



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. E040 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: ARTICLES 3(1), 22(1) & (2)(c), 48, 50(1), 159(1) AND 258(1) & (2)(c) OF THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES 1(1), 2(1-4), 3(1), 10, 24, 73, 75, 29, 131(2)(a), 153(4), AND 232 OF THE CONSTITUTION.**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 41(1) AND 47(1) OF THE CONSTITUTION.**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTION 37 OF THE PUBLIC SERVICE COMMISSION ACT, NO. 10 OF 2017, AND OF SECTION 5 OF THE EMPLOYMENT ACT, NO. 11 OF 2007.**

**IN THE MATTER OF: DETERMINING THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE ETHICS AND ANTI-CORRUPTION COMMISSION'S DECISION TO FILL VACANCIES IN ITS SECRETARIAT THROUGH INTERNAL RECRUITMENT FROM WITHIN ITS EXISTING WORKFORCE.**

**IN THE MATTER OF: THE DOCTRINES OF LEGITIMATE EXPECTATION AND VOID AB INITIO.**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**ETHICS AND ANTI-CORRUPTION COMMISSION....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Petitioner through his Petition filed in Court on 28<sup>th</sup> August, 2020, alleges that the 1<sup>st</sup> Respondent a public body established pursuant to Article 79 of the Constitution of Kenya, 2010 and under Section 3(1) of the Ethics and Anti-Corruption Commission Act, 2011 is in the process of an unlawful and illegal recruitment process to fill a total of 12 positions as advertised in an “*Internal Advertisement*” that was to close on 7<sup>th</sup> July, 2020.

The Petitioner maintained that the said decision by the Commission was contrary to clear provisions of the Constitution of Kenya, 2010 and national legislation (the Employment Act, 2007 and the Public Service Commission Act, 2017) on appointments to Public office which ought to be done through an open, merit based, inclusive and competitive process.

The Petitioner further maintained that the Commission's actions will exclude and/or lock out qualified and interested persons from the general public by limiting the appointments to internal members of staff.

In his Petition, Mr. Omutatah highlighted the advantages of an external recruitment vis a vis one done internally and insists that the former is best suited in the circumstances.

He posits that there is no Kenyan Law in force that requires or allows for job listings to be offered to internal candidates prior to the same positions being advertised to the general public and thus the 1<sup>st</sup> Respondent's actions are inexcusable.

He avers that the recruitment process employed by the 1<sup>st</sup> Respondent is therefore discriminatory and thus contrary to the provisions of Article 27 of the Constitution of Kenya, 2010 and Section 5(1), (2) and (3) of the Employment Act, 2007.

The Petitioner further contends that the 1<sup>st</sup> Respondent's actions violate the provisions of Articles 3(1), 4(2), 10, 27, 41(1), 47(1), 73(2)(a) and 232(1)(a – f) of the Constitution of Kenya, 2010, section 5 of the Employment Act, 2007 and Section 37(1 – 3) of the Public Service Commission Act, 2017.

He seeks the following reliefs:

- a) A declaration that the EACC's impugned internal recruitment process is irregular, unlawful and unconstitutional and, therefore, invalid, null and void ab initio.
- b) An order quashing the EACC's impugned internal recruitment process.
- c) An order that in filling the existing vacancies EACC, the 1<sup>st</sup> Respondent shall adhere strictly to the law.
- d) An order compelling the Respondents to pay the Petitioner the costs of this suit.
- e) Any other relief this Court may deem just to grant.

Given the urgency in the matter the Petitioner filed his Petition together with a Notice of Motion Application filed under Certificate of Urgency under Articles 20, 22, 50(1), 23(3), 159(2)(d), 165 and 258 of the Constitution of Kenya, 2010 Sections 19 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all enabling provisions of the Law seeking inter alia the issuance of a temporary order suspending the recruitment process by the 1<sup>st</sup> Respondent.

The Application was premised on the grounds on the face of the motion and was further supported by the Affidavit of **OKIYA OMTATAH OKOITI** sworn on 27<sup>th</sup> August, 2020.

In response to both the Petition and Notice of Motion Application both dated 27<sup>th</sup> August, 2020, the 1<sup>st</sup> Respondent filed a Replying Affidavit deponed by **ELLYJOY BUNDI**, an Assistant Director in charge of Human Resources Management Department on 1<sup>st</sup> September, 2020 in which she avers that the filling of vacant positions within the commission's secretariat is governed by its internal policies that include secondment, promotions, internal and external advertised competitive processes.

She therefore deposes that the decision to fill the vacant positions internally was made at the 76<sup>th</sup> Special Meeting of the commission held on 11<sup>th</sup> June 2020 and was lawful, Constitutional and valid.

