



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 160 OF 2018

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

CONSOLATA NKATHA MAINA.....1<sup>ST</sup> RESPONDENT

MARGARET MWACHANYA.....2<sup>ND</sup> RESPONDENT

PAUL KURGAT.....3<sup>RD</sup> RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....4<sup>TH</sup> RESPONDENT

JUDGMENT

1. *Okiya Omtatah Okoiti*, the petitioner, filed this petition, a public interest litigation, against *Consolata Nkatatha Maina, Margaret Mwachaya, Paul Kurgat* and the *Independent Electoral and Boundaries Commission*, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively. *The Honourable Attorney General* sought to be enjoined into these proceedings and he was enjoined as an interested party.

2. The petitioner averred that by a press statement issued on 16<sup>th</sup> April 2018, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents declared that they had resigned as Commissioners of the 4<sup>th</sup> respondent, an independent constitutional commission responsible for managing electoral processes in the country. He contended however, that the three had not formerly tendered their resignation as required by the Constitution and the law, and that they were still drawing salaries and allowances from public coffers.

3. He further averred that the obtaining state of affairs at the 4<sup>th</sup> respondent given the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' alleged resignation, was untenable in law and was preventing appropriate consequential action that should be taken by the appointing authority and that public resources were being extended to persons who were no longer Commissioners.

4. Based on the above facts, the petitioner sought the following reliefs;

*i. A declaration that the 1<sup>st</sup> – 3<sup>rd</sup> respondents have threatened and/ or violated the Constitution of Kenya.*

*ii. The 1<sup>st</sup> – 3<sup>rd</sup> respondent ceased being commissioners of the 4<sup>th</sup> respondent on 16<sup>th</sup> April 2018 and on the same date ceased being entitled to a salary and other benefits associated with the office of a commissioner of the 4<sup>th</sup> respondent.*

*iii. An order that compelling the 1<sup>st</sup> – 3<sup>rd</sup> respondents to vacate office and return all public property in their possession.*

*iv. Compelling the 4<sup>th</sup> respondent to surcharge the 1<sup>st</sup> – 3<sup>rd</sup> respondents for any public resources expended on them since 16<sup>th</sup> April 2018.*

*v. costs of the petition and*

*vi. Any other relief the Court may deem just to grant.*

*1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' response*

5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a replying affidavit each all sworn on 8<sup>th</sup> May 2018 and filed in court on 9<sup>th</sup> May 2018. The three affidavits carry similar depositions. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents deposed that they were Commissioners of the 4<sup>th</sup> respondent but that they had since resigned; that their resignation as commissioners is guided by section 7A of the Independent Electoral and Boundaries Commission Act, (IEBC) 2011, and that in that regard, the law requires that resignation be by written notice to the President.

6. They deposed that they formally tendered their resignation letters to the President on 16<sup>th</sup> April 2016 as required by the constitution and the law and that resignation cannot be inferred. They contended that resignation is a process with milestones that gives effect to the actual resignation. According to the three respondents, the last of such steps is a notice in the Kenya Gazette declaring a vacancy in the office of the resigning commissioner.

7. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents maintained that as far as they were concerned, they had resigned as Commissioners but such resignation was to be officially communicated by the appointing authority and that no vacancy had been declared yet. They contested the petitioner's allegation that they were the reason why recruitment of their replacement commissioners had not taken place.

8. They further deposed that they were not receiving salary or benefits and that the Chairman of the 4<sup>th</sup> respondent acted in haste and wrote a letter asking the Treasury to stop their salary and benefits; that the Chairman had ordered that they return the Commission's properly and that their stay at the Commission was therefore untenable.

#### **4<sup>th</sup> Respondent's Response**

9. The 4<sup>th</sup> respondent filed a replying affidavit by **Wafula Chebukati**, the Chairman of the 4<sup>th</sup> respondent sworn on 29<sup>th</sup> May 2018 and filed in court on 31<sup>st</sup> May 2018. **Mr. Chebukati** deposed that in line with the 4<sup>th</sup> respondent's mandate and the spirit of the Constitution and Article 10 in particular, Commissioners, including the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, had a plenary meeting which decided that an audit over the expenditure of public funds during the 2017 general elections be conducted and mandated the Chairman to formally write to the Chief Executive Officer of the 4<sup>th</sup> respondent for an explanation over the concerns that had been raised; that the Chairman did so on 16<sup>th</sup> January 2018 and that the CEO responded in a memo of 19<sup>th</sup> February 2018.

