



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 449 of 2012

JOEL MWANGI KIHANGA 1ST PETITIONER

PHILIS MWIHAKI IGORO 2ND PETITIONER

SAMUEL KIRIMI GUANTAI 3RD PETITIONER

AND

HON. ATTORNEY GENERAL 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ...3RD RESPONDENT

JUDGMENT

Introduction

1. The 1st petitioner is a practicing advocate while the 2nd and 3rd petitioners are law students pursuing their Diploma courses at the Kenya School of Law. Their grievance concerns the ongoing recruitment of various positions in the Office of the Director of Public Prosecutions. They complain that the process has not been done in a fair and transparent manner contrary to the principles and values of the Constitution and in breach of their fundamental rights and freedoms. The petitioners seek the following reliefs in their petition;

(a) *A declaration that the respondents have acted in breach of the fundamental Constitution provisions as set forth herein that is to say, Articles 27, 28, 41, 47, 232, 234 as well as the relevant legislation.*

(b) *Order that the current recruitment by the 3rd respondent is tainted by illegality, want of transparency, is oppressive and fails the test of constitutionality and therefore the same be suspended or stayed by the Honourable Court.*

(c) *Declaration that the recruitment exercise is a nullity for offending basic constitutional rights of the petitioners and the general Kenyan people and consequently is wholly invalid.*

(d) *Conservatory orders to stay and/or suspend the entire exercise pending the full hearing and determination of the instant application and such other or further reliefs as this Honourable Court may deem fit and just to grant.*

2. The petition is opposed by the respondents. The 2nd respondent, the Public Service Commission (“PSC”), is mandated to carry out recruitment of personnel in the public service and according to the affidavit of Bernadette Nzioka, its secretary, sworn on 11th October 2012, the recruitment is being conducted in accordance with the proper procedures. There is also a replying affidavit sworn by Rodah Ogoma, a Principal State Counsel, in the Office of the Director of Public Prosecutions (“the Directorate”), sworn on 5th October 2012.

3. I have heard the submissions of the respective advocates on record and considered the pleadings and depositions. I now take the following view of the matter.

The pleadings and depositions

4. In a petition brought to enforce fundamental rights and freedoms or enforce the provisions of the Constitution under **Article 22** or **258** respectively, the petitioner is obliged to set out with clarity the rights infringed and the facts that give rise to the infringement in relation to him or her (See **Anarita Karimi Njeru v Attorney General [1979] KLR 54** and **Matiba v Attorney General [1990] KLR 666**). In **Trusted Society of Human Rights Alliance v Attorney General and Others Nairobi Petition No. 229 of 2012 (Unreported)** the court went further and noted that it was not necessary to set out the violations with mathematical precision but in a manner that will enable the respondent have notice of the allegations and defend himself and enable the court adjudicate the violation.

5. The threshold for an application under **Article 22(1)** is an actual or threatened breach of a right or fundamental freedom. A party must surmount this bar before the court can consider whether in fact the petition is brought in respect of any other person to whom **Article 22(2)** applies. Absent a violation or threat, then one cannot invoke public interest to agitate proceedings under **Article 22** or **258** as the case may be (see **Peter Kaluma v Attorney General and Another Nairobi Petition No. 79 of 2011 (Unreported)**).

6. In this case the petitioners are neither applicants nor potential applicants for the positions advertised by the Directorate; they are far removed in fact from what is alleged to be a threat or violation of any right or fundamental freedom. None of them have applied for the positions that were advertised and only the first petitioner is a duly qualified advocate. But this of itself, does not disentitle the petitioners from filing the application.

7. What is important is that the pleading, in this case the petition, must set out the facts that demonstrate the violation as required by **Article 22(1)**. This general rule of pleading applies notwithstanding that these are proceedings to enforce fundamental rights and freedoms. Unfortunately in this case the petitioner’s case only became clear once counter affidavits were filed. I must also add that unless there are certain matters which the law imposes a burden of proof on the respondent, it is the petitioner who bears the burden to prove the violation and that he or she is entitled to the relief sought and the facts upon which the case is based must be set out in the petition.

8. I have, however, heard the matter and it is in the interest of justice to resolve the petitioner’s grievance as set out in the petition which concerns the recruitment of officers in the Directorate. I shall consider and restrict myself to the matters pleaded in the petition filed on 3rd October 2012.

