



REPUBLIC OF KENYA



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**Okech v Chief Justice & 2 others (Petition 267 of 2013)
[2013] KEHC 2660 (KLR) (3 June 2013) (Ruling)**

CALEB OKECH V CHIEF JUSTICE & 2 OTHERS[2013]eKLR

Neutral citation: [2013] KEHC 2660 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

PETITION 267 OF 2013

DAS MAJANJA, J

JUNE 3, 2013

BETWEEN

CALEB OKECH PETITIONER

AND

HONOURABLE CHIEF JUSTICE 1ST RESPONDENT

THE CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT

THE JUDICIAL SERVICE COMMISSION 3RD RESPONDENT

RULING

Background and Introduction

1. This petitioner challenges the process of appointment of Judges of the High Court under the First Schedule to the *Judicial Service Act*, Act No. 1 of 2011 (referred to hereafter as the “First Schedule” and “the Act” respectively).
2. On 25th January 2013, the 3rd respondent, the Judicial Service Commission (“JSC”) published an advertisement calling for qualified applicants to apply for 40 positions of High Court Judge.
3. On 7th May 2013, JSC published a notice in the newspapers stating, inter alia, that, “The Judicial Service Commission having reviewed the applications for completeness and conformity with the requirements in the Advert Ref. V/No. 4/2013 has shortlisted the following seventy six (76) Candidates for interview for the Post of Judges of the High Court/Courts with status of the High Court on the dates and time herein indicated.” The names of the 117 applicants were published together with the names of the 76 candidates who had been shortlisted.



4. The press release also notified the public and shortlisted candidates that the interviews for the shortlisted were scheduled to commence on 3rd June 2013. It is this process that the petitioner seeks to injunct by way of a conservatory order which is the subject of this decision.

Petitioner's Case

5. The petitioner moved the court by a petition dated 22nd May 2013 seeking, inter alia, to quash the decision of the JSC to shortlist the 76 candidates. The petitioner's case is to be found in paragraphs 11, 12, 13, 14 and 15 of the petition which state as follows;
 - (11) It is not clear the criteria the Respondents applied in selecting the seventy six (76) names for shortlisting and rejecting/leaving out the one hundred and seventeen (117) applicants. A casual look at the list of the applicants and the list of the candidates shortlisted for the interview does not reveal much, and on the face of it creates the impression that the 3rd Respondent knew what they were doing, were acting within the law, and should be left to do their work without interference from any quarters.
 - (12) However, a detailed analysis of the report availed to the Respondents by the Law Society of Kenya on the standing and particulars of some of the applicants and the 76 candidates shortlisted for interview reveal a worrying trend and frightening conspiracy by the 3rd respondent and lays bare the fact that the Respondents are part of a criminal scheme to favour part of the 76 applicants and to prejudice a large part of the 117 left out of the shortlisting with the hope of escaping detection and blame. In the event that this grand corruption is allowed to succeed, it will roll back the tremendous gains that have been made by the Judiciary in the past three (3) or so years.
 - (13) An analysis of the 193 individual applicants reveal, for example, that a candidate admitted to the bar in 2012 has been shortlisted for interview, while at least six (6) of the persons shortlisted had cases at the Disciplinary Committee of the Law Society of Kenya or the Advocates Complaints Commission and in fact, some of the cases are still pending or remain unresolved.
 - (13) Further, analysis also reveals that out of 76 shortlisted candidates, more than half are long serving (senior) Magistrates who it is clear have been unduly favoured by the 3rd respondent by being given preference in the shortlisting at the expense of younger but suitably qualified Magistrates and more so, to the prejudice of Advocates practicing at the bar
 - (14) Further analysis shows that at least one or several other applicants who had been interviewed in the past by the respondents for the position of a Judge again applied this time but the Respondents failed to shortlist him for unknown reasons.
6. Together with the petition, the petitioner filed a Chamber Summons seeking the following conservatory order;
 - (3) Pending hearing of the main petition, this Honorable Court be pleased to issue Conservatory Orders staying and or suspending the process of interviewing, shortlisting, recommending for appointment and or hiring of new Judges by the Judicial Service Commission or in any manner whatsoever dealing with the names of the persons shortlisted for interview for the position of Judge of the High Court of Kenya.
7. The application was supported by the affidavit of Caleb Okech sworn on 24th May 2013 and a further affidavit sworn on 29th May 2013. Both affidavits set out the basic facts as I have outlined at paragraph 5 above. In order to support his case, the petitioner annexed a letter dated 17th April 2013, from the



