



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 373 OF 2012

JOHN WAWERU WANJOHI.....1ST PETITIONER
JOHN NJOROGE MUINAMI.....2ND PETITIONER
SAMUEL MUREITHI GATERU.....3RD PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT
NATIONAL LAND COMMISSION.....2ND RESPONDENT
MINISTER FOR LANDS.....3RD RESPONDENT
ACTING HEAD OF CIVIL SERVICE AND SECRETARY TO THE CABINET.....4TH RESPONDENT

CONSOLIDATED WITH PETITION 426 OF 2012

BETWEEN

**KIPNGETICH MAIYO
 BERNARD ASIBA
 RUTH JEPKEMBOI SUTER
 KIPKEMBOI KEMEU**

KIPRUTO CHIRCHIR

TUM

**DANSON TOROREI
 JOHN KERICH
 MILTON TUWEI
 PHILIP MASIBAI**

FLORA JEPCHIRCHIR

LEI

GEOFFREY

MUASYA

EMILY JEBITOK

SALIL

HELLEN MARITIM TUITOEK
REBECCA BITOK SAWE
ELIAJH KIPNGETICH TIROP
CAROLINE TALLAM

KIGEN

STEPHEN

MAINA

EDWARD

BITOK

BUSIENEI

ELIJAH

SAMUEL KINUI

CHIRCHIR

KENNETH

TALLAM

SIMON

LEI

OBADIA KIPKORIR
JOSEPH ROTICH
JOSHUA

ROTICH.....PETITIONERS

AND

THE KENYA LAND COMMISSION SELECTION PANEL.....1ST
RESPONDENT

THE PUBLIC SERVICE COMMISSION.....2ND
RESPONDENT

THE ATTORNEY GENERAL.....3RD
RESPONDENT

COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION.....4TH
RESPONDENT

JUDGMENT

Introduction

1. These two consolidated cases concern the appointment of the chairperson and members to the National Land Commission (“the Commission”) which is established under **Article 67** of the Constitution. The functions of the Commission are as follows;

- (a) To manage public land on behalf of the national government.

- (b) To recommend a national land policy to the national government.
- (c) To advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
- (d) To conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities.
- (e) To initiate investigations on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress.
- (f) To encourage the application of traditional dispute resolution mechanisms in land conflicts.
- (g) To assess tax on land and premiums on immovable property in any area designated by law; and
- (h) To monitor and have oversight responsibilities over land use planning throughout the country.

2. Parliament operationalised the Commission by enacting the ***National Land Commission Act 2012 (Act No. 5 of 2012)*** (“the Act”) which according to the preamble is, “*An Act of Parliament to make further provisions as to the functions and powers of the National Land Commission, qualification as and procedures for appointment to the Commission, to give effect to the objects and principles of devolved government in law management and administration, and for connected purposes.*”

3. **Section 7(1)** of the Act provides that the Commission shall consist of a chairperson and eight other members appointed in accordance with the Constitution and the Act. Under **section 7(2)**, the chairperson and members shall be appointed in accordance with the procedure set out in the **First Schedule** to the Act.

4. It is the appointments of the chairperson and members of the Commission that has led to the filing of the two consolidated cases. All parties concede that the nominees are duly qualified and are all beyond reproach considering aspects of leadership and integrity. The gravamen of the petition is that the nominations do not reflect national values and aspirations and more particularly they do not reflect regional or ethnic balance.

5. The process adopted by the Panel is not in dispute and is set out in the replying affidavit of Dr Daniel Weru Ichang’i, the Chairperson of the National Land Commission Selection Panel (“the Panel”), sworn on 19th September 2012. The affidavit was filed in opposition to ***Nairobi Petition No. 266 of 2012*** which was adopted as a response in the two consolidated cases. That petition was subsequently withdrawn. Before I proceed to determine the matter in contest, I will set out these background matters.

The Facts

6. **Article 250** of the Constitution generally sets out the composition, appointment and terms of office of Commissions and independent offices including the National Land Commission by dint of **Article 248**. The Article reads in part:

250. (1) *Each commission shall consist of at least three, but not more than nine, members.*

(2) *The chairperson and each member of a commission, and the holder of an independent office, shall be*

(a) identified and recommended for appointment in a manner prescribed by national legislation;

(b) approved by the National Assembly; and

(c) appointed by the President.

(3) To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.

(4) Appointments to commissions and independent offices shall take into account the national values mentioned in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.

7. The detailed procedure of appointment of the chairperson and members of the Commission is set out in the **First Schedule** to the Act which provides as follows;

FIRST SCHEDULE

PROCEDURE FOR APPOINTMENT OF CHAIRPERSON AND MEMBERS OF THE COMMISSION

(1) The President, in consultation with the Prime Minister shall, within fourteen days after the commencement of this Act and whenever a vacancy arises, constitute a selection panel comprising—

(a) a nominee of the Office of the President;

(b) a nominee of the Office of the Prime Minister;

(c) a representative of the Cabinet Secretary;

(d) two persons, of opposite gender, nominated by the Non- Governmental Organisations Council, who have demonstrated competence and capacity in matters related to natural resources;

(e) one person who is a citizen of Kenya, nominated by the Kenya Private Sector Alliance from their member organizations who has demonstrated competence and capacity in the land sector.

(f) a nominee of the Association of Professional Societies in East Africa; and

(g) a nominee of the National Gender and Equality Commission:

Provided that after the first elections under the Constitution, the nominee of the office of the Prime Minister under subparagraph (b) shall not constitute membership of the selection panel.

(2) The Public Service Commission shall—

(a) convene the first meeting of the selection panel, at which the members of the selection panel shall elect a chairperson from among their number; and

(b) provide the selection panel with such facilities and other support as it may require for the discharge of its functions under this Act.

