



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 513 of 2012

EVANS NYAMBEGA AKUMAPETITIONER/APPLICANT
VERSUS

THE ATTORNEY GENERAL1ST RESPONDENT

NATIONAL POLICE SERVICE COMMISSION.....2ND RESPONDENT

MR. JOHNSTONE M. KAVULUDI.....3RD RESPONDENT

AND

ALBERT MULINDI.....1ST INTERESTED PARTY

SAMUEL MUIGAI NG'ANG'A.....2ND INTERESTED PARTY

RULING

Introduction

1. This is yet another of many recent cases challenging public appointments to Constitutional Offices. The Applicant seeks to challenge the appointment of the Chairperson to the National Police Service Commission (“the Commission”) and is also unhappy with the manner in which the Commission was constituted.

2. The National Police Service is established under **Article 243** while the Commission is established under **Article 246** of the Constitution and is mandated to among other things recruit and appoint persons to hold or act in offices in the service, confirm appointments, and determine promotions and transfers within the service and exercise disciplinary control over persons holding offices within the Service.

3. According to **Article 246(2)**, the Commission is to consist of;

“(a) the following persons, each appointed by the President—

(i) a person who is qualified to be appointed as a High Court Judge;

(ii) two retired senior police officers; and

(iii) three persons of integrity who have served the public with distinction;

(b) the Inspector-General of the National Police Service; and

(c) both Deputy Inspectors-General of the National Police Service.”

4. By the National Police Service Commission Act, No. 30 of 2011 (“the Act”), Parliament enacted the law governing the operations of the Service. The Act came into operation on 4th October, 2011 and in its long title, the purpose of the Act is to ‘**make further provisions for the functions and powers of the National Police Service Commission; the qualifications and procedures for appointment, and for connected purposes.**’

5. **Section 5** of the **Act** sets out the qualifications for appointment of the Chairperson and members of the Commission. **Section 6** also sets out the procedure for appointment of members of the Commission. I shall not delve into the import of these provisions in view of the issue for determination at this point.

6. Commissions and Independent Offices are given special recognition in the Constitution. **Article 249** sets out the objects and authority of Commissions: viz;

“ (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.”

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

“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;

Petitioner’s Case

8. Before me is a Notice of Motion dated the 7th November, 2012 filed together with the Petition in which the Applicant seeks the following Orders;

“ a) ...

b) That the Honourable Court be pleased to set aside the advertisement on Monday October 15th, 2012 page 44 V.M/NPS/1/2012 inviting applicants for the positions of inspector General of Police, Deputy Inspector General of Police No. V/NO/NPS/2/2012 and Deputy Inspector-General of Administration Police No. V/NO/NPS/2/2012 subsequently be pleased to set aside National Police Service Commission list of applicants and short listed candidates for the position of Inspector General of police numbering 9 and further Deputy Inspector General numbering 9 in total until this matter is fully heard inter partes and determined. (sic)

- c) *That the Chairperson be restrained from conducting, inviting, transacting and mentioning anything to do with the National Police Service Commission until his integrity and leadership issues are heard inter-partes and determined.*
- d) *That this Honourable Court be pleased to order that the Petitioner be issued with an early hearing date to enable him be heard expeditiously*
- e) *That the 1st, 2nd and 3rd Respondents be restrained from transacting, mentioning, inviting, conducting or entering the office of the National Police Service Commission until this matter is heard inter partes*
- f) *That orders be issued to the 1st, 2nd and 3rd Respondents to vacate the office and services of the National Police Service Commission forthwith.*
- g) *That recruitment or employment of any officer/persons seven in command investigation Department Director, by the National Police Service Commission or Transitional Authority, other equipment be stopped other than Guns and Bullets that are of greater supremacy to our security and order.(sic)”*

9. On 19th November, 2012 I heard the Parties on the Motion, and the Applicant’s case is basically that the Chairperson of the National Police Service Commission is illegally in office for he does not possess the qualification of a person qualified to be a judge of the High Court as required by the Constitution. The Applicant further challenges the probity of the Chairperson arguing that he is morally unfit to hold office. The facts are well set out in the Motion itself.

10. The Applicant further urged the point that the persons comprising the Selection Panel and the shortlisted candidates all lacked gender and regional balance with only Eastern and Central provinces being represented. He further contended that the shortlisted candidates lacked integrity and urged that the appointments be set aside.

Respondents case

11. The 2nd and 3rd Respondents (‘Respondents’) opposed both the Application and the Petition. In the Replying Affidavit dated 14th November, 2012, sworn by Mr. Johnstone M. Kavuludi; (the chairperson of the National Police Service Commission) it is their case that the Petition was misconceived in that although the Commission is a creature of the Constitution under **Article 246**, the office of the Chairperson is not subject to the constitutional qualification criteria. It is also the Respondents’ case that the qualifications and appointments of Chairperson of the Commission are set out under **Section 5(1)** of the **National Police Service Commission Act** and do not include qualification as a High Court judge.

12. Mr. Kavuludi further deponed that **Article 251** of the **Constitution** lays down the procedure for the removal from office of the Chairperson and that the same ought to be followed in any instance where such removal is being sought.

