



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 13 OF 2013

BETWEEN

NORTH EAST PROFESSIONALS

ASSOCIATION (NEPA)PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

KENYA BUREAU OF STANDARDS

(KEBS) BOARD2ND RESPONDENT

EXPORT PROCESSING ZONES

AUTHORITY BOARD (EPZA) 3RD RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY BOARD (NEMA) 4TH RESPONDENT

JUDGMENT

Introduction

1. The petitioner in this case is an association that brings together professionals from the former North Eastern Province. Their plight is that the respondents have ignored the plight of professionals from the region in the appointment of Chief Executives of the Kenya Bureau of Standards (KEBS), Export Processing Zones Authority (“EPZA”) and the National Environmental Management Authority (“NEMA”).
2. The petitioner’s case is that the appointing authorities have ignored the national values and principles of the Constitution contained in the preamble **Article 10** and **Articles 27, 232** and **250** of the Constitution. These values include among other equality, non-discrimination and protection of the marginalised.

Petitioner’s Case

3. The salient facts that form the basis of the amended petition dated 5th February 2013 emerge from the affidavits of Dr Abdirizak Arale Nunow sworn on 16th January 2013 and 5th February 2013 can be summarised as follows;
 1. In August 2010, Mr Abdikadir Omar Aden was among the several people interviewed for the position of Managing Director of KEBS. He scored the highest mark but a Mr Koskei was appointed.
 2. In November/December 2011, Dr Abdirizak Arale Nunow emerged the top candidate for consideration of the post of Director General for NEMA but Professor Wakhungu was appointed instead.
 3. In October 2012, the EPZA carried out interview to fill the post of the Chief Executive Officer, one Dr Mohammed Omar emerged the person with the highest marks but a Mr Mr Nabutola was appointed.
 4. In the circumstances, counsel for the petitioners, Mr Ondieki argued that by failing to appoint the person with the highest marks, the appointing authority had violated the Constitution and discriminated against these candidates. Further, each of the candidates had a legitimate expectation to be appointed once they had top marks. The petitioners also aver that a close scrutiny of the appointments of all parastatal chief executive officers demonstrate that professionals from North Eastern Province have been side-lined and/or left out the process for consideration.

Respondents' Case

5. Mr Moimbo, counsel for the 1st respondent, opposed the petition on the grounds the **Article 232** sets out the values and principles of the public service that underpin the guidelines for appointment in the public service. Counsel submitted that though merit was a key factor, the appointing authority was entitled to take into account the factors stated in **Article 232** in order to give effect to the objects of the Constitution. He emphasised that high scores and marks do not guarantee an appointment.
6. The 2nd respondent's position was that the appointment of the Chief Executive was carried out in accordance with the **Standards Act (Chapter 496 of the Laws of Kenya)** where the Council forwards three candidates duly interviewed to the Minister for appointment. According to the affidavit of Burudi Kalo, the Manager in Charge of Legal Service, sworn on 4th July 2013, at the material time Abdikadir Omar Aden was the highest scorer but a Mr Koskei, who was not on the shortlist, was appointed. That appointed was subsequently revoked and the recruitment process set in motion once again. Mr Aden did not apply when the post was advertised afresh. In the circumstances, there was no cause for complaint and that at all material time KEBS carried out its process transparently.
7. The position of NEMA is set out in the affidavit of Irene Kamunge, the Acting Director of Legal Services, sworn on 29th August 2013. Its position is that the process of appointment was carried out transparently and in accordance with **Environmental Management and Co-ordination Act, 1999** where the Board of the Authority recommends three candidates for appointment to the President. Ms Kamunde depones that after an open and competitive process Abdirizal A. Nunow scored the highest marks but Prof Wakhungu was appointed by the President. Its position is that once the recommendation was made to the President NEMA became *functus officio*.
8. The 3rd respondent, the EPZA, did not participate in these proceedings despite service.

Determination

9. I have read the pleadings, depositions and considered the submissions of the parties. This matter concerns the appointment of public offices. The promulgation of the Constitution heralded a new era where public appointments are to be made in a transparent and accountable manner consistent

with the values and principles of the Constitution.

10. The issue at the heart of this case is whether the appointments of the persons I have set out were contrary to the values and principles and in violation of the Constitution. I have considered the material in all the depositions and I am satisfied that in each case the processes were open, fair and transparent and in accordance with the statutory requirements governing each body.
11. In each case, the appointing authority, whether it is the President or the Minister, is left with discretion to accept or reject the advice of the statutory body. I would like to mention that this discretion does not mean that the person with the highest marks will always be selected. To insist on this will undermine the other considerations which may lead to constitutionally acceptable outcomes like promotion of gender, persons with disabilities of the marginalised. In any case persons who top the merit lists are all qualified for appointment to those positions.
12. At the end of the day, despite the lofty principles that we have given ourselves from our Constitution, each case must be decided on its own facts and merits. The petitioner bears the burden of proving that a violation of the Constitution has occurred that requires the court to grant relief.
13. I have read and re-read the pleadings and deposition and I am satisfied that the processes of appointment met the constitutional threshold. They all complied with the statutory requirements and were transparent. There is no evidence of a deliberate and systematic attempt to side-line, alienate or frustrate professionals from North Eastern Province. It has not been shown that professionals from North Eastern Province did not have an equal opportunity to compete for the positions under consideration.
14. The petitioners' grievance only relates to three organisations, while the Government has very many organisations where professionals from North Eastern Province have had the opportunity to be appointed and no evidence has been presented to show that when all the parastatals are considered there has been discrimination.

Determination

15. It is clear that the petitioner's case lacks merit. As such it is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 4th day of October 2013

D.S. MAJANJA

JUDGE

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

Mr Moimbo instructed by the State Law Office for the 1st respondent.

Mr Moriasi instructed by Ombachi Moriasi and Company Advocates for the 2nd respondent.

Mr Ouma instructed by Mereka and Company Advocates for the 4th respondent.