(3) The selection panel shall, within seven days of convening, by advertisement in at least two daily newspapers of nationwide circulation, invite applications from persons who qualify for nomination and appointment for the position of the chairperson and members referred to under section 8.

(4) The selection panel shall within twenty one days after the expiry of the deadline for receipt of applications under paragraph (3)—

(a) consider the applications received under paragraph (3) to determine their compliance with the provisions of the Constitution and this Act;

(b) short list the applicants;

- (c) publish the names of the shortlisted applicants and the qualified applicants in at least two daily newspapers of nationwide circulation;*
- (d) conduct interviews of the shortlisted persons in public;*
- (e) shortlist two qualified applicants for the position of chairperson;*
- (f) shortlist sixteen qualified applicants for the position of the members; and*
- (g) forward the names of the qualified persons to the President.*
- (5) The President shall, within fourteen days of receipt of the names of successful applicants forwarded under paragraph (4)(g), nominate the chairperson and members of the Commission and forward the names of the persons so selected to the National Assembly for approval.*
- (6) The National Assembly shall, within twenty-one days of the day, it next sits after receipt of the names of the applicants under paragraph (5), vet and consider all the applicants, and may approve or reject any or all of them.*
- (7) Where the National Assembly approves of the nominees, the Speaker of the National Assembly shall forward the names of the approved nominees to the President for appointment.*
- (8) The President shall, within seven days of receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members of the Commission approved by the National Assembly.*
- (9) Where the National Assembly rejects any nomination, the Speaker shall within three days communicate its decision to the President and request the President to submit fresh nominations.*
- (10) Where a nominee is rejected by the National Assembly under paragraph (9), the President shall within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under paragraph (4).*
- (11) If the National Assembly rejects any or all of the subsequent nominees submitted by the President for approval under paragraph (10), the provisions of paragraphs (1) to (5) shall apply.*
- (12) In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender.*
- (13) The selection panel may, subject to this section, determine its own procedure.*
- (14) Until after the first general elections under the Constitution, the President shall, in the appointment of the chairperson or members of the Commission, consult the Prime Minister.*
- (15) The selection panel shall stand dissolved upon the appointment of the chairperson and members of the Commission under paragraph (8).*
- (16) Where the provisions of paragraph (10) apply, the selection panel shall continue to exist but shall stand dissolved upon the requisite appointments being made under paragraph (11).*
- (17) Despite the foregoing provisions, the President may, by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.*

8. Pursuant to the **First Schedule**, the Panel was duly constituted to invite applications from the Kenyan public for short listing and interviewing. Thereafter the Panel, in accordance with its procedures,

advertised the positions, received applications, shortlisted and interviewed candidates. Upon completion of its task, the panel addressed the results of their exercise to the President through letter dated 21st June 2012 as follows;

His Excellency Hon. Mwai Kibaki, C.G.H., M.P

President and Commander-in-Chief of the Defence

Forces of the Republic of Kenya

Office of the President

Harambee House

P O Box 62345 – 00200

NAIROBI

Your Excellency,

SUBMISSION OF INTERVIEW RESULTS FOR THE POSITIONS OF CHAIRPERSON AND MEMBER OF THE NATIONAL LAND COMMISSION

Following the enactment of the National Land Commission Act, 2012 (No. 5 2012), the Selection Panel for the Recruitment of the Chairperson and Members of the National Land Commission held its inaugural meeting on 14th May 2012 to, among others, elect a Chairperson as well as chart the way forward.

Under the First Schedule of the Act, the Selection Panel is required to nominate for appointment two (2) qualified persons for the position of Chairperson and sixteen (16) qualified persons for the position of Members of the National Land Commission.

In response to the advertisements carried out in the print media on 21st and 24th May 2012, thirty-one (31) applications were received for the position of Chairperson while four hundred and twenty-seven (427) applications were received for the position of members.

The details of all the applicants for the positions of Chairperson and Members and the names of the shortlisted candidates were published in the print media on 7th June 2012.

Public interviews for the position of Chairperson were conducted on 14th Jun 2012 while those for member were conducted between 15th and 21st June 2012 at the Public Service Commission.

Following the conclusion of the interview, the Selection Panel, pursuant to paragraph 12 of the First Schedule of the National Land Commission Act and in compliance with Article 27(8) of the Constitution, hereby recommends the following successful candidates for consideration for nomination and appointment to the position of Chairperson and Members of the National Land Commission:

Chairperson, National Land Commission

| NAME | ID/NO/ | GENDER | COUNTY | AVERAGE SCORE(%) |
|--|----------------|---------------|-----------------|-------------------------|
| Muhammad A. Swazuri, Ph.D., OGW | 0154150 | M | Kwale | 81.8 |
| Dr Elizabeth A. Nzioki | 8913578 | F | Machakos | 73.9 |

Member, National Land Commission

| NAME | ID/NO/ | GENDER | COUNTY | AVERAGE SCORE(%) |
|---------------------------------|----------|--------|--------------|------------------|
| Dr Tomiik M. Konyimbih | 4877438 | M | Kisumu | 85.6 |
| Silas Kinoti Muriithi | 2439373 | M | Meru | 81.8 |
| Dr Winfred Njeri Mwangi | 10166710 | F | Muranga | 80.9 |
| Dr Samwel Kipngetich A. Tororei | 4835968 | M | Narok | 78.9 |
| Abigael Mbagaya | 7129443 | F | Kakamega | 78.5 |
| Erick Okongo Mogeni | 10785476 | M | Nyamira | 77.8 |
| Mohamed A Mohamed | 0047574 | M | Garissa | 77.5 |
| Mairura E Omwenga | 0249756 | M | Kisii | 76.5 |
| Rose Chelangat Kitur | 10772815 | F | Kericho | 76.0 |
| Abdulkadir Adan Khalif | 3405901 | M | Mandera | 74.3 |
| Clement Isaih Lenachuru | A146560 | M | Baringo | 73.3 |
| Dr Rose M Musyoka | 7259255 | F | Makueni | 72.4 |
| Esther Damar Kodhek | 10366553 | F | Homa Bay | 72.1 |
| Emma Muthoni Njogu | 10510501 | F | Nakuru | 70.3 |
| Dr Judy W K Ayodi | 10933592 | F | Vihiga | 66.5 |
| Benjamin Njore Mwasi | 0155292 | M | Taita Taveta | 66.3 |

The curriculum vitae of the nominees and the score sheets in respect of all the candidates interviewed are attached herewith in the order of their performance.

