



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 244 OF 2019

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

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), 279(1), 232, 249(1) & (2), 250(2), (3) & (4) AND 259(1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTIONS 11(5),(6) & (7) OF THE PUBLIC AUDIT ACT NO. 34 OF 2015 AND SECTION 5 OF THE ACCESS TO INFORMATION ACT NO. 31 OF 2016

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL THRESHOLDS FOR APPOINTMENT AS THE AUDITOR GENERAL

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE GOVERNMENT'S DECISION TO ABANDON THE RECRUITMENT OF THE NEW AUDITOR GENERAL AND TO RE-ADVERTISE THE VACANCY

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

THE NATIONAL EXECUTIVE OF THE REPUBLIC

OF KENYA.....1st RESPONDENT

THE SELECTION PANEL FOR THE APPOINTMENT

OF THE AUDITOR GENERAL.....2nd RESPONDENT

THE HON ATTORNEY GENERAL.....3rd RESPONDENT

AND

KATIBA INSTITUTE.....INTERESTED PARTY

JUDGMENT

1. The delivery of this judgment was first scheduled for 26 February 2020. It was not delivered. The Court then gave notice of judgment for 6 March 2020. It had to be rescheduled again because of an application filed by the Okiya Omtatah Okoiti (Petitioner) on 3 March 2020.
2. On or around 27 August 2019, the President issued a declaration of vacancy for the Office of Auditor General and the notice called upon interested candidates to apply to the Secretary/Chief Executive Officer, Public Service Commission on or before 9 September 2019.
3. After the lapse of the application deadline, the President, on 20 September 2019 appointed a Selection Panel for the purpose of selecting nominee(s) for appointment as Auditor General.

4. According to a Gazette Notice of 11 October 2019, some 70 persons applied out of which the Selection Panel shortlisted 17 for interviews to run from 22 October 2019 to 25 October 2019.
5. The Selection Panel conducted interviews, and on 11 December 2019, it informed the public through a press conference that it had been unable to find 3 successful candidates to recommend to the appointing authority. At the same time, the Selection Panel indicated that it had recommended to the President to re-advertise the vacancy.
6. The President re-advertised the vacancy for Auditor General on 17 December 2019, and interested candidates were instructed to make applications on or before 30 December 2019.
7. On 19 December 2019, Petitioner moved the Court under a certificate of urgency contending that the re-advertisement was *ultra vires*. He sought an order interdicting the fresh recruitment.
8. The Duty Court certified the application urgent and directed that it be served upon the Respondents for *inter partes* hearing on 23 December 2019.
9. The Respondents filed a replying affidavit in opposition to the motion on 23 December 2019, the *inter partes* hearing day.
10. When the application was placed before the Court, it directed that hearing proceed on 17 January 2020.
11. On the morning of 17 January 2020, the Petitioner filed skeletal submissions, and when the application was called for hearing, all the parties indicated that they were ready to proceed.
12. However, when the application was called after the cause-list call over, Mr. Ogosso, counsel for the Respondents indicated a change of mind and requested to be allowed 2 days to file a further affidavit, on the ground that the Petitioner had only served him with the skeletal submissions in Court.
13. The Court allowed the parties to address it off-record on the way forward after it which directed that to optimally utilise judicial time, the motion and the Petition would be heard together as the factual and legal questions posed were similar.
14. The Court, in the circumstances, directed that the parties file/exchange further affidavits and submissions, and in the interim issued an interim interdict stopping the Selection Panel from proceeding with the recruitment process pending the highlighting of submissions on 20 February 2020.
15. The next day, 21 January 2020, the Respondents filed an application under a certificate of urgency, asking the Court to set aside or discharge the interim interdict stopping the recruitment process.
16. The Duty Court certified the application urgent and directed that it be placed before this Court for further directions.
17. When the application came for directions on 23 January 2020, the Court directed the filing of further affidavits in with mention set for 27 January 2020.
18. When the file was placed before the Court on 27 January 2020, Mr. Nani Mungai informed the Court that he was coming on record for the 1st Respondent.
19. The Court, again, heard brief oral submissions from the parties and ultimately, agreement was reached that the Petition and the motion be urged together on 4 February 2020.
20. The record bears out that the following documents were filed
 - (i) Petition and Motion on 19 December 2019.
 - (ii) Replying Affidavit sworn by Sammy Onyango on behalf of the Respondents on 23 December 2019.
 - (iii) Petitioner's skeletal submissions on 17 January 2020.
 - (iv) Respondents' application under a certificate of urgency on 20 January 2020.
 - (v) 1st Respondent's skeleton submissions filed on 21 January 2020.
 - (vi) Further affidavit by Julius Muia on behalf of the 1st Respondent on 24 January 2020.
 - (vii) Further Affidavit by Sammy Onyango on behalf of the 2nd and 3rd Respondents on 24 January 2020.
 - (viii) 1st Respondent's submissions on 27 January 2020.

(ix) 2nd and 3rd Respondent's submissions on 27 January 2020.

(x) Petitioner's further affidavit, submissions and List of Authorities on 3 February 2020.

(vi) Interested Party's submissions on 4 February 2020.

21. The Court received the oral highlights as scheduled and reserved judgment on notice (a notice was given for judgment on 26 February 2020).

22. However, on 21 February 2020, the office of the Honourable Chief Justice called for the file, and the file was forwarded to his office on 24 February 2020 (the Court has since established from correspondence in the file that the Deputy Registrar received back the file on 25 February 2020 but it was only on 27 February 2020 that the file was placed in the Court's desk).

23. In the circumstances, a fresh judgment notice was issued for 6 March 2020, but the delivery of the judgment aborted because of an application by the Petitioner seeking a mistrial and recusal of the Judge (separate Ruling in respect of the application has been delivered).

24. The Court has considered all the material placed before it, including the tens of case law/authorities cited by the parties, even if no reference is made explicitly to all of them.

25. The Court has adopted the Issues as proposed by the parties, albeit condensed where necessary.

Joinder of Katiba Institute as an Interested Party

26. The participation of *Katiba Institute* as an Interested Party was questioned by the 2nd and 3rd Respondents as Issue (c), and by the 1st Respondent as a preliminary issue.

27. Due to the urgency of the Petition, the Court directed that it would consider the objection on the joinder of *Katiba Institute* as part of the hearing on the merits.

28. The law on the joinder of an Interested Party is now fairly settled (see *Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Ors* (2014) eKLR and *Francis Kariuki Muruatetu & Ar v Republic & 5 Ors* (2016) eKLR).

29. An Interested Party ought to have a direct stake or legal interest in the dispute, in that any outcome would affect them. And joinder of an Interested Party is not as of right but at the discretion of the Court.

30. In the Petition herein, *Katiba Institute* did not apply to be enjoined as an Interested Party. Had it applied to be joined, the Court would have been called upon to determine whether it had any stake or legal interest in the dispute.

31. The Petitioner had, in his wisdom opted to include *Katiba Institute* as an Interested Party without seeking the Court's exercise of discretion as to the joinder.

32. *Katiba Institute* was joined into these proceedings through an unusual practice, but which practice is gaining ground where parties are included as Interested Parties before the Court is allowed to determine if the Interested Party has a real stake or legal interest in the dispute.

33. In the instant case, it is the Petitioner who solely determined that *Katiba Institute* had a stake or legal interest in the proceedings. Technically, it is *Katiba Institute* which should have moved the Court to demonstrate its legal interest in the Petition.

34. The Court was not given the opportunity at the first instance to determine the stake or legal interest.

35. However, despite opposing the participation of *Katiba Institute* and having the procedural law on their side, the Respondents did not demonstrate any prejudice or unwholesome impact on the use of scarce judicial time the involvement of *Katiba Institute* would occasion to the expeditious determination of the dispute before Court.

36. In the obtaining circumstances, and finding no prejudice likely to be occasioned to the Respondents with the participation of *Katiba Institute* as an Interested Party, or the Court through prolonged dispute or the just determination of the Issues in dispute, the Court will overrule the Objection on the participation of *Katiba Institute* as an Interested Party.

37. The Court has taken note that *Katiba Institute* filed submissions supporting the Petitioner's cause.

Whether Petition raised constitutional questions

38. The first substantive question identified by the 1st Respondent was whether the Petition had been pleaded with specificity expected of a Constitutional Petition.

39. The Respondents urged the Court to decline any relief on the ground that the Petition did not raise constitutional questions nor meet the standard contemplated by *Anarita Karimi Njeru v Republic* (1979) eKLR in that the alleged constitutional violations were not set out with a

reasonable degree of precision. It was also contended that the Petitioner did not outline how the outlined rights were infringed.

40. The Respondents urged the Court to follow in the footsteps of the Court in *Samuel Nduati & 3 Ors v Cabinet Secretary, Ministry of Health & 9 Ors* (2018) eKLR and dismiss the Petition.

