



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Constitutional and Human Rights Division

Petition No. 6 of 2013

AMONI THOMAS AMFRY.....1ST PETITIONER

NAGIB MOHAMED SHAMSA.....2ND PETITIONER

AND

THE MINISTER FOR LANDS1ST RESPONDENT

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

AND

- 1. DR. MOHAMED SWAZURI**
- 2. DR. TOMIIK M KONYIMBIH**
- 3. DR. ROSE MUSYOKA**
- 4. DR. SAMUEL TOROREI**
- 5. SILAS KINOTI MURIITHI**
- 6. ABIGAEL MBAGAYA**
- 7. MUTHONI NJOGU**
- 8. CLEMENT ISAIAH LENANCHURU**
- 9. ABDULKADIR ADAN KHALIF..... INTERESTED PARTIES**

JUDGMENT

Introduction

1. The issue for consideration in this decision is whether the court should issue an order directed at the President to Gazette the Chairperson and Members of the National Land Commission established under **Article 67** of the Constitution in accordance with the provisions of the ***National Land Commission Act, 2012 (Act No. 5 of 2012)*** (“the Act”).

2. The procedure for the appointment of the Chairperson and Members of the Commission is set out in the **First Schedule** to the Act which provides:

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.

[Emphasis mine]

3. It is not in dispute that the Selection Panel shortlisted candidates, conducted interviews, forwarded names to the President, who in consultation with the Prime Minister, nominated the Chairperson and Members of the Commission. The National Assembly duly approved the names of persons so selected and forwarded them to the President for gazettelement in accordance with **paragraph 8** of the **First Schedule** to the Act. What remains now is for the President to act in accordance with **paragraph 8** of the **First Schedule** to the Act.

4. Prior to the completion of nomination and appointment process, the appointment of commissioners was challenged in court in **Petitions No. 373 and 426 of 2012**. By a judgment delivered on 12th October 2012, the court dismissed the petition. By a letter dated 15th October 2012, the Office of the Attorney

General informed the Acting Head of the Civil Service and the Secretary to the Cabinet, the Permanent Secretary, Ministry of Lands and the Chairman, National Land Commission Selection Panel that the petitions had been dismissed and conservatory orders discharged. The Deputy Chief Litigation Counsel advised that, ***“You may proceed and gazette commissioners.”***

Petitioner’s Case

5. It is the petitioners case that the provisions of the Act are underpinned by the provisions of **Article 250 (2)** which impose on the President the duty and responsibility of formally appointing the Chairperson and members of the Commission through a notice in the official Gazette. **Article 250 (2)** states as follows;

250(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.

6. The petitioners also contend that the National Land Commission is an integral part of **Chapter Five** of the Constitution titled, ***“Land and Environment.”*** Mr Mureithi, counsel for the petitioners, submitted that land policy and the newly enacted land statutes contemplate a working Commission and that failure to constitute the Commission undermines the implementation of the Constitution.

7. The petitioners aver that no reason has been advanced on behalf of the President why the interested parties have not been formally appointed into the Commission through a notice in the official Gazette as required by the law. Through their petition dated 9th January 2009 they now seek the following reliefs;

(i) A declaration that save for the formal appointment of the interested parties by His Excellency the President through a notice in the official Gazette the appointment of interested parties as Chair and Members of the National Land Commission is legal, valid and lawfully concluded.

(ii) A declaration that Chapter Five of the Constitution on Land and Environment and the land statutes particularly the National Land Commission Act, 2012, the Land Act, 2012 and the Land Registration Act, 2012 cannot be fully implemented without final appointment and assumption of office by the interested parties into the National Land Commission.

(iii) A declaration that the delay and or failure by His Excellency the President of the Republic of Kenya to formally appoint the interested parties into the National Land Commission through a notice in the official Gazette is a contravention of Articles 291), 391), 10(1), 2(c), 73(1), 2(b), (c)(i), (d), (e) and 250(2)(c) of the Constitution and Section 29 of the Sixth Schedule to the Constitution and a violation of the National Land Commission Act section 8 of the First Schedule and is not in the public interest.

(iv) A declaration that given the constitution and functions of the National Land Commission under Article 67 of the Constitution and the prescribed period of appointment of the National land Commission under Section 29 of the Sixth Schedule to the Constitution of Kenya 2010 and Section 8 of the First Schedule to the National Land Commission Act, 2010, the obligation and duty on His Excellency the President of the Republic of Kenya to formally appoint the interested parties as chair and members of the National Land Commission calls for urgent and expedited action by his Excellency the President.