10. **Mr. Chebukati** deposed that in a plenary meeting of 16<sup>th</sup> March 2019 the CEO's response was considered but was found wanting and the plenary decided to refer the matter to the 4<sup>th</sup> respondent's internal audit department to conduct an in-depth audit and the CEO was to take a 3 months' leave. He deposed that contrary to the decisions made by the plenary, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents later distanced themselves from those decisions leading to their resignation on 16<sup>th</sup> April 2018.

11. **Mr. Chebukati** contended that according to section 7A of the **IEBC Act**, a commissioner should give a written notice of resignation to the President and further stated that according to the internal Human Resource policy, the a resigning commissioner should clear all outstanding liabilities and return the Commission's properties. He stated therefore that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were under obligation to return the Commission's properties upon resigning.

12. In a Supplementary Affidavit sworn on 29<sup>th</sup> August 2018, **Mr Chebukati** deposed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents had since cleared with the 4<sup>th</sup> respondent and returned the Commission's property in their possession; that on 24<sup>th</sup> August 2018, the 1<sup>st</sup> and 2<sup>nd</sup> respondents purported to return work at the 4<sup>th</sup> respondent's offices, a flagrant violation of Article 73 of the Constitution and that in his view, this could not happen since the three had already resigned.

#### **Petitioner's submissions**

13. **Okiya Omtata**, who appeared in person, submitted that the petition concerns the 1<sup>st</sup> to 3<sup>rd</sup> respondents who had resigned as Commissioners of the 4<sup>th</sup> respondent, and that the three respondents had in their respective replying affidavits intimated that they resigned on 16<sup>th</sup> April 2018 and sent notices in writing to the President. The petitioner contended that even though that was said to be the factual position on 24<sup>th</sup> August 2018 the 1<sup>st</sup> and 2<sup>nd</sup> respondents purported to return to office ostensibly to start working again.

14. According to **Okiya Omtatah**, the petition seeks the court's determination on the status of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. He submitted that although the Constitution does not provide for resignation as a mode of ceasing to be a Commissioner, section 7A of the **IEBC Act** identifies resignation as one of the modes of vacating office. He contended, therefore, that having resigned on 16<sup>th</sup> April 2016, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents ceased to be Commissioners. He was of the view that once the three resigned, the President did not have to accept or reject that resignation as contended by the three that they remained commissioners until vacancies were declared.

#### **4<sup>th</sup> Respondent's Submissions**

15. **Mr Sisule**, learned counsel for the 4<sup>th</sup> respondent, submitted in support of the petition. While highlighting their written submissions dated 15<sup>th</sup> October 2018 and filed in court on the same day, learned counsel contended that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents resigned as commissioners and were, therefore, no longer state officers. According to learned counsel, the fact of publishing the vacancies in a Gazette Notice is not meant to actualize the resignations. In **Mr. Sisule's** view, publishing vacancies in gazette notice(a) is merely an act of notifying the public of the vacancy and kicking off the process of recruiting new commissioners to fill the vacancies.

16. Learned counsel relied on the case of **Council of Governors v Attorney General & Another** [2017]eKLR for the submission that the Court should adopt plain language in interpreting statutory provisions. **Mr Sisule** argued that the fact of the matter remained that the three

respondents resigned as Commissioners and could not hide under the guise that the President has not gazetted the vacancies to attempt to return to the commission. He relied on the Supreme Court decision in John Harun Mwau & 2 others v IEBC & 2 Others [2017]eKLR (Petition No 2 of 2017 consolidated) on the meaning of withdrawal and when it becomes effective.

17. In learned counsel's view, once the three respondents made their intention of resigning known, they cannot be presumed to be still in office. He contended that formal communication by letter of resignation to the President followed by open announcement to that effect was sufficient to constitute a substantive and legally effective act of ceasing to be Commissioners.