13. Mr. Ojwang, learned State Counsel who appeared for the Respondents further took the position that under **Article 246** that establishes the Service, there is no requirement that the Chairperson of the Commission need be a person qualified as a judge of the High Court. Counsel further submitted that the Petitioners had a chance to present their case before the Selection Panel and because they failed to do so, then ‘nothing would be stopped at this point.’

14. Counsel further pointed out that none of the allegations regarding the Chairperson’s personal conduct were substantiated and urged the Court to dismiss the Application and Petition.

Opinion

15. I have considered the application and rival submissions before me and I am conscious of the fact that at this stage, I am being called upon to exercise discretion at an interlocutory stage and without going to the merits of the Petition.

16. In considering the issue at hand, I have addressed my mind to the following core issues:

(i) The jurisdiction of the court to entertain the matter

(ii) The efficacy of the orders sought.

(iii) The balance of convenience

17. Amongst the prayers sought is ‘That orders be issued to the 1st, 2nd and 3rd Respondents to vacate the office and services of the National Police Service Commission forthwith.’ Mr Ojwang representing the Respondents in opposing the Application and Petition argued that the allegations are unsubstantiated and that they ought to have been raised at the interview panel. The point made was that there was nothing to be stopped at this point in time. My opinion in that regard is as follows;

18. There is now a string of authorities settling the issue on this Court’s jurisdiction to entertain challenges regarding public appointments concluded under the Constitution. The case of **FIDA-K & Others v- The Attorney General & Another Petition No. 102 of 2011** is one such authority in which the Court observed thus: **“If the process of the appointment is unconstitutional, wrong, unprocedural or illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no jurisdiction to address the grievances raised by the Petitioners. In our own view even if the five appointees were sworn in, this court has jurisdiction to entertain and deal with the matter.”**

19. A similar question on the timing of a Petition against an appointment to a public office has also recently been raised and settled in **Trusted Society of Human Rights Alliance v Attorney General and Other Nairobi Petition 229 of 2012 (Unreported)**. Where Justices Joel Ngugi, Mumbi Ngugi and G.V. Odunga stated thus,:

“59. We have already noted that anybody has a right to bring a Petition challenging the constitutionality of an action, and it should not matter that the Petitioner did not present any complaints during the selection or vetting process. The fact that the person who was appointed does not meet the constitutional threshold will not change merely because the person who brings the matter to Court did not raise it during the selection process, and the Court cannot shy away from making such a determination if sufficient evidence is presented before it. Needless to say, the Petitioner must exercise vigilance to file such a case within a reasonable time following the appointment. In addition, the Court must be satisfied that the constitutional challenge is not brought in bad faith or merely for purposes of harassing or delaying legitimate governmental processes.”

20. The Court in the **Trusted Society of Human Rights Alliance case (above)** dealt with issues of integrity, such as are now being raised by the Applicant. Upon reviewing cases from other jurisdictions, the Court established the standard in reviewing public appointments in the following terms:

“[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...To this extent, therefore, the constitutional review is not for error but for legality.”

(See also ***John Waweru Wanjohi & 2 others v Attorney General & 3 Others, Petition No. 373 of 2012*** as per Majanja J.)

21. Aside from the above erudite holdings, under **Article 165** of the **Constitution**, this Court has the power to determine, *‘the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.’* Further, **Article 258(1)** provides that ***“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”***

It is therefore obvious and I hereby find and hold that the Petition is properly before Court and the Applicant is also properly before the Court.

22. On the second and third issues, I take judicial notice of the fact that the said Chairperson of the Commissioner has already been sworn in and has taken office. I also take note that the prayers to quash the advertisement for certain positions mentioned above for practical purposes have been overtaken by events as the same is behind us and orders to that effect will serve no purpose. It is not in the habit of this court to issue orders that are merely academic and serve no purpose. The horse has already bolted in that regard even as the Applicant seeks to slam shut the stable door.

Therefore and without stating more, Prayers number 2, 3 and 5 must accordingly fail.

23. In determining whether or not to allow the reliefs sought in the Application, I have also addressed my mind to the fact that the issues raised by the Applicant have serious ramifications on government operation’s and in particular the discharge of the duties of the police force, security of which is key and a public interest issue.

24. Equally, the allegations raised by the Applicant regarding the probity of the Chairperson to the Commission are serious, serious enough as not to be hastily determined in the absence of adequate material and in-depth consideration of them based on sufficient evidence placed before court. At this point, I do not have such adequate evidence as to enable me lift the judicial arm and strike out the appointment as being in breach of the Constitution. For the same reason, I may not make the drastic orders now sought without a full hearing on the substantive issues posed. The balance of convenience in the circumstances shifts against the Applicant.

25. Having held as above, I am left with no choice but to dismiss the Application dated 7th November, 2012 with no order as to costs.

26. The Petition dated 7th November, 2012 should now be fixed for hearing on a priority basis to determine the substantive issues raised in.

27. The Respondents and Interested Parties are also ordered to file their submissions within fourteen (14) days and directions shall thereafter be given.

28. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2012

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – court clerk

Mr. Wamanza holding brief for Mr. Ojwang for Respondents

Dr. Khaminwa for Interested Parties

No appearance for Applicant

Order

Ruling duly delivered

**ISAAC LENAOLA
JUDGE
29/11/2012**

Further Order

Mention on 10/12/2012

**ISAAC LENAOLA
JUDGE
29/11/2012**