She further averred that the Commission's decision was guided particularly by the provisions of Section 2 of its Corporate Policies and Procedure Manual 2017 that provides 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...*”**

The Affiant maintains that the advertisement and/or invitation for application for vacancies was done in a lawful manner and in accordance with the law, rules and regulations, the Commission's internal policies and provisions of the Corporate Procedure Policy, career progression guidelines as well as provisions of the Constitution of Kenya, 2010.

She further states that the decision was further precipitated by the fact that the Government vide Treasury Circular Number 7/2019 dated 28<sup>th</sup> June, 2019, froze new recruitments for Ministries, Departments and Agencies, Constitutional Commissions and Independent Offices but did not bar promotions of officers within an organization.

She averred that the advertised positions were subject of promotion through an internal competitive process due to the large number of qualified officers in lower grades and few positions available and therefore submitting it to internal recruitment was not discriminatory in the circumstances.

She further avers that this Court cannot interfere with the recruitment process as promotions and/or internal recruitment processes is a competitive process and is not necessarily a Constitutional issue.

The 1<sup>st</sup> Respondent contends that the Petitioner lacks the requisite *locus standi* to make a claim for legitimate expectation and that both the Petition and the Notice of Motion Application are malicious, outrageous and are made in bad faith.

The 1<sup>st</sup> Respondent further contends that the rights that are alleged to have been infringed by the Petitioner have not been pleaded with precision as required in law.

It maintains that the Petitioner has failed to demonstrate how the recruitment process adopted affects him or the general public and how the same is unlawful, unreasonable and procedurally unfair.

It is on this basis that the 1<sup>st</sup> Respondent urged this Court to find that the Petitioner herein has failed to establish a prima facie case for the grant of the orders he seeks in his Petition and as a result dismiss the Petition with costs to the 1<sup>st</sup> Respondent.

The 2<sup>nd</sup> Respondent on its part filed its Grounds of Opposition dated 1<sup>st</sup> September, 2020 in which it maintained having been wrongly enjoined in the matter.

The 2<sup>nd</sup> Respondent was subsequently expunged from the proceedings on 6<sup>th</sup> October, 2020 when the matter came up for hearing of the Notice of Motion Application.

Parties thereafter agreed by Consent to proceed with the hearing of the Application and the main petition simultaneously and by way of Submissions.

### **Submissions by the Parties**

The Petitioner submitted that he has the requisite *locus standi* to file the instant Petition by dint of the provisions of Articles 22 and 258 of the Constitution of Kenya 2010. The Petitioner relied on the Judicial decisions in the cases of **Timothy Otuya Afubwa & Another v County Government of Trans Nzoia & 3 Others (2016) eKLR** and **Trusted Society of Human Rights Alliance v Nakuru Water and Sanitation Services Company & Another (2013) eKLR** where the Courts pronounced that a Petitioner had the relevant locus standi once it was established that the Petition was about Public Interest.

The Petitioner further submitted that he has rightfully filed his Petition seeking the correction of Constitutional infringements by the 1<sup>st</sup> Respondent and as a result the issue of *locus standi* ought not to arise. He relied on the case of **Ms. Priscilla Nyokabi Kanyua v Attorney General & Another Nairobi HCCP No. 1 of 2010** where the Court was of the view that every taxpayer had the right to approach the Court where they felt there was need to protect the rule of law and stop the unlawful conduct of an entity.

On the issue of Jurisdiction of this Court, the Petitioner maintains that this Court is clothed with the requisite jurisdiction to hear and determine his Petition by virtue of the provisions of Articles 162(2) and 165(5) of the Constitution of Kenya, 2010 and Section 12 of the Employment and Labour Relations Act as read with Rule 28 of the Employment and Labour Relations Rules, 2016.

He posits that the impugned internal recruitment process undertaken by the 1<sup>st</sup> Respondent was and is in fact irregular, illegal and unconstitutional as it is in violation of the provisions of Article 10 of the Constitution of Kenya, 2010 on Public participation as potential applicants from the general public have been locked out from participating in the recruitment process. For emphasis the Petitioner relied on the case of **Abdi Ahmed Abdi v CS Interior and Coordination of National Government & 7 Others, H.C Petition No. 238 of 2015**.

He further submitted that having an external recruitment exercise would ensure that the process was competitive and merit based as opposed to having the advertised positions filled internally. For emphasis he relied on the case of **Community Advocacy Awareness Trust & 8 Others v Attorney General & 6 Others (2012) eKLR** where the Court held that the promulgation of the new Constitution meant that there was going to be a new regime of appointments to public offices that was free from corruption, tribalism and nepotism as the process would be guided by the provisions of Article 10 of the Constitution of Kenya, 2010.

It is on this basis that the Petitioner maintained that the recruitment process employed by the 1<sup>st</sup> Respondent was carried out in gross violation of Articles 10, 27, 47, 73, 232 and 246 of the Constitution of Kenya, 2010. For emphasis he relied on the case of **Okiya Omutatah Okoiti v Attorney General & 2 Others; Francis Muthaura (AMB) & 5 Others (Interested Parties) (2019) eKLR**.

The Petitioner further contended that the Internal advertisements also violated Section 37 of the Public Service Commission Act, 2017 and Section 10 of the Ethics and Anti-Corruption Act. To fortify this argument he relied on the cases of **Judicial Service Commission v Mbalu Mutava & Another (2014) eKLR**, **Dry Associates Ltd v Capital Markets Authority & Another (2012) eKLR** and **Henry Mutundu v Chairperson, Independent Electoral and Boundaries Commission & Another (2019) eKLR**.

He further averred that the discriminatory and selective approach taken by the 1<sup>st</sup> Respondent of restricting Applications to fill vacancies at its secretariat to the exclusion of qualified and interested members of the public violates the Petitioner's and the Public's legitimate expectations. To buttress this argument the Petitioner relied on the cases of **David Kariuki Muigua v Attorney General & Another (2012) eKLR**, **Communication Commission of Kenya v Royal Media Services & 5 Others (2014) eKLR** and **Kevin K. Mwiti & Others v Kenya School of Law & 2 Others (2015) eKLR** all on the doctrine of legitimate expectation.

On the issue of costs, the Petitioner maintained that he sued the 1<sup>st</sup> Respondent in its capacity as a public office pursuant to Article 79 of the Constitution of Kenya, 2010 and hence should be condemned to pay costs to the Petitioner in the event of success.

He relied on the principle of award of costs in Constitutional litigation between a private party and the state, where the state is bound to pay costs to a party in the event of success and if unsuccessful each party to bear its own costs. Reliance was placed on the Court decisions in the cases of **Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others (2018) eKLR** and **Erick Okeyo v County Government of Kisumu & 2 Others (2014) eKLR** on the issue of costs.

In conclusion the Petitioner submitted that he has proved his case beyond reasonable doubt and therefore urged this Court to allow his Petition in terms of the reliefs sought therein.

## **1<sup>st</sup> Respondent's Submissions**

The 1<sup>st</sup> Respondent on its part submits that the Petition and Application as filed are devoid of merit and only meant to scuttle the intended promotion of officers by the 1<sup>st</sup> Respondent through a competitive process contrary to their legitimate expectation of upward mobility and career progression.

The 1<sup>st</sup> Respondent further denied that its internal recruitment exercise violated the provisions of Articles 27, 41(1) and 47(1) of the Constitution of Kenya, 2010 as alleged by the Petitioner.

It is further argued that the Petitioner has failed to prove his case to the required threshold and that he equally failed to set out with precision the particular rights that have been violated by the 1<sup>st</sup> Respondent in undertaking an internal recruitment process.

The 1<sup>st</sup> Respondent further submitted that the Petition as filed has failed to meet the threshold as set out in the cases of **Anarita Karimi Njeru v Republic (1979) KLR and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR**.

The 1<sup>st</sup> Respondent contended that no sufficient reasons have been given to warrant interference with its recruitment process. For emphasis the 1<sup>st</sup> Respondent relied on the cases of **Geoffrey Mworira v Water Resources Management Authority & 2 Others (2015) eKLR** and **Joseph Daniel Gitahi Maina v County Assembly of Nyeri Service Board & Another (2018) eKLR**.

The 1<sup>st</sup> Respondent further submitted that it intended to carry out the internal promotions through a competitive process which is not in any way illegal as the same is governed by the applicable laws, principles and practices of Human Resource Management. To buttress this argument, the 1<sup>st</sup> Respondent relied on the case of **Alfred Nyungu Kimungui v Bomas of Kenya (2013) eKLR**.

It further submitted that contrary to the Petitioner's contention the Commission has not reached any administrative decision with respect to the impugned internal recruitment process for the advertised positions and therefore this Court ought to dismiss the claim of violation of the Petitioner's rights in relation with Article 47. For emphasis the 1<sup>st</sup> Respondent relied on the case of **Kenya National Commission on Human Rights & Another v Attorney General & 3 Others (2017) eKLR**.

The 1<sup>st</sup> Respondent further submitted that the instant case does not give rise to any legitimate expectation on the part of the Petitioner herein or the general public at large. The 1<sup>st</sup> Respondent urged this Court in the circumstances to accordingly dismiss the Claim for legitimate expectation as pleaded by the Petitioner. For emphasis the 1<sup>st</sup> Respondent relied on the cases of **Republic v Director of Public Prosecutions & 4 Others Ex- Parte Senator Johnson Nduya Muthama (2015) eKLR** and **Republic v Kenya Revenue Authority ex-parte Shake Distributors Limited H.C Misc Civil Application No. 359 of 2012 on legitimate expectation**.

In conclusion the Commission maintained that the Petitioner has failed to prove his case to the required standard and that the instant Petition as filed is outrageous, malicious and brought in bad faith and urged this Court to dismiss it with costs to the 1<sup>st</sup> Respondent.

## **Analysis and Determination**

Having considered the pleadings, evidence, submissions and authorities cited by the parties and it is my view that the issues arising for determination are:

1. Whether the Petitioner has locus standi to institute these proceedings
2. Whether the impugned internal recruitment process adopted by the 1<sup>st</sup> Respondent was/is irregular, illegal and unconstitutional
3. Whether the impugned internal recruitment process adopted violates the Petitioner's fundamental rights and freedoms under Articles 27, 41(1) and 47 of the Constitution of Kenya as read with Sections 37 of the Public Service Commission Act and Section 5 of the Employment Act.
4. Whether the right to legitimate expectation was in any way violated by the 1<sup>st</sup> Respondent through the impugned internal recruitment process
5. Whether the Petitioner is entitled to the reliefs sought in his Petition.

## **Whether the Petitioner has locus standi to institute these proceedings**

The 1<sup>st</sup> Respondent contested the Petitioner's locus standi to institute the legal proceedings. The Petitioner on the other hand placed reliance on the provisions of Articles 22 and 258 of the Constitution of Kenya, 2010 and maintains that he is indeed clothed with the requisite locus standi to institute these proceedings.

Article 22(1) and (2) of Constitution states as follows: -

**(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.

Article 258 provides as follows –

**258. Enforcement of this Constitution.**

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(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.

In light of the above, the Law is very clear that “every person” has the right to institute Court proceedings claiming that a right or a fundamental freedom in the bill of rights has been denied or that the Constitution has been contravened or is threatened with contravention.

In the case of **Timothy Otuya Afubwa & Another v County Government of Trans Nzoia & 3 Others (Supra)** it was held that a petition under *Articles 258(2)(c) and 22 (1) of the Constitution can be brought by a person acting on behalf of the public.*

Further in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**, the Court of Appeal stated:

*“Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in public interest.”*

This Court is therefore satisfied that the Petitioner herein has the requisite *locus standi* to institute the proceedings herein.

**Whether the impugned internal recruitment process adopted by the 1<sup>st</sup> Respondent was/is irregular, illegal and unconstitutional**

The Petitioner has put in lengthy submissions in support of his objection to the internal recruitment process adopted by the 1<sup>st</sup> Respondent highlighting advantages of an external recruitment process as opposed to an internal one.

He submitted that having the positions filled internally was in fact irregular, illegal and unconstitutional as it locked out potential members of the general public who were qualified to fill the positions.

The 1<sup>st</sup> Respondent on its part maintained that its actions were well within the law and that the decision to internally advertise for the positions was done following a resolution reached at the commission’s 76<sup>th</sup> Special Meeting held on 11<sup>th</sup> June, 2020 and a directive by the Government as communicated vide Treasury Circular Number 7/2019 that froze new appointments for among others, Constitutional Commissions like the 1<sup>st</sup> Respondent.

I have perused the said circular dated 28<sup>th</sup> June, 2019 and marked EB – 3 in the 1<sup>st</sup> Respondent’s Replying Affidavit sworn on 1<sup>st</sup> September, 2020 and note that indeed at clause 23 the Government through the National Treasury and Planning did freeze new appointments except for security agencies, health workers and education sector.

The 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent herein.

**Whether the impugned internal recruitment process adopted violates the Petitioner's fundamental rights and freedoms under Articles 27, 41(1) and 47 of the Constitution of Kenya as read with Sections 37 of the Public Service Commission Act and Section 5 of the Employment Act.**

Having found that the internal recruitment process was lawful, I find that the Petitioner has not established that the 1<sup>st</sup> Respondent violated any of the provisions of the Constitution or statute as the 1<sup>st</sup> respondent's actions are well founded in law.

**In the circumstances, the Petition dated 27<sup>th</sup> August, 2020 is devoid of merit and is accordingly dismissed with no orders as to costs. The interim orders issued on 9<sup>th</sup> October, 2020 suspending the process of filling the vacancies within the 1<sup>st</sup> Respondent are hereby vacated and the 1<sup>st</sup> Respondent is at liberty to proceed with the recruitment process forthwith.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF JANUARY 2021**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**