41. The Petitioner in rebutting the competency challenge contended that the Petition met the threshold as envisaged under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, and that even if the standard was not met, there was *epistolary jurisdiction* under Rule 10(3) & (4) permitting the Court to accept even oral applications where constitutional violations were alleged.

42. The Petitioner cited the Court of Appeal preposition in *Peter M. Kariuki v Attorney General* (2014) that the narrow approach enunciated in *Anarita Karimi Njeru* should yield to a purposive interpretation.

43. The Petitioner, therefore, urged the Court not to let form triumph over merit.

44. The Court has relooked at the Petition.

45. It questions the second attempt to recruit an Auditor General.

46. It has set out the relevant constitutional and statutory provisions establishing the office and the legal provisions purportedly violated by the Respondents and these include non-compliance with the national values and principles of governance, the values and principles of public service and the responsibilities of leadership.

47. The Petition, as drafted cannot be that ambiguous that the Respondents were put in doubt as to what the case they were expected to meet.

48. The Petitioner clearly and precisely set out the case he was advancing by outlining the facts, the applicable legal provisions and how the provisions were allegedly violated.

49. In the view of the Court, the principle in *Anarita Karimi Njeru* does not call for mathematical precision in drafting of pleadings. It is the substance of the alleged violations and provisions violated which should be looked at, hence the invocation and creeping of the *epistolary principle* which is common in India, in our jurisdiction.

The legal authority of the President and the Selection Panel

50. Under Issue 2, the 1st Respondent identified a broad question to wit, what is the process and constitutional and legal mandate/power of the President and the Selection Panel in the selection of candidates for nomination as Auditor General.

51. The Petitioner discussed this broad issue under issues (e) to (h) in his submissions. The 1st Respondent identified the question under (a).

52. The Court has identified and isolated several sub-themes running under the broad Issue.

Consideration of extraneous factors

53. One of the grounds of challenge by the Petitioner to the fresh recruitment process was that the Selection Panel in failing to recommend three names to the President for nomination as Auditor General had taken into consideration taken extraneous factors not contemplated by the applicable legal framework.

54. The Petitioner asserted that the qualifications/eligibility criteria for one to hold the position of Auditor General were those set out in Article 229(2) of the Constitution as read with section 5 of the Public Audit Act.

55. According to the Petitioner, the Selection Panel introduced extraneous and subjective qualifications in the name of *tact, diplomacy and independence*.

56. In the view of the Petitioner, such attributes could only serve as an added advantage, and could not be used to bar any qualified candidate from appointment as Auditor General.

57. The decision to cancel the recruitment process based on the extraneous considerations, the Petitioner urged, violated the binding national values and principles as enshrined in Article 10, the right to equality and freedom from discrimination as demanded by Article 27, the right to fair labour practices set out in Article 41(1), the right to fair administrative action guaranteed by Article 47, the responsibilities of leadership set out in Article 73 as well as Articles 229(1), 232(1), 250 and 251 of the Constitution.

58. The decision not to recommend three names, the Petitioner submitted was, therefore, *ultra vires* because of the introduction of these extraneous considerations.

59. The Respondents were of a contrary view.

60. According to them, the Constitution and the Public Audit Act did not expressly set out the procedures and criteria the Selection Panel

ought to follow during the interview process, and therefore it was open to it to determine its criteria. The criteria set by the Selection Panel, according to the Respondents included *high moral character, integrity, and impartiality*.

61. In the view of the Respondents, the Selection Panel was clothed with statutory authority to set recruitment criteria and the setting of such criteria and scoring template did not amount to consideration of any extraneous factors.

62. Apart from the constitutional qualifications outlined in Article 229(2) of the Constitution, the Selection Panel is authorised by section 11(5) of the Public Audit Act to prepare criteria for interviewing the candidates and also to score the candidates.

63. The extraneous factors alleged to have been considered by the Petitioner were *tact, diplomacy and independence* and the setting of a pass mark of 70%.

64. The office of the Auditor-General is both a state and public office.

65. In terms of constitutional architecture, candidates/holders of the office of the Auditor-General must pass the test of leadership and integrity as contemplated by Chapter Six of the Constitution.

66. Some of the guiding principles of leadership and integrity include objectivity and impartiality in decision making free of influence by favouritism or other improper motives.

67. The requirement for independence is contextualised in section 10 of the Public Audit Act.

68. Equally, the office of the Auditor-General being a state office is a public trust or service which should be exercised in a manner that demonstrates respect for the people.