Lack of transparency and integrity

9. The first issue is whether the process was transparent and lacked integrity. The basis for this complaint is that the advertisement calling for applications for various positions in the Office of the Director of Public Prosecutions was published on 7th September 2012 and the closing date was 20th September. According to the petition, the 3rd respondent purported to have completed the shortlisting process “*within a single working day.*” The petitioners assert that this was impossible as the applications and accompanying documentation are numerous. The petitioners aver that this exercise could only have been accomplished unless the Directorate had already completed the exercise and the other processes were a public relations exercise.

10. The PSC has demonstrated that this allegation is not true. Ms Bernadette Nzioka has deponed that the entire process of shortlisting took 10 days and that this was achieved through inputting the data as soon as applications were received making the process more efficient.

11. Apart from casting doubt on the recruitment process, the petitioners’ case lacks a factual basis to prove lack of integrity and transparency.

Discrimination

12. The second issue concerns discrimination. The petitioners allege the requirement for serving officers within the Directorate to have attained a certain minimum period within a specified job group before consideration for promotion delimits their eligibility for appointment. This is discriminatory when compared to private practitioners who are entitled to be shortlisted without necessary experience.

13. This allegation, once again, is not backed by any fact set out in the petition or supporting affidavit. I have looked at the newspaper advertisement and it does not make distinction, in terms of experience, between a person in private practice and a person in public service.

14. Mr Wandugi, submitted that the court should consider the allegations set out in the responding affidavit sworn by the 1st petitioner. In that affidavit, the 1st petitioner sets out names of persons who, in his view, do not qualify for recruitment and who have been shortlisted. In this respect, I agree with the submission by Mr Okello, counsel for the 2nd respondent, that these allegations lack material basis. As averments in an affidavit, there must be a statement of the source of the allegations or grounds of belief which was lacking. Furthermore, it is the petition that must set out the petitioner’s case. A responding affidavit which makes allegations against third parties who may not have an opportunity to defend themselves is inadequate and cannot be subject of this inquiry.

15. The petitioners have not demonstrated how the provisions of **Article 27** which protects the rights to equality and forbids discrimination, has been infringed. This claim is therefore dismissed.

Oppressive and unconscionable requirement

16. The third ground the petitioners raise is that the conditions and stipulations in the recruitment impose very high conditions that it is impossible for persons in the department to apply or is otherwise intended to propel inexperienced persons to high office.

17. The petitioners aver that the constitutional threshold for the appointment of Director of Public Prosecutions is the equivalent of a High Court Judge and the requirements as set out by the 3rd respondent for the Assistant Director of Public Prosecutions is the requirement of the Chief Justice and a Supreme Court Judge. The petitioner avers that this is a serious flaw as the former position is junior to the latter and yet it demands higher qualifications. These conditions, according to the petitioners, which unjustifiably deprive qualified officers from ascending to these position.

18. In her replying affidavit, Bernadette Nzioka clearly explains the fact that the terms of appointment are pegged on Civil Service Scheme of Service which requires attainment of certain level of experience in each grade. This position is also supported by Rodah Ogoma, who depones that career

progression within the civil service requires one to serve at least three years in one job group to be eligible for promotion or appointment to the next level. However, in view of previous unsuccessful recruitment, the conditions imposed by the Civil Service Scheme of Service were waived to enable qualified officers apply due to the serious shortage of prosecutors in the country.

19. The requirement for the length of service takes into account the position of civil servants. It does not disadvantage them and consequently it is not oppressive as contended by the petitioners. Besides, it is not for this court to determine the qualification for various offices in the civil service and the petitioners have not shown or demonstrated that the setting of qualification breaches their fundamental rights and freedoms.

Conclusion

20. I have considered the petition as a whole and it does not demonstrate any violation of the petitioners' rights and fundamental freedoms. The petitioners have not discharged their burden to prove the allegations of breach. I have no option but to dismiss the petition with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of October 2012.

D.S. MAJANJA
JUDGE

Mr Wandugi instructed by Wandugi and Company Advocates for the petitioners.

Mr Kamau, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Mr Okello, Principal Prosecution Counsel, instructed by the Director of Public Prosecutions.