The Selection Panel proposes that any of the candidates recommended for Chairperson may be considered for membership in the Commission.

Yours faithfully

Daniel W. Ichang'i, Ph.D., OGW

Chairperson

National Land Commission Selection Panel

cc. Rt Hon. Raila A. Odinga, EGH, MP

*Prime Minister
Republic of Kenya
NAIROBI*

9. By a letter dated 4th July 2012, addressed to the Clerk of the National Assembly, the National

Assembly was advised that the President in consultation with the Prime Minister nominated the following persons to be considered for appointment as Chairperson and members of the National Land Commission;

1. Mr Muhammad Swazuri – Chairperson
2. Dr. Tomiik M Konyimbih - Member
3. Mr Silas Kinoti Muriithi – Member
4. Dr Rose M Musyoka – Member
5. Dr Samwel Kipng’etich Tororei – Member
6. Ms Abigael Mbagaya – Member
7. Ms Emma Muthoni Njogu – Member
8. Mr Clement Isaiah Lenachuru – member
9. Mr Abdulkadir Adan Khalif – Member

10. As is the practice in the National Assembly, the nominations were forwarded to the relevant departmental committee of the National Assembly, the Departmental Committee on Lands and Natural Resources. The Committee considered the nominees, took public comments and representations and in their report dated 14th August 2012, it recommended to the National Assembly that the persons appointed by the President in consultation with the Prime Minister be approved for appointment. The National Assembly duly approved the chairperson and members as proposed by the Committee. They are now waiting formal appointment and Gazettement by the President.

11. Before the chairperson and members of the Commission could take office, the Court issued a conservatory order restraining the respondents from appointing, swearing in the Commissioners and in any way executing their appointments. The order remains in force pending the hearing and determination of this suit.

Petitioner’s Case – Petition No. 373 of 2010

12. The petitioner’s case is set out in the petition dated 27th August 2012. The petition is supported by the affidavit of John Waweru Maina sworn on 27th August 2012 (“the supporting affidavit”). Unfortunately the petition does not set out facts necessary to disclose a cause of action as is required of good pleadings but recites arguments and legal submissions.

13. The supporting affidavit, at the material part, states as follows;

[1] That I am the petitioner herein duly authorised by other applicants therefore competent to swear this affidavit.

[2] That I am informed by my advocates on record which information I verily believe to be correct that Article 10 of the Constitution of Kenya enjoins the respondents to espouse the values of equality, fairness, justice, equality, non-discrimination and inclusiveness.

[3] That I am informed by my advocates on record which information I verily believe to be correct that Article 27(1), (2), (4), (5) of the Constitution of Kenya enjoins the respondents not to discriminate against any persons for any reasons whatsoever.

[4] That I am informed by my advocates on record which information I verily believe to be correct that

the Article 57 enjoins the respondents to protect the vulnerable, weak, young and the marginalised.

[5] That the appointments to the National Land Commission have been discriminatorily in total disregard to the provisions of Article 250(4) of the Constitution.

[6] That there was no consideration of regional balance in the appointments.

[7] That the applicants will suffer continued miscarriage of justice and alienation in the appointments to key position in the country.

[8] That the principles and values in the Constitution of Kenya are not just paper aspirations; it is the duty and province of the court to bring these values into the daily realities of Kenyans.

[9] That there is no point of having constitutional provisions which do not have meaning to Kenyans.

[10] That I swear this affidavit in support of the petition herein.

14. At paragraph 26 of the petition, the petitioner framed the following questions for the court's determination.

- (1) Whether it is right and just to have some areas getting more slots yet others were excluded.*
- (2) Whether it is justified for appointments to exclude, deny and oust other regions (e.g Central and Nairobi) from serving in the Commission.*
- (3) Whether Article 250(4) and Article 10 of the Constitution were violated.*
- (4) Whether the criteria used for appointments of commissioners to the National Land Commission was proper and credible procedure to warrant the confidence of Kenyans.*

15. Mr E. Ondieki, who urged the petition, submitted that there are four issues for determination. The first issue is whether taking all circumstances into consideration; the appointment met the legitimate expectations of Kenyans as set out in the preamble, **Articles 10, 27 and 250(4)**. Mr Ondieki further submitted that the spirit of the Constitution and more particularly **Article 250(4)** is that this process must reflect the regional and ethnic diversity of the people of Kenya. Counsel contended that the petitioners have no problem with the nominees. He however noted that there is no representative from Nairobi Region, Central Region, Kisii Region and Maasailand and it could only be fair to have members from these regions.

16. Mr Ondieki maintained that even if the process is structurally fair, if it does not result in a situation where there is regional and ethnic diversity, then the process fails the test of **Article 10 and 250(4)** of the Constitution. The petitioners urge the court to find that there ought to be a member of the Commission from each region and therefore the current composition of the Commission falls short of this requirement.

17. The petitioners' case is that there must be rational criteria to the nominations to achieve the constitutional objectives as the Commission is a powerful body and it must have a national outlook. Mr Ondieki submitted that the Panel ought to have taken all factors into consideration and in view of the outcome, the court could only conclude that there was no rational criteria which led to the exclusion of persons from certain regions from appointment. In order to support his arguments counsel relied on the following cases; **Community Advocacy & Awareness Trust and Others v Attorney General, Nairobi Petition 243 of 2011 (Unreported)** and **Hon Johnson Muthama v Minister for Justice and Constitutional Affairs Nairobi Petition 198 of 2011 (Unreported)**.

18. Mr Ondieki finally submitted that selection panels play a major role in appointment of commissions and independent offices and therefore this court should give guidance on how these panels should come up with fair procedures to avoid a process like one in this case that was flawed.

Petitioner's Case – Petition No. 426 of 2012

19. The petitioners in this matter describe themselves as members of the Kalenjin Community who predominantly reside in the Rift Valley and they bring to this cause on their own behalf and on behalf of other members of the Kalenjin Community and residents of Rift Valley and in the public interest.

20. In their petition dated 19th September 2012, the petitioners aver that the list of nominees approved by the National Assembly does not reflect Kenya's diversity so as to afford equal opportunity for appointment of members of all ethnic groups and the same is in favour of some communities and regions thus clearly contravening **Articles 10** and **232**.

21. The petitioners' complaint is that by shortlisting only 6 people out of the 31 applicants for the position of chairperson and 32 persons out of 427 applicants for the post of members of the Commission, the Panel effectively implied that only shortlisted persons met the threshold requirements as set out in the Constitution and the Act. The petitioners therefore contend that in discharging its legal mandate, the Panel acted unlawfully and unconstitutionally and came up with a shortlist that is unlawful, unjust and lacked regional balance.

22. The petitioners further complain since the Rift Valley Province region has historically been rocked with land problems, disputes and massive displacements, the community ought to be adequately represented in the Commission. It is the petitioners' case that given the mandate of the Commission, the respondents were enjoined to ensure that its composition fairly represents Kenya's diverse communities bearing in mind the historical and contemporary matters that require comprehensive and urgent redress. In this regard, it was submitted that the Coastal, Rift Valley and Central Kenya Communities should be represented in the Commission to ensure its credibility and public legitimacy.

23. In the petitioners' view, Selection Panels have not fairly and objectively applied the criteria of regional and ethnic balance in the appointment of members of the established Commissions. They contend that in applying the criteria of regional balance and ethnic representation, the respondents were enjoined to take the following factors into account:-

- (i) Kenya has eight regions based on the provinces under the former Constitution.
- (ii) Kenya is now divided into 47 counties under the Constitution.
- (iii) The population in the respective regions and counties.
- (iv) The number of persons appointed to established commissions from such regions and counties since the implementation of the Constitution commenced.
- (v) The mandate of the relevant Commission and the reason for its existence.

24. The petitioners' submit that in taking the above factors into consideration, the respondents were enjoined to take the following factors into consideration in nominating persons to represent the Kalenjin Community in the Commission:-

- (i) The Rift Valley Province is the most populous region according to the last census and which represents over 25 per cent of Kenya's total population.
- (ii) The Kalenjin is the third largest community in Kenya after the Kikuyu and the Luhya
- (iii) The Kalenjin people are dominant ethnic community in the following counties, Kericho, Bomet, Nandi, Uasin Gishu, Keiyo Marakwet, Baringo and Pokot.
- (iv) There are no Kalenjin members of the two most important constitutional Commissions namely the Independent Electoral and Boundaries Commission (IEBC) and the Commission for Implementation of

the Constitution (CIC). In the premises, fair, meaningful and credible representation of the Kalenjin Community in the National Land Commission is imperative.

(v) The counties inhabited by the Kalenjin people comprise the bulk of the former white Highlands and are therefore associated with conflicts over land in the post-independence era.

25. The petitioners' case is that in at least three commissions constituted after the promulgation of the Constitution, the Kalenjin community has been grossly underrepresented while some regions have been unfairly overrepresented. For example, the petitioners aver that the Somali are over-represented given their total population in the following respects;

(i) The Northern Eastern Province or region is the least populous in Kenya yet the Commission comprises two persons from there.

(ii) The chairman and one member of the Independent Electoral and Boundaries Commission (IEBC) hail from North Eastern Province (region) and there is no member from the Kalenjin Community.

(iii) The Somali Community is represented in the Commission for Implementation of the Constitution but the Kalenjin Community is not represented.

(iv) There is at least one member of the Somali Community in all the Constitutional Commissions that have so far been established.

(v) Given the homogeneity of inhabitants in North Eastern Province and the almost conspicuous absence of conflicts and grievances that informed the establishment of the Commission, there is little justification for over-representation of these regions in the Commission.

26. As a result of the grievances outlined, the petitioners' seek the following reliefs;

a) *That a declaration be issued to declare that the nominee's list for appointment to the National Land Commission prepared and published by the 1st respondent and approved by the National Assembly is invalid, null and void ab initio for being in contravention of Articles 10(2)(a) and (b) and 232(1)(h) and (i) of the Constitution of Kenya.*

b) *That a declaration be issued to declare that the list of nominees to the National land Commission approved by the National Assembly is unlawful, null and void for contravention of the rights of the petitioners as members of the Kalenjin Community to equality and freedom from discrimination protected by Article 27 of the Constitution.*

c) *That a declaration be issued to declare that the process of selection and nomination of chairman and members of the National Land Commission is unlawful, null and void for contravening the rights of the petitioners to fair administrative action protected by Article 47 of the Constitution.*

d) *That a declaration be issued to declare that the list of nominees approved by the National Assembly for appointment to the National Land Commission is unlawful, null and void for contravention of the rights of marginalised sub-tribes of the Kalenjin Community protected by Article 56 of the Constitution.*

e) *That a declaration be issued to declare that the 1st, 2nd and 3rd respondents violated the right to human dignity of the petitioners and other members of the Kalenjin Community protected by Article 28 of the Constitution in purporting that they should be represented in the National Land Commission by a person who had applied for appointment as a disabled person and has been nominated as such in that capacity.*

f) *That a declaration be issued to declare that on account of the representation of the Somali Community in the established constitutional commissions stipulated in Articles 47, 79 and 248 of the Constitution, the First and Second Respondents are stopped from nominating any person from the three*

counties of North Eastern Province (region) as member or chairman of the National Land Commission.

