



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 479 of 2012

LEONARD NJOGU ..... PETITIONER

AND

THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

TEACHERS SERVICE COMMISSION ..... 2<sup>ND</sup> RESPONDENT

JUDGMENT

Introduction

1. The Teachers Service Commission is established under **Article 237** of the Constitution. In order to operationalise the Act, Parliament enacted the *Teachers Service Commission Act, (Act No. 20 of 2012)*. The Act commenced on 31<sup>st</sup> August 2012.
2. The petitioner has raised concerns about the process of nomination and appointment of the Chairperson and members of the Commission.
3. The facts giving rise to the claim are not contested and are set out in the pleadings and depositions filed by the parties. There is the petition dated 18<sup>th</sup> October 2012 and the affidavit of the petitioner sworn on the same date. The petition is opposed by the replying affidavit of James M. Kamunge, the chairperson of the Selection Panel for the Appointment of Chairperson and Members of the Commission, sworn on 5<sup>th</sup> November 2012. The Teachers Service Commission (the Commission) has filed an affidavit sworn on 20<sup>th</sup> October 2012 by its Director, Human Resource Management and Development, Josephine Maundu.

The Procedure

4. **Section 5(1)** of the *Teachers Service Commission Act* (“the Act”) provides that the chairperson and eight other members of the Commission shall be appointed in accordance with the Constitution and the provisions of **Section 8** of the Act.
5. **Section 8** of the Act sets out the procedure for nominations and appointment. The part material to this case provides;
  8. (1) *Within fourteen days of the commencement of this Act, or whenever a vacancy arises in the Commission, the President in consultation with the Prime Minister shall by notice in the Gazette declare a vacancy and constitute a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.*

**(2) The selection panel constituted under subsection (1) shall consist of—**

**(a) a chairperson not being a public officer appointed by the President;**

**(b) the Cabinet Secretary in the Ministry responsible for matters relating to education or his representative;**

**(c) the Attorney General or his representative;**

**(d) the Principal Secretary in the Ministry responsible for public service or his representative;**

**(e) one person nominated by the Federation of Kenya Employers; and;**

**(f) two persons, one man and one woman, nominated by the cabinet Secretary representing the interests of registered teachers.**

**(f) one person nominated by a recognized association of private schools; and**

**(h) A prominent educationist not serving in Government appointed by the Cabinet Secretary**

**(3) A person appointed under subsection (1) (f) shall not be a serving official or member of the nominating union.**

**(4) The chairperson shall convene the first meeting of the selection panel within seven days of his or her appointment.**

**(5) The selection panel shall, within seven days of convening, invite applications from persons who qualify for nomination and appointment as chairperson or member of the Commission by advertisement in at least two daily newspapers of national circulation.**

**(6) The selection panel shall within seven days of receipt of applications under subsection (5)—**

**(a) consider the applications to determine their compliance with the provisions of the Constitution and this Act;**

**(b) shortlist the applicants;**

**(c) interview the shortlisted applicants; and**

**(d) submit the names of three qualified applicants for the, position of chairperson and thirteen qualified applicants for the position of a member to the President.**

**(7) The President shall, within seven days of receipt of the names forwarded under subsection (6), nominate one person and eight others for appointment as chairperson and members of the Commission and forward the names to the National Assembly for approval.**

**(8) The National Assembly shall, within twenty one days of its sitting, consider each nomination received under subsection (7) and approve or reject any of them.**

**(9) Where the National Assembly approves the nominees, the Speaker of the National Assembly shall, within five days forward the name of the approved applicants to the President for appointment.**

**(10) The President shall, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly within seven days of receipt of the approved nominees from the Speaker of the National Assembly.**

***(11) Where the National Assembly rejects any nominee, the Speaker shall as soon as is reasonably practicable communicate its decision to the President and request the President to submit fresh nominations from amongst the persons shortlisted and forwarded by the selection panel under subsection (6).***

***(12) If the National Assembly rejects any or all of the subsequent nominees submitted by the President for approval under subsection (10), the provisions of subsections (5) and (6) shall apply.***

***(13) The panel shall stand dissolved upon the appointment of the chairperson and members under subsection (10).***

***(14) Where the provisions of subsection (11) apply, the panel shall continue to exist but shall stand dissolved upon the requisite appointments being made.***

***(15) The ministry responsible for public service shall provide secretariat services to the panel.***

***(16) In nominating or appointing a person as a member of the-Commission, the panel and the President shall—***

***(a) observe the principle of gender equity, ethnic and other diversities of the people of Kenya, and shall ensure equality of opportunity for persons with disabilities; and***

***(b) take into account the national values and principles set out in Articles 10, 27 and 232 of the Constitution.***

***(17) Until after the first general election under the Constitution, the President shall in nominating persons for appointment as chairperson or member of the Commission act in consultation with the Prime Minister.***

***(18) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister 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.***

***(19) Subject to this section, the panel may determine its own procedure.***

6. The genesis of the petitioner's case is that the Selection Panel ("the Panel") appointed in accordance with the Act commenced its work by advertising the vacant positions of chairperson and three members of the Commission. One such advert calling for applications was published in the Daily Nation of 27<sup>th</sup> September 2012.

7. The Panel met on 12<sup>th</sup> October 2012 and considered applications received from candidates. On 13<sup>th</sup> October 2012, the Panel published a shortlist of candidates for chairperson and members of the Commission. There were five shortlisted persons for the post of chairperson of the Commission and 16 persons for the position of member. The Panel did not publish the names of all applicants but due to public outcry the Panel published the names of all the applicants on 17<sup>th</sup> October 2012 in the newspapers.