### ***1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's submissions***

18. **Miss Anyango**, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, submitted also highlighting their written submissions dated 16<sup>th</sup> October 2018 and filed in court on the same day, that the three respondents indeed resigned as Commissioners on 16<sup>th</sup> April 2018; that the three sent notices of their resignation to the President as required by law and that the remainder of the process including gazetting vacancies was not within the respondents' control. Learned counsel contended, therefore, that based on the above factual basis, the present petition was unnecessary. He urged that the same be dismissed.

### ***Determination***

19. I have considered this petition, the responses thereto; submissions on behalf of the parties and the authorities relied on. Although all parties appear to be in agreement that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein resigned, the only question raised by this petition seems to be when their resignation took effect, if at all.

20. The facts of this petition are not in dispute. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were Commissioners with the 4<sup>th</sup> respondent with the 1<sup>st</sup> respondent as the Vice Chairperson of the commission. On 16<sup>th</sup> April 2018 the three, addressed a press conference publicly announcing their resignation from the commission with immediate effect. Reasons for their resignation are not importance in so far as this petition is concerned. What followed was this petition seeking reliefs to the effect that the three respondents should vacate office, formally hand over commission properties and that they should not be paid salaries and benefits.

21. The three respondents filed responses that were similar in content stating that they had indeed resigned as Commissioners and formally sent written notices of their resignation to the President and that they were not in control of what would follow next since it was up to the President to actualize their resignation by publishing vacancies in a Gazette Notice.

22. While this petition was pending for hearing, the 1<sup>st</sup> and 2<sup>nd</sup> respondents tried to go back to their former offices which prompted the petitioner to file an application for restraining orders, contending that having publicly resigned, the three could not go back to their former offices and the court granted restraining conservatory orders pending the hearing and determination of the petition. The question that arises therefore is when the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' resignation took effect.

23. The 4<sup>th</sup> respondent is an independent constitutional commission established under Article 88(1) of the constitution. Its Commissioners are identified and appointed in accordance with Article 250(2) of the Constitution and section 5 of the Act as read with the First Schedule to the Act. That is; commissioners are identified in accordance with the IEBC Act, approved by Parliament and appointed by the President.

24. Article 251 of the Constitution provides how a Commissioner may be removed from office. According to this Article, a commissioner can only be removed from office on grounds of serious violation of the constitution or any other law including contravention of chapter six, gross misconduct, physical or mental incapacity, incompetency or bankruptcy. A person desiring the removal of a commissioner on any of the above grounds, has to present a petition to the National Assembly setting out the alleged facts constituting the ground; the National Assembly will then to consider the petition and, if it is satisfied that the petition discloses a ground for removal, will send the petition to the President and on receiving the petition the President may suspend the commissioner pending the outcome of the complaint and appoint a tribunal to investigate the complaint.

25. It is plain from the reading of the constitutional text, that there is no provision for a commissioner's resignation. The Constitution speaks of removal from office which means that the action to remove a commissioner is third party driven as opposed to self-desire to leave. That cannot, however, mean that a commissioner who desires to leave cannot resign because the constitution does not allow it. In my respectful view, a commissioner just like any other person, has a constitutional right to leave the commission if he wishes and no one can stop him. To leave employment is a right to make a choice and therefore a constitutional right that cannot be limited as it is not legally possible to force one to keep a job he or she does not wish to. And as the Supreme Court observed in John Harun Mwau & 2 others v IEBC & 2 Others (*supra*) that no one could be forced to participate in an election he had lost interest in, in the same vein, there is no way a commissioner can be forced to remain in office if there is no longer such motivation simply because there is no constitutional provision for resigning from office.

26. That notwithstanding, the IEBC Act provides for resignation, stating at section 7A (1) (b), that a vacancy may arise following resignation by notice in writing to the President. Section 7A(2) requires the President to then publish a notice of the vacancy in the Gazette within seven days of the occurrence of the vacancy and under sub section (3), recruitment should commence immediately after declaration of the vacancy.