g) That an order of prohibition be issued to prohibit His Excellency the President from appointing the nominees due to the unlawfulness and unconstitutionality of the composition of the proposed nominees and the process used in arriving at the nominees.

h) That an order of Mandamus be issued to compel the respondents to provide the petitioner with the following particulars;

1. The criteria, formula or method used to shortlist candidates;

2. The criteria formula or method used to nominate candidates for the chairperson, vice chairperson and members of the National Land Commission.

i) Costs of this petition

j) Such other relief as this Honourable Court may deem fit and just to grant.

27. Mr Wanyaga, counsel for the petitioners, outlined the grievances of the petitioners. Counsel first submitted that there was a problem with the Panel in that that the Selection Panel was selected contrary to the Act and this was illegal. That the report of the Departmental Committee noted this fact and failed to act accordingly therefore as panel was constituted unlawfully it could not reach a lawful verdict.

28. Counsel submitted that the second issue of concern was whether the nominees meet the regional and ethnic composition. He noted that some ethnic groups are represented by more than one person and no reason has been advanced for this particularly where the Commission has a small membership. Good reasons have to be given why one ethnic group is represented by more than one member of the community.

29. The petitioners' case is that the respondents ought to have taken into account all the other constitutional commissions, a fact acknowledged by the Parliamentary Committee in its report. Counsel submitted that ethnic diversity cannot be achieved if certain communities get two appointments and other communities are excluded. Counsel submitted that other ethnic groups and regions must be accommodated in light of the considerations demanded by the provisions of the Constitution.

30. Finally, Mr Wanyaga submitted that the Panel ought to have considered the ethnic and regional composition of members in all the other commissions and but they failed to do so. In counsel's view, the respondents failed to consider other factors other than competence and qualification. In the circumstances, counsel submitted that the appointment of the chairperson and members of the Commission ought to be set aside.

Respondents' case

31. The respondents were represented by the Office of the Attorney General. Ms Munyi, the Deputy Chief Litigation Counsel, opposed the petitions on the basis of the replying affidavit of sworn by Dr Ichang'i.

32. Ms Munyi pointed out that the letter dated 21st June 2012 from the Panel to the President sets out the nominees and their counties of origin. She submitted that these names represent a diversity of candidates and persons in Kenyan. Counsel also submitted that the appointment was in accordance with the provisions of the Act and the Panel carried out its mandate as required by the Act and that none of the parties had demonstrated in their pleading that there was any problem with the process of appointment.

33. Ms Munyi further submitted that the criteria adopted by the Panel in carrying out its responsibilities were clear as demonstrated in the minutes of the meetings held by the Panel. That the Panel took into account issues of county balance, gender representation, persons with disability, different fields of study

as well as the two-third gender principle and complied with **Articles 10** and **250**. Counsel also submitted that there were only nine positions available as against the forty seven counties and forty two ethnic groups to be considered and that ethnic diversity and regional balance were considered and the process was neither imbalanced nor skewed to exclude anyone and all qualified applicants were considered. Counsel emphasised that there were no slots set aside for any ethnic groups.

34. It is the respondent's case that the procedure adopted by the Panel and indeed the entire process was rational, fair and procedural and it met the constitutional threshold and as such the petitions lack merit and should be dismissed.

National values and principles

35. The petitioners' considerations are based on national values and principles and their application to the appointment to the chairperson and members of the commission. These values and principles are set out in **Articles 10, 232** and **250**.

36. **Article 10** contains the National values and principles of governance. **Article 10** provides as follows:

10. (1) *The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—*

(a) *applies or interprets this Constitution;*

(b) *enacts, applies or interprets any law; or*

(c) *makes or implements public policy decisions.*

(2) *The national values and principles of governance include—*

(a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*

(b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*

(c) *good governance, integrity, transparency and accountability; and (d) sustainable development.*

37. These values and principles provide a foundation upon which Kenyans have determined that our democratic state shall be built thus when making appointments to public office, every selecting, appointing and nominating authority must take into account these values and principles.

38. Commissions and Independent Offices are given special recognition in the Constitution. The objects and authority of Commissions are set out in **Article 249** thus:

249. (1) *The objects of the commissions and the independent offices are to—*

(a) *protect the sovereignty of the people;*

(b) *secure the observance by all State organs of democratic values and principles; and*

(c) *promote constitutionalism.*

(2) *The commissions and the holders of independent offices—*

(a) *are subject only to this Constitution and the law; and*

(b) are independent and not subject to direction or control by any person or authority.

39. **Article 232** of the Constitution sets out the values and principles of the public service. **Article 232** provides as follows:

232. (1) The values and principles of public service include—

- (a) *high standards of professional ethics;*
- (b) *efficient, effective and economic use of resources;*
- (c) *responsive, prompt, effective, impartial and equitable provision of services;*
- (d) *involvement of the people in the process of policy making;*
- (e) *accountability for administrative acts;*
- (f) *transparency and provision to the public of timely, accurate information;*
- (g) *subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;*
- (h) *representation of Kenya's diverse communities; and*
- (i) *affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—*
 - (i) *men and women;*
 - (ii) *the members of all ethnic groups; and*
 - (iii) *persons with disabilities.*

(2) The values and principles of public service apply to public service in—

- (a) *all State organs in both levels of government; and*
- (b) *all State corporations.*

(3) Parliament shall enact legislation to give full effect to this Article.

