



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 334 OF 2013

BETWEEN

ABDI SITAR YUSUF..... PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

**SELECTION PANEL OF THE TEACHERS SERVICE COMMISSION 2ND
RESPONDENT**

JUDGMENT

1. By a petition dated 1st July 2013, the petitioner has moved to the court to make certain declarations concerning the appointment of the chairperson and members to the Teachers Service Commission.
2. This matter concerns the *Teachers Service Commission Act (Act No. 20 of 2012)* (“the Act”) and nominations of the chairperson and members of the Commission. The issue for consideration in the petition is a transitional problem where commissioners from the former Commission were retained after the Constitution created the Teachers Service Commission under **Article 237** and a new Act to implement the provision enacted.
3. As the petition concerned the interpretation of the Act and its application, the parties agreed to address me on the meaning of the Act without filing depositions and submissions. In view of the prevailing circumstances where the Commission has only one commissioner, the matter required speedy resolution and I proceeded accordingly.
4. **Section 8** of the Act sets out the procedure for nominations and appointment to the Commission. 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 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). [Emphasis mine]

5. In order to fill in vacancies created by the implementation of **Article 237** by the Act, a Selection Panel (“the Panel”) was appointed under **section 8** of the Act to fill vacancy for the position of chairperson and three members of the Commission. The Panel discharged its mandate by calling for applications, interviewing and shortlisting candidates for consideration by the President. It submitted three names for the position of chairperson and five names for the position of member. Five names were in fact shortlisted for the position of chairperson and eleven for position of member but due to the fact that only part of the Commission was being filled, the names submitted were those required to fill the partial vacancy hence **section 8(6)(d)** was not complied with by the Panel.
6. For the position of Chairperson, the President submitted one name to the National Assembly which was rejected. After this the same name was re-submitted but it was once again rejected. For the position of member, three names were submitted and were all rejected. The President then re-submitted another list for consideration with two names, which had been rejected, and a fresh name which the National Assembly duly approved.
7. The issue of interpretation of **section 8(11)** was raised in *Nairobi Petition No. 8 of 2013 Abdi Sitar Yusuf v Attorney general and Others*. In that case the petitioner argued that the President could not re-submit names rejected by the National Assembly but could only submit “*fresh nominations from amongst the persons shortlisted and forwarded by the selection panel.*” The Court considered the matter and in a judgment delivered on 25th March 2013 it stated, “[24] the submission of a list, in so far as it contained names of persons rejected by the National Assembly did not constitute “**fresh nominations**” and was therefore in breach of **section 8(11)** of the **Teachers Service Commission Act** and is to that extent set aside.”
8. At present and as a result of this state of affairs there is only one sitting commissioner. There are seven vacancies on the Commission. That of Chairperson and two members arising from the incomplete process that was cut short by the court decision in *Petition No. 8 of 2013*. Five vacancies are as a result of the members whose term has come to an end and all the parties are agreed that the appointment of these five members is to be done by constituting a panel under **section 8 of the Act**.
9. As regard the three vacancies arising from the aborted process, the narrow issue that falls for consideration is whether the names forwarded to the President for appointment of the two Commissioners must be “*fresh nominations from the persons shortlisted and forwarded by the selection under subsection 8(6).*” In simple terms, the question is whether the President must only have regard to the actual list forwarded to him.

10. In my view, the problem in this case is not merely one of legal interpretation but a practical one. As outlined in paragraph 2 above, the Panel did not forward the shortlisted number required by **section 8(6)(d)** of the Act due to the number of vacancies available hence, if a literal meaning was ascribed to “*fresh nominations from the person shortlisted and forwarded*” then there would be no list to draw from as a result of the rejection by the National Assembly and taking into account the decision of the court in ***Petition No. 8 of 2013***.
11. The problem in this case must be approached from a practical point and the court is called upon to fall back to the values and principles that infuse governance articulated in **Article 10** of the Constitution which includes good governance. There is no argument that the Panel did not conduct its proceedings in accordance with the law, all it did was that it failed to comply with **section 8(6)(d)** of the Act in light of the four vacancies that were available at the material time. Furthermore, the National Assembly and the Court intervened to change the circumstances that were not contemplated. Ideally, the Panel ought to have submitted all the thirteen applicants shortlisted to the President for consideration. The President’s hands cannot be tied by the failure of the Panel to forward the full complement of names.
12. I therefore find and hold that in the circumstances of this case, “*the persons shortlisted and forwarded by the selection panel under subsection (6)*” must be deemed to include the persons who were actually shortlisted but whose names were not submitted to the President by the Panel. These number eight out of thirteen shortlisted and constitute the pool from which the President may draw the two in order to fill the two vacancies of members of the Commission.
13. As regards the position for Chairperson all parties are agreed that in the circumstances the position has to be advertised afresh.
14. For the reasons outlined above, I now make the following orders;
- 1. In order to fill the two vacancies of member of the Teachers Service Commission, the President shall be at liberty to nominate any person not rejected by the National Assembly from the shortlist prepared by the Selection Panel under section 8(6)(d) of the *Teachers Service Commission Act, 2012* and which shortlist shall be deemed for purposes of section 8(11) of the Act to include names of persons who were shortlisted but whose names were not forwarded to the President.**
 - 2. The position of Chairperson shall be advertised and a Selection Panel constituted under section 8 of the Constitution shall proceed to consider applications in accordance with the Act.**
 - 3. There shall be no order as to costs.**

DATED and DELIVERED at NAIROBI this 8th July 2013

D.S. MAJANJA

JUDGE

Mr Ondieki instructed by Ondieki and Ondieki Advocates for the petitioner.

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

Mr A. Sitima instructed by the Teachers Service Commission.