previously been interviewed are again being re-interviewed for the 3rd or 4th time for the same position contrary to their rights under **Article 47** of the **Constitution** and with no reasons given.
 - iii) that although the Selection Panel previously constituted has not been disbanded, a new Selection Panel has called for interviews of named candidates within 48 hours of their names being advertised in the daily newspapers pointing to a clear intention to defeat the present Petition.
5. More fundamentally, the Petitioners have urged the point that the President and the Attorney-General have not followed the KNCHR Act in the manner in which the previous interview process was conducted and so the present interviews should be stopped to enable the Court interrogate all those processes.
 6. Miss Munyi's response is that no prejudice would be caused to the Petitioners if the interviews are conducted because the Court has the mandate to nullify their results should it be found later that the whole process was irregular and/or unlawful.
 7. That the Application has not met the threshold for grant of conservatory orders which matter I will revert to shortly.
 8. I have considered the rival submissions and I note that at this stage I am only required to satisfy myself that there is a *prima facie* case with a likelihood of success and that unless the interim conservatory orders are granted, there is a real danger that the Applicants will suffer prejudice as a result of the violation or threatened violation of the Constitution – see **Petition No.16 of 2011, CREAM & Others vs A.G** per Musinga, J. I am also alive to the fact that the Respondent has requested 7 days to file a substantive response to the application before a more detailed ruling on the substance of the Application can be delivered. If that be so, and having read the Petition and Application before me, and without pre-determining the issues, all I can state is as follows;
 9. Firstly, I see no prejudice whatsoever if the interviews are rescheduled to another date to enable this Court interrogate the weighty issues of process raised, more so when those issues touch on the appointment of the Chairperson and member of an important constitutional organ such as the KNCHR.
 10. Secondly, at a *prima facie* level, it is unclear whether the process being undertaken by the Acting Chairperson of the Selection Panel is lawful and within the meaning of Section 11 of the KNCHR Act and it would be best to preserve the status quo until all parties are heard on the matter. As Braithwaite JA stated in **AG vs Surmair Bansray (1985) 38 WIR 286**, such an order “... *would direct both parties to undertake that no action of any kind to enforce their respective rights would be undertaken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact.*”

He also added that “*the High Court would be required to deal expeditiously with the Application inter-partes ... and to set down the substantive motion for hearing within a week at most of the interim conservatory order.*” I agree wholly with the Learned Judge.
 11. Lastly, as was stated by Justice Kokaram in **Steve Ferguson & Anor vs AG of Trinidad and Tobago claim No.CV 2008 – 000639**;
 12. “The Constitutional Court must hold the scales of justice evenly between the claimants and the State. There are competing and powerful interests at state ... [and] the Court must therefore be astute to balance these competing interests in the interim while it deals with the substantial complaints of the claimants.”

13. In striking that delicate balance, I have to the conclusion that no substantial prejudice would be caused to the Respondent or the Selection Panel if the interview process aforesaid is stopped for at least 7 days as requested by the Respondent to enable a substantive response to be filed.

14. In that case, the proper order that attract my mind are the following;

- 1) The interview process scheduled to be conducted on 25/10/2013 and 28/10/2013 by the Selection Panel for the Appointment of Chairperson/Member of the KNCHR and convened by an Acting Chairperson in the name of Ms. Catherine R. Omweno is hereby stopped by way of an interim conservatory order for 7 Days only.
- 2) Upon the expiry of the 7 Days and having seen the responses(s) by the Respondent and Interested Party (KNCHR) this Court will determine whether to extend or not to extend those orders.
- 3) Directions will now be taken on how the matter should proceed to an expeditious determination.
- 4) Costs shall abide the outcome of the Substantive Motion.

15. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2013

ISAAC LENAOLA

JUDGE

AT 12.00 P.M.

In the presence of:

Irene – Court clerk

Mr. Oluoch for Petitioner

Miss Munyi for Respondent

No appearance for Interested Party

Order

Ruling duly delivered

ISAAC LENAOLA

JUDGE

Further Order

Application dated 16/10/2013 is stood over for hearing inter-partes on 31/10/2013

Respondent and interested Party to file their responses and submissions before that date.

ISAAC LENAOLA

JUDGE