40. **Article 73**, which is part of Chapter 6 dealing with leadership and integrity, also, has provisions that guide appointments in public service. **Article 73(2)(a)** provides as follows:

73(2) The guiding principles of leadership and integrity include—

- (a) *selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;*

41. The ethnic and regional diversity of the members of the various Commissions must also be considered and taken into account. When constituting the membership of Commissions and appointing Independent Offices, **Article 250(4)** of the Constitution provides;

250(4) Appointments to Commissions and Independent Offices shall take into account the national values referred to in Article 10, and the principle that the composition of commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.

42. All these provisions provide a basis for diversity as a legitimate consideration for public appointments and the Panel and all bodies carrying out the task of public appointments are bound by these values and their work must be measured against these values and principles.

43. The petitioners call upon this court to review the appointments made in accordance with the constitutionally prescribed procedure. As I stated earlier in the judgment the petitioners do not complain about the competence or integrity of the nominees to the Commission, the grievance centres upon the outcome of the nomination process in that they claim that it does not meet the constitutional objectives of ethnic and regional diversity of the people of Kenya.

44. In ***Community Advocacy and Awareness Trust and Others v Attorney General Nairobi Petition No. 243 of 2011 (Unreported)*** the court addressed the issue of whether the appointments to the National Gender and Equality Commission were discriminatory. The court observed, “[106] *Having regard to the process of selection conducted [under section 11 of the National Gender and Equality Commission Act], the test is therefore whether the appointment meets the objects of Articles 10, 73, 232(1) (g) (h) and (i) and 250 of the Constitution. Compliance with the objects of these provisions provide the legitimate purpose for the differentiation of various applicants. As long as it can be demonstrated that there is a rational relationship between the object sought to be achieved and the means chosen there is no infringement of Article 27. The legitimate purpose is determined by the Constitution itself which requires that such appointments must reflect ethnic and regional diversity while taking into account the rights of special groups like the youth, the marginalized and persons with disability.*”

45. The court must of course be careful not to usurp the powers and functions of the various Constitutional and statutory bodies involved in appointments. The role of the Court is to ensure that fidelity to the Constitution is maintained. In the ***Community Advocacy and Awareness Trust and Others v Attorney General (Supra)***, the court noted that, “[110] *There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself.*”

46. More recently the issue of the standard to be applied by court in reviewing the nominations and appointments was examined in detail in the case of ***Trusted Society of Human Rights Alliance v Attorney General and Other Nairobi Petition 229 of 2012 (Unreported)***. Although the case dealt with issues of integrity, the broad principles suggested in the case are relevant. The court, after reviewing cases from other jurisdictions, concluded that, “[77] ***The constitutional standard emerging from these cases, which we now adopt, is that the Court is entitled to review the process of appointments to State or Public Offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the constitutional requirement. The absence of any evidence that such an inquiry was conducted, or, the availability of evidence that such an inquiry was, in fact, not conducted, would lead to the conclusion that the procedural aspects of this constitutional test have not been satisfied. Additionally, the Court must review the appointment decision itself to determine if it meets the constitutional threshold for appointment. The test here is one of rationality: can it be said that the appointing authority, after applying its mind to the constitutional requirements, reached a rational conclusion that the appointee met the constitutional criterion? While the appointing authority has a sphere of discretion and an entitlement to make the merit analysis and determination of the question whether the appointee actually meets the constitutional criteria, Courts will review that determination where, rationally, a reasonable person would not have reached that determination. The test, then, is one of reasonableness: substantively, the Court will defer to the reasonable determination of the appointing authority that a proposed appointee has satisfied the constitutional criterion. Where such a determination is unreasonable or irrational, however, the Court will review it. To this extent, therefore, the constitutional review is not for error but for legality.***” [Emphasis mine]

47. Taking these principles into account then the question for determination by this court is whether the process adopted for the nomination and appointment of the chairperson and members of the Commission

is rationally related or connected to the objects sought to be achieved, that is whether it achieves regional and ethnic diversity. This issue of diversity must be considered vis-à-vis the entire process set out in the Act and it is the burden of the petitioner to establish that the appointment or nominating authority failed in its constitutional obligation.

Analysis and Determination

48. Petitioners complain broadly that the appointments to the National Land Commission were made with no consideration of regional and ethnic balance. Did the Panel, the President and the Prime Minister and the National Assembly ignore the principle of diversity in appointments?

49. The nomination and selection process must be looked at as a whole. In ***Community Advocacy and Awareness Trust and Others v Attorney General (Supra)***, the court observed that, “[94]The process ... must also be seen as a process of checks and balances intended to achieve the objectives of the Constitution. Each stage of the process constitutes a check and balance on the other. Each authority charged with responsibility to make a decision has a margin of discretion which it is bound to exercise in accordance with the Constitution and the law.”

50. The first port of call is in the appointment process by the Panel. The Selection Panel is a creature of statute and is intended to establish an organised manner in which candidates are considered. The key mandate of the selection panel is to competitively shortlist for appointment competent and suitably qualified Kenyans. The Act sets out the minimum qualifications for the chairperson and members of the Commission. All Kenyans who meet these minimum qualifications are entitled to apply. The composition of the Panel from persons of varied backgrounds is intended to enhance the diversity of views of the panellists. The process as established is intended to be open and transparent.