69. In the view of this Court, the attributes of high moral character, integrity, impartiality, *tact, independence and diplomacy* mentioned by the Selection Panel during the Press Conference were not extraneous considerations, but qualifications found both in the text and spirit of Articles 10(2)(c), 73(1)(a)(ii),(iv), 73(2)(a),(b),(c),(d) & (e), 232(1)(c) of the Constitution, and sections 7 and 10 of the Public Audit Act.

Was the Selection Panel obliged to send interview proceedings report to Parliament?

70. According to the Petitioner, the import of section 11(5) of the Public Audit Act was that the Selection Panel had no option but to send to Parliament a report of its interview proceedings, and to the President, three recommended names within 7 days of selection, even if it was dissatisfied with the quality of the candidates.

71. Failure to submit the report to Parliament and three recommended names to the President, the Petitioner urged, breached the obligation by the State to publish and publicise important information affecting the nation as required by Article 35(3) of the Constitution for access to information by citizens, the values and principles of accountability for administrative acts and transparency in availing timely and accurate information concerning the public service to the public as contemplated by Article 232(1)(e) & (f) of the Constitution.

72. The Petitioner also contended that section 5 of the Access to Information Act placed a burden on the Respondents to disclose the report of the interview proceedings.

73. Submitting a report of the interview proceedings to Parliament, according to the Petitioner would have breathed life in the need for transparency and accountability in the recruitment process as the public would have been put in the picture as to the conduct of the process.

74. Relying on unverified reports, the Petitioner contended that the Selection Panel had indeed forwarded three names to the President, and the President was under a statutory duty to nominate one and send the name to the National Assembly.

75. Any concerns on the suitability of the recommended persons by the Selection Panel, it was urged should have been put in the report of the interview proceedings send to Parliament, as it was at approval stage that the nominee(s) could be rejected by the National Assembly.

76. For emphasis, the Petitioner urged that the Selection Panel could not terminate the process leading to a re-advertisement.

77. For the Respondents, it was contended that the Selection Panel had the power to decline to submit a report on the interview process to Parliament and/or select and forward to the President three names where the candidates failed to meet the legal qualifications and set criteria because it had the leeway to determine the selection/scoring criteria.

78. According to the Respondents, if the Selection Panel failed to find three candidates meeting the constitutional, statutory and criteria set, it could lawfully recommend a repeat process without releasing the report of the interview proceedings as such an action would be prejudicial to the fresh recruitment.

79. The release of the interview proceedings and results, it was urged would advantage prospective candidates in the repeat process.

80. In short, the Respondents were contending that the requirement to submit a report of the interview proceedings, and three recommended names to the President crystallised only if the at least three of the candidates met the legal qualifications and set minimum criteria.

81. To answer the question posed, the Court is being called upon to construe primarily the meaning to be attached to section 11(5) & (6) of the Public Audit Act and more so the need to submit a report of the interview proceedings to Parliament.
82. The starting point is always the *plain meaning rule*. The Court may also invoke the *language* canon of construction. The Court must of course not lose sight of the intention of the legislature if it can be ascertained.
83. If there was mischief the legislature intended to address, the Court must consider it. The mischief rule is closely interlinked with the purposive approach.
84. Under section 11(5) of the Public Audit Act, the Selection Panel is under an obligation to submit to Parliament a report of the interview proceedings.
85. Before the Constitution 2010 and the Public Audit Act, 2015, the recruitment of the Auditor General was not participatory. It was not accountable. It was not a transparent process.
86. The Constitution 2010 made the office an independent office. The qualifications for holding the office were ingrained in the supreme law but given more content in the Public Audit Act, 2015.
87. Section 11(5) of the Act does not appear to qualify the obligation on the Selection Panel to submit a report on the interview proceedings to Parliament to instances where three persons have been recommended for selection as Auditor General.
88. There must have been an objective/purpose in requiring the Selection Panel to submit a report of the interview proceedings to Parliament, and not necessarily expressly providing for submitting the report to the President.
89. The objective, according to the Court is located in the Constitution. It is part of the good governance, transparency and accountability enshrined in the national values and principles, the need to promote public confidence in the integrity of public and state offices under chapter Six, and the public service values of accountability, transparency and provision of accurate and timely information to the public.
90. The argument therefore that releasing the interview proceedings would be prejudicial or advantage applicants during a repeat process have no merit.
91. The Selection Panel as a public entity entrusted with a legal mandate must inspire public confidence in its operations.
92. It can only inspire public confidence in its operations by being transparent and accountable to the public and the representatives of the people.
93. The public confidence in the Selection Panel would, in turn, ensure public confidence in the person appointed as the Auditor General.
94. In other words, there would be no public confidence in the Auditor General if the Selection Panel was not transparent and accountable.
95. It is only by releasing the interview proceedings that the people of Kenya would be assured that extraneous considerations did not influence the recruitment process (these proceedings did not have the benefit of the interview proceedings and was therefore under a handicap).
96. The duty of the Selection Panel to submit a report of the interview proceedings to Parliament is not qualified by a requirement that there should be successful recruitment.
97. In consideration of the foregoing, the Court finds that the Selection Panel had both a constitutional and statutory duty to submit a report of the interview proceedings to Parliament as elected representatives of the people despite the outcome of the interview process.