27. The Act, therefore, recognizes that a commissioner may resign and actualizes that resignation through a written notice to the President. There is no doubt that in the present petition, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents followed the statutory script when they resigned as commissioners of the 4<sup>th</sup> respondent. They did not only send to the President written notices as admitted in their own affidavits, but also publicly informed the people of Kenya that they had resigned as commissioners, a self-removal act as opposed to one instigated by a third party in terms of Article 251 of the Constitution.

28. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not attached copies of their notices of resignation sent to the President, but a reading of their affidavits leaves no doubt that they impliedly resigned with immediate effect. This is so because they have not stated anywhere in those affidavits that they gave a periodic notice within which they were to resign. That means, and they agree, that they resigned on 16<sup>th</sup> April 2018 and not any other date and therefore with immediate effect. Taken in that context and without evidence to the contrary, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' resignation was immediate following their written notice to the President and public announcement.

29. I have read the text of section 7A of the IEBC Act, and it is plain to me, that the section does not require the President to approve or decline resignation by a member of the commission. The act of sending a letter to the President communicating resignation, is intended to create a vacancy and kick off, first; declaration of the vacancy and second, followed by recruitment for the replacement. In interpreting section 7A, the court should give it a plain language in determining the legislature's intention. Where the intention of the legislature is clear, the court should not do more than give effect to that intention. The court should only go on to search for the intention where there is ambiguity in the legislation or its provision.

30. At the same time the court should not stretch the meaning of a statute or its provision beyond that intended by the law maker. In that regard, therefore, giving section 7A a plain interpretation, it is my considered view that the section does not require a commissioner to notify the President of his/her intention to resign but rather to notify the President of his or her resignation. That is; the commissioner is deemed to have resigned upon sending a written notice to that effect to the president.

31. Furthermore, from the reading of the statute, the President does not have discretion whether or not to accept the resignation. He is only notified by the commissioner of the resignation and the President's mandate is that to initiate the rest of the process by declaring a vacancy which leads to the process of recruitment of replacement(s). In that respect, therefore, it is my finding, and I so hold, that resignation of a commissioner is immediate upon notifying the President in writing, of the resignation. Publication of the vacancy in the gazette is a formal step and has no bearing on the actual act of resignation. That, in my view, is the spirit of the statute and its provision.

32. There was a contention that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had purported to go back to office on the pretext that the Court, (*Okwany J*, had stated in *Isaiah Biwott Kangwony v Independent Electoral and Boundaries Commission & another [2018] eKLR* that the three respondent's resignation was not proper implying that the three were still in office. I have had advantage of reading the decision by *Okwany J* and what the learned Judge said after considering section 7A was that;

***“[28]. From a legal standpoint therefore, and in light of the clear provisions on how a vacancy may be created in the commission, this court is unable hold that there is any vacancy in the Commission following the alleged resignations communicated through the press statements. My finding is that if indeed, the lawmakers intended that a vacancy, through resignation, may be communicated through any other means other than a letter addressed to the President, then the Act would have explicitly stated as much...”(underlining mine)***

33. It is clear that the learned Judge was referring to the fact that no material evidence had been placed before her on the three respondents' resignation except what was in the media. That could not be taken to mean the three respondents were still lawfully in office as that was not the decision of the court. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents were not parties to that petition and for that reason, the facts they have disclosed to this court regarding their resignation were not available for consideration by *Okwany J*.

34. Having carefully considered this petition, the responses, submissions and the law, the conclusion I come to is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents resigned as commissioners with the *Independent Electoral and Boundaries Commission* on 16<sup>th</sup> April 2018 and ceased to be members of the commission upon notifying the President of their resignation. Whether or not vacancies have been declared does not make them commissioners any more. Regarding the contention that they should not be paid salaries and benefits that is not a matter for this court since there are oversight organs that deal with such issues.

35. Based on what I have stated above, I am satisfied that the petition is merited and is allowed and I make the following order which I find appropriate in the circumstances of this case.

***i. A declaration is hereby issued that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents ceased to be commissioners of the Independent Electoral and Boundaries Commission, the 4<sup>th</sup> respondent, on 16<sup>th</sup> April 2018 upon resigning.***

***ii. Each party do bear their own costs.***

**Dated Signed and Delivered at Nairobi this 7<sup>th</sup> day of December 2018**

**E C MWITA**

**JUDGE**