(v) A declaration that the interested parties are hereby duly deemed to be appointed and gazetted as contemplated under Article 250(2) (c) of the Constitution and Section 8 of the First Schedule of the National Land Commission Act.

(vi) A mandatory order compelling the respondents to jointly and severally cause the appointment of the

interested parties as Chair and members of the national land Commission to be published in the official Gazette within a reasonable time.

(vii) Costs of this petition

Respondent's Case

8. The respondent did not file a replying affidavit, but filed a statement of grounds of opposition dated 28th January 2013 where it raised several objections. Mr Kaumba, counsel for the respondents, condensed his arguments into three broad grounds.

9. Mr Kaumba argued that by dint of **section 29 (1)** of the **Sixth Schedule** to the Constitution, the new appointments should be finalised within one year from the effective date of the parent law establishing the organ or institution. To this extent, counsel contended that the effective date for the National Land Commission appointment was on the 2nd May 2012 hence the one year period has not elapsed from that date and as such the petition is prematurely filed.

10. Second, counsel argued that there was no time limit in which the President was required to effect the appointment. Counsel noted that in accordance with the established jurisprudence as affirmed in the case of **Community Advocacy and Awareness Trust and Others v. Attorney General Nairobi Petition No 243 of 2011**, "*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 insistence that decisions must be rational that limits arbitrariness and not discretion by itself.*" Counsel maintained that there was a margin of discretion within which the President could exercise his power of appointment.

11. Third, Mr Kaumba also submitted that the operationalisation of the Commission is dependent on the creation of the County Land Management Boards established under **section 18** of the Act to which process must await the general election. The respondent's position is that the operation of the Commission is pegged on the making of rules and regulations to be approved by Parliament under **section 34** of the **Interpretation and General Provisions Act** and **section 36** of the Act hence it is prudent not to make appointments when the rules and regulations would not be approved by virtue of the dissolution of Parliament.

Determination and disposal

12. The only issue is whether the Court may direct the President to comply with clear constitutional and statutory provisions. No factual issues have been placed before the court to contest the fact that the President has not acted in accordance with statute. Secondly, the power of the President is circumscribed by the very clear terms of **Article 250(2) (c)** and the **First Schedule** which requires the President to gazette appointment of the chairperson and members of the Commission within seven days. **Paragraph 8** of the **First Schedule** to the Act does not admit any discretion and therefore the case of **Community Advocacy and Awareness Trust and Others v Attorney General (Supra)** is not applicable to this case.

13. As to the argument that the petition is premature, counsel for the respondent also referred to **section 29 (1)** of the **Sixth Schedule** to the Constitution which provides;

29. (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalised within one year.

14. This argument is not tenable as the appointments referred to under the provisions are those created by the Constitution and not those created by legislation. Such posts include office of the Chief Justice, Attorney General etc. Simply stated, the **Sixth Schedule** is not applicable where there is a specific statute governing a specific appointment.

15. I have also considered the provisions of **section 18** of the Act which the respondents have relied on

for the argument that the Commission's operation was dependent on the creation of the County Land Management Boards. The relevant part of the **section 18** provides that;

18. (1) The Commission shall, in consultation and co-operation with the national and county governments, establish county land management boards for purposes of managing public land.

(2) A county land management board shall comprise—

(a) not less than three and not more than seven members appointed by the Commission; and

(b) a physical planner or a surveyor who shall be nominated by the county executive member and appointed by the governor.

.....

16. My reading of the section is that it deals with establishment of county land management boards and does not in any way affect the operationalisation of the Commission. More importantly, the section contemplates an already functional Commission which is given the responsibility to form the County Boards.

17. The functions of the Commission are well set out in **Article 67 (2)** and mirrored in **section 5** of the Act. It is an erroneous assumption to suggest that the appointment of the Commissioners be held hostage pending the making of regulations. The **section 36** permits the Commission to make regulations for the better fulfillment of its mandate. It provides, ***“The Commission may make regulations generally for the better carrying into effect of any provisions of this Act and such regulations shall be tabled before Parliament for approval.”*** This section implies three things; First, that the power to make regulations is vested on the Commission and this necessitates that there must be an operational Commission in place to make the rules and second, that the making of the rules is ‘permissive’ to aid the Commission better discharge its mandate and third and more importantly, that the making of regulations is not a pre-condition for the discharge of the Commission's functions. As already stated, the roadmap for the discharge of the duties by the Commission are well laid out in the Constitution and the Act and therefore the respondents' reliance on rule-making to justify the stalemate in the operationalisation of the key land institution in the country is untenable and can only be at best termed as a red herring.

18. Lastly, I think a properly constituted Commission would be in a better position to carry out its Constitutional obligations including rule making, making necessary appointments and generally establishing its operations. To permit a situation where third parties including other state organs carry out or purport to take over the mandate of the Commission ultimately undermines the authority and independence of the Commission itself.

19. I find no merit in the respondent's arguments and no material has been placed before the Court to negate any responsibility imposed on the President to carry out the legislative intent contained in the **First Schedule** to the Act. Compliance with the provisions of the Constitution and statute go to the heart of the rule of law. The rule of law is a recognised national value which this Court must give effect. All State officers, organs, public officers are required to follow the law and Constitution. **Article 129** provides as follows;

129(1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.

(2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and their well-being and benefit. [Emphasis mine]

20. The process of appointment of the chairperson and commissioners of the Commission set out in the **First Schedule** is imperative and no cause has been shown why it cannot be implemented to give effect to the provisions of **Article 67** and **250(2)**. I also find and hold that failure to complete the appointment of

the chairperson and members of the Commission undermines the value of good governance in that the institution intended to govern land law and prepare land policy remains in limbo for an indeterminate period.

21. Apart from the role the National Land Commission is meant to play, failure to establish it has deep repercussions and suspends the carrying out of key functions in the land management. It is notable for instance, that operationalisation of key certain provisions is pegged on the establishment of the Commission such as **Article 62 (2) and (3)** which deals with administration of public land by dint of **Section 2(4) of the Sixth Schedule**.

22. The delay in the setting in motion the operation of such a key institution in land reforms in our country contrary to the intention of Kenyans expressed through their duly elected representatives cannot be allowed to go on especially bearing in mind our common history where the emotive issue of land has caused untold suffering and lives have been lost.

23. The nature and extent of relief for breach or non-compliance with the Constitution is within the discretion of the Court. Such discretion must be exercised judicially and in light of the circumstances of each case. In **Jayne Mati and Another v Attorney General Nairobi Petition No. 108 of 2011 [2011]eKLR**, I stated as follows; “[18] *The petitioners have sought certain declarations. The issuing of a declaration or any other relief under Article 258 of the Constitution is a matter of discretion for the court dependent on the circumstances of each case. While a right is granted to every person to institute proceedings claiming that the Constitution has been contravened or is threatened, it is not in every case that the court will grant relief. What constitutes a threat to the Constitution will of course be dependent of on the facts of each particular case. [19] What is clear to me is that Court must exercise its role in a manner that promotes constitutionalism and supports state organs, authorities and state and public officers to work together in concert to realise the dream of a new Kenya.*”

24. The Constitution requires the President to appoint commissioners in accordance with legislation. The legislative intent and directive has been expressed in **paragraph 8 of the First Schedule** to the Act. The National Assembly has done its part in accordance with the regulations, the Court has declined to intervene to stop the process of appointment and what remains now is for the President to act in accordance with the law. There is nothing to interpose the obligation of the President to act in accordance with the law. The only remedy therefore is to direct the President to act in accordance with the Constitution and the law.

25. As regards the issue of costs, I would follow what was stated in **Harun Mwau and Others v Attorney General and Other Nairobi Petition No. 65 of 2011 [2012] eKLR**, where the Court stated. “[180] *In matters concerning public interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the state but lost. Equally, there is no reason why the state should not be ordered to pay costs to a successful litigant.*”

26. In my view, this litigation is without a personal interest and one intended to ensure the realisation of the rule of law.

27. In the circumstances and in order to effect the purpose and objectives of the Constitution, I hereby direct as follows;

(a) The President be and is hereby directed to comply with the provisions of paragraph 8 of the First Schedule to the National Land Commission Act and officially appoint the Chairperson and Members of the National Land Commission within seven (7) days from the date hereof.

(b) The 2nd respondent shall bear the costs of the petition.

DATED and **DELIVERED** in **NAIROBI** this 4th day of February 2013.

D.S. MAJANJA
JUDGE

Mr Mureithi with him Mr Njamwea for the petitioners instructed by Mbugua Mureithi and Company Advocates.

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