



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**PETITION NO. E156 OF 2021**

**IN THE MATTER OF:**

**ARTICLES 3(1), 22, 23, 48, 50(1), 162(2)(a), 165(5), 258, AND 259(1) OF**

**THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF:**

**THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21,**

**22, 24, 27, 41(1), 47, 73, 75, 129, 153(4)(a), 232, AND 259(1) OF**

**THE CONSTITUTION OF KENYA 2010.**

**IN THE MATTER OF:**

**THE ALLEGED VIOLATION OF SECTION 37(1) & (4)(E) OF**

**THE PUBLIC SERVICE COMMISSION ACT, 2017; MWONGOZO;**

**THE GOVERNMENT CIRCULAR NO. OP/CAB.9/1A; AND THE**

**GUIDELINES ON TERMS AND CONDITIONS OF SERVICE FOR**

**STATE CORPORATIONS 2004.**

**IN THE MATTER OF:**

**THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE BOARD'S**

**ONGOING PROCESS OF RECRUITING AND APPOINTING BOTH**

**THE CHIEF EXECUTIVE OFFICER AND THE GENERAL MANAGER OF**

**THE NORTHERN WATER WORKS DEVELOPMENT AGENCY.**

**IN THE MATTER OF:**

**THE DOCTRINE OF LEGITIMATE EXPECTATION AND VOID *AB INITIO*.**

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

**VERSUS**

**THE BOARD OF DIRECTORS,**

THE NORTHERN WATERWORKS

DEVELOPMENT AGENCY.....RESPONDENT

RULING

1. Petitioner seeks the following orders:-

- i) A declaration that by stating that “Only shortlisted candidates shall be contacted,” the Board ruled out the publication and fatally failed in their obligation under the law to be transparent and accountable.
- ii) A declaration that the Board’s failure in its obligation under the law to provide for public participation in the recruitment process is fatal to the exercise.
- iii) A declaration that the Board’s failure to develop a roadmap and guidelines for recruitment, and failure to comply with Mwongozo and the Guidelines on Terms and Conditions of Service for State Corporations 2004 is fatal to the exercise.
- iv) A declaration that the Board’s failure to comply with Sections 37(4)(e) and 37(1) of the Public Service Commission Act, 2017 is fatal to the recruitment process.
- v) A declaration that failure to send the outgoing CEO terminal leave as required by Government Circular No. OP/CAB.9/1A is fatal to the recruitment process.
- vi) A declaration that the recruitment process is unconstitutional therefore null and void.
- vii) An order quashing the recruitment process.
- viii) An order compelling the Board to carry out the recruitment process in accordance with the law.
- ix) That there be orders as to costs of these proceedings, and the Respondent to bear the Petitioner’s cost of the Petition.
- x) Any such other order(s) as this Honourable court shall deem just in the circumstances.

2. The Petitioner has set out the grounds upon which he seeks the orders above. He asserts that in the recruitment process there has been violations of the kind that call for intervention of the Court. He asserts the ongoing recruitment of the CEO is void *ab initio* for the failure of the Respondent to follow the guidelines in Mwongozo and the Cabinet Secretary’s Circular No. OP/CAB.9/1A, the Public Service Act and the State Corporations Act.

3. The Respondent was opposed and filed a response through the CEO of the Respondent Mr. Isaack Shaban. In his replying affidavit he asserts that the Board is in the process of recruiting for the two positions of General Manager Infrastructure development which fell vacant by retirement and CEO upon expiry of the final term of the outgoing CEO. He deponed that the process is being conducted openly, competitively and transparently in compliance with Articles 10 and 232 of the Constitution and in full compliance of the provisions of the State Corporations Act and the Mwongozo Guidelines thereto. He deponed that in compliance with the provisions of Section 37 of the Public Service Commission Act No 10 of 2017, the two vacancies were advertised in the ‘MY GOV’ weekly which was carried by The STAR mainstream Newspaper on 21<sup>st</sup> September 2021 and in the Daily Nation on 22<sup>nd</sup> September 2021 in compliance with current Government circulars on cost cutting measures on government jobs and tender advertisements. He deponed the Star and the Nation Daily are reputable and well known newspapers with nationwide circulation and that the advert is also available on the Northern Water Works Development Agency website - [www.nwwda.go.ke](http://www.nwwda.go.ke) which information was made very clear in the advertisement. He deponed that the Petitioner did not take time to read the advertisement which clearly provides for the job descriptions in the functions and the job specifications in the qualifications and key competencies required for the two positions. He stated that he was not aware of a requirement for the Board to publicize the job description and specifications of the advertised positions are specified in the advertisements and the same are available in the organizations approved career guidelines and grading structure as approved by State Corporations Advisory Committee. He deponed that the salary, allowances and other remuneration attached to the vacant positions is set by the Salaries and Remuneration Commission and not the Board which is available in the public domain for serious applicants. He deponed that he was not aware of a requirement that the Board must conduct public participation as a condition to advertising for vacant positions. He asserts the fact that the advertisement provided that, ‘only shortlisted candidates will be contacted did not mean that a long list, a short list, time and venue of the interviews would be a secret.’ He deponed that it does not serve any meaningful purpose to contact candidates who are not shortlisted because they do not meet the shortlisting criteria and are therefore not invited for interviews and that the shortlisting criteria and the shortlisting process are conducted by the Board after the advert is closed and not before. He deponed that this Petition is premature as it was dated 4<sup>th</sup> October 2021 while the advertisement was to close on 12<sup>th</sup> October 2021 some 8 days later. He deponed that the long listing and the shortlisting process had not taken place and therefore it was premature and speculative to allege that the same will not be publicized. He deponed that the Board has no preferred candidate which allegation is only intended to demean and intimidate the Board to abandon the recruitment process which is one of its mandates under Section 5(3) of the State Corporations Act 2012. He asserts that the Petitioner’s legitimate expectation in this instant case is clearly an abuse of the Court process. He deponed that the Board held a scheduled full Board meeting on 15<sup>th</sup> October 2021 and resolved to release the outgoing CEO whose term ends on 31<sup>st</sup> December 2021 for a two months terminal leave with effect from 1<sup>st</sup> November 2021 in order to ensure a smooth transition and competitive recruitment of a new CEO in compliance with Head of Public Service circular number OP/CAB.9/1A issued on 23<sup>rd</sup> November 2010 titled **Procedure for Reappointment of Service Chief Executive Officers in State Corporations**. He deponed that with effect from 1<sup>st</sup> November 2021 the Board will appoint an acting CEO to oversee the smooth transition. He deponed that with the above facts having been brought to the attention of the court it is clear that this petition is premature, unfounded,

malicious and an abuse of the court process being prosecuted with the sole intention of unlawfully paralyzing the recruitment process. He deposed that the Petition has no chances of success and should be dismissed in order to advance the true course of justice by paving way for the recruitment process to be continued.

4. The Petitioner filed submissions in support of his petition and he asserts that this Petition is filed in good faith pursuant to Article 3(1) of the Constitution which places the obligation on the Petitioner to respect, uphold and defend the Constitution. And the Constitution at Articles 22 and 258 gives power to any citizen to institute proceedings where he/she feels the fundamental rights and freedoms in the Bill of Rights, or the Constitution itself, are threatened or have been infringed or violated. The Petitioner submits that the Petition meets the test of *bona fide* public interest litigation. The Petitioner submits he is a renowned crusader of constitutionalism, good governance, and probity in public affairs management, and the information in the Petition is not vague or indefinite. The Petitioner submits the facts relied upon in the Petition are *prima facie* true and correct in the sense that the Respondents violated the law. The Petitioner submits that the Petition is merited, has a valid basis and sets forth sufficient facts from which the Honourable Court is able to make a finding of a contravention of the Constitution of Kenya 2010, national legislation, and government policy. It is submitted that the gravamen of the Petition is that the Board's ongoing process of recruiting and appointing both the Chief Executive Officer and the General Manager of the Northern Water Works Development Agency is laced with violations of the Constitution, national legislation, and government policy. *Inter alia*, it is the Petitioner's case that the dispute herein would not have arisen had Board performed the recruitment in compliance with the law. He cited the definition in **Blacks' Law Dictionary, 9th Edition** at page 1644, on what triable issue means "*subject or liable to judicial examination and trial*" whilst "the trial" has been given to mean "*a formal judicial examination of evidence and determination of legal claims in an adversary proceeding.*" The Petitioner submits the Constitution was violated and the Court should intervene because under Article 2(1) of the Constitution, the Constitution binds all persons including the Respondent and under Article 2(4) of the Constitution provides that any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid. The Petitioner submits that he has pointed out alleged acts and omissions on the part of the Respondent which he alleges contravene the Constitution, national legislation, and government policy. The Petitioner relies on the decision in **Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjihia & Another [2016] eKLR** and submits that in the circumstances of this case, the court should intervene to ensure the Respondent respects, upholds and defends the Constitution. In that case, the court held:

*"That the Court can interfere where there is improper exercise of discretion is now trite. As was held by Warsame J. (as he then was) in Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration..."*

The judge went on to cite with approval a passage in **Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300**, where it was held:

*"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in-non observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."*

5. The Petitioner submits that the dispute herein falls under the ambit of Article 47, which provides a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He submits that Article 47 is breached in this case when the Respondent's actions are unreasonable as was recognised in the case of **Republic v Kenya Power & Lighting Co. Ltd. & Another [2013] eKLR** where the Court held:

*"I think the words of Lord Greene, M.R. at page 229 in the Wednesbury Corporation case (supra) will make good closing remarks in this case. He observed that:-*

*"It is true the discretion must be exercised reasonably. Now what does that mean" Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority... In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."* Emphasis supplied

6. The Petitioner cites the case of **Republic v National Police Service Commission exparte Daniel Chacha [2016] eKLR**, where the court defined the scope of the rights under Article 47 of the Constitution as follows:

*"In Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014 in which the Court of Appeal held that:*

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

7. The Petitioner submits that he has demonstrated that the Constitution was violated and is threatened with further violation and this Court should intervene. He submitted that even threats to the Constitution are justiciable. He submits that this Petition is ripe and relies on the case of **Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya & 10 Others [2015] eKLR**. He submits that the Board's failure to be transparent and to provide information is fatal. The Petitioner submits that by stating that "Only shortlisted candidates shall be contacted," the Board ruled out the publication, when appropriate, of a long list of all applicants, a list of shortlisted candidates, and the time and venue of the mandatory job interviews and, therefore, fatally failed in its obligation under the law to be transparent and accountable, and to grant citizens access information in their custody and to publish and publicise any important information affecting the nation. The Petitioner submits that even though the Respondent argues in its two affidavits filed in response to the Petition that the phrase "Only shortlisted candidates shall be contacted" does not rule out the publication at an appropriate date of the long list of all applicants and the shortlist of candidates, and the venues and times of interviews, it is a fact that the Respondent does not undertake to do so. All it commits itself to do is limited to the phrase "Only shortlisted candidates shall be contacted." The Petitioner submits that in absence of a similar undertaking to publish the long list of all applicants and the shortlist of candidates threatens the right to information and, being a threat, it is justiciable as was held in the CORD case above. The Petitioner submits the Court should take notice of the deponent's very dismissive attitude to public participation at paragraphs 14 to 19 of its Replying Affidavit dated 19<sup>th</sup> October 2021. The Petitioner submits that Article 10 of the Constitution binds that Board when it makes or implements public policy decisions to uphold the national values and principles of governance, including: the rule of law, democracy and participation of the people, human rights, good governance, integrity, transparency and accountability, and sustainable development. He argues that by declining to let the Kenyan public know who applied for the jobs and who were shortlisted, the Board was not being transparent and accountable. It is also against best national practice for the Board not to publish the long and short lists, and only contact shortlisted candidates. The Petitioner submits the Board has an obligation under Articles 33(1)(a) and 35 of the Constitution as read together with the Access to Information act, 2016 to disclose unclassified information in its custody and the Board's decision to contact only shortlisted candidates is irregular and unlawful and, therefore, unconstitutional, null and void *ab initio* because it violates the Petitioner and the public's rights to freedom of expression enshrined under Article 33(1)(a) of the Constitution of Kenya, which stipulates that freedom of expression includes the freedom to seek, receive or impart information or ideas. He submits that further, the right to information is inviolable as a constitutional right because it is granted by the Constitution and not by the State and it is the duty of the State and it is also everyone's duty is to respect and uphold this right. He cited the case of **Trusted Society of Human Rights Alliance & 3 Others v Judicial Service Commission [2016] eKLR**, where the Court reaffirmed the position that the Constitution does not limit the right to access information. The Petitioner submits that moreover, the right to access information is a right that the individual has to access information held by public authorities acting on behalf of the State. He submits this is an important right for the proper and democratic conduct of government affairs, for this right enables citizens to participate in that governance. For instance, successful and effective public participation in governance largely depends on the citizen's ability to access information held by public authorities. Where they do not know what is happening in their Government and or if actions of those in government are hidden from them, they may not be able to take meaningful part in their country's governance. The Petitioner submits that the right to access information is a foundational human right upon which other rights flow and that for citizens to protect their other rights, the right to access information becomes critical for any meaningful and effective participation in the democratic governance of their country. Furthermore, the Petitioner contends that, the Respondent's decision not to make full disclosure to the public of the applicants and the shortlisted candidates contravenes the Constitution of Kenya 2010, which is clear that information held by the state is accessible by citizens and that the State has an obligation to disclose the information. He asserts that the Board has no capacity to pronounce that "Only shortlisted candidates shall be contacted" as the Board must publish and publicise the names of all applicants and the shortlist of candidates. The Petitioner submits that in furtherance of the objectives of Article 35, the National Assembly enacted the Access to Information Act and Section 4 of the Act provides for the procedure to access information. The Section echoes Article 35(1) of the Constitution which provides that subject to the Act and any other written law, every citizen has the right of access to information held by the State.

8. The Petitioner further submits that the refusal to avail to the public the information as to the applicants and the shortlisted candidates also violated Article 2(5) & (6) of the Constitution to the extent that it violated Kenya's obligations under international law. Further and in particular: Article 19 of the Universal Declaration of Human Rights is clear that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". He submits that Article 19(2) of the International Convention on Civil and Political Rights also makes the right to information imperative when it states that:-

*"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."* And finally on this aspect he submits that Article 9(1) of Africa Charter on Human and Peoples Rights (The Banjul Charter) states that "every individual has the right to receive information". The Petitioner submits the right to freedom of information has also been recognized in regional treaties to which Kenya is a party. He submits that in **Trusted Society of Human Rights Alliance (supra)** the Court approvingly cited the case of **Brummer v Minister For Social Development 2009 (II) BCLR 1075(CC)** where it was stated that:

*"access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas?."*

9. It is submitted further that it is contrary to the law, constitutional edict, and logical piety, especially in a value laden society such as Kenya, for the Board to set off to have the recruitment process shrouded in secrecy and only to announce to the public the name of the appointee after the process. He cited Section 5 of the Public Service (Values and Principles) Act, 2015, which applies to all State organs and State Corporations, provides that every public officer shall maintain high standards of professional ethics, which include being transparent in

executing the officer's functions and observes the rule of law. It was therefore incumbent on the Board to be accountable to the public and inform them of each stage of the recruitment exercise. The Petitioner thus submits that the Board's failure to provide for public participation is fatal to the ongoing recruitment. It is submitted that the recruitment process violates express Section 37 of the Public Service Commission Act, 2017 which is the applicable law because both the Water Act 2016 and the Legal Notice No. 28 of 26<sup>th</sup> April 2019, which establish the Authority do not provide for the advertising of vacancies in the public service. He submits that further, contrary to Section 37(1), the advert was not published on the Public Service Commission's (PSC's) website and by publishing the advert on the Northern Water Works Development Agency's website only did not meet the threshold set in law. He argues that the deponent has not demonstrated that the vacancy was advertised through radio and that with a print run of only 78,000 copies, the use of MyGov insert in The Star newspaper, instead of advertising directly in either the Standard or the Daily Nation, which have a far wider circulation and readership, did not meet the threshold of advertising in "at least one daily newspaper of nationwide coverage." He submits that contrary to Section 4(e) of the Act which states categorically that, "*An advertisement inviting applications to fill any vacancy in a public office shall provide for — (e) the applicable remuneration including salary, allowances and other benefits,*" the advert did not provide any information on the remuneration for the offices advertised. The Petitioner submits that the advert fails to explicitly show the background and context of the work and to explicitly state the terms of employment contrary to Section 37(4)(c) and (d) of the Act. The Petitioner submits further that the advert fails to disclose any consideration that may occasion disqualification and fails to plainly and openly state any consideration of equity or affirmative action. The Petitioner submits the Authority is a State corporation which must recruit its employees in a transparent and competitive process subject to the Constitution of Kenya 2010, the Public Service Commission Act, Mwongozo (The Code of Governance for State Corporations), and other Government policies. He submits the Board has no capacity to exercise residual power and for it to purport to exercise powers outside the law howsoever is unlawful and *ultra vires*.

10. The Petitioner cites the decision in the case of **Republic v Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 Others [2017] eKLR** held as follows:

*Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.***

11. The Petitioner submits the Board can only act within the powers donated by the law. It cannot arrogate itself any power beyond that which the law donated to it, and do or demand to do that which the law does not contemplate. If indeed the law desired to clothe the Board with power to act in the manner it has acted in the impugned recruitment exercise, nothing would have been simpler than expressly providing for it. He cites the case of **Law Society of Kenya v Centre for Human Rights and Democracy & 13 Others [eKLR]** where the Court of Appeal held that:

*If it is proved that the tribunal, person or authority has deviated from the established and set beacons or pathway or legal criteria as delineated and demarcated for it and has run wild and amok, and at worst has gone on a frolic of its own, become an unruly horse and engaged in caprice, malice, witch-hunting and a wild goose chase running helter-skelter, it is the duty of the High Court through its supervisory jurisdiction to pull the leash and firmly point the delineated legal path that the tribunal, person or authority is enjoined by law to tread and to follow. The supervisory jurisdiction of the High Court is the leash and bridle that affirm and ensures that all tribunals, persons or authority are subject to the Constitution, rule of law, natural justice and good governance. It ensures that there is no trampling and aberration of the fundamental rights of the citizen. The supervisory jurisdiction is an in-built internal check and balance within the judicial system. It is the king pin upon which the cog and wheels of justice revolve and without it, untrammelled exercise of discretion reigns supreme - this is not what the people of Kenya intended when they promulgated the 2010 Constitution. The people of Kenya intended to have a country governed by the Constitution and the rule of law, not an unchecked exercise of judicial and quasi-judicial power by any person or authority.*

12. It is submitted that the petitioner and the public at large had the legitimate expectation that the Board would adhere strictly to the law in the impugned recruitment exercise and that expectation was breached by the Board when it acted outside the law.

13. He submits the Court has the power to grant any other appropriate reliefs which will enhance the protection of the Constitution and uphold the rule of law as well as constitutionalism. He cites a plethora of cases on this point and asserts the Court. The Petitioner submits that this Honourable Court is clothed with powers under Article 23(3) of the Constitution to grant appropriate reliefs in any proceedings, such as this one, seeking to enforce fundamental rights and freedoms in the Bill of Rights and that under Article 20, the Constitution empowers the Courts and tribunals to apply the provisions of the Bill of Rights effectively by developing the law and adopting the interpretation that most favours the enforcement of the right. On its part, Article 259(1)(c) proclaims that the Constitution shall be interpreted in a manner that permits the development of the law. The Petitioner submits that, since this case was filed by a private citizen against a public entity in public interest, with utmost good faith for general good of the public, to advance a legitimate public interest, and is not aimed at giving the Petitioner personal gain, the Respondents should be condemned to pay cost of the suit to the Petitioner. The Petitioner further submits that, should the suit fail, he should not be condemned to pay costs of this suit for the reason that this matter was filed in public interest under Article 22 and 258 of the Constitution of Kenya 2010, and the petitioner was advancing public interest and personal gain. The public interest is to ensure that public duties of the Respondent are performed in compliance with the law and not *ultra vires*.

14. The Respondent on its part submits that granted the respective cases advanced by the parties herein, the issues that arise for determination by this Honourable Court are:

i) Whether there was public participation in the recruitment process

ii) Whether the process was conducted with regard to the law.

iii) Whether the orders sought should issue.

The Respondent submits that as to whether there was public participation in the recruitment process, it is the Petitioner's claim that there was no public participation when setting out the advertisement for the CEO of the Northern Water Works Development Agency. The Respondent posits that the question that this Honourable Court should seek to address is at what stage should public participation happen and can the Petitioner allege that there was no Public Participation at a stage when the Respondent was still receiving applications from interested candidates? The Respondent cites the decision of the Supreme Court of Appeal of South Africa in the case of **King and Others v Attorneys Fidelity Fund Board of Control and Another 2006(1) SA 474 (SCA)** where the Court observed as follows on the issue of public participation;

*“Public involvement might include public participation through submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become ‘involved’ in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes, the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it.”*

15. The Respondent submits that further to the foregoing, the issue of public participation in recruitment process has been extensively litigated in numerous cases. It relies on the case of **Consumer Federation of Kenya (COFEK) v Attorney General & 2 Others [2012] eKLR** at paragraph 57 and 58:

*“On one part, the public is entitled to know who has been shortlisted. The public participates by being able to send any reports or objections on any of the persons who have been selected. Those who have not been shortlisted are given an opportunity to make inquiries as to why they have not been shortlisted.*

*Finally, even the persons selected are still advertised giving an opportunity to participate in the process. It is by reason of the advertisement of the person so nominated, that Kenyans can also participate in the process by launching a challenge to the process of appointment.”*

16. Further, they cite the decision of Lenaola J. (as he then was) in **Independent Policing Oversight Authority & Another v Attorney General & 660 Others [2014] eKLR** in reference to Public Participation opined that;

*“It is clear and I must state so, that it is impossible to define the forms of facilitating appropriate degree of public participation. To my mind, so long as members of the public are accorded a reasonable opportunity to know about the issues at hand and make known their contribution and say on such issues, then it is possible to say that there was public participation.”*

17. The respondent submits that additionally, the Court in **Benson Riitho Mureithi v J.W. Wakhungu & 2 Others [2014] eKLR**, observed as follows:

*“It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution.”* Emphasis supplied

18. The Respondent submits that from the foregoing it is clear that most judicial judgments relating to public participation in the recruitment process emphasize the need for public participation in the shortlisting process. At this point, the members of the public are invited to bring forth information and comments concerning the shortlisted candidates within a specific time but prior to the date of interviews. However, we argue that public participation, while important, is not necessary in the receiving of application process. It submits the Petitioner's entire public participation argument is hinged on the allegations that the Board had decided not to publish the long list of applicants, the list of shortlisted candidates and the venues of the interviews, thereby deny the public opportunity to participate in the process (see para 54 of the Petition). The Petitioner further alleges that the Respondent had not opened up the recruitment process to public participation by inviting the making provision for industry stakeholders and members of the general public to participate in the process. The Respondent urges that this Court should take notice that the Petitioner filed his petition on the 7<sup>th</sup> October 2021 while on the other hand, the Respondent's vacancy advertisement stipulated that the deadline for sending in applications was 12<sup>th</sup> October 2021. There were 5 days in between the deadline for applications for the vacant positions and the date of filing this petition. So then, how was the respondent supposed to publish the longlists, the names of shortlisted candidates, when the closing deadline for applications had not yet reached? In fact, if the Respondent was to publish any lists before the 12<sup>th</sup> October 2021, it would be locking out any potential applicants thereby disadvantaging them. The Respondent submits the recruitment process was at the advertising/application process. The Respondent was receiving applications by interested candidates for positions advertised and as such the Petition was premature. At that point, it is submitted, there was no value and necessity to involve the public during the process of receiving applications as shortlisting only starts when the deadline imposed for receipt of deadlines lapses. While the Respondents do not deny that public participation is integral to the recruitment process in the public service, the Petitioner has prematurely jumped the gun in this case. Public participation plays no role and adds no value in the receiving of applications as all it involves is receipt of applications nothing more. Further, the onus of proving that there was no public participation falls on the Petitioner. This was held in the case of **Law Society of Kenya v Attorney General & 2 Others [2013] eKLR** where the court held the following:

*“52.The burden of showing that there has been no public participation or that the level public participation within the process*

*does not meet the constitutional standards is on the petitioner”*

19. It is submitted that an aspect of public participation is availability of information. The Respondent submits that its documents marked “IS 1”, “IS 2” and “IS 3” were made by open advertisement and clearly show what the qualification requirements were for the vacancies, they also clearly indicate where the applicants ought to send their applications and when the deadlines for sending the applications was. These requirements were all public information and made available to anyone who wanted to apply for the vacant positions. In light of the above, the Respondent submits that the Petitioner has not discharged his onus to prove that the advertisement lacked public participation. He has not demonstrated that any individual who intended to apply for the position was denied the opportunity to do so, that the applicants were not aware of where to send their applications and when the deadline for submission of application was. In any case should this Court find that public participation is necessary for this recruitment process, public participation is demonstrated by the open advertisement of the post of Chief Executive officer through the Agency’s website, the MyGov newspaper and the Star Newspaper. The Respondent submits that the applicants were given more than enough time to send in their applications. The Respondent submits that the Petitioner has clearly filed this petition prematurely as public participation does not add any value in this particular process of receiving applications.

20. As to whether the process was conducted with regard to the law, it is submitted that the Petitioner questions the legality of the recruitment process on a number of reasons, one of them being that it goes against Sections 37 (1) and 37 (4) (e) of the Public Service Commission Act. In paragraph 22 of the Petition, it is alleged that the vacancies were not advertised on the Public Service Commission’s website, at least one daily newspaper of nationwide coverage, radio and other modes of communication so as to reach a wide population. Further, the Petitioner claims that the vacancies do not provide for remuneration. It submits that Section 37 of the Public Service Commission Act states as follows;

*37. Advertisement of vacancies*

*(1) Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission's website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.*

.....

*(4) An advertisement inviting applications to fill any vacancy in a public office shall provide for:*

- (a) the title and rank of the public office;*
- (b) the public body in which the office is tenable;*
- (c) the background and context of the work, where necessary;*
- (d) the terms of employment;*
- (e) the applicable remuneration including salary, allowances and other benefits;*
- (f) the prescribed qualifications applicable, including any desired previous achievements;*
- (g) the core duties of the office;*
- (h) the expected deliverables of the office;*
- (i) the supervision, accountability and reporting arrangements;*
- (j) any added advantage applicable;*
- (k) the mode and deadline of transmitting the application;*
- (l) any consideration that may occasion disqualification; and*
- (m) any consideration of equity or affirmative action.*

21. The Respondent submits that before this court is an evidence of an advertisement placed in My Government newspaper covered in the Star Daily on 21<sup>st</sup> September 2021. Additionally, the same was mentioned in the Daily Nation on 28<sup>th</sup> September. In addition to that, the advertisement was also availed on the Respondent’s website. The Respondent submits that the Star and the Daily Nation are known to be reputable and accessible newspapers with nationwide circulation. Further, the Public Service Commission Human Resource and Policies Procedures Manual provides for a minimum of 21 days recruitment notice which was clearly adhered to. It submits that Section B4 of the above Manual provides as follows:

*B.4 Advertisement of Vacant Posts*

1. *Ministries/State Departments will advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty one (21) days before closing the advert. The advert shall have the following details: the title of the post, number of vacancies, job description, person specification and the proposed remuneration.*

22. On the question of remuneration, the job advert was keen to indicate a grading structure for both jobs which ought to have guided the interested applicants on the salary scale to expect. Further, salary structure for employees of the Respondent is a publicly availed document that is publicly accessible for perusal. The Manual also provides that the advert shall be delivered in soft copy to the Public Service Commission to be posted in its website. My Lord, once this is done, the office has no mandate to interfere in the internal operations of another state body and cannot push the Public Service Commission to make an advertisement on its website. It is submitted that the Petitioner has failed to demonstrate that the advertisement was tainted with illegality, irrationality and procedural impropriety or was contrary to dictates of Article 27 and 47(1) of the Constitution as the power of the Respondent is donated by statute, the minimum qualifications in MWONZOGO have been met. MWONGOZO is issued jointly by the Public Service Commission and State Corporations Advisory Committee (SCAC) under the President's Executive Order pursuant to Sections 7 and 30 of the State Corporations Act. It is submitted that Section 7 of the State Corporations Act gives power to the President to give directions of a general or specific nature with regard to the better exercise and performance of the functions of State Corporations. Section 30 of the Act gives power to the President to make Regulations for the better carrying into effect of the provisions of the Act. Under these powers, The President promulgated MWONGOZO, Code of Governance for State Corporations and Attachment 1 of MWONGOZO sets out the specifications for appointment of Chief Executive Officers of State Corporations as follows: -

- i. Holds a degree in the relevant field from a university recognized in Kenya;*
- ii. Has at least ten years knowledge and experience in the relevant field;*
- iii. Meets the requirements of Chapter six of the Constitution;*
- iv. Has served in a position of senior management for a period of at least five years;*
- v. Meets the requirements of the fit and proper test.*

23. The Respondent makes reference made to the job advert which shows that all the above were complied with. It submits that Article 35 of the Constitution provides for the right to access to information by all Kenyan citizens, information which is held by the state or other person and is required for the exercise of protection of any right and that the state should publish and publicise any information affecting the nation. While Article 24 of the Constitution goes on to provide that a right can be limited by law and to the extent that the limitation is reasonable and justifiable taking into account the factors laid down by the Constitution. Additionally, the Access to Information Act an Act that was enacted to give effect to Article 35 of the Constitution and provides a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles. Under Section 5 (a) of the Act, it is provided for how disclosure of information by public entities should be done and provides that subject to Section 6, a public entity should facilitate access to information as provided under the same Section. The Respondent submits the Act is to be interpreted and applied on the basis of a duty to disclose and nondisclosure shall be permitted only in circumstances exempted under section 6 which provides that:

*Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—*

- (b) impede the due process of law;*
- (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;*
- (h) damage a public entity's position in any actual or contemplated legal proceedings; or*
- (h) information between the national and county governments deemed to be injurious to the conduct of affairs of the two levels of government;*

24. The Respondent submits that the Court should take into consideration that the advertisement for the vacancies were duly published in 3 newspapers of nationwide circulation and therefore could reach many Kenyan citizens for the purposes of application for the position and that therefore, Article 35 of the Constitution was complied with in as far as access to information is concerned. However, the Petitioner in this matter upon the realization that the vacancies were not published in the newspapers of their liking or those that they consider to be the only ones of nationwide coverage brought a suit prematurely to court which begs the question what information can be put to the public and to what extent. The Petitioner has argued that he would want the information published to the public so as to see how the vacancies came to be posted and the names of those who applied as well as those who were shortlisted. The Respondent submits that it seems that the Petitioner put little to no consideration to the provisions of the law being that the process was constitutional and properly guided by the set laws under the Constitution and the Access to Information Act.

25. As to whether the orders sought by the Petitioner should issue, it is the Respondent's humble submission that the Petitioner having failed to discharge his burden of proof on the alleged violations, unconstitutionality and the illegality and is therefore undeserving of the orders sought. In view of the above analysis, it is the Respondent's submission that the prayers sought are unattainable and that the Court should dismiss this petition with costs to the Respondent. In view of the above analysis, it is submitted that the orders sought cannot be issued as against the Respondent as they have the effect of crippling the realization of a statutory mandate in the interest of justice and the greater public. Further, that the Petitioner has not established a case for the issuance of the orders sought in petition as such the petition should be

dismissed with costs to the Respondents.

26. The Petitioner filed the petition prematurely. That said, the Petition reveals that the Respondent's job recruitment was marred with irregularities as there was no advertisement in the Public Service Commission website as required. The advertisement also fell short by not availing sufficient particulars. In essence the Petitioner had sought the application of the strictures of the law in the advertisement and recruitment. While the Court does not agree that public participation starts at the point of making the advertisement, it notes the Respondent was noncommittal about the listing of the shortlisted candidates and invitation of the comments or adverse reports from the public as behoves a public body recruitment. The Court need not rehash the decisions made in this regard. It is clear the exercise of recruitment though advertised in two publications with nationwide access and the Respondent's website failed to meet the dictates of Mwongozo. The orders that commend itself for me to make is declaring the advertisement and recruitment process invalid for being *ultra vires* and order the start of the process afresh and the Respondent to ensure the process provides for public participation at the stage of the shortlisted candidates, make sufficient disclosure on the job advert as required under the Public Service Commission Human Resource and Policies Procedures Manual and MWONGOZO. As the litigation was a public interest litigation, the Court makes an order that each party shall bear their own costs. A public spirited individual who seeks the application of the law should not anticipate a reward for being conscientious enough to take the proverbial bullet for the public good. Petition is allowed as stated above.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**