51. During the submissions, Mr Ondieki stated that the Panel was improperly constituted as it lacked diversity. However, he could not point to any depositions or averments in the petition to support this claim. Mr Wanyaga, confirmed that there was a problem with the constitution of the Panel. He pointed to the remarks in the Departmental Committee Report which stated, at paragraph 58, page 32, that, “*The Selection Panel was not well constituted as the representatives of the NGO council to the panel – Mr Stephen Ndichu and Ms. Violet Okinda, were not nominated by the NGO Council as per their rules of procedure.*”

52. The Departmental Committee did not state how the two nominees were nominated but it noted that there were “*continued wrangles in the NGO Council ...*” which made the nomination process “*vulnerable to manipulation.*” From its own statement it is not even clear whether the process of selection was a mere irregularity. I find that the evidence presented to demonstrate that the Panel was not properly constituted is lacking in clarity and insufficient for me to make any finding in the petitioners’ favour.

53. The task of shortlisting suitable candidates was based on objective criteria upon which each candidate was evaluated. This particular stage of the process is concerned with competence and merit. Those candidates who meet the evaluation criteria are shortlisted for interview. In its meetings of 4th and 5th June 2012, the Panel set out the criteria for short listing as follows;

- *Attaching a copy of National Identity Card or passport*
- *County balance*
- *Gender representation*
- *Persons with disability*
- *Fifteen (15) years in matters relating to any of the following fields for the position of Chairperson:-*

- (i) *Public administration;*
- (ii) *Land management and administration*
- (iii) *Management of natural resources*
- (iv) *Land adjudication and settlement*
- (v) *Land law, land survey, spatial planning OR land economics; OR*
- (vi) *Social Sciences*

· *Ten(10) years' experience in matters relating to any of the following fields for the position of member;*

- (i) *Public administration;*
- (ii) *Land management and administration*
- (iii) *Management of natural resources*
- (iv) *Land adjudication and settlement*
- (v) *Land law, land survey, spatial planning OR land economics; OR*
- (vi) *Social Sciences*

54. The persons shortlisted are set out in the submission to the President dated 21st June 1012 and it is prepared in accordance with the **First Schedule** to the Act.

55. The petitioners' complaint is that there is lack of ethnic and regional diversity. The grounds for this argument emerging from the petitions was that some specific regions; Coast, Central, Masailand, Kisii and Nairobi were excluded from consideration, that members of the Kalenjin community were not selected and that the Somali community was over represented. In my view, the evidence does not support this assertion. The letter dated 21st June 2011 from the Panel to the President at paragraph 8 above shows that the persons selected for appointment by the President in consultation with the Prime Minister comprised of 10 male and 8 female, all duly qualified and from various counties within the Republic. The evidence on record shows that the nominees also had key competencies required for membership of a Commission that deals with the important subject of land.

56. The obligation of the Panel is to balance all the Constitutional criteria; ethnic and regional diversity, gender, representation of minorities and persons with disabilities among the persons who are competent and qualified in order to come up with a shortlist. The manner of coming up with the shortlist is entirely within the province of the Panel. I do not find that the Panel used a procedure that was not designed to meet or achieve the object of competence and diversity. The procedure was open and transparent and facilitated the achievement of the Constitutional objectives.

57. The petitioners' argument is that certain regions should have been represented. The petitioners in **Petition 426 No. of 2012** state that the Kalenjin community was not represented. The petitioners in **Petition No. 373 of 2012** contend that certain regions which should have been represented were excluded. In my view this argument is inconsistent with the Constitution. What the Constitution requires is diversity not cut-outs, curve-outs or quotas for particular groups or regions. There is no requirement that there be reserved seats for specific ethnic groups or communities based on their respective populations or that certain ethnic groups be excluded from consideration. The Commission is for all Kenyans and represents all Kenyans and any Kenyan who applies to be considered chairperson or member of the Commission is entitled to apply to be considered for nomination.

58. I must point out that a distinction must be made between elective political posts, which are representative of particular electoral areas and other non-elective state and public offices. On appointment to their positions, such officers are unanchored or unbound from their ethnic or regional affiliation and are bound to the responsibilities of public service consistent with provisions of **Chapter 6** of the Constitution on Leadership and Integrity.

59. The petitioners' have raised the argument that some regions with higher populations are underrepresented in the Commission. I think this argument conflates the electoral processes where representation is based on population. If the Constitution intended that representation on Commission be based on the respective population of various ethnic groups or regions, it would have stated as much. The Constitution is clear on the considerations that must be taken into account in constituting Commissions and the objective is to achieve diversity in various respects. To have regard to population alone would create undermine this noble objective of diversity in all respects.

60. Land is an important part of Kenya life and it is in recognition of this fact that the Constitution has specific and detailed provisions on the management of land and land rights. The Commission is the apex institution in matter concerning administration of land. All Kenyans have an interest in land and the process of appointment is intended to ensure that the body that is entrusted with this duty is diverse in terms of gender, ethnic and regional balance and has the key competencies required to manage land. This task of meeting these objectives is rather delicate and the Panel must meet this expectation despite the fact that there are only nine slots to be filled.

61. The procedure adopted by the Panel under the Act and the **First Schedule** was transparent, inclusive, based on objectively ascertained criteria clearly articulated in the Act. The Panel was entitled to use its own procedures to shortlist candidates for interview as it is not possible to interview all the applicants. Based on the material before the court, I do not detect any discrimination of any group or community or any exclusion of any person.

