



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 116 OF 2020(PET EO14 OF 2020)**

(Before Hon. Justice Hellen S. Wasilwa 29<sup>th</sup> September, 2020)

ABDI MOHAMED ABDULLAHI.....PETITIONER

VERSUS

THE BOARD CHAIRMAN, NATIONAL WATER HARVESTING

& STORAGE AUTHORITY.....1<sup>ST</sup> RESPONDENT

THE BOARD OF DIRECTORS, NATIONAL WATER HARVESTING

& STORAGE AUTHORITY.....2<sup>ND</sup> RESPONDENT

THE CABINET SECRETARY, NATIONAL WATER HARVESTING

& STORAGE AUTHORITY.....3<sup>RD</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

**JUDGMENT**

1. What is before this Honourable is the Petition dated 23/7/2020, in which the Petitioner seeks the following reliefs:-

*i. A declaration that the recruitment process ensuing from Re-Advertisement Notice, “Vacancy for the position of Chief Executive Officer - Ref NWHSA/CEO/2019/2020/02” dated 30<sup>th</sup> June, 2020 and/or from any other advertisement for the vacancy of the same position, not being from Re-Advertisement Notice for the position of Chief Executive Officer, under Ref NWHSA/CEO/2018/2019/01 dated 11<sup>th</sup> June, 2019 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, either by themselves or through their servants, agents, representatives and/or by any other person is unconstitutional, null and void ab initio and in violation of the law.*

*ii. A declaration that the recruitment process ensuing from the Re-Advertisement Notice for the Position of Chief Executive Officer, Referenced NWHSA/CEO/2018/2019/01” dated 11<sup>th</sup> June, 2019 met all the constitutional and legal requirements and/or was conducted in strict compliance of all the laws, thus valid and lawful.*

*iii. A Mandatory Order do issue from this Honourable Court compelling and/or directing the 3<sup>rd</sup> Respondent to appoint and Gazette the second top most candidate, being Andrew Mukhisa Wanyonyi as the substantive Chief Executive Officer of the Authority within fourteen days (14) from the date hereof, failing which the said second top most candidate shall be deemed as duly appointed on such terms and conditions the Cabinet Secretary for Public Service may determine on the advice of the Salaries and Remuneration Commission (SRC).*

*iv. Upon grant of Order three (3) above, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and Respondents and/or any relevant state officer/office be ordered to unconditionally facilitate the said second top most candidate to smoothly and immediately assume office, pay all his salary and/or allowances as per the law and/or provide him all the required support to enable him perform the functions and duties of his office during his tenure in office.*