Registrar of the JSC to the Secretary/Chief Executive Officer of the Law Society of Kenya (“LSK”) requesting him to supply to the JSC, “with any information that may render anyone of the applicants unsuitable for the post.” The LSK responded to the request by a letter dated 29th April 2013 to which was attached a matrix containing information of the candidates setting out information whether the candidates were of good standing. According to the letter, a member of the LSK was considered to be of good standing if the member has taken out a practising certificate, attained at least 5 years Continuing Legal Education (CLE) Units each year of practice as from the year 2005 and has not been convicted of disciplinary issues by the Advocates Complaints Commission.

8. Mr Kuloba, learned counsel for the petitioner, opened his submissions by emphasising that the JSC, as a constitutional commission, was bound by the values and national principles of governance set out in Article 10 of the *Constitution*. He also pointed out that Article 172(2) obliges the JSC to be guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality. Counsel reiterated the grievances set out in the petition by reference to specific cases in the matrix provided by the LSK. He concluded that on the whole the evidence demonstrated inequality, favouritism and lack of application of specific criteria to shortlist candidates for interview. On this basis he submitted that a conservatory order was warranted to stop an unconstitutional process from taking root.

Respondent’s Case

9. The respondents oppose the application on the basis of the replying affidavit by Winfrida Mokaya, the Registrar of the Judicial Service Commission, sworn on 31st May 2013. The thrust of the affidavit is that the JSC was guided by the provisions of the Constitution and the Act in shortlisting the candidates to be interviewed for the position of High Court Judge.
10. Mr Issa, learned counsel for the respondents, submitted that the allegations made by the petitioner are of a generalized nature, unfounded and lack any material basis. Counsel also submitted that there was no violation of the petitioner’s fundamental rights and freedoms. He also stated the grant of conservatory order would not be in the public interests and would not promote the efficient administration of the constitutional mandate of the JSC. Counsel cited the case of *Andrew Omtatah Okoiti v Attorney General and others* Nairobi Petition No. 92 of 2011[2011]eKLR where the court declined to grant conservatory orders to stop the JSC conducting interviews for the position of the Chief Justice and Deputy Chief Justice.

Determination

11. The application for consideration is one seeking conservatory orders and the principles upon which the court exercises discretion are well known. The jurisdiction of the High Court to inquire into the process of appointment of Judges is undoubted (see *Federation of Women Lawyers Kenya (FIDA-K) and Others v Attorney General and Another*, Nairobi Petition No. 102 of 2011 [2011]eKLR, of *Andrew Omtatah v Attorney General and Others* (Supra), *Albert Lukoru Loduna and Others v Judicial Service Commission* Nairobi Petition No. 480 of 2012 [2012] eKLR).
12. The question for determination is whether the Court should grant of conservatory orders. The principles upon which the Court acts in such circumstances are well settled. In *Centre for Rights Education and Awareness (CREAW) and 7 others v Attorney General and others* Nairobi Petition No. 16 of 2011, Hon. Justice Musinga stated that, “It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory



Order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the court the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

13. In *Muslims for Human Rights (Muburi) and 2 others v Attorney General and 2 others* Mombasa Petition No. 7 of 2011 [2011] eKLR Justice Ibrahim stated that,

“Article 23 (3)(c) confers on the court discretion to grant a Conservatory Order. The exercise of discretion as is usually the case must be exercised judiciously and not capriciously taking into account all the facts and circumstances of the case. The court in exercise of the discretion must act cautiously and with a great degree of care but still with reasonableness or flexibility and fairness to promote the enhancement and enforcement of fundamental rights and freedoms of the individual and the public at large, where appropriate.”