62. The Constitution and the Act require that the President and the Prime Minister appoint a total of nine members to the Commission. The diversity of the appointees can easily be demonstrated as follows;

| NAME | SEX | COUNTY | PROVINCE |
|--------------------------------|-----|----------|---------------|
| 1 Dr. Muhammad Swazuri | M | KWALE | COAST |
| 2 Dr Tomiik M Konyimbih | M | KISUMU | NYANZA |
| 3 Silas Kinoti Muriithi | M | MERU | EASTERN |
| 4 Dr Rose Musyoka | F | MAKUENI | EASTERN |
| 5 Dr Samuel Tororei | M | NAROK | RIFT VALLEY |
| 6 Ms Abigael Mbagaya | F | KAKAMEGA | WESTERN |
| 7 Ms Muthoni Njogu | F | NAKURU | RIFT VALLEY |
| 8 Ms Clement Isaiah Lenanchuru | M | BARINGO | RIFT VALLEY |
| 9 Mr Abdulkadir Adan Khalif | M | MANDERA | NORTH EASTERN |

63. Contrary to the petitioners' claim, Rift Valley region is represented by three members of the Commission and there is only one person from North Eastern. Rift Valley and all other regions are not homogenous and have different ethnic communities and the consideration for appointment can never be that a person from the dominant community in a particular region must represent that region. Even within specific regions diversity may be considered in terms of counties or even sub-ethnic groups within a

larger ethnic group. All these are factors that the Panel is entitled to consider in order to achieve constitutional objectives.

64. After the President in consultation with the Prime Minister appointed the chairperson and members of the Commission, the legislature had its say on the matter. It is clear that the Committee took various views from the public and considered complaints and allegations against nominees received through memoranda and submissions. As part of its conclusions, the Committee noted that the appointees included persons with disability and the nomination was sufficiently sensitive to regional and community balance.

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.

66. The petitioners seem to ignore the fact that there country has at least 42 ethnic groups and 47 counties. The ethnic groups are not even homogeneous. As provided in the Constitution there can only be nine members of the Commission and I do not think it would be realistic to expect the Commission to have representation of all the ethnic groups. What the appointing authorities are required to do is do the best they can to accommodate the requirement of diversity in all its form.

67. Mr Ondieki submitted that this court should issue guidelines for Selection Panels. I will reiterate what I stated in **Community Advocacy and Awareness Trust and Others v Attorney General (Supra)**, *"The court is not well suited to determine matters which are best discussed and agreed upon at a policy level in an environment that fosters public participation, consensus building and civic education. It is possible that a set of principles developed over time will emerge as various cases going through the court process upto the apex court but one case or dispute cannot determine the whole course of how ethnic and regional diversity is to be achieved in public appointments. In the case of Prinsloo v Van der Linde and Another (Supra) at para 20, the Constitutional Court of South Africa warned against making sweeping statements about difficult and complex area of equality and discrimination. The court observed that in view of the history of that country, "All this reinforces the idea that this Court should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely. This is clearly an area where issues should be dealt with incrementally and on a case by case basis with special emphasis on the actual context in which each problem arises."*

68. There was no evidence presented of how other Selection Panels constituted under other statutes conducted their work and I cannot therefore make any judgment as to whether they are fair and achieve constitutional objectives. It is important that each Selection Panel maintain a level of flexibility in achieving the objectives set by the Constitution.

69. Finally, applying the test in **Trusted Society of Human Rights Alliance v Attorney General and Other (Supra)**, can it be said that the Panel, the President and the Prime Minister and the National Assembly after applying their minds to the constitutional requirements, reached a rational conclusion that the appointees met the constitutional objectives. Based on my analysis above, my answer is yes.

70. I also do not find any breach of the petitioners' fundamental rights and freedoms. There was no discrimination of any person or community contrary to **Article 27** as the means used by the Panel was rational to achieve the objects of ethnic and regional diversity. I also do not find any breach of the petitioners' right to dignity contrary to **Article 28** nor has this been demonstrated. I also do not find that the entire selection and appointment process violated of the petitioners' right to fair administrative action

protected under **Article 47**.

Conclusion and Disposition

71. Before I conclude this matter I would be remiss if I did not comment on the pleadings and depositions filed in **Petition No. 373 of 2012**. The key purpose of pleadings is to set out facts which constitute a cause of action. Similarly, the purpose of an affidavit is to depone to facts which the deponent knows of his knowledge, information and belief. Affidavits should not express the deponent's opinions or those of the advocate. These matters are better left for submissions. I do not think that this obligation is lessened merely because the matter is one filed to enforce fundamental rights and freedoms under **Article 22** or enforce the Constitution under **Article 258**. Argumentative pleadings, devoid of facts obscure the real issues in controversy and more often than not undermine the objective of expeditious disposal of matters (see **Meme v Republic [2004] 1 KLR 645** and **Tito Alai Okumu v Commissioner of Customs and Another Nairobi No. 240 of 2011 (Unreported)**).

72. I have evaluated the process of nomination and appointment of the chairperson and members of the National Land Commission on the basis of the case presented by the petitioners and I am satisfied that the procedure adopted by the Selection Panel, President and Prime Minister and the National Assembly achieved the Constitutional objectives and statutory requirements of competence, gender equity, regional and ethnic diversity.

73. In the circumstances, I do not find any infraction of the Constitution or the fundamental rights of the petitioners. Consequently, these consolidated petition are dismissed but with no order as to costs. The conservatory orders in force, are for the avoidance of doubt, discharged.

DATED and DELIVERED at NAIROBI this 12th day of October 2012.

D.S. MAJANJA

JUDGE

Mr E. Ondieki instructed by Ondieki and Ondieki Advocates for the petitioners in Petition No. 373 of 2012.

Mr O. Wanyaga instructed by Kinoti and Kibe and Company Advocates for petitioners in Petition No. 426 of 2012.

Mr S. Munyi, Litigation Counsel, instructed by the State Law Office for the respondents.

Mr Lando, Advocate, instructed by Dr. Samuel Kipng'etich Tororei, interested party.