



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 104 OF 2019

IN THE MATTER OF ARTICLES 19, 20, 22, 23, 24,

AND SECTION 23(1) OF THE SIXTH SCHEDULE

TO THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF

NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

UNDER ARTICLE 10 (c) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF

RIGHTS UNDER ARTICLE 35 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION

OF SECTIONS 10(1) & 27 OF THE INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION ACT, NO.9 OF 2011

AND

IN THE MATTER OF THE CONSTITUTION OF

KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

CHAMA CHA MAWAKILI (CCM).....PETITIONER

- VERSUS -

THE CHAIRPERSON INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th October, 2020)

JUDGMENT

The petitioner filed on 21.06.2019 the petition through P. Ogendi & Company Advocates. The petitioner prayed for orders as follows:

- 1) A declaration that the recruitment process ensuing from the vacancy notice called “Vacancy in the position of Commission Secretary / Chief Executive Officer, Independent Electoral and Boundaries Commission Ref. No. IEBC/C/CEO/1/2019” dated 21.05.2019 is unconstitutional and in violation of the law.
- 2) An order of judicial review in the nature of certiorari to bring into the High Court for purposes of quashing all or any recruitment process ensuing from the vacancy notice called “Vacancy in the position of Commission Secretary / Chief Executive Officer, Independent Electoral and Boundaries Commission Ref. No. IEBC/C/CEO/1/2019” dated 21.05.2019.
- 3) An order of judicial review in the nature of prohibition to bring into the High Court for purposes of prohibiting the respondents from carrying on the process of recruitment ensuing from the vacancy notice called “Vacancy in the position of Commission Secretary / Chief Executive Officer, Independent Electoral and Boundaries Commission Ref. No. IEBC/C/CEO/1/2019” dated 21.05.2019.
- 4) A declaration that the recruitment process of the Secretary to the Commission or CEO be commenced afresh and in strict compliance with