14. The issues raised by the petitioner concerns the process of shortlisting candidates for interview by the JSC and I must decide whether the petitioner has established a *prima facie* case with probability of success in respect of the matters pleaded as violating the Constitution and the Act. I am aware that the petition is yet to be heard yet I must take into account that a *prima facie* case is more than just an arguable case.

15. The minimum qualifications of Judges of the High Court is provided under Article 166(5) as follows;

- (5) Each judge of the High Court shall be appointed from among persons who have—
- (a) at least ten years’ experience as a superior court judge or professionally qualified magistrate; or
 - (b) at least ten years’ experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
 - (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

16. Apart from the minimum qualifications, Part V of the First Schedule sets out the criteria for evaluating the qualifications of individual applicants.

13. Criteria for evaluation of qualifications.

In determining the qualifications of individual applicants under the Constitution, the Commission shall be guided by the following criteria -

- (a) professional competence, the elements of which shall include—
 - (i) intellectual capacity;
 - (ii) legal judgment;
 - (iii) diligence;
 - (iv) substantive and procedural knowledge of the law;
 - (v) organizational and administrative skills; and
 - (vi) the ability to work well with a variety of people;
- (b) written and oral communication skills, the elements of which shall include—



- (i) the ability to communicate orally and in writing;
- (ii) the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and
- (iii) effectiveness in communicating orally in a way that will readily be understood and respected by people from all walks of life;
- (c) integrity, the elements of which shall include—
 - (i) a demonstrable consistent history of honesty and high moral character in professional and personal life;
 - (ii) respect for professional duties, arising under the codes of professional and judicial conduct; and
 - (iii) ability to understand the need to maintain propriety and the appearance of propriety;
- (d) fairness, the elements of which shall include –
 - (i) a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and
 - (ii) open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views;
- (e) good judgment, including common sense, elements of which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles;
- (f) legal and life experience elements of which shall include—
 - (i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and
 - (ii) broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of demonstrable interests and cultural backgrounds, and in areas outside the legal field; and
- (g) demonstrable commitment to public and community service elements which shall include the extent to which a Judge or Magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in which a Judge or Magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular.

17. One of the grievances raised by the petitioner is that some of the candidates who had qualified were not shortlisted. The *Constitution*, the *Act* and the regulations made thereunder do not require that all candidates who apply and who possess the minimum qualifications under the Constitution must be shortlisted. Section 30 of the *Judicial Service Act*, 2011 provides for the shortlisting of candidates. The section provides as follows;



- (1) For the purposes of transparent recruitment of judges, the Commission shall constitute a selection panel consisting of at least five members.
 - (2) The function of the selection panel shall be to shortlist persons for nomination by the Commission in accordance with the First Schedule.
 - (3) The provisions of this section shall apply to the appointment of the Chief Justice and Deputy Chief Justice except that in such case, a person shall not be appointed without the necessary approval by the National Assembly.
 - (4) Members of the selection panel shall elect a chairperson from amongst their number.
 - (5) Subject to the provisions of the First Schedule, the selection panel may determine its own procedure.
18. It follows therefore that for candidates to be shortlisted, they must meet the minimum constitutional requirements set out in Article 166(5) and satisfy the criteria set out in regulation 13 of the First Schedule. In shortlisting candidates Article 172(2) requires the JSC to shortlist candidates competitively and take into account gender equality. By applying these principles it is clear that the JSC shortlist will not contain all the applicants or all the applicants who have met the minimum constitutional qualifications.
19. The petitioner's case is that the JSC failed to apply these criteria in shortlisting candidates for interview. The petitioner's case focuses on certain candidates identified by the matrix provided by the LSK who allegedly had the deficiencies which I have set out in paragraph 5 above.
20. The petitioner's case is primarily based on information contained in the matrix of information supplied by the LSK. This begs the question, what is the place of information provided by LSK in the process of appointment of Judges. Regulation 8 of the First Schedule deals with information from professional bodies and it provides as follows;
8. Background investigation and vetting.
 - (1) The Commission shall, within thirty days of the reference check, investigate and verify, in consultation with the relevant professional bodies or any other person, the applicant's professional and personal background for information that could pose a significant problem for the proper functioning of the courts should the applicant be appointed.
 - (2) The background investigation and verification referred to under subparagraph (1) may continue until the time the Commission votes on its nominations.
21. I draw four conclusions from regulation 8 of the First Schedule regarding the information provided by professional bodies. First, the key obligation placed on the JSC is to investigate and verify the information provided to it. Second, the role of professional bodies is to provide information necessary for the JSC to carry out its evaluation of the candidate. Third, such information provided is not conclusive of the qualification of the candidate as the JSC must consider whether such information "could pose a significant problem for the proper functioning of the courts should the applicant be appointed." Thus, the fact of conviction of a disciplinary infraction does not of itself, within the regulations, disqualify a candidate. Fourth, information provided is subject to further investigation and verification which may continue until the time the Commission votes on nominations. In other words, the matrix provided by the LSK is not conclusive of the qualification of the candidate. To hold otherwise would be to give the LSK a veto over candidates qualifying for judgeship which would



- be contrary to the requirement of independence of the JSC guaranteed under the Constitution. I would also add that the LSK information is limited to whether a member is of “good standing” which parameters are set by the LSK itself. The duty of the JSC is to go beyond what is provided by the LSK.
22. On the basis of the *Constitution*, the *Act* and regulations contained in the First Schedule, I conclude that the petitioner’s case does not meet the threshold of a prima facie case with a probability of success.
 23. Even if the petitioner had a prima facie case, the grant of a conservatory order is discretionary and must be considered in light of the specific facts of the case. I agree with the position taken by the respondents that there has been undue delay in presenting this case. The interviews were scheduled on 7th May 2013 and the public duly informed of this fact. The petitioner only filed this matter on 23rd May 2013 and the application heard three days before the commencement of interviews. Candidates have already been notified of the interviews and arrangements have been made to conduct these interviews scheduled to run from 3rd June 2013 to 23rd June 2013. To cancel them at the last minute would not be in the public interest and would affect the rights of those candidates who have taken time to prepare for the interviews.
 24. On the other hand the process of appointment of judges is open and the public, including the petitioner, is entitled to participate in accordance with the regulations contained in the First Schedule. In the notice issued on 7th May 2013, the JSC called on members of the public, “to submit any information that may have a bearing on the selection of the candidates.” The petitioner has not demonstrated that the matters he complains of have been brought to the attention of the JSC and the JSC has declined to consider them. It would be premature, at this stage, to stop what is really a continuous investigative process that is intended to determine suitably qualified persons for judgeship.
 25. Finally, I conclude by citing the case of *John Waweru Wanjohi & others v the Attorney General & Others, Kipngetchi Maiyo & others v the Kenya Land Commission Selection Panel* Nairobi consolidated Constitutional Petitions Nos. 373 of 2012 and 426 of 2012 (Unreported), where the appointment of Commissioners to the National Land Commission was challenged and where I stated that, “The court must of course be careful not to usurp the powers and functions of the various constitutional and statutory bodies involved in appointments. The role of the court is to ensure that the fidelity of the Constitution is maintained.”

Disposition

26. For the reasons outlined above, I dismiss the petitioner’s Chamber Summons dated 24th May 2013 with no order as to costs.
27. I further make the following orders for purposes of hearing and determination of the petition;
 - (a) The respondents shall file and serve the replying affidavit to the petition within 14 days.
 - (b) The petitioner shall be at liberty to file a supplementary affidavit within 7 days of service of the replying affidavit.
 - (c) The matter shall be mentioned on 5th July 2013 for directions as to the hearing of the petition.

SIGNED AND DATED AT NAIROBI THIS 3RD DAY OF JUNE 2013.

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE 2013.



MUMBI NGUGI

JUDGE

Mr Kuloba instructed by A. S. Kuloba and Company Advocates for the petitioner.

Mr Issa instructed by Issa and Company for the 1st, 2nd and 3rd respondents.

