



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.445 OF 2013

BETWEEN

**ENG. PIUS KATHUKYA.....1ST
PETITIONER**

AND

PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

PROF. MARGARET KOBIA.....2ND RESPONDENT

JUDGMENT

1. Pius Kathukya filed this Petition on 1/11/2013 and although quite bare and is not dated and is not supported by any Affidavit, it is quite obvious what his complaint is. And since he was acting in person, I decided to hear him nonetheless. I invoked **Article 159(2)(a), (b) and (d)** of the **Constitution** in doing so.
2. His complaint is as follows; that on an unclear date, he applied for the position of Principal Secretary in the Government of Kenya and specified that his expertise would be required at the Ministry of Industrialization. He was, according to him, shortlisted for the interview to fill up that position but the Respondent declined to invite him for an interview and so he never got an opportunity to show his competence and expertise for the job.
3. The main and substantive prayer in the Petition is that the Respondent should re-advertise the position of the Principal Secretary in the Ministry of Industrialization and select a Principal Secretary with skills to *“add industries in this Nation and reduce importation [of goods]”* and also transform *“KIRDI which has not come up with any single raw material to make other products required by the people”*. KIRDI is the acronym for the Kenya Industrial Research and Development Institute.
4. The Respondent's answer to the Petition is contained in a Replying Affidavit sworn on 3/12/2013 by Professor Margaret Kobia, Chairperson of the Public service Commission (PSC). While admitting that the Petitioner indeed applied for employment as Principal Secretary, among more than 2000 applicants for the position, he was neither shortlisted nor interviewed and he was

therefore not appointed by the President to that position.

5. Further, that by dint of the provisions of **Article 155(2)** of the **Constitution** and **Section 12(1)** of the **National Government Co-ordination Act, 2013**, a Principal Secretary is responsible for the administration of a State Department and he need not be a technical person with technical skills and expertise in a particular field as argued by the Petitioner.
6. In any event, that once the interviews for the position(s) were conducted by the Public Service Commission, the said Commission became *functus officio* as the appointments are in fact made by the President and not the Commission.
7. That therefore the Petition is misguided and should be dismissed with costs.
8. I have considered the oral submissions made by both the Petitioner and Miss Mwangi, learned State Counsel on behalf of the Respondent and I wish to render my opinion as follows;
 - (i) From his Submissions, it is clear that the Petitioner, a USA trained Chemical Engineer is unhappy that he was not employed at the Ministry of Industrialization where he is certain that his skills and experience are needed. **But what is the process by which Principal Secretaries are recruited?**

Article 155 of the **Constitution** provides as follows in that regard;

“(1) There is established the office of Principal Secretary, which is an office in the public service.

(2) Each State department shall be under the administration of a Principal Sec

(3) The President shall—

(a) nominate a person for appointment as Principal Secretary from among persons recommended by the Public Service Commission; and

(b) with the approval of the National Assembly, appoint Principal Secretaries.

(4) The President may re-assign a Principal Secretary.

(5) A Principal Secretary may resign from office by giving notice, in writing, to the President.”

What process is used by the PSC to reach the stage of making recommendations to the President?

According to the unconverted position stated by Prof. Kobia, once a vacancy is announced, applications are made and received. Thereafter interviews are conducted and the names of suitable candidates are forwarded to the President for nomination. The National Assembly later subjects the nominees to an approval process before appointments are made by the President.

In the instance case, the Petitioner did apply for appointment but was not shortlisted for interviews and so his journey ended there.

(ii) Is there anything unlawful or unconstitutional about the way the PSC conducted itself in the present case?

The Petitioner in his Petition stated that he was *“shortlisted as competent for interview, but the Respondent declined to write to the Petitioner inviting him to attend interview (sic)”*

The above position is disputed by Prof. Kobia who deponed that the “*Petitioner herein was not among the shortlisted candidates*” and that fact was borne out by the fact that his name was not in the list of shortlisted candidates published in daily newspapers and the PSC's website.

That evidence has not been shaken and I believe it. The Petitioner's statement that he was shortlisted is not supported by any evidence at all and I will dismiss it as baseless

The Petitioner in his Petition also stated that “*the Respondent declined to respond to an application by the Petitioner seeking the position of Principal Secretary in the Ministry of Industrialization*” contrary to **Article 22 Clauses 1 and 3 (c) and (e) of the Constitution**

Sadly, that **Article** relates to enforcement of the Bill of Rights including non-payment of Court fees and has nothing to do with any alleged breaches of the law by the PSC. As to whether PSC declined to respond to the Petitioner's application, Prof. Kobia stated that all the information regarding who applied for the position, who was shortlisted, who was interviewed and the eventual 26 nominees by the President were matters that were sufficiently publicised in the daily newspapers and PSC's website and the Petitioner ought to have noticed that he had been unsuccessful in his quest to be appointed a Principal Secretary.

I see nothing unlawful about the actions taken to publicise the process and it is instructive that the Petitioner has not sought to know the reasons why he was not shortlisted. If he had done that and PSC had declined to respond to him, I may have found that he had a legitimate complaint. As it is, I see no reason to find that PSC had acted in breach of the Petitioner's fundamental rights or at all

(iii) **Article 155(2) of the Constitution** states that “*each State department shall be under the administration of a Principal Secretary*”

“**Administration**” is defined in **Black's Law Dictionary** as;

“*The management or performance of the executive duties of a government, institution or business*”.

A “**manager**” is defined in the same Dictionary as;

“*A person who administers or supervises the affair of a business, office or other organisation*”

Taking all the above definitions together, it is clear to me that the office of Principal Secretary requires largely competence in management and skills to manage both financial and human capital. It is of course, in my view, quite well to argue that expertise in the relevant department is important but clearly it is managerial skills that are vital as opposed to technical skills.

The above finding will then answer the Petitioner's arguments in submissions that in the whole of Kenya, he is the most qualified person to sit in the office of Principal Secretary, Ministry of Industrialization and unlike the present holder of the office (*whose qualifications he confessed that he did not know*). He also failed in any way to show his skills in administration and management generally.

(iv) It is now trite that where certain functions are repositied by the Constitution upon an organ of government, unless that organ acts outside the law and specifically breaches that law or the Constitution (and the Court has declared so) no other organ should purport to takeover those functions. That is why the holding in **Matemu vs Trusted Society of Human Rights Alliance & Others C.A No.290/2013** holds true.

In that case, the Judges stated as follows;

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are however not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the Petition the subject of this appeal that;”[Separation of powers] must mean that the courts must show difference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role including the last work in determining the constitutionality of all governmental actions...”.”

I am duly guided and in the instant case, it is clear from my analysis above that neither the PSC, the National Assembly nor the President can be faulted in the way Principal Secretaries were eventually appointed.

9. In conclusion, the Petitioner is a gallant Kenyan who passionately argued that his skills and expertise are much need in the industrial sector. His attempts at getting employment at KIRDI and in the Central government have however been unsuccessful. He deserves sympathy but as to the Petition before me, I agree with Miss Mwangi that it is completely misguided and must fail.

10. The Petition filed herein on 1/11/2013 is hereby dismissed. As to costs, the Petitioner was unable to pay Court fees because of apparent impecunity. To punish him with costs will be unfair. Let each party therefore bear its own costs.

11. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MARCH, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Petitioner in Person

Mr. Maimbo holding brief for Mr. Irari for Respondent's

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE