



Ondo & another v Ethics and Anti-Corruption Commission & 2 others; Acting Deputy Chief Executive Officer of Ethics and Anti-Corruption Commission & another (Interested Parties); Njenga (Exparte) (Petition E113 of 2021 & Judicial Review Application E019 of 2021 (Consolidated)) [2022] KEELRC 1398 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 1398 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E113 OF 2021 & JUDICIAL REVIEW
APPLICATION E019 OF 2021 (CONSOLIDATED)

MA ONYANGO, J

MAY 13, 2022

IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 41 AND 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS 33 AND 34 OF THE PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: CONTRAVENTION OF THE RULES OF NATURAL JUSTICE

BETWEEN

KEVIN OTIENO ONDO PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

ACTING DEPUTY CHIEF EXECUTIVE OFFICER OF ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

SHERIA MTAANI NA SHADRACK WAMBUI INTERESTED PARTY



**AS CONSOLIDATED WITH
JUDICIAL REVIEW APPLICATION E019 OF 2021**

BETWEEN

REPUBLIC APPLICANT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION RESPONDENT

AND

ADRIAN KAMOTHO NJENGA EXPARTE

JUDGMENT

1. This judgment relates to two suits which were instituted in respect of the same subject matter, the first being Petition No. E113 of 2021 dated 14th July 2021, while the second is Judicial Review Application No. E019 of 2021 dated 15th July 2021.
2. In the petition, the Petitioner Kevin Otieno Odongodescribes himself as a law abiding citizen of Kenya who is passionate about the upholding of the Bill of Rights, the Rule of Law and *the Constitution* of Kenya. He states that he has filed the petition in public interest by dint of Article 22(2)(c) and 258(2) (c) of *the Constitution* 2010.
3. The 1st Respondent is a Commission established by Article 79 of *the Constitution* of Kenya 2010 and Section 3 of the *Ethics and Anti-Corruption Commission Act*, 2011.
4. The 2nd Respondent is a Commission established by Article 248(2) of *the Constitution* of Kenya 2010 and whose powers are set out in Section 5 of the *Public Service Commission Act*, 2017.
5. The 3rd Respondent is a state office established by Article 156 of *the Constitution* of Kenya, 2010.
6. The 1st Interested Party is an officer and/or an employee of the Ethics and Anti-Corruption Commission, having been appointed to the position of acting Deputy Chief Executive Officer in 2019.
7. Sheria Mtaani Na Shadrack Wambui, a registered non-governmental organisation whose goal and mission is to assist members of the public, especially the vulnerable and disadvantaged, in accessing justice by supporting the rule of law and administration of justice, applied and was enjoined to the petition as a 2nd Interested Party.
8. In the petition herein, the Petitioner seeks to stop the advertisement of the position of Deputy Chief Executive Officer of the Ethics and Anti-Corruption Commission, the 1st Respondent on grounds that the 1st Interested Party who has been acting in the position for more than two years, and members of the public, have legitimate expectation that the 1st Interested Party would be confirmed to the position. Further, that the recruitment process would be a waste of public funds.
9. The second suit is a judicial review application filed by Adrian Kamotho Njenga, who describes himself as a public spirited citizen, an ardent defendant of *the Constitution* and an advocate of the High Court of Kenya. He has filed the judicial review application against the Ethics and Anti-Corruption



- Commission, the Respondent. He seeks an order of certiorari to remove into this Court and quash the recruitment notice of the position of Deputy Chief Executive Officer of the Ethics and Anti-Corruption Commission referenced as EACC/DCEO/1 published on 9th July 2021. The grounds in support of the application are inter alia, that the vacancy notice is discriminatory, irritational and arbitrary as it customises the requirements for the position to target a particular outcome and lock out eligible members of the public from lawfully competing for the position.
10. The Ex Parte Applicant further avers that the recruitment notice offends Article 47(1), 94(5), 234(2) (a)(i) and 232 of *the Constitution* and Sections 36(1)(b), 3(a) and (e), 37 *Public Service Commission Act*, 2017 as well as Section B.4.(1) of the Human Resource Policies and Procedures Manual for the Public Service of May 2016.
 11. In order to put the suits herein into perspective, it is important to set out the background of the petition and the judicial review application.
 12. The position of Deputy Chief Executive Officer of the 1st Respondent fell vacant on 1st July 2019 following the resignation of the immediate past holder thereof. The 1st Interested Party was on 5th December 2019 appointed to fill the position in acting capacity for six months. The appointment was extended by letter dated 24th November 2020 for one year. The same was to lapse on 5th December 2021.
 13. On 23rd June 2020, the Respondent internally advertised the position. The internal advertisement was however contested in *Okiya Omtata Okioti v Ethics and Anti-Corruption Commission & Another*, Petition No. E040 of 2020 which was determined on 15th January 2021, when the Court dismissed the same.
 14. The 1st Respondent thereafter again commenced the recruitment process for the position of Deputy Chief Executive Officer, this time in the Daily Newspapers, thus opening up the position to qualified members of the public as well as its serving officers.
 15. The 1st Respondent responded to the petition through the replying affidavit of Ellyjoy Bundi, the 1st Respondent's Assistant Director In Charge of Human Resources Management Department sworn on 5th August 2021 in which she states that all vacancies in the 1st Respondent are filled competitively based on merit and are advertised internally or externally where applicable as provided under Clause 2.4.5 of the 1st Respondent's Corporate Policies and Procedures Manual 2020.
 16. The affiant depones that the 1st Respondent is an independent commission established under Section 3 of the *Ethics and Anti-Corruption Commission Act* as read together with Article 79 of *the Constitution* and is therefore not governed by Section 34 of the *Public Service Commission Act*.
 17. The affiant further states that the 1st Respondent's decision to advertise the position of Deputy Chief Executive Officer externally was informed by the following reasons:
 - i. To remove the perception created in *Okiya Omtatah Okioti v Ethics and Anti-Corruption Commission & another* [2021] eKLR that the Commission by advertising internally was targeting an internal candidate;
 - ii. Need for external advertisement by the Commission was for the expansion of a qualified pool of candidates.
 18. That the advertisement and/or invitation for application for vacancies of 9th July 2021 was done in a lawful manner and in accordance with the law, rules and regulations, Commission internal policies and provisions of the corporate procedure policy, career progression guidelines and the provisions of *the Constitution* of Kenya, 2010.



19. The 2nd and 3rd Respondents filed grounds of opposition to the petition as follows –
- a. That the 2nd and 3rd Respondents are not proper parties to the notice of motion application and petition both dated 14th July 2021.
 - b. That both the Application and Petition do not reveal any specific cause of action against the 2nd and 3rd Respondents.
 - c. That the 1st Respondent is an independent body established pursuant to Article 79 of *the Constitution* and the *Ethics and Anti-Corruption Commission Act*, 2011 with full mandate to deal with its internal affairs, including recruiting, managing and firing of its own staff.
 - d. That the 3rd Respondent is established under Article 156(4)(b) of *the Constitution* of Kenya, 2010 with the mandate to represent the national government in any legal proceedings and that the national government is not a party in this suit thus the 3rd Respondent has no role in this suit.
 - e. That the 2nd Respondent is established under the *Public Service Commission Act*, 2017 and has equally no role whatsoever in the human resource management of the 1st Respondent.
 - f. That the Petitioner has failed to demonstrate to this court in any manner whatsoever how the 2nd and 3rd Respondents have violated their constitutional rights under *the Constitution* this being a matter of public interest.
20. The 1st Interested Party Abdi Ahmed Mohamud filed a replying affidavit sworn on 20th July 2021 in which he deposed that on 19th July 2021 he learnt from Court pleadings in this suit that one Kevin Otieno Odongo had filed this petition seeking orders in his favour and/or to protect his interests.
21. He deposes that the said Kevin Otieno Odongo is not known to him and that he has not given the said Kevin Otieno Odongo instructions to represent him or his interests in this suit. He further states that he is qualified, for the position of Deputy Chief Executive Officer of the 1st Respondent and happy to be subjected to an open and fair interview process like all other interested and qualified Kenyans.
22. With respect to the judicial review application, the Respondent (the Commission) again filed a replying affidavit of Ellyjoy Bundi sworn on 24th August 2021 in which it is deposed that the minimum requirements for the position of Chief Executive Officer are in the statute but there are no requirements in the statute for the position of the Deputy Chief Executive Officer.
23. The affiant states that in arriving at the qualifications for the vacant position the Respondent was guided by the Career Progression Guidelines.
24. That the Commission's Career Progression Guidelines at Section 1.1.2 provides the minimum number of months or years of experience the job holder is required to have to be appointed to the position of Deputy Chief Executive Officer to be 17 (Seventeen) years of service, of which five (5) should be in comparable position from a reputable organization.
25. That under Article 1(2) of the International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (No. III) it is provided; "Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."



26. On the averment that the Respondent failed to disclose the remuneration of the position the affiant deposes that Clause 2.4.9 of the Commission's Corporate Services Policies and Procedures Manual 2020 does not provide for disclosure of the remuneration in the advertisement for vacant positions.
27. It is further the affiant's position that the vacancy notice of 14 days was in accordance with the law, the rules and regulations governing the Commission's recruitment.
28. On the Ex Parte Applicant's averment that there is no provision for the Deputy Chief Executive Officer to subscribe to the oath of office yet he carries out duties of the Chief Executive Officer, the affiant states that this averment is unfounded and without basis as the Deputy Chief Executive Officer's duties are clearly set out in the advert and in the Commission's Career Progression Guidelines and the duties are not similar to those of the Chief Executive Officer.
29. The petition and the judicial review application were disposed of together. All parties filed written submissions except the 2nd and 3rd Respondents, that is, the Public Service Commission and the Attorney General. I will therefore refer to the 1st Respondent as the Respondent henceforth in this judgment.

Analysis and Determination

30. I have considered the pleadings and submissions of the parties and the issues arising for determination are the following:
 - i. Whether the *Public Service Commission Act* applies to the Ethics and Anti-Corruption Commission;
 - ii. Whether the Interested Party should be confirmed to the position of Deputy Chief Executive Officer;
 - iii. What are the applicable qualifications for Deputy Chief Executive Officer of the Respondent; and if so,
 - iv. Whether such qualifications are higher than those of the Chief Executive Officer;
 - v. Whether the Petitioner and Ex Parte Applicant are entitled to the prayers sought.

i. Whether the Public Service Commission Act applies to the Ethics and Anti-Corruption Commission

31. It is the submission of the Petitioner, 2nd Interested Party and the Ex Parte Applicant that the *Public Service Commission Act* applies to the Ethics and Anti-Corruption Commission.
32. The Petitioner submits that any internal policies of the Respondent ought to conform to *the Constitution* and statutes, including the *Public Service Commission Act*. That Section 34(3) of the Public Service Commission does not permit an employee to act in a vacant position for two years. That the 1st Interested Party therefore had legitimate expectation to be confirmed to the position. That the advertisement is a violation of fair labour practice and a waste of public funds.
33. The 2nd Interested Party relies on the decision in *Edab Cherono Maiywa v University of Nairobi Enterprises and Services Limited* [2020] eKLR, *Kenya Shoe & Leather Workers Union v Slapper Shoe Industries* [2015] eKLR and *Silas Kaumbuthu Mbutura v Meru Central Dairy Co-operative Union Limited* [2015] eKLR.



34. The Ex Parte Applicant also faulted the Respondent's recruitment notice on grounds that it contravened Sections 36(1)(b), (30(a) and (e), Section 37(1), (2), (3) and (4)(e) of the Public Service Act. I have however noted that in the submissions of the Ex Parte Applicant there is no reference to the Public Service Act. I presume that the Ex Parte Applicant is no longer pursuing this line of argument.
35. The Respondent has submitted at length and in great detail, that the Respondent, being an independent commission, is not bound by the Public Service Commission Act. It refers to Article 79 of the Constitution which provides: -
- Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter.
36. It submits that pursuant to the provisions of Article 79 of the Constitution, the Ethics and Anticorruption Commission Act was enacted as the legislation giving life to the said Article 79. The said Act established the Ethics and Anti-Corruption Commission at Section 3 which provides: -
1. There is established an Ethics and Anti-Corruption Commission.
 2. In addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to—
 - a. Acquire, hold, charge and dispose movable and immovable property; and
 - b. Do or perform all such other things or acts for the proper discharge of its functions under the constitution, this act or any written law, as may lawfully be done or performed by a body corporate.
37. The Respondent further relies on the decision in Judicial Service Commission v Salaries and Remuneration Commission & another [2018] eKLR where the Court observed inter alia that:
- “In that context, commissions and independent offices have operational, administrative, decisional and financial independence when discharging their constitutional mandate. They do not therefore seek direction or permission from any other person or authority on how they should perform their constitutional mandate. The people of Kenya, while adopting the Constitution, decided that commissions and independent offices act independently and perform their constitutional mandate to the exclusion of other organs of state, authorities or persons.”
38. Both the Public Service Commission and the Ethics and Anti-Corruption Commission are independent commissions established under the Constitution. Article 249(2) specifically provides that -
- (2) The commissions and the holders of independent offices—
 - a. are subject only to this Constitution and the law; and
 - b. are independent and not subject to direction or control by any person or authority.
39. Section 18 of the Ethics and Anti-Corruption Commission Act provides as follows -
18. Staff of the Commission



1. There shall be a secretariat of the Commission.
 2. The secretariat shall comprise of—
 - a. such professional, technical and administrative officers and support staff, as may be appointed by the Commission in the discharge of its functions under this Act; and
 - b. such public officers as may be seconded by the Public Service Commission to the Commission upon its request.
 3. For purposes of this Act, a public officer who is seconded to the Commission under subsection (2)(b), shall be deemed to be an employee of the Commission and shall enjoy the same benefits and shall be required to comply with *the Constitution*, this Act and any other written law relating to matters of ethics, leadership and anti-corruption, and any instruction, orders and directions of the Commission in the same manner as an employee recruited directly by the Commission under this Act.
 4. The Commission shall, in the appointment of employees, ensure that—
 - a. at least one-third of the employees are of either gender;
 - b. the appointment reflect ethnic and regional diversity of the people of Kenya.
40. Further, Section 28 of the Act provides –
28. Independence of the Commission
- Except as provided in *the Constitution* and this Act, the Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority.
41. Also, relevant is Section 32 which provides –
32. Regulations
- The Commission may make regulations for the better carrying out of this Act, with respect to—
- a. the appointment, including the power to confirm appointments of persons, to any office in respect of which it is responsible under this Act;
 - b. the disciplinary control and termination of appointments of employees of the Commission; and
 - c. the practice and procedure of the Commission in the exercise of its functions under this Act.
42. The Third Schedule to the Act is the Code of Conduct for members
- members and employees of the Commission. Rule 1 of the Code provides –
1. Impartiality and independence of members
 1. Every member and employee of the Commission shall impartially and independently perform the functions of a member in good faith and without fear, favour or prejudice, and without influence from—
 - a. the Government;



- b. any public officer;
 - c. any political party;
 - d. candidate participating in an election; or
 - e. any other person or authority.
43. From all the provisions cited it is clear that the Ethics and Anti-Corruption Commission, being an independent commission with its own Act and Code of Conduct, is not bound by the *Public Service Commission Act*. Section 34 of the *Public Service Commission Act*, or any other provisions of the said Act, are not applicable to the Ethics and Anti-Corruption Commission.
44. The foregoing also address the issue raised by the Ex Parte Applicant to the effect that the advertisement did not contain the benefits and remuneration package of the Deputy Chief Executive officer.

Whether the Interested Party ought to be confirmed to the position of Deputy Chief Executive Officer

45. The Petitioners and 2nd Interested Party seek to stop the advertisement to fill the position of Deputy Chief Executive Officer on grounds that the 1st Interested Party has acted in the position in excess of two years and ought to be confirmed to be position. They cite legitimate expectation of the 1st Interested Party and a waste of public funds in the process of recruitment.
46. The 1st Interested Party in his replying affidavit has no issue with the advertisement of the position. He deposed in the replying affidavit sworn in response to both the petition and the judicial review application, that he is qualified for the position and would be happy to go through an open interview.
47. Of significance is that the 1st Interested Party deposed that he did not instruct the Petitioner or the 2nd Interested Party to file this suit to protect his rights.
48. Articles 22(1) and (2) and Article 258 provide persons who institute Court proceedings in their own right or in defence of others. The two articles are reproduced below –

22. Enforcement of Bill of Rights

- 1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.

258. Enforcement of this Constitution



3. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
 4. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.
49. In the instant suit, the 1st Interested Party, whose interests both the Petitioner and 1st Interested Party have stated they are protecting, has indeed indicated that he does not need such protection and has not instructed any of them to institute the current proceedings on his behalf.
50. In any event, he does not fall under the category of persons on whose behalf another person can institute Court proceedings by dint of either Article 22(2) or Article 158(2). In this respect, neither the Petitioner nor the 2nd Interested Party have locus to institute the instant proceedings to protect the rights of the 1st Interested Party who is able and capable of instituting this suit and who does not feel aggrieved by the advertisement that has been impugned and is the subject of the petition herein.
51. The question of protecting legitimate expectations of the 1st Interested Party therefore does not arise.
52. Besides the foregoing, the Petitioner and 2nd Interested Party argue that the 1st Interested Party should be confirmed to the position because he has acted in that position for more than two years. They cite the provision of Section 34 of the [Public Service Commission Act](#) which provides that acting appointments may not exceed six months.
53. As I have already observed above, Section 34 of the [Public Service Commission Act](#) is not applicable to the Ethics and Anti-Corruption Commission.
54. Even assuming it did, Section 34 of the [Public Service Commission Act](#) does not provide that where an employee acts in excess of the prescribed period such employee will be confirmed to the position. Subsection (6) thereof provides that whenever it comes to the attention of the Commission that an authorised officer has made an acting appointment or assignment in contravention of the Section, it shall take corrective measures, including substantively filling the position.
55. Taking corrective measures does not equal confirming an officer to the position. There are many forms of corrective measures including substantively filling the position.
56. In the instant case, the 1st Respondent has stated that the 1st Interested Party was originally appointed to act in the vacant position for six months from 5th December 2019 and on 23rd June 2020, advertised the position internally.
57. That this internal advertisement was contested in *Okiya Omtata Okoiti v Ethics and Anti-Corruption Commission & Another* (supra) whose judgment was delivered on 11th January 2021.



58. That the acting appointment of the 1st Interested Party was extended for a period of one year by letter dated 24th November 2020 and was to expire on 5th December 2021, thus it embarked on the process of filling the position by the advertisement that is the subject of the suits herein.
59. It is the 1st Respondent's position that the extension was in line with its internal policy on acting appointments which provides at Section 2.5.18.6 that acting appointments will be for a duration of six months but may not exceed twelve months.
60. Having found that the *Public Service Commission Act*, upon which the Petitioner and 2nd Interested Party anchored their prayer for appointment of the 1st Interested Party to the position of Deputy Chief Executive Officer of the 1st Respondent is not applicable, the only other argument left is legitimate expectation which the Petitioner and the 2nd Interested Party have relied on.
61. As I have pointed out above, the 1st Interested Party does not support this argument of the Petitioner and 2nd Interested Party. The Court will nevertheless consider whether the 1st Interested Party had legitimate expectation for appointment without a competitive process by virtue of the long acting appointment.
62. In the case of *Republic v Director of Public Prosecutions & 4 others Ex parte - Senator Johnson Nduya Muthama* [2015] eKLR, at page 46, the Court cited De Smith, Woolf & Jowell, in "Judicial Review of Administrative Action" 6th Edition Sweet & Maxwell page 609:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the Constitutional principle of the rule of law, which requires predictability and certainty in Government's dealings with the public."

Unless a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage, one cannot claim legitimate expectation".

63. Again, in *Republic v Kenya Revenue Authority Ex parte Shake Distributors Ltd* [2012] eKLR
- "...the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."
64. From the facts of this case, especially the replying affidavit of the 1st Interested Party, there is no proof of legitimate expectation.
65. Even had a promise been made to the 1st Interested Party that he would be confirmed, this would still not constitute legitimate expectation.
66. By "legitimate", it is expected that the action, or the promise or the expectation, is within the province of the law. In this case the law that is applicable is Article 232 of *the Constitution* which provides for values and principles of public service and the national values and principles of governance at Article 10 of *the Constitution*. Both provisions underscore good governance, integrity, transparency and accountability, fair competition and merit-based appointments. By demanding that the 1st Interested Party be confirmed to the position of Deputy Chief Executive Officer, the Petitioner and 2nd Interested



Party are demanding that the 1st Respondent violates Article 10 and 232 of *the Constitution*. Legitimate expectation, cannot be anchored on an expectation that is unconstitutional.

67. I thus find that there was no legitimate expectation by the 1st Interested Party or any other person, for his confirmation to the position of Deputy Chief Executive Officer without undergoing a competitive selection process.
68. In the judicial application, the Ex Parte Applicant has identified the following issues for determination:
- a. Whether the position of the Deputy CEO of the Respondent as currently structured is duly provided for in law;
 - b. If provided for, what are the applicable qualifications for appointment to the position of the Deputy CEO of the Respondent;
 - c. Whether the minimum qualifications for the position of Deputy CEO of the Respondent can be higher or superior to those of the position of substantive CEO as prescribed by section 16 of the *Ethics and Anti-Corruption Commission Act*, 2011;
 - d. Whether the requirement for applicants to possess at least 17 years relevant work experience is lawful, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;
 - e. What is the effect of non-compliance with the applicable statutory and constitutional imperatives?

The Qualifications of Deputy Chief Executive Officer

69. The Ex Parte Applicant has submitted that in view of the fact that the *Ethics and Anti-Corruption Commission Act* does not provide for the qualifications of the Deputy Chief Executive Officer, the logical inference is that the qualifications applicable to the Chief Executive Officer would apply to the Deputy Chief Executive Officer. He relies on the decision in *Resley v The City Council of Nairobi* [2006] 2 EA 311 it was held thus:

“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid ...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent.”

70. The qualifications for Secretary/CEO as set out in Section 16 of the *Ethics and Anti-Corruption Commission Act* as follows:
- (2) A person shall be qualified for appointment as the Secretary of the Commission if the person—
 - a. is a citizen of Kenya;
 - b. possesses a postgraduate degree from a university recognised in Kenya;
 - c. has had at least ten years proven experience at management level;



- d. has experience in any of the following fields—
 - i. ethics and governance;
 - ii. law;
 - iii. public administration;
 - iv. leadership;
 - v. economics;
 - vi. social studies;
 - vii. audit;
 - viii. accounting;
 - ix. fraud investigation;
 - x. public relations and media; or
 - xi. religious studies or philosophy;
- e. meets the requirements of Chapter Six of *the Constitution*.

(2) The Secretary shall be a State officer and shall serve on such terms and conditions as the Commission may determine.

71. In the impugned advertisement, the Respondent set out the following qualifications for the Deputy Chief Executive Officer:

“For appointment as the Deputy Chief Executive Officer of the Commission, a person must possess the following qualifications:

- i. Be a citizen of Kenya;
- ii. Meet the requirements of Chapter Six of *the Constitution*;
- iii. Holds a degree in either Law, Criminology, Communications, Arts, Science, Economics, Political Science, Education, International Relations, Engineering, Business Management, Public Administration, Governance or any of its equivalent qualification from a recognised university;
- iv. Master’s degree in either Law, Criminology, Communications, Arts, Science, Economics, Political Science, Education, International Relations, Engineering, Business Management, Public Administration, Governance or its equivalent qualification from a recognised University;
- v. Have at least seventeen (17) years’ relevant work experience out of which at least five (5) years at the position of Director in a public organization or its equivalent in a reputable institution in any of the following fields: ethics and governance; law; fraud investigations; economic intelligence, public administration; leadership; management; economics; audit; accounting; public relations or any other relevant fields.
- vi. Membership in a related professional body in good standing;



- vii. Leadership/Governance training lasting not less than six (6) weeks from a recognized institution.
 - viii. Professional training in Law, Anti-Corruption, Ethics, Integrity, Fraud Investigations, economic intelligence, Finance or Accounting or any other relevant fields lasting not less than four (4) weeks from a recognized institution.
72. The Ex Parte Applicant submits that the Respondent has set the mandatory qualifications for the position of Deputy CEO to be onerously higher than those applicable to the substantive CEO position, and contrary to section 16 of the *Ethics and Anti-Corruption Commission Act*, 2011. That the qualifications enumerated at numbers v-viii of the Respondent's vacancy notice have no basis in law, since they are not statutorily set as mandatory. That the said extras are elements of advantage to persons in possession of the same and should only be regarded as such.
73. The Ex Parte Applicant further submits that the impugned vacancy notice did not provide for the applicable remuneration including salary, allowances and other benefits as required, contrary to Article 232(1)(f) of *the Constitution*. That imposition of baseline qualifications for the position of Deputy CEO that are higher or stiffer than those of the position of substantive CEO would be to turn logic on its head.
74. The Ex Parte Applicant relies on the case of *Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 others (Interested Parties)* [2019] eKLR, where the court expressed itself as follows:
- “Therefore, in carrying out recruitment to public offices, the appointing authority is required, inter alia, to adhere to the twin principles of fair competition and merit. Again, *the Constitution* does not define what amounts to fair competition which is the crux of this petition. However, the spirit of these provisions was well articulated in *Consumer Federation of Kenya (COFEK) vs. Attorney General & 2 others* [2012] eKLR, in which the High Court cited with approval the case of *Community Advocacy and Awareness Trust and Others vs. Attorney General Nairobi* Petition No 243 of 2011, where the Court in relation to public appointments stated:
- “[73] 27th August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterized by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. *The Constitution* signifies the end of ‘jobs for the boys’ era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments.”
75. The Ex Parte Applicant submits that notwithstanding the lack of legal anchorage, the requirements set by the Respondent are more onerous than those prescribed for the offices of the president, chief justice, attorney general, principal secretaries and constitutional commissioners among other high positions. That it rings out clearly and with clarity that the said qualifications are ill conceived, unreasonable and unjustifiable in an open and democratic society.
76. The Ex Parte Applicant submits that Article 27 of *the Constitution* underpins the right to equal benefit and protection of the law. That should the vacancy notice be allowed to stand, members of the public who meet the prescriptions of section 16 of the *Ethics and Anti-Corruption Commission Act*, 2011, will lose the benefit accorded by the law to have their applications for the position of Deputy CEO of the Respondent considered on the merits. That through procedural impropriety and unfair introduction



of alien conditions, a vast segment of qualified citizens shall be unfairly discriminated against and irregularly excluded from the recruitment process. That by unfairly barring applications of otherwise eligible candidates, the Respondent is infringing on the citizenry entitlement to express themselves as to their qualifications and abilities in relation to the said position.

77. The Ex Parte Applicant submits that any action in breach of statutory provisions as evident herein is legally untenable and relies on the decision in *Gitbu Muigai & Another v Law Society of Kenya & Another* [2015] eKLR where it was held that:

“In our view, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority...”

78. The Ex Parte Applicant submits that the manifest noncompliance with the law renders the vacancy notice void ab initio. The qualifications under section 16 of the *Ethics and Anti-Corruption Commission Act*, 2011 are couched in the mandatory form “shall”. Any derogation from the said requirements would necessitate an amendment of the Act. By purporting to alter express statutory provisions through documents referred to as “Commission’s Corporate Services Policies and Procedures Manual 2020, and Commission’s Career Progression Guidelines, the Respondent is in downright violation of Article 94(5) of *the Constitution* which is categorical that no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by *the Constitution* or legislation.

79. The Ex Parte Applicant relies on the decision in *Macfay v United Africa Co. Ltd* [1963] 3 All E.R. 1169, where it was held that:

“If an act is void, then it is a nullity. It is not only bad, but incurably bad. There is no need for the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

80. The Ex Parte Applicant submits that Section 24(2) of the Statutory Instruments Act, 2013 is unequivocal that a statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act. It therefore follows that the policy documents relied upon by the Respondent are void to the extent of their inconsistency with section 16 of the *Ethics and Anti-Corruption Commission Act*, 2011.

81. That the depositions borne in the Respondents replying affidavit are unsupported by any law and are majorly denials of the obvious, hence they bear no weight of persuasion to the Court. By failing to abide by the law, the Respondent is acting contrary to the public interest. Reliance is made on the decision in *Republic v County Government of Mombasa Ex-Parte - Outdoor Advertising Association of Kenya* [2014] eKLR where it was held thus: -

“There can never be public interest in breach of the law, and the decision of the respondent is indefensible on public interest because public interest must accord to *the Constitution* and the law as the rule of law is one of the national values of *the Constitution* under Article 10 of *the Constitution*.”

82. The Ex Parte Applicant submits that the Respondent has a legal duty to ensure that its recruitment processes are carried out in conformity with the law. That this was not done in the current, case giving



- rise to the unfair and unmerited exclusion of legally qualified members of the public from the selection process.
83. The Respondent in response submits that applications for judicial review deal with the process of arriving at a decision. That the Ex Parte Applicant has not met the threshold for grant of the judicial review orders as the Applicant has not placed materials before this court to demonstrate that the Commission's decision was ultra vires, irrational, unlawful, unreasonable, procedurally unfair or discriminatory contrary to the dictates of Article 47(1) of the Constitution.
84. That in filling vacant positions in the Commission, the only processes that are statutorily guided are those of the membership of the Commission, that is the Commissioners, and the Secretary/ Chief Executive Officer. All other positions within the Secretariat are filled pursuant to the Commission's internal policy which include secondment (as permitted by the Ethics and Anti-Corruption Commission Act), internally advertised competitive processes, promotion and externally advertised competitive processes.
85. That all vacancies in the Commission are filled competitively based on merit and are advertised either internally or externally where applicable as the Commission may determine from time to time as provided under Clause 2.4.5 of the Commission's Corporate Services Policies and Procedures Manual 2020.
86. That Clause 2.4.5 of the Commission's Corporate Services Policies and Procedures Manual 2020 provides: -
- “Vacancies in the Commission will be filled competitively based on merit and will be advertised either internally or externally where applicable, as the Commission may determine from time to time.”
87. That in the case of Republic v Communications Authority of Kenya Ex Parte Information Communication Technology Association of Kenya (1CTAK) [2021] eKLR, the Court found that the Respondent acted without authority in enhancing the minimum qualifications set out in MWONGOZO, hence it acted ultra vires. That this case is distinguishable in that the Commission in filing the position of the Deputy CEO, was guided by the Commission's Corporate Services Policies and Procedures Manual 2020 and Commission's Career Progression Guidelines and hence in compliant with the requirements of the governing laws.
88. The Respondent submits that the Ex Parte Applicant has not challenged the constitutionality of the Commission's Corporate Services Policies and Procedures Manual 2020 in his pleadings. That the Ex Parte Applicant has tried to sneak this issue in his written submissions.
89. It submits further that the issue of the Commission's Corporate Services Policies and Procedures Manual 2020 was considered by the Court in Okiya Omtatah Okoiti v Ethics and Anti-Corruption Commission & another [2021] eKLR, where it was held:
- “The 1st Respondent further maintained that its decision to advertise the positions internally was supported by its Corporate Services Policies and Procedures Manual also attached to its Replying Affidavit and marked as EB - 1 that provides at Clause 2.4.5 as follows: -
- “Clause 2.4.5 All vacancies in the Commission will be filled competitively based on merit and will be advertised either internally or externally where applicable as the Commission may determine from time to time.



Clause 2.4.6 eligibility for appointment or promotion will be in accordance with the existing Career Guidelines... "

From the foregoing, it is clear the commission acted within its mandate and the confines of the law when it elected to fill the positions internally as opposed to externally.

Further the internal advertisement is supported by the 1st Respondent's Corporate Services Policies and Procedures Manual, dated July 2017 which provides at Clause 2.4.8 as follows:

"2.4.8 The Commission may, where need be, advertise vacant posts in at least two local dailies of wide national circulation, the Commission's website or any other method as the commission may decide from time to time."

I therefore find that there was no illegality or unconstitutionality in the filling of the vacant positions within the Commission by way of internal advertisement as decided by the 1st Respondent herein."

90. That to fill a position as high as that of a Deputy Chief Executive Officer, the Commission must look at the qualifications of staff to be supervised and therefore requires a more qualified person.
91. The Respondent submits that the Commission is bound by the provisions of the law on minimum requirements for the position of the Chief Executive Officer but there are none in statute with respect to the position of the Deputy Chief Executive Officer.
92. That Section 16(2)(c) of the *Ethics and Anti-Corruption Commission Act* provides for the minimum requirements of the Chief Executive Officer to be ten (10) years at management level together with any other experience from the fields specified in the said section.
93. That Section 16(2)(c) of the *Ethics and Anti-Corruption Commission Act* provides, 'A person shall be qualified for appointment as the Secretary of the Commission if the person - (c) has had at least ten years proven experience at management level;
94. The Respondent relies on the case of *Henry Mutundu v Chairperson, Independent Electoral and Boundaries Commission & another; Attorney General (Interested Party)* [2019] eKLR, where the Court held: -
 - " 85. Section 10 of the Independent Electoral and Boundaries Commission (IEBC) Act, does not provide the minimum years of general work experience that the Chief Executive Officer (CEO) must have but this does not preclude the Respondent from making a decision on how best to carry out the recruitment process within its scope of work and the functionality of the office bearer. In carrying out this work, the Respondent must however work within the law."
95. The Respondent submits that the Commission's Career Progression Guidelines provide at Section 1.1.2 the minimum number of months or years of experience the job holder is required to have to be appointed to the position of Deputy Chief Executive Officer to be 17 (Seventeen) years of service, of which five (5) should be in comparable position from a reputable organization.
96. That the qualifications set out for the position of Deputy Chief Executive Officer in the advertisement is not higher than those of the Secretary/CEO and hence the recruitment notice is in compliance with the requirements of the governing laws.



97. From the foregoing, it is clear that the main issue the Ex Parte Applicant has with the advertisement is the seventeen years of experience which in his opinion is more than the statutory provisions.
98. As the Respondent has explained, and as is evident from a keen reading of the job advertisement and Section 16 of the Act, the Act provides for ten (10) years proven experience at management level. That any experience outside management level is excluded from the 10 years proven experience at management level. This means that the experience which was not at management level is excluded for the 10 years.
99. In the advertisement, the 17 years is for “relevant” work experience, with at least five years at the position of Director.
100. Does the advert really require higher experience than the Act? I do not think so. In fact, it requires only five years at senior management level while the Act provides for ten years’ experience at management level.
101. Besides the foregoing, the Act provides that the Commission has power to hire such experts as maybe necessary for the performance of any of its functions (See Section 13(2)(e). Further, Section 18(2) of the Act gives power to the Commission to set up a secretariat as follows –
- (2) The secretariat shall comprise of—
- a. Such professional, technical and administrative officers and support staff, as may be appointed by the Commission in the discharge of its functions under this Act; and
- b. Such public officers as may be seconded by the Public Service Commission to the Commission upon its request.
102. The Act does not limit the Respondent from deciding the qualifications of the professional and technical staff to fill any positions within the organisation as is necessary for it to perform its functions.
103. Section 18(2)(a) responds to the issue raised by the Ex Parte Applicant about the qualifications of the Deputy Chief Executive Officer. Such position having not been provided for in the Act, it is the sole discretion of the Respondent to decide. On the titles and qualifications for any position within its Secretariat, the only limit being as set out in Section 18(2) of the Act.
104. The fact that the Act sets out the minimum qualifications of the CEO does not mean that the Respondent cannot appoint persons with higher qualifications than that of the CEO if such qualifications are necessary for its operations. Indeed, it is a matter of common knowledge that in most organisations the CEO is not always the person holding the highest qualifications in the organisation. The qualifications depend on the requirements of the positions. Specialist or technical persons, which in many organisations, require qualifications that may be higher than the CEO.
105. For the foregoing reasons, I find no merit in both the petition and the judicial review application with the result that the same are dismissed.
106. In view of the fact that the suits are framed to be in public interest (even though I do not hold the same view as the Petitioner, 2nd Interested Party and the Ex Parte Applicant) I will make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF MAY 2022

MAUREEN ONYANGO

JUDGE



ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE

