



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 190 OF 2019

(CONSOLIDATED WITH PETITION NO. 193 OF 2019)

IN THE MATTER OF: ARTICLES 1,2 ,3, 4(2), 10, 12(1)(a), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 156, 162, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: ALLEGED VIOLATION ARTICLES 1,2 ,3, 4(2), 10, 27, 41(1), 47,232 AND 259(1) OF THE CONSTITUTION

IN THE MATTER OF: ALLEGED VIOLATION OF SECTION 10(1) & (2) OF THE NATIONAL EMPLOYMENT AUTHORITY ACT NO.3 OF 2016

IN THE MATTER OF: ALLEGED VIOLATION OF SECTION 19 OF THE HUMAN RESOURCE MANAGEMENT PROFESSIONALS ACT 2012

IN THE MATTER OF: ALLEGED VIOLATION OF THE QUALIFICATIONS FOR THE APPOINTMENT OF THE CHAIRPERSON OF THE NATIONAL EMPLOYMENT AUTHORITY

AND

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE APPOINTMENT OF MARY WAMBUI MUNENE AS THE CHAIRPERSON OF THE NATIONAL EMPLOYMENT AUTHORITY

BETWEEN

KENYA YOUNG PARLIAMENTARIANS ASSOCIATION.....PETITIONER

AND

CABINET SECRETARY LABOUR &

SOCIAL PROTECTION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

MARY WAMBUI MUNENE.....3RD RESPONDENT

INSTITUTE OF HUMAN RESOURCE MANAGEMENT.....INTERESTED PARTY

BETWEEN

SIASA PLACE.....1ST PETITIONER

PAWA INITIATIVE.....2ND PETITIONER

AND

CABINET SECRETARY LABOUR &

SOCIAL PROTECTION1ST RESPONDENT

THE NATIONAL EMPLOYMENT

AUTHORITY BOARD.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL3RD RESPONDENT

MARY WAMBUI MUNENE.....1ST INTERESTED PARTY

INSTITUTE OF HUMAN RESOURCE MANAGEMENT..2ND INTERESTED PARTY

JUDGMENT

Introduction

1. The two Petitions herein were filed on 18th October, 2019 and 23rd October, 2019 respectively but they were consolidated by consent on 14.11.2019 under Petition 190 of 2019. The Petitions contest the appointment of Mary Wambui Munene as the Chairperson of the National Employment Authority, vide Gazette Notice No. 9816 (Vol. CXXI- No. 137) published on 14th October, 2019.
2. In support of both Petitions, the Institute of Human Resource Management was joined as an Interested Party.
3. The 1st and 2nd Respondent and the Respondents in Petition 190 and Petition 193 respectively (hereinafter referred to as the Respondents) ,were represented by the Attorney General. In response to the Petition, they filed a Replying Affidavit sworn by Peter K. Tum the Principal Secretary, State Department of Labour sworn on 13th November, 2019.
4. The 3rd Respondent, (hereinafter referred to as Ms. Wambui) neither entered appearance nor filed any response to the Petitions. This is despite her knowledge of the proceedings which was confirmed by her advocates, the firm of Njoroge Ndungu & Co. Advocates, when they requested for a copy of the pleadings from the Petitioner's counsel.

Petition 190 of 2019

5. The Petitioner is an association of young parliamentarians drawn from the National Assembly and the Senate of the Republic of Kenya, championing the youth cause in the country and they have brought this petition on their own behalf and on behalf of the citizens of Kenya. The petition challenges the appointment of Ms. Wambui as the Chairperson of the National Employment Authority (NEA) contending that she is not qualified under the law, policy and best practice to be the Chairperson of the National Employment Authority. The Petitioner avers that Ms. Wambui does not conform to the provisions of section 10 (2) (c) of the National Employment Authority(NEA) Act as she does not have at least 7 years' experience in human resource management.
6. The Petitioner contends that Ms. Wambui does not hold any of the qualifications or their equivalent as required by the NEA Act in order to qualify as a certified Human Resource Professional under section 19 (1) of the Human Resource Management Professionals Act, 2012 to entitle her to be considered as a chairperson of NEA as envisaged under section 10 (2) (c) of the NEA Act.
7. The Petitioner avers that the qualifications under section 10 (2) of the NEA Act are mandatory and not discretionary and should be read together with the provisions of the Human Resource Management Professionals Act, 2012. The Petitioner avers that Ms. Wambui has on several occasions personally admitted that she, possesses a limited educational background which makes her unqualified and unsuitable to conduct the affairs of NEA as its Chairperson.
8. In addition, the Petitioner avers that the guiding principles for appointment of any state officer is provided under Chapter Six of the Constitution in which Article 73 (2) provides that guiding principles of leadership and integrity pin the selection of a state officer on the basis of personal integrity and suitability. In addition, the Petitioner contends that the Gazette Notice flouts the provisions of Article 232 of the Constitution as it does not take into account the values and principles of public service in appointing a person who is not qualified.
9. The Petition seeks the following prayers:
 - 1) An order declaring the impugned directive issued by the 1st Respondent on behalf of the 3rd Respondent unconstitutional for want of violations of constitutional provisions.
 - 2) Upon grant of order 1 above an order quashing the said directive/gazette notice appointing the 3rd Respondent as the chairperson of the National Employment Authority.
 - 3) A permanent injunction restraining the 3rd Respondent from assuming office as the Chairperson of the National Employment Authority.
 - 4) An order declaring that any appointment by the 1st Respondent for Chairperson of the National Employment Authority must

comply with the mandatory provisions of section 10 (2) of the National Employment Authority Act.

5) Costs of this petition.

6) Any other orders, writs and or directions this Honourable Court deems fit and just to grant.

10. The Petition is supported by the Affidavit of Antony Samba Buluma the Petitioner's Executive Director sworn on 18th October, 2019 in which he reiterates the averments in the Petition.

Petition 193 of 2019

11. The Petitioners in the second petition comprise the 1st Petitioner which is a Non-Governmental Organisation whose main objective is creation of an enabling environment for women and youth mainstreaming in the Kenyan politics and is also a human rights defender. The 2nd Respondent is a limited liability company comprising young conscious artists and activists with the aim of contributing to the shaping of Kenya's social-economic and political landscape.

12. The Petition faults the procedure followed in recruiting Ms. Wambui as the Chairperson of NEA. They contend that the appointment of Ms. Wambui and the whole process of her appointment did not adhere to Articles 10, 73 (2) and 232 of the Constitution, section 36 (1) of the Public Service Act, section 10 of the Public Service (Values and Principles) Act and section 22 of the Public Officer Ethics Act. They further contend that to the extent that the Ms. Wambui was handpicked by the 1st Respondent without having met the required threshold and without following the laid down constitutional and statutory requirements for the chairperson of NEA, her appointment is unconstitutional, unprocedural, unlawful and irregular for being in violation of the above provisions.

13. They aver that before the 1st Respondent can appoint and gazette an appointee to the chairperson of the NEA, the nominee must be recruited through a fair, open, competitive, merit based and inclusive recruitment process applicable in public service to determine the nominee's personal integrity, competence and suitability as required under the Constitution and statutes.

14. The Petitioners aver that there is nothing in the NEA Act that avoids or makes any constitutional or statutory provision with respect to public service appointment incapable of being implemented and the qualifications under section 10 (2) of the NEA Act are in addition to and not in exclusion of the applicable tests and standards on public service employment.

15. They contend that unlike Mary Wambui, the Outgoing Chairperson Ms. Winnie Pertet demonstrably and satisfactorily met the requirements under section 10 (2) of the NEA Act with respect to academic qualification and experience in human resource. They further contend that other than being a former Member of Parliament, having served one term 2013 -2017, Ms. Wambui has no other demonstrable academic and/or qualifications and/or experience befitting the position of Chairperson of NEA Board.

16. The Petition therefore seeks the following prayers:

A. A declaration that the Interested Party does not meet the required constitutional and statutory requirements, standards, qualifications and experience to be appointed to the position of the Chairperson of the National Employment Authority Board and thus she is unqualified, unsuitable and unfit to serve as chairperson of the national employment authority board.

B. A declaration that the purported appointment of the Interested Party to the position of the Chairperson of the National Employment Authority Board vide Gazette Notice No. 9815 (Vol. Cxxi-No. 137) dated 14th October, 2019 did not meet the laid down substantive and procedural constitutional requirements applicable in public service appointments; and is therefore unconstitutional, unlawful, irregular, null and void for being in contravention of Articles 10,27, 73 (2) and 232 of the Constitution of Kenya, 2010.

C. A declaration that the 1st Respondent's purported handpick and appointment of the Interested Party vide Gazette Notice No. 9815 (Vol. Cxxi- No. 137) dated 14th October, 2019, to the position of the Chairperson of the National Employment Authority Board without following the laid out substantive and procedural, constitutional and statutory requirements applicable in public service appointments; the said purported handpick and appointment is unconstitutional, unlawful and irregular for being in contravention of Articles 10,27,73 (2) and 232 of the Constitution Of Kenya , 2010.

D. An order quashing Gazette Notice No. 9815 (Vol. Cxxi-No.137) dated 14th October, 2019 vide which the Cabinet Secretary for Labour and Social Protection purported to appoint Mary Wambui Munene as the chairperson of the National Employment Authority Board.

E. An order directing the respondents to ensure that future appointments to the National Employment Authority Board of those board members whose membership is not automatic by virtue of their offices pursuant to section 10 (1) of the National Employment Authority Act No. 3 of 2016, strictly adhere to the substantive and procedural, constitutional and statutory requirement applicable in public service.

F. A declaration that the 1st and 2nd Respondents have violated the petitioners' right to access to information contrary to the guarantee under Article 35 of the constitution of Kenya 2010.

G. An order of compensation including aggravated damages for violation of the petitioners' right guaranteed under Article 35 of the

Constitution as aforesaid.

H. Costs of this petition be borne by the Respondent.

I. Such other orders this Honourable Court shall deem fit pursuant to Article 23 (3) of the Constitution of Kenya 2010.

17. The Petition is supported by the Affidavits of Nerima Wako, the 1st Respondent's Executive Director and Banice Mbuki Mburu, the 2nd Respondent's Executive Director, both sworn on 23rd October, 2019. The deponents reiterate the allegations in the Petition.

Interested Party's case

18. CHRP Dorcas Wainaina, OGW, the Interested Party's Executive Director filed an Affidavit sworn on 20th November, 2019 in support of the Petitions.

19. She avers that section 10 (2) of the NEA Act makes it a mandatory condition that the Chairperson of NEA has to have at least 7 years' experience in human resource management or its equivalent.

20. She confirms that Ms. Wambui is not a Member of the Institute, which is charged with the responsibility to register persons who meet the required professional and ethical standard to practice as human resource professional in Kenya. She further avers that Ms. Wambui does not satisfy the requirements under section 19 of the Human Resource Management Professional in Kenya. She avers that Ms. Wambui cannot be said to be a human resource management professional deserving to chair such an important body as NEA as she is not aware of her application for a practising certificate to IHRM.

21. She contends that Ms. Wambui does not have the professional competency as required under section 10 of the NEA Act therefore her appointment contravenes Article 73 and Article 3 of the Constitution. She therefore contends that Ms. Wambui does not satisfy the mandatory statutory requirement under the NEA Act that was invoked by the Cabinet Secretary in appointing her.

22. She avers that the Institute received complaints and queries from its members on the qualification of the appointee. That she sent a letter to the 1st Respondent on the appointee's membership but there was no response to the letter. Finally, she contends that the appointment of Ms. Wambui does not promote the welfare and interest of the Human Resource Professionals in this country.

Respondents' case

23. The State Law office appeared for all the Respondents except Ms. Wambui in the two Petitions, and opposed the petitions vide the Replying Affidavit sworn by Mr. Peter K Tum on 13th November, 2019. In brief, they aver that section 10 (1) (a) of the National Employment Authority Act confers power upon the 1st Respondent to appoint the Chairperson of NEA and section 10 (2) of the NEA Act spells out the qualifications of the Chairperson of the Authority.

24. They further aver that section 10 (2) of NEA Act only prescribes at least 7 years' experience in human resource management or its equivalent but does not prescribe the qualifications thereof. In addition, this section does not require the Chairperson of the NEA to be certified as a human resource professional under section 19 (1) of the Human Resource Management Professionals act, 2012.

25. They aver that Ms. Wambui is an experienced, dedicated and passionate entrepreneur having worked with corporate organisations, non-profit and government agencies on social welfare and social justice across Kenya. They further aver that the Petitioner has not demonstrated how the 1st Respondent flouted Article 232 of the Constitution. They contended that Article 27 (4) and (5) of the Constitution bars discrimination of any person on the basis of age and gender among others. They further contended that the Petitioners should prove their allegation that Ms. Wambui possesses a limited education background.

26. They further aver that the petitioners have not proved that Ms. Wambui has not met the provisions of Chapter six of the Constitution of Kenya and described the allegations in the Petition as mere hearsay, baseless and without merit lacking any iota of evidence. They therefore prayed for the petitions to be dismissed with costs.

Submissions in support of the Petition

27. Mr. Manwa, learned counsel for the Petitioners in Petition 193 of 2019, submitted that Ms. Wambui's appointment is impugned as it was unconstitutional and was done against the public service appointment principles. He argued that Article 260 defines a public officer, public body and public office and that these definitions are in tandem with section 11 of the NEA Act which provides that remuneration of the Board is from public coffers. He therefore contended that Mary Wambui was appointed to serve in a public office.

28. The counsel further submitted that Ms. Wambui should have been competitively appointed by considering merit and competence. He also submitted that Ms. Wambui is not qualified for the position of Chairperson as compared with the qualifications of the outgoing chairperson. He observed that Ms. Wambui's curriculum vitae(CV) which is annexed to the Respondents' in their Replying Affidavit, shows that she served one term as a Member of Parliament but the CV does not show that she has 7 years' experience in human resource management. He further observed that the CV does not demonstrate any academic qualification and that it is just a CV.

29. He submitted that the Petitioners have a legitimate expectation to question the appointment of Ms. Wambui and also be given the criteria which was used by the 1st Respondent in appointing her. He submitted that in accordance with Article 35 of the Constitution, the Petitioners

in their letter to the Respondents requested for information with respect to the lists of applicants, scores of each applicant, the date when the review and evaluation of the applicant was done and any special consideration on the appointment but there was no reply to the letter. Consequently, the counsel submitted that the failure to grant the information sought violated the Petitioners' rights under Article 35 of the Constitution, section 4 (1) and (3) of the Access to Information Act and sections 8 of the Public 8 of the Public Service (Values & Principles) Act.

30. In conclusion, he argued that Ms. Wambui's appointment did not meet the constitutional and statutory requirements for public officers and urged the Court to allow the reliefs sought in the Petition.

31. Mr. Akhulia, learned counsel for the Petitioner in Petition 190 of 2019, submitted that the 1st Respondent did not adhere to the threshold under Article 10 and 73 of the Constitution. He further submitted that the 1st Respondent's actions were not in accordance with Article 73 and 232 of the Constitution as the appointment was not based on fair competition and merit. He contended that Ms. Wambui is not competent and her appointment was an abuse of the power donated to the 1st Respondent under the NEA Act.

32. He urged the Court to interpret section 10 (2) (c) of the NEA Act to mean that the experience is in HR or similar to HR. He submitted that the professional qualifications contemplated under section 10 (2) of NEA Act should be construed in line with the Human Resource Management Professionals Act. Accordingly, he reiterated that Ms. Wambui does not possess any experience in HR Management as required under section 10 (2) (c) of the NEA Act and urged the Court to grant the reliefs in the Petition.

33. Mr. Njomo, learned counsel for the Interested Party, (hereinafter referred to as the Institute), submitted that the Institute's mandate includes regulatory role of the HR management in the country and as such, it has a duty to verify whether Ms. Wambui has human resource qualifications. He submitted that as far as the Institute is concerned, Ms. Wambui is a lay person in the HR profession because she is not a member of the Institute, she has not practised HR management and she is therefore not qualified for appointment under section 10 (2) (c) of the NEA Act.

34. He further submitted that there is a clear disregard of mandatory provisions of section 10 (2) of the NEA Act in the said appointment. He further submitted that section 19 of the Human Resource Management Professionals Act has not been met as Ms. Wambui is not recognised as a HR professional in Kenya. He therefore urged the Court to allow the Petitions

Respondents' submissions

35. Ms. Chesyina learned state counsel appearing for the Respondents confirmed that indeed Ms. Wambui had been appointed Chairperson of the NEA vide the impugned Gazette Notice. She, however, submitted that the appointment was lawful since the appointee was qualified and due process was followed. The counsel observed that the qualifications under section 10 (2) of the NEA Act include 7 years' experience in HR management only and argued that the section does not require that the chairperson be a certified HR professional. She further observed that section 10 (2) of the NEA Act does not require that the chairperson must possess the qualification under the Human Resource Management Professionals Act and as such she contended that the allegation that the Human Resource Management Professionals Act was disregarded is devoid of merits.

36. The Counsel submitted that under the Black's Law Dictionary experience is defined as practical wisdom gained by personal knowledge, feeling and action. She contended that, according to the Cabinet Secretary, the 1st Respondent, Ms. Wambui met the experience required because her CV shows that she has the experience in managing people under Maendeleo ya Wanawake. She contended that the legislature did not intend more or further qualification but only experience in HR management and contended that the Institute is seeking an amendment of the law through court as opposed to Parliament.

37. In addition, she submitted that the Petitioners have not shown how Article 232 and other articles were violated by the appointment of Ms. Wambui. She submitted that the CV of Ms. Winnie Pertet is not related to the appointment of Ms. Wambui and does not influence the appointment of the Chairperson of NEA.

38. On the other hand, the counsel submitted that under Article 35 (2) of the Constitution, the right to information is conferred upon all persons who must be human citizens and not artificial persons and relied on **Nairobi Law monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013] eKLR**.

39. She argued that the Petitioners wrote the request for information on 18th October, 2019 and filed the petition on 23rd October 2019 which was too soon for any information to have been availed by the Cabinet Secretary. She submitted that the Court in **Kituo cha Sheria & another v Central Bank of Kenya & 8 others [2014] eKLR** held that the right to information is not absolute but limited. She further contended that the Petitioners have already posted the CV of Mary Wambui on Facebook and wondered whether the Petitioners are seeking the information to spoil other persons' reputation.

40. With respect to Petition 190, the counsel submitted that Ms. Wambui was appointed Chairperson of NEA as a ceremonial steward to preside over meetings, administration, setting agenda but not to undertake functions of NEA or its board as a whole. She reiterated that the Cabinet Secretary strictly complied with the Act in appointing the Chairperson of NEA and contended that it is the work of the Board to implement the NEA Act.

41. She submitted that Article 73 of the Constitution was not violated as the Petitioners have not proved that the appointee has integrity issues or that she is incompetent. She further argued that Ms. Wambui should not be discriminated on account of age or otherwise as Article 27 of the Constitution gives her equal protection from discrimination. She urged the Court to dismiss the Petition for being mere speculations and without merit.

Rejoinder

42. In a brief rejoinder, Mr. Manwa submitted that a legal person under Article 260 of the Constitution includes a company, association or other body of persons whether incorporated or not. He further argued that there is no difference between a person and a citizen.

43. As regards the right to information, the counsel observed that since service of the letter dated 18th October, 2019, the Cabinet Secretary has not responded to the letter and the information sought thereby has also not been availed to Court in this petition. As regards publication of Ms. Wambui's CV on Facebook, the counsel contended that there is no proof that the Petitioners have posted any information on social media in respect of the documents filed. He further contended that the CV of the outgoing chairperson is posted on the NEA website, likewise Ms. Wambui's CV is in the public domain as a former MP.

44. On the other hand, the counsel contended that Chapter Six of the Constitution provides for leadership and integrity and the onus is upon the appointing authority and not upon the Petitioners to prove that the appointee is qualified and has met the constitutional threshold. Finally, he submitted that the response filed by the Respondents in Petition 190 has not responded to the issues raised in Petition 193 being the process of appointment.

Issues for determination

45. It was confirmed by the defence that the 1st respondent appointed Ms. Wambui to be the Chairperson NEA for three years with effect from 14.10.2019 vide Gazette Notice No 9816 published on 14th October, 2019. The appointment was done in exercise of the power donated by section 10(1) of the NEA Act. It is common knowledge that the said position is in the public service and it is remunerated from the public coffers. It is now trite that under the new constitutional dispensation, appointments of public officers are subject to certain constitutional and statutory thresholds which must be respected and complied with or else the same can be impugned. The said thresholds include competence and integrity of the appointee, and also the process of the recruitment.

46. The main issues for consideration are:

- a. Whether Ms. Wambui was qualified for appointment as Chairperson of the National Employment Authority under section 10 (2) of the National Employment Authority Act.
- b. Whether the process of her recruitment to the position of Chairperson was flawed.
- c. Whether the petitioners' right to information was violated by the 1st respondent.
- d. Whether the petitioners are entitled to the reliefs sought.

a. Whether Ms. Wambui qualifies for appointment as Chairperson of the NEA under section 10 (2) of the NEA Act.

47. The Petitioners and the Institute contest Ms. Wambui's appointment on the ground that she does not meet the qualifications set out under section 10 (2) of the NEA Act. In particular, they aver that Ms. Wambui does not possess 7 years in human resource management or its equivalent as prescribed under section 10 (2) (c) of the NEA Act which according to them should be read together with section 19 of the Human Resource Management Professionals Act. They further contend that Ms. Wambui is a former Member of Parliament who has admitted that she has a limited educational background.

48. The Respondents' case is that section 10 (2) of the NEA Act does not make reference to the Human Resource Management Professionals Act or require that the Chairperson must be HR professional. They submitted that Ms. Mary Wambui has experience in human resource management due to her role as a secretary at Maendeleo ya Wanawake and as a Member of Parliament.

49. Section 10 (2) of the NEA Act provides: -

“A person shall be qualified for appointment as the chairperson of the Board if that person—

(a) is a citizen of Kenya;

(b) meets the requirements of Chapter Six of the Constitution; and

(c) has at least seven years' experience in human resource management or its equivalent.”

50. In my view the issue of Ms. Wambui's citizenship and her integrity requirements under Chapter six of the Constitution has not been contested in both petitions herein. I therefore proceed to deal with the question whether Ms. Wambui possesses the 7 years' experience in HR management or its equivalent required under section 10(2) of the NEA Act and the competence requirement under chapter six of the Constitution.

51. Human Resource Management basically refers to, or involves the management of persons in order to achieve an organisation's objectives, and it includes planning, procurement, compensation, integration among others.

52. The Human Resource Management Professionals Act establishes the Institute and provides for the regulation of the standards and

practice of human resource management professionals. Ms. Wambui is definitely not a human resource professional under the Human Resource Management Professionals Act according to the Institute. However as correctly argued by the respondent's, Section 10 (2) of the NEA Act only requires 7 years' experience in human resource management or equivalent. The Oxford English dictionary, 12th Edition defines experience as:

“knowledge or skill gained over time”

53. Ms. Wambui did not oppose the petitions herein and especially the allegation that she does not possess 7 years' experience in HR management or its equivalent. However, Mr. Peter Tum filed her CV which sets out her professional experience and achievements as a one term Member of Parliament for Othaya, Director at Figaros Limited, Administrator and Co-ordinator at Kanu Office Nyeri and Secretary at Maendeleo ya Wanawake.

54. I have carefully perused and considered the said CV but found no iota of evidence that she has any experience in HR management. I have also found that the roles she has undertaken as shown in the CV can not be interpreted as being the equivalent of human resource management because there is nothing to show that she has ever held managerial and operative functions of human resource management anywhere, for 7 years. In my considered opinion the concepts and techniques of human resource management which would lead to the experience sought under section 10 (2) of the NEA Act cannot be assumed to be obliquely attained. Such experience would only accrue from a background in the subject or interaction with such functions, which I find the appointee has not exhibited.

55. In addition to foregoing, Chapter 6 of the Constitution provides that: -

“(1) ...

(2) The guiding principles of leadership and integrity include

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;”

56. As already noted herein above, Ms. Wambui's personal integrity is not in question. However, her competence and suitability to the appointed is indeed questionable. In particular, I must reiterate that the lack of experience in human resource management or its equivalent makes her incompetent and unsuitable for the position. In **Godfrey Musaina & another v Cabinet Secretary for Tourism & 7 others [2017] eKLR** the Court held:

“From the above definitions, competence can be said to be ability, knowledge or skill that enables a person to understand and act effectively in a job situation. It would appear that it is not necessary for one to have academic qualifications in order to be competent to do a certain job or assignment. It would suffice if, in such a case, one has sufficient capacity to deal with financial matters... It is possible for one to have competence in a certain field out of practice and experience, for instance, having undertaken similar duties in a similar or related field for some time. Such experience would make the person competent without necessarily having attained higher academic qualification in that field. In its plain and ordinary meaning, the word “competence” means minimum ability to do that particular job or work, the legislature intended that one should have knowledge and understand financial matters for him to qualify for appointment.”

57. Though the above case was in reference to financial competency under an Act of Parliament, the Constitution provides for competency as a principle of leadership and governance. Such competence in this case would mean the ability by Ms. Wambui to undertake her role having had experience in human resource management. In the absence of experience in the specific field I return that she is not competent for appointment to the position of Chairperson of NEA.

58. The defence counsel argued that the Cabinet Secretary, appointed Ms. Wambui as a Ceremonial Steward to the Authority suggesting that the relevant professional qualification and skills are not necessary in that role of the NEA Chairperson. However, I disagree with that submission because as a Chairperson Ms. Wambui is not expected to be a flower-girl in NEA but the person to provide leadership to the board and the specialised Authority in order to ensure that it achieves its functions under the NEA Act. As already noted above, the new constitutional dispensation requires that value for tax payers' money is guaranteed through meeting of thresholds before appointing persons to public positions. It follows therefore that no one should be appointed to any public office if he or she cannot meet the legitimate purpose of government in the constitutional or statutory positions.

59. In view of the observations made herein above, I find and hold that the petitioners have proved that Ms. Mary Wambui does not meet the qualifications for appointment to the position of Chairperson of National Employment Authority prescribed under section 10 (2) of the NEA Act.

b. Whether the process of her appointment to the position of Chairperson was flawed.

60. The NEA Act does not provide for the process of recruitment of persons to the Board including that the Chairperson. However, any appointment of a public officer must adhere to the values set out under Article 10 and Article 232 and must take into account the provisions of Chapter Six of the Constitution, in particular Article 73 (2). In addition, section 10 of the Public Service (Values and Principles) Act requires that public appointments and promotions be on the basis of fair competition and merit. The section provides:

“(1)The public service, a public institution or an authorised officer shall ensure that public officers are appointed and promoted on basis of fair competition and merit.

(2)Despite subsection (1), the public service may appoint or promote public officers without undue reliance on fair competition or merit if—

(a) a community in Kenya is not adequately represented in appointments to or promotions in the public service or in a public institution;

(b)the balance of gender in the public service or in a public institution is biased towards one gender;

(c) an ethnic group is disproportionately represented in the public service or in a public institution; or

(d)persons with disabilities are not adequately represented in the public service or in a public institution.

(3)Each public institution or each authorised officer shall develop a system for the provision of relevant information that promotes fairness and merit in appointments and promotions.”

61. Section 10 (3) of the NEA Act provides for the provision of information that promotes fairness and merit in appointments. The Petitioners in Petition 193 contend that a nominee to the position of Chairperson must be recruited through a fair, open, competitive, merit based and inclusive recruitment process. They further contend that section 10 of the Public Service (Values and Principles) Act provides that public office appointments be based on fair competition and merit.

62. The petitioners submitted that they requested for the list of shortlisted candidates, the scores of each applicant and the reviews and evaluation of each of the applicants but the Respondents declined to supply the same. The defence counsel, however submitted that the information was not submitted due to the short duration between the date of the letter of request and the date of filing the suit. That explanation in my view does not hold because up to the time when the hearing was concluded, the Respondents did not avail the requested information documents related to the recruitment process except Ms. Wambui's CV.

63. It is such information that this Court ought to interrogate in order to verify whether the recruitment process was in compliance with the Constitution because it is in the public interest that merit and fair competition was considered in appointing Ms. Wambui as a Chairperson of the Authority that is expected to provide for a comprehensive institutional framework for employment management, to enhance employment promotion interventions and to enhance access to employment for youth, minorities and marginalized groups.

64. The Court of Appeal in **Ferdinand Ndung'u Waititu v Benson Riitho Mureithi (suing on his behalf and on behalf of the general public) & 2 others [2018] eKLR** held:

“The application of Chapter six of the Constitution to public officers, places an obligation on the appointing authority to take into account the integrity of the persons being considered for appointment as a public officer. In particular, Article 73(2) of the Constitution, provides the guiding principles of leadership and integrity, which includes... The above constitutional provision places an obligation on any appointing authority in regard to the appointment of a State officer to inquire into the personal integrity, competence and suitability of the appointee. The requirement of accountability to the public places the spotlight on the process and provides for public participation. Therefore, the issue of consideration of integrity and competence of the appellant was a crucial process in his appointment as Chairman of the Athi Water Services Board, and a matter of public interest.”
[Emphasis Added]

65. In the end I find that the 1st Respondent, the Cabinet Secretary has not proved that he competitively appointed Ms. Wambui as the Chairperson of the National Employment Authority. He also did not prove that there was a mechanism by which the public was to interrogate the integrity and competence of the appointee. Consequently, I find that the process of her appointment was flawed and in breach of the constitution and statutes.

c. Whether the petitioners' right of Access to information was violated.

66. In the letter dated 18th October, 2019 the Petitioners in Petition 193 , requested for information on the list of applicants, review and qualifications for appointment *inter alia*. They contend that they are entitled to this information by virtue of Article 35 of the Constitution and the failure to provide such information has resulted to the violation of their right of access information.

67. The defence counsel, however, argued that said right information is not available to the Petitioners as they are not citizens. She further contended that the information could not be availed because the suit was filed shortly after serving the letter requesting for the same. In addition, she contended that the right to information is not absolute. In their rejoinder, the petitioners contended that the definition of a person under Article 260 includes a juridical person and that there is no difference between a person and a citizen.

68. I have carefully considered the pleadings, the foregoing submissions, the cited constitutional provisions and the precedents. The 1st Petitioner, Siasa Place describes itself as a Non-Governmental Organisation while the 2nd Petitioner describes itself as limited liability Company. On the other hand, Article 35(1) of the constitution provides that: -

“Every citizen has the right to-

a) Information held by the state; and

b) Information held by another person and required for exercise or protection of any right or fundamental freedom.”

69. In **Famy Care Limited v Procurement Administrative Review Board & Another [2013] e KLR**, Majanja J held that:-

“The right of access to information protected under Article 35(1) has an implicit limitation that is, the right is only available to a Kenyan citizen. Unlike other rights which are available to every ‘person’ or ‘a person’ or ‘all persons’ this right is limited by reference to the scope of persons who can enjoy it. It follows that there must be a distinction between the term ‘person’ and ‘citizen’ as applied in Article 35 ... Though the term “citizen” is not defined in Article 260, citizenship is dealt with under Chapter Three of the Constitution, Articles 12 to 18. The purport and effect of these provisions is that citizenship is in reference to natural persons”

70. In **Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 Others [2013] e KLR** Mumbi Ngugi J agreed with the foregoing interpretation and held that: -

“81. I therefore fully agree with the decision of Majanja J in Famy Care Limited that a body corporate or a company is not a citizen for the purpose of Article 35(1) and is therefore not entitled to seek enforcement of the right to information as provided under that Article.”

71. Mumbi J referred to the American case of Paul v Virginia where the Supreme Court of the US held that: -

“... corporations are not citizens within the meaning of the clause; that term citizen, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, possessing only such attributes as the legislature has prescribed...”

72. Applying the facts of the instant case to the provisions of Article 35 (1) and the above precedents, I agree with the defence counsel that the right of access to information under Article 35 of the Constitution is only available to citizens who are natural persons and not juridical persons like corporations or companies or organisations like the petitioners herein. Accordingly, I must which I do, return that the failure by the respondents to provide the petitioners with the information concerning the recruitment process of Ms. Wambui as the Chairperson of NEA did not violate the Petitioners’ rights to information under Article 35(1) of the Constitution.

d. Whether the petitioners are entitled to the reliefs sought.

(i) Quashing of the appointment of Ms. Mary Wambui Munene.

73. I have already found, herein above, that the 1st Respondent, violated the provisions of Article 10, Article 73 and 232 of the Constitution, Section 10 (2) of the National Employment Authority Act and section 10 of the Public Public Service (Values and Principles) Act when he appointed Ms. Wambui as the Chairperson NEA on 14.10.2019. The appointment did not meet the substantive and procedural requirements laid down by express constitutional and statutory provisions. Ms. Mary Wambui Munene did not meet the competence threshold for the position and her recruitment was not competitively done but irregularly done through what appears to be handpicking. I therefore make declaration that the said appointment is unconstitutional because it was done in violation of the said provisions of the Constitution and the statutes.

74. Flowing from the foregoing declaration, and more so, based on my finding herein above that Ms. Mary Wambui Munene is not qualified to be appointed as the Chairperson of the National Employment Authority and that the process of her appointment was flawed, further make declaration that the said Gazette Notice No. 9816, CXXI-No. 137 of 14th October, 2019 appointing Ms. Mary Wambui Munene as the Chairperson of the National Employment Authority was irregular, unlawful and unconstitutional; and hereby quash it forthwith.

75. In view of the foregoing declaratory orders and the quashing of her appointment, Ms. Mary Wambui Munene is permanently restrained by order of injunction from assuming office as the Chairperson of the National Employment Authority. Flowing from the foregoing order, in case Ms. Wambui has already assumed office, which was not confirmed, then I direct that she vacates the office forthwith.

76. To avoid a repeat of court battles on the appointment of the Chairperson of National Employment Authority, I make declaration, as prayed that, appointment of the Chairperson of National Employment Authority by the 1st respondent, must comply with the mandatory provisions of the section 10 (2) of the National Employment Authority Act.

(ii) Violation of right to information under Article 35 of the Constitution.

77. In view of my finding herein above that the petitioners herein were not availed the right of access to information under Article 35 (1) of the Constitution, I decline to make declaration that their right of access to information was violated.

78. Flowing from the foregoing I find that the petitioners are not entitled to damages for violation of their alleged right to information under Article 35 of the Constitution.

Conclusion and disposition

79. I have found that the appointment of Ms. Mary Wambui Munene as the Chairperson of the National Employment Authority by the 1st respondent vide Gazette Notice No. 9816, CXXI-No. 137 of 14th October, 2019 was irregular, unlawful and unconstitutional because it was

done in violation of both substantive and procedural thresholds envisaged in express provisions of the Constitution and statutes. The said thresholds relate to her competence and the procedure of her recruitment.

80. I have further found that the right to information under Article 35(1) is limited and only enjoyed by citizens who are natural persons in exclusion of juridical persons like the petitioners herein. For that reason, I have declined to grant the petitioners any remedy under Article 35 of the Constitutional.

81. The upshot of what I have said in many words is that the two petitions as consolidated herein succeeds to the extent stated above and the reliefs granted are collapsed into the following orders and judgment entered for the petitioners accordingly: -

- a) A declaration that Ms Mary Wambui Munene does not meet the required constitutional and statutory qualifications and experience for appointment to the position of the Chairperson of the National Employment Authority Board and thus she is unqualified, unsuitable and unfit to serve as chairperson of the national employment authority board.
- b) A declaration that the purported appointment of Ms Mary Wambui Munene to the position of the Chairperson of the National Employment Authority Board vide Gazette Notice No. 9815 (vol. Cxxi-no. 137) dated 14th October, 2019 did not meet the laid down substantive and procedural constitutional requirements applicable in public service appointments; and is therefore unconstitutional, unlawful, irregular, null and void for being in contravention of Articles 10,27, 73 (2) and 232 of the Constitution of Kenya, 2010.
- c) A declaration that the 1st respondent's purported handpicking and appointment of Ms. Mary Wambui Munene vide Gazette Notice No. 9816 (vol. Cxxi- no. 137) dated 14th October, 2019, to the position of the Chairperson of the National Employment Authority Board without following the laid out substantive and procedural, constitutional and statutory requirements applicable in public service appointments, is unconstitutional, unlawful and irregular for being in contravention of Articles 10,27,73 (2) and 232 of the Constitution Of Kenya , 2010.
- d) The Gazette Notice No. 9816 (Vol. Cxxi-No.137) dated 14th October, 2019 vide which the cabinet secretary for labour and social protection purported to appoint Mary Wambui Munene as the chairperson of the National Employment Authority Board is hereby quashed forthwith.
- e) Permanent injunction is hereby issued restraining Ms Mary Wambui Munene from assuming office as the Chairperson of the National Employment Authority.
- f) The 1st respondent is hereby directed to ensure that future appointments of the Chairperson of the National Employment Authority Board must strictly adhere to the substantive and procedural, constitutional and statutory requirement applicable in public service.
- g) Due to the public interest nature of the proceedings, I decline to award any costs.

Dated and delivered at Nairobi this 17TH day of JANUARY 2020.

ONESMUS N MAKAU

JUDGE