8. According to the Panel's workplan, the interviews for persons shortlisted for the position of Chairperson were scheduled for 16<sup>th</sup> October 2012 and while those of members of the Commission were scheduled for 17<sup>th</sup> and 18<sup>th</sup> October 2012.

9. At the time of hearing this matter, the interviews had been completed and the names of the candidates submitted for consideration by the President in consultation with the Prime Minister to make appointments and forward the same to Parliament for approval.

### **Issues for Consideration**

10. I have heard the parties arguments on the matters and in summary the petitioner raised several complaints regarding the procedure adopted by the Panel for resolution by the court as follows;

- (a) The time limited for calling for application and consideration was too short.
- (b) The Panel failed to publish all the names of applicants.
- (c) The Panel failed to consider the issue of diversity and gender
- (d) Only four positions were advertised contrary to the Constitution.

11. As the basis facts are not contested, I shall consider the issues and arguments made by the parties and make my findings.

### **Unreasonable Time Limits**

12. According to Ms Khaemba, counsel for the petitioner, the time limited for the calling for applications was too short therefore denying members of the public meaningful participation in the process.

13. Counsel for the 1<sup>st</sup> respondent, Mr Kaumba submitted that the timeliness was fixed by the Act and could not be changed by the Panel and in the circumstances, the limits given by the statute were not contrary to the Constitution.

14. I agree that the Panel being a statutory body could not vary the terms of its appointment and mandate and was required to process applications within 7 days of receipt of applications. In the circumstances, in so far as the Panel followed the statutory procedure, it cannot be faulted.

### **Failure to publish all the names of applicants**

15. The petitioner avers that the Panel failed to publish all the names of the applicants. According to Ms Khaemba, the public was denied the right to information therefore objections could not be raised.

16. In answer to this accusation, Chairman of the Panel states that this was not done because there was no mandatory requirement for publication of the applicants and the process was complicated by the strict time frames within which the Panel had to comply with the process. He avers that when this issue was raised by the public, the Panel published all the details of the applicants.

17. The publication of the names of applicants is not a mandatory requirement in the Act. The Panel is entitled to determine its own procedure and in doing so, it must bear in mind the values contained in **Article 10** like transparency, accountability and good governance. The publication of applicants' names goes a long way in building confidence in the selection process and in promoting transparency and in publishing the names the Panel complied with these requirements. Otherwise, I find no merit in this complaint.

### **Gender and Diversity**

18. Ms Khaemba submitted that the names of the persons appearing on the shortlist contained people from Nairobi and Mombasa showing that other areas were excluded. Furthermore only four women out of the sixteen applicants were shortlisted for the position of member of the Commission contrary to the one-third gender rule requirement contained in **Article 27(8)** of the Constitution.

19. The 1<sup>st</sup> respondent denies these allegations and avers that regional and gender balance should not be considered in isolation but in terms of totality of the Commission. As there were already three women Commissioners already in office, the numbers of women shortlisted was less.

20. I do not think this complaint has any merit as no material was placed before the court to consider

whether there was a breach of any of the requirements of diversity and gender balance. The petitioner has relied mostly on the postal addresses of the shortlisted candidates to demonstrate that there was no diversity. I do not think reference to postal addresses is sufficient basis for determining the regional diversity of the candidates and I therefore decline to interfere on this basis.

### **Position of existing commissioners**

21. The petitioner's case is that under **Article 250** each commission established under the Constitution shall have not less than three and not more than nine commissioners. According to the Act, the TSC has nine Commissioners. According to Ms Khaemba, the Act does not save the terms of existing commissioners but only the staff members and thus all the positions should have been advertised. She also argued that the current Commissioners should be vetted and if they have not then they hold office contrary to **Chapter Six** of the Constitution.

22. Mr Kaumba submitted that the Commissioners in office remained in office by virtue of **section 50(2)** of the Act which save the contracts of existing members of the Commission.

23. According to Josephine Maundu, the Commission under the provisions of the repealed **Teachers Service Commission Act (Chapter 212 of the Laws of Kenya)**, there were five serving commissioners whose terms are set to expire on 30<sup>th</sup> June 2013. The 2<sup>nd</sup> respondent, through its counsel, Mr A. Situma, drew the Courts attention to the provisions of **section 51(2)** of the Act which he submitted saved the terms of the five Commissioners holding office and also the provisions of the **Sixth Schedule (The Transitional and Consequential Provisions)** to the Constitution.

24. I think this issue is resolved by the provisions of **section 31(2)** of the **Sixth Schedule** to the Constitution which provides as follows;

***31(2) Subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution.***

25. This provision is to be read with **section 50(1)** and **(2)** of the Act which provides;

***50(1) Notwithstanding section 49, a person who immediately before the commencement of this Act, was a staff of the Teachers Service Commission under the repealed Act, shall continue to hold or act in that office as if appointed to that position under this Act.***

***(2) Every contract entered into before the commencement of the Act shall continue to be in force to the extent that the terms and conditions of the contract are not inconsistent with the provisions of this Act.***

26. The five Commissioners are persons holding public office established by law within the meaning of the **section 31(2)** of the **Sixth Schedule** and continue to do so and act in that office by virtue of the **section 31(2)**. In the circumstances they are properly in office and their position cannot be impugned.

27. There is nothing in **Chapter Six** of the Constitution that requires them to undergo vetting, though as State officers, they are now fully subject to the provisions on Leadership and Integrity.

### **Disposition**

28. The petitioner's case lacks merit and is hereby dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 8<sup>th</sup> day of November 2012

**D.S. MAJANJA**  
**JUDGE**

Ms Khaemba instructed by Kinyanjui and Njau Advocates for the petitioner.

Mr Kaumba, Litigation Counsel, instructed by the State Law Office, for the 1<sup>st</sup> respondent.

Mr A. Sitima instructed by the Teachers Service Commission.