**v. Cost of the Petition.**

**Background**

2. The Petitioner avers that on 11<sup>th</sup> June, 2019 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents caused a re-advertisement notice calling upon members of the public to apply and submit their Applications for the position of the Authority's Chief Executive Officer and further directed that such Applications be submitted on or before the 3<sup>rd</sup> July, 2019 at 5.00pm.
3. He further avers that the process of application was successfully closed on the said date and the recruitment process commenced. He further averred that the 1<sup>st</sup> Respondent did receive a total of 51 Applications out of which 11 Applicants were shortlisted for the 1<sup>st</sup> round of interviews that took place between 23<sup>rd</sup> and 25<sup>th</sup> July, 2019. The Petitioner further contended that the top 7 candidates that scored above 70% were subjected to a further interview on 13<sup>th</sup> August, 2019.
4. The Petitioner maintains that the rigorous recruitment process was eventually concluded and that the 2<sup>nd</sup> Respondent arrived at the top 3 candidates being Engineer Sammy M. Mburu 81.78%, Mr. Andrew Mukhisa Wanyonyi 80.11% and Mr. Ali Boru 76.44%.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents subsequently forwarded the said candidates to the 3<sup>rd</sup> Respondent with recommendation for appointment. Prior to the conclusion of the process, the Petitioner avers that the top most candidate, Engineer Sammy M. Mburu alongside the then acting Chief Executive Officer of the Authority were arrested and charged in Kisumu Chief Magistrates' Court in Criminal Case No. 595 of 2019 and as a result the Acting Chief Executive Officer was forced to step aside from office pending hearing and determination of the criminal case against him.
6. The Petitioner avers that the 2<sup>nd</sup> Respondent made a resolution during its 6<sup>th</sup> Special Full Board Meeting held on 18<sup>th</sup> November, 2019 to appoint Engineer G.K Sang as acting Chief Executive Officer for a period of 6 months or until such a time that a substantive Chief Executive Officer was appointed.
7. The Petitioner further avers that on 10<sup>th</sup> February, 2020, Engineer Sammy M. Mburu the top most candidate died leaving the 3<sup>rd</sup> Respondent with only 2 candidates eligible for appointment to the position of Chief Executive Officer.
8. He further avers that on 20<sup>th</sup> March, 2020 the President revoked the appointment of David Ole Nkedianye as the 3<sup>rd</sup> Respondent's Chairman pursuant to a Gazette Notice Volume CXXII No. 50 and Mr. Eric Okeyo appointed to fill the said position effective 20<sup>th</sup> March, 2020 for a period of 3 years.
9. On 25<sup>th</sup> April, 2020, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents declared vacant the position of Chief Executive Officer of the Authority and an advertisement was made on 25<sup>th</sup> March, 2020 inviting applicants to apply for the position by submitting their Applications on or before 14<sup>th</sup> April, 2020 at 5.00pm.
10. The Petitioner contends that this Court on 9<sup>th</sup> April, 2020 in Judicial Review No. 10 of 2020, stayed and/or set aside the March, 2020 advert on grounds that it contravened the provisions of Section 33 of the Water Act.
11. Subsequently, the then Acting Chief Executive Officer Engineer Geoffrey K. Sang continued holding the said office albeit in an acting capacity. He was however arrested on 24<sup>th</sup> April, 2020 by the Director of Criminal Investigations. The 2<sup>nd</sup> Respondent revoked his appointed and instead appointed Sharon Obonyo as the Authority's Acting Chief Executive Officer for a period of 6 months or until such a time a substantive Chief Executive Officer would be appointed.
12. The Petitioner further contends that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent vide a Re- Advertisement Notice, "Vacancy For the Position of Chief Executive Officer – Ref NWHSA/CEO/2019/2020/02" dated 30<sup>th</sup> June, 2020 invited members of public to apply for the position of the Authority's Chief Executive Officer by submitting their Applications on or before 21<sup>st</sup> July, 2020 at 5.00pm.
13. The Petitioner maintains that his Petition is grounded on the fact that the recruitment process of the Authority's Chief Executive Officer must be open, transparent and accountable. He further maintains that the process must be competitive, fair, based on merit, suitability and afford all the candidates an equal opportunity, impartial and that it must be done in strict compliance with Constitution and other legal requirements.
14. He further maintains that the recruitment process ensuing from the June 2020 Advert failed to meet the requirements as provided under Articles 10 (1) (c), 19, 20, 22, 23, 24, 35, 73, 159 (1), (2) (a) & (b), 232, 258 (1) of the Constitution of Kenya, 2010, Section 5 (1) of the Information Act, Section 33 (1) of the Water Act, Section 10 (1) of the Public Service (Values and Principles) Act, 2015, Clause 1.2 of Mwongozo The Code of Governance for State Corporations, Clauses B. 5 and B.22 of the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service of May, 2016 and Regulations 22 (1) (a) of the Public Service Regulations, 2018 and is therefore flawed, null and void ab-initio.
15. He further argues that the rationale why state corporations' boards forward three names to the parent ministry for appointment is for purposes of ensuring that in the event the top most candidate dies, becomes physically or mentally incapacitated and/or cannot occupy the position the appointing authority will either appoint the second top most candidate or the third most candidate in that order.
16. He further argues that the 2<sup>nd</sup> and 3<sup>rd</sup> top most candidates legitimately expect to be appointed at the end of the recruitment process and

that the 3<sup>rd</sup> Respondent's failure to appoint either of them is in violation and/or breach to the provisions of Articles 10 (1) (c), 19, 20, 22, 23, 24, 35, 73, 159 (1), (2) (a) & (b), 232, 258 (1) of the Constitution of Kenya, 2010, Section 5 (1) of the Information Act, Section 33 (1) of the Water Act, Section 10 (1) of the Public Service (Values and Principles) Act, 2015, Clause 1.2 of Mwongozo The Code of Governance for State Corporations, Clauses B. 5 and B.22 of the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service of May, 2016 and Regulations 22 (1) (a) of the Public Service Regulations, 2018.

17. In conclusion, the Petitioner urges this Honourable Court to allow his Petition in terms of the reliefs sought therein.

18. The Petition is supported by the Petitioner's Affidavit sworn on 23/7/2020 in which he reiterates the grounds on the face of the Petition.