Termination and re-advertisement of vacancy for Auditor General

98. The Petitioner asserted that under section 11(10) of the Act, only Parliament had the exclusive power to terminate the process and trigger a repeat recruitment process of the Auditor General after rejecting the names of nominees presented to it by the President.
99. And in performing its mandate, the Petitioner asserted that Parliament was required to consider the report on the interview proceedings in terms of section 11(5) of the Public Audit Act.
100. According to the Petitioner, the Selection Panel had no option but recommend the three top candidates to the President even if (Selection Panel) was dissatisfied with the candidates and leave it to the National Assembly to decline to approve the nominee(s).
101. In terminating the recruitment process and causing a re-advertisement, the Petitioner maintained, the Selection Panel and the President were acting *ultra vires*.
102. The Petitioner further asserted that the Selection Panel breached the right to fair administrative action (Article 47 of the Constitution) by failing to recommend three names to the President despite shortlisting 17 candidates. All the 17 candidates, the Petitioner urged at some point, qualified to hold the office of the Auditor-General.

103. The Respondents urged that the Selection Panel having the discretion to set the criteria for selection and having found that none of the candidates met the qualifications and set criteria, could recommend a termination and thereafter a repeat recruitment process.

104. In the view of the Respondents, the recruitment process only becomes complete upon the valid appointment of a person to the office of the Auditor-General.

105. The recruitment of an Auditor General is both statute guided and time-bound exercise.

106. The Public Audit Act does not envisage the termination of the process unless the National Assembly declines to approve a nominee forwarded by the President.

107. The question, therefore, begs whether that is the only valid method through which the recruitment process could be terminated. According to the Petitioner, the National Assembly route was the only lawful route.

108. In the view of the Court, the Petitioner has given a narrow construction to section 11(8) & (10) of the Public Audit Act, 2015.

109. The mere fact that other avenues of terminating the recruitment process are not set out in law does not mean that other methods would be invalid.

110. It cannot be that that the only possible and legal way the recruitment process for the Office of the Auditor-General may come to an end is through a rejection by the National Assembly.

111. The nominees may decline to take up the office. There may probably be no qualified candidates at the shortlisting stage.

112. It would make no sense in such types of scenarios to insist that the National Assembly must decline the nominee(s). It would not be illegal or *ultra vires* in such a case for the appointing authority to formally terminate the process.

113. In the view of the Court, the termination of the recruitment process under section 11(8) & (10) is only applicable where the Selection Panel successfully recommends three names of candidates who meet the legal qualifications and set criteria to the President.

114. In other words, the duty on the Selection Panel to send names to the President is qualified to cases where the legal qualifications and set criteria have been met and where there are no qualified candidates, the process can be terminated upon recommendation by the Selection Panel to the President and started afresh within the confines of the law.

Life of the Selection Panel

115. The Respondents took the position that the legal mandate and life of the Selection Panel only comes to an end when a person has been validly appointed to the office of the Auditor-General.

116. When a vacancy occurs in the office of the Auditor General, section 11 of the Public Audit Act contemplates a time-bound process with the President declaring the vacancy within 7 days. The applications should be made to the Public Service Commission within 14 days.

117. Within 14 days of the close of receiving applications, the President is expected to constitute a Selection Panel.

118. The main responsibilities of the Selection Panel are considering (interviewing) the applicants and selecting names of three who qualify for appointment as Auditor General.

119. The Selection Panel is required to forward the names of the three to the President within 7 days for nomination and the President also has 7 days to forward the nominee(s) to the National Assembly for appointment or rejection. If the National Assembly rejects a nominee, the President is required to forward another name from the list of three.

120. Should the National Assembly reject all the three initial nominees, the process is expected to start fresh as Section 11(13) of the Public Audit Act contemplates fresh gazetting of vacancy for an Auditor General, fresh applications, fresh constitution of a Selection Panel, fresh interviews and selection of 3 new names.

121. In the present case, it seems the President did not constitute a fresh Selection Panel.

122. Cumulatively, the above section of the Public Audit Act suggests to the Court that the life span of the Selection Panel is finite, and lapses when a report is submitted to the President, either recommending three persons for appointment as Auditor-General or recommending a fresh process. The Court, therefore, rejects the contention by the Respondents that the Selection Panel remains validly constituted until a person is appointed to the office of the Auditor-General.

123. Consequently, if the Selection Panel fails to recommend three persons for appointment as Auditor-General and more so in the circumstances like obtained here, there was a need for a positive formal decision from the appointing authority extending the life of the Selection Panel and/or constituting a fresh Selection Panel. No material was placed before the Court to show that the life and or legal mandate of the Selection Panel was extended or that it was reconstituted.

124. Further authority to extend the life of the Selection Panel can be inferred from the provision of section 59 of the Interpretation and General Provisions Act.

125. The President did not issue an order extending the term of the Selection Panel within 14 days after the close of the application period or constitute or reconstitute the Selection Panel, and in the circumstances, the initial Selection Panel lacked the legal competence to act on or process the recruitment arising from the re-advertisement.

Public participation

126. The Respondents contended that public participation in the recruitment process was demonstrated by the open advertisement for the office of the Auditor-General, the open and transparent shortlisting of candidates, open manner of informing the public of the outcome of the process including a recommendation for re-advertisement and the open re-advertisement by the President.

127. The Respondents also contended that the role of the National Assembly in the approval process ensured public participation as the public were free to give views on the suitability of the nominees.

128. The Respondents urged the Court to follow the legal principle adopted in Nairobi High Court Petition No. 318 of 2012 *Law Society of Kenya v Attorney General* (unreported) that the Court ought to interrogate the entire process.

129. Save for the failure to demonstrate that the interviews were conducted in the open, and for which the Respondents did not tender any explanation, the Court finds that the recruitment process was substantially in compliance with the tenets of public participation.

Appropriate remedies

130. The Respondent urged the Court not to grant an order of mandamus because it had not been demonstrated that the decision of the Selection Panel not to submit three names to the President was unreasonable.

131. It was also urged that the decision for fresh recruitment was an exercise of discretion and in terms of the principles set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1KB 223, the Court ought not to intervene because it disagreed by the decision of the Selection Panel.

132. The Respondents also invoked the principle of separation of powers/doctrine of deference to urge the Court not to issue an order of mandamus as the recruitment process was within the competence of the Executive and Legislature. The Court was asked to defer to the decision of the Selection Panel.

133. In the view of the Respondents, the Petitioner had failed to prove that they had failed or declined to perform a statutory duty.

134. The Petitioner on his part contended that the overriding public interest in ensuring appointments to public offices were strictly done following the law could lead to no other place but to quash the fresh recruitment and order the Respondents to conclude the first recruitment process.

Conclusion and Orders

135. The Petitioner sought 9 declarations and 3 substantive orders targeted at quashing the re-advertisement, compelling the Selection Panel to forward 3 names to the President and the National Assembly.

136. The Petitioner has partly succeeded, and the Court will issue orders as follows:

(i) A declaration that section 11(5) of the Public Audit Act imposes an obligation on the Selection Panel to submit to Parliament a report of the interview proceedings including the scores of each candidate without any qualification.

(ii) A declaration that the Selection Panel appointed through Gazette Notice No. 8896 lacked the legal competence and validity to consider any applications for the re-advertised vacancy for the position of the Auditor-General before the extension of its the life or to constitution afresh.

(iii) An order that the Selection Panel and/or the Honourable Attorney General submit forthwith to Parliament a report of the interview proceedings.

137. This was public interest litigation.

138. The Court has found some merit in it. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 12th day of March 2020.

Radido Stephen

Judge

Appearances

Petitioner in person

For 1st Respondent Mr. Nani Mungai instructed by Muriu, Mungai & Co. Advocates

For 2nd & 3rd Respondents Mr. Ogosso, Senior State Counsel, Office of the Attorney General

For Interested Party Mr. Lempaa

Court Assistant Judy Maina