19. Given the urgency of the matter, the Petitioner filed this Petition together with a Notice of Motion Application dated 23<sup>rd</sup> July, 2020. The Application was under Certificate of Urgency and sought *inter-alia* Orders stopping, staying and/or setting aside the ongoing recruitment process for the position of Chief Executive Officer (CEO) of National Water Harvesting and Storage Authority ensuing from Re-Advertisement Notice, "Vacancy for the Position of Chief Executive Officer – Ref NWHSA/CEO/2019/2020/01" dated 30<sup>th</sup> June 2020 (the June 2020 Advert) and/or from any other advertisement for vacancy of the same position by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents either by themselves or through their servants, agents, representatives and/or any other person pending hearing and determination of the Application and the Petition herein.

20. The Application is supported by the Affidavit of **ABDI MOHAMED ABDULLAHI**, the Petitioner herein sworn on 23<sup>rd</sup> July, 2020 in which he reiterates the grounds on the face of the Notice of Motion.

21. In response to the Petition and Application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn by **ERICK OKEYO**, the Chairperson to the Board of Directors of the National Water Harvesting and Storage Authority, the 1<sup>st</sup> Respondent herein on 4<sup>th</sup> August, 2020 in which he avers that the Application to stop, stay and/or set aside the on-going recruitment process for the position of the Chief Executive Officer is baseless and is simply meant to frustrate the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from effectively performing their duties.

22. He further confirms that as a result of the rigorous recruitment process three candidates Engineer Sammy M. Mburu, Mr. Andrew Mukhisa Wanyonyi and Mr. Ali Boru were selected and recommended to the 3<sup>rd</sup> Respondent for appointment.

23. The Affiant further confirms that on or about 15<sup>th</sup> November, 2019 the top most candidate was arrested and charged for abuse of office, theft, fraud and uttering a false document and was subsequently forced to step aside.

24. He further avers that the authority subsequently received a letter from the Ethics and Anti-Corruption Commission (EACC) informing it that it had received adverse reports against one Andrew Mukhisa Wanyonyi who had a major integrity issue.

25. The chronology of events at the Authority as indicated in the Petition were confirmed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and that the Board did appoint Sharon Obonyo to the position of Chief Executive Officer albeit in an acting capacity pending appointment of the substantive office holder.

26. He contends that there is no legitimate expectation on the part of the top candidates as pleaded by the Petitioner and that the assertion that a runners up can be appointed to the substantive position in the event the best candidate cannot fill the said position is baseless and unfounded in law.

27. He further argues that this Court cannot issue an Order to compel the 3<sup>rd</sup> Respondent to appoint a Chief Executive Officer from the names recommended from the 2019 recruitment process because the top candidate died.

28. He avers that following the cancelation of the 2019 recruitment process, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents made a new advert on 25<sup>th</sup> March, 2020 inviting applications from the public to apply for the substantive position of the Chief Executive Officer. The said advert was later challenged in Court through Judicial Review No. 10 of 2020; Republic versus The Board of Directors, National Water and Harvesting Authority & Another Ex Parte Alex Migwi Mwangi and that the Hon. Justice Onesmus Makau issued a stay order to temporarily stop the recruitment process on the grounds that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not met the conditions in the Water Act with respect to minimum qualifications.

29. The Honourable Court further directed the Ex-parte Applicant to file a substantive Application within 21 days, which was not done prompting an Application by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to dismiss the case for want of prosecution, which Application remains pending before the Honourable Court.

30. The deponent maintains that on 4<sup>th</sup> June, 2020 the Cabinet Secretary, Ministry of Water, Irrigation and Sanitation approved the commencement of the recruitment of a substantive Chief Executive Officer and as a result an Advertisement made to that effect. He maintains that the advertisement for 30<sup>th</sup> June, 2020 was done in strict compliance with the provisions of the Water Act.

31. Mr Okeyo argues that the instant Application and Petition filed herein are pre mature as the board is currently reviewing 52 applications and should therefore be allowed to conclude the recruitment process.

32. He further argues that the top 2 candidates from 2019 do not stand to suffer any prejudice since the advert was open to any person to apply and was made within the structures of the law.

33. It is on this basis that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the Application and Petition as filed are devoid of merit, are an abuse to the Court process and is only meant to delay the matter further.

34. He urges this Honourable Court to accord the board an opportunity to complete the recruitment and only intervene when there is an outright breach and/or infringement of the law.

35. He argues that there are no valid reasons advanced for this Court to stay the on-going recruitment of the Chief Executive Officer of the Authority.

36. In conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urge this Honourable Court to find both the Application and Petition devoid of merit and accordingly dismiss the same with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

37. In response to the Replying Affidavit, the Petitioner filed a Further Affidavit on 24<sup>th</sup> August, 2020 in which he contends that the allegations levelled against the 2<sup>nd</sup> top candidate were not true as he had been cleared of all the allegations levelled against him and on that ground was eligible for appointment to the position of Chief Executive Officer.

38. He further avers that as at 15/8/2019 the board had already forwarded Eng. Sammy M. Mburu for appointment to the position of Chief Executive Officer. He maintains given that the said candidate could not fill the position the Respondents are bound to pick another candidate from the remaining top 2 candidates.

39. He therefore argues that this Honourable Court out to allow his Petition in terms of the reliefs sought therein.

40. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents on their part did not file any response to the Application and the Petition and chose to rely on the Replying Affidavit filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

41. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their written submissions in opposition to the Petition dated 1<sup>st</sup> September, 2020 which they highlighted in open Court orally when the matter was fixed for hearing on 8<sup>th</sup> September, 2020.

#### **Submissions by the Parties**

42. In his submissions, the Petitioner argued that the cancellation of the 2019 recruitment process is unjustifiable and that it violated the 2<sup>nd</sup> and 3<sup>rd</sup> candidates rights. He further contended that their legitimate expectation for appointment was created as soon as they were invited for the interview.

43. The Petitioner further submitted that the top most candidate was appointed before due diligence was carried out by the Respondents and that after his arrest, the Respondent ought to have appointed a candidate from the remaining top 2 candidates. He specifically submitted that of the two candidates, the 3<sup>rd</sup> Candidate had no integrity issues a fact that was within the Respondents knowledge.

44. He maintained that the reason the Respondent failed to appoint from the remaining candidates was due to the fact that Eng. Mburu was their preferred candidate and that the decision to restart the process was to ensure another preferred candidate fills the position.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Submissions**

45. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the other hand submitted that the process of recruitment of 2019 had in fact been finalized when the letter dated 1<sup>st</sup> October, 2019 was done to the Cabinet Secretary indicating that Eng. Sammy Mburu ought to be issued with an appointment letter.

46. Mr. Wanyama further submitted that the only logical issue is to proceed with another recruitment process the Cabinet Secretary having failed to appoint either the 2<sup>nd</sup> or 3<sup>rd</sup> Candidates. He further submitted that the assertion that the board had a preferred candidate was baseless and not true and that this Court cannot compel the board to appoint the 2<sup>nd</sup> preferred candidate in place of the best performing candidate.

47. The Respondents further submitted that the Petition as filed offends the doctrine of separation of powers that militates against granting of the Orders sought by the Petitioner at this point. The Respondents further contend that the said doctrine is for checks and balances and that the Court ought to exercise this power with caution. To buttress this argument, the Respondents cited and relied on the cases of **Re the Matter of the Interim Independent Electoral Commission Advisory Opinion No. 2 of 2011, Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another [2017] eKLR** and **Trusted Society of Human Rights Vs The Attorney General & Others [2012] eKLR**.

48. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further submitted that the Petitioner seeks to have this Court to superintend over its mandate and oversee the appointment a Chief Executive Officer a task that is accorded to both Respondents by law. It is further contended that if the Orders sought are granted, it would lead to a constitutional deadlock as the on-going recruitment process has been done in accordance with the law.

49. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that it is actually in public interest that the 2019 recruitment process be cancelled on the grounds that the top most candidate died and the 2<sup>nd</sup> top most candidate has major integrity issues thus necessitating a fresh recruitment.

50. It is further submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> top candidates had no legitimate expectation for appointment as Chief Executive Officer. For

emphasis, the Respondents cited and relied on the case of **Magerer Langat & Another Vs Paul Kiprono Chepkwony, The Governor County Government of Kericho & 2 Others [2020] eKLR** where the Court cited the case of **Justice Kalpana H. Rawal Vs Judicial Service Commission & 3 Others [2016]** in which it was held that a claim for legitimate expectation without anything more in the form of suffered detriment cannot ipso facto sustain an action founded on the doctrine of legitimate expectation.

51. In conclusion, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents urged this Honourable Court to find the Petition as filed unmerited, an abuse to the Court process and to proceed and dismiss it in its entirety with costs to the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

### **3<sup>rd</sup> and 4<sup>th</sup> Respondents' Submissions**

52. Mr. Odhiambo in his submissions relied entirely on the Replying Affidavit filed by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents and associated himself with the submissions made on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

53. He further submitted that the Petitioner herein lacks the requisite locus to file his Petition, as this is not a matter of public interest.

54. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents further contended that the Orders sought in the Petition cannot be granted by this Honourable Court for the reason that if granted they will create a situation where this Court is seen to be undermining the authority of the board and as a result create an illegal and bad precedent.

55. In conclusion, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents urged this Honourable Court to dismiss the Petition with costs.

### **Rejoinder by the Petitioner**

56. In his brief rejoinder, the Petitioner maintained that his Petition is merited and therefore urged this Honourable Court to allow it in terms of the reliefs sought therein.

57. He further contended that the recruitment process was not concluded as contended by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

58. On the issue of locus, the Petitioner relied on the provision of Article 22 of the Constitution that allows any person to bring a Petition of this nature. He therefore urged this Honourable Court to find the Petition with merit and allow it in terms of the reliefs sought therein.

59. I have examined all the averments and submissions presented before this Court. The issues for this Court's determination are as follows:-

*a. Whether the recruitment process commenced with the Notice of 11<sup>th</sup> June, 2019 was concluded or is still on going.*

*b. If concluded whether these subsequent advertisement for the position of 1<sup>st</sup> Respondent's Chief Executive Officer is valid or not.*

*c. What remedies to grant in the circumstances.*

### **Issue no. 1**

60. As submitted and as agreed by all Parties, the initial advertisement for the Respondent's Chief Executive Officer was done vide a vacancy notice of 11<sup>th</sup> June, 2019.

61. From the Petitioner's affidavit, there was a rigorous process for the recruitment of the Chief Executive Officer. On 3<sup>rd</sup> July, 2019, the 1<sup>st</sup> Respondent received 51 applications out of which 11 applicants were shortlisted for the 1<sup>st</sup> round interviews that took place between 23<sup>rd</sup> to 25<sup>th</sup> July, 2019. The top 7 candidates were subjected to a further interview on 13<sup>th</sup> August, 2019.

62. Eventually, the top 3 candidates were selected as follows:-

*a) Engineer Sammy M. Mburu - 81.78%*

*b) Mr. Andrew Mukhisa Wanyonyi - 80.11%*

*c) Mr. Ali Boru - 76.44%*

63. These 3 top candidates were forwarded to the 3<sup>rd</sup> Respondent for appointment of one of them. Before the appointment of any of these 3 was made, the top most candidate was appointed in an acting capacity as Chief Executive Officer.

64. As per the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions, dated 14<sup>th</sup> August, 2020 before any substantial appointment could be made on 15<sup>th</sup> November, 2019, the top most candidate was arrested and charged for abuse of office, theft, fraud and uttering a false document and was subsequently forced to step aside.

65. At that point indeed, the topmost candidate had not yet been officially appointed to the position of Chief Executive Officer. This implies that if the 1<sup>st</sup> candidate had integrity issues, the appointing authority still had a choice from the other 2.

66. The Respondents submitted that they had requested the EACC to look into the integrity of all the 3 candidates whose names had been selected. The Respondents averred that they received adverse reports against Andrew Mukhisa Wanyonyi. In the meantime, the 2<sup>nd</sup> Respondent continued to have acting Chief Executive Officers.

67. The Respondents attempted to conduct fresh recruitment process of the Chief Executive Officer but the advisement was quashed by Court in ELRC JR No. 10 of 2020 for the reason that the advertisement process was not in conformity with the Water Act.

68. Though the Respondent averred that the 2<sup>nd</sup> top most candidate had integrity issues, the Petitioner through his supplementary affidavit deponed that the 2<sup>nd</sup> Respondent had not proved that the 2<sup>nd</sup> top most candidate had integrity issues because the issues are not mentioned in the letter from the EACC and the results of any investigations have not been mentioned and that the said candidate was subjected to investigation by the office of the DPP and was cleared of any charge.

69. Other than this, it is not clear why the 3<sup>rd</sup> Respondent wrote to the Commission on 7<sup>th</sup> October, 2019 on issues of the candidates when they had already recommended the appointment of the top most candidate on 1<sup>st</sup> October, 2019.

70. It is therefore true that the consideration of integrity issues was not a condition precedent in the recommendation for appointment by the top most candidate as it was for the other 2 candidates.

71. Other than the allegation that the 2<sup>nd</sup> top most candidate had integrity issues, it is not clear why the Respondent did not then proceed to appoint the 3<sup>rd</sup> candidate who was also on the list of the recommended candidates.

72. It is also evident that before the recruitment process was conducted the Applicants were asked to get Clearance Certificates from the EACC. The candidates could not have been shortlisted had they not met this criterion.

73. The candidates had to be cleared by the DCI, HELB, KRA, EACC and CRB.

74. The fact that the 3 top candidates were shortlisted and went through various interviews culminating in their recommendation for appointment shows that they passed the initial integrity test and the request by the Respondent to EACC after recommending appointment of Engineer Sammy Mburu for appointment and after him being found culpable to be charged was in bad faith and in this Court's view meant to scuttle the would be appointment of the other 2 candidates.

75. Assuming even that the 2<sup>nd</sup> candidate had integrity issues and so could not be appointed following the charging in Court of the 1<sup>st</sup> candidate, the law would also mandate the Respondent to communicate this position to the 2<sup>nd</sup> top most candidate.

76. Article 35 (1) of the Constitution provides as follows:-

1) ***“Every citizen has the right of access to:-***

***a) information held by the State; and***

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

77. Coupled with this is the provision of Article 10(1) of the Constitution, which provides for good governance, integrity, transparency and accountability as a nation value and principle of good governance.

78. Article 232 (1) of the Constitution provides as follows:-

1) ***“The values and principles of public service include:-***

***a) high standards of professional ethics;***

***b) efficient, effective and economic use of resources;***

***c) responsive, prompt, effective, impartial and equitable provision of services;***

***d) involvement of the people in the process of policy making;***

***e) accountability for administrative acts;***

***f) transparency and provision to the public of timely, accurate information;***

*g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;*

*h) representation of Kenya's diverse communities; and*

*i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of:-*

*(i) men and women;*

*(ii) the members of all ethnic groups; and*

*(iii) persons with disabilities”.*

79. This is the selection and appointment of the Chief Executive Officer, the Respondents were expected to share information needed even to the losing candidates and show transparency in the process.

80. I do not find this to have been done to the latter and this implies that the process remained hanging in the balance. It is therefore my finding that the recruitment process flowing from the advert placed on 11<sup>th</sup> June, 2019 was not concluded.

## **Issue No. 2**

81. Having found that the above process was not completed, it follows that there could be no subsequent recruitment process for the same position unless the Respondents closed up the 1<sup>st</sup> process. It therefore follows that other advertisements and attempt to recruit a new Chief Executive Officer for the Corporation cannot proceed. The initiated process vide the advertisement placed on 30<sup>th</sup> June, 2020 Ref. NWSA/CEO/2019/2020/02 is henceforth cancelled altogether.

## **Remedies**

82. Having found as above, I find that the petitioner has proved his case and I grant orders as follows:-

*i. A declaration that the recruitment process ensuing from Re-Advertisement Notice, “Vacancy for the Position of Chief Executive Officer - Ref NWSA/CEO/2019/2020/02” dated 30<sup>th</sup> June, 2020 and/or from any other advertisement for the vacancy of the same position, not being from Re-Advertisement Notice for the Position of Chief Executive Officer, under Ref NWSA/CEO/2018/2019/01 dated 11<sup>th</sup> June, 2019 by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, either by themselves or through their servants, agents, representatives and/or by any other person is unconstitutional, null and void ab initio and in violation of the law.*

*ii. A declaration that the recruitment process ensuing from the Re-Advertisement Notice for the Position of Chief Executive Officer, Referenced NWSA/CEO/2018/2019/01 ” dated 11<sup>th</sup> June, 2019 met all the constitutional and legal requirements and/or was conducted in strict compliance of all the laws, thus valid and lawful.*

*iii. The 3<sup>rd</sup> Respondent to appoint a Chief Executive Officer from the 2<sup>nd</sup> top most candidate or 3<sup>rd</sup> top most as the case may be within the next 7 days.*

*iv. Each Party to bear its own costs.*

Dated and delivered in open Court this 29<sup>th</sup> day of September, 2020.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Makhanu with Gedi for Petitioner – Present

Miss Odhiambo for 3<sup>rd</sup> Respondent – Present

Peter Wanyama for 1<sup>st</sup> and 2<sup>nd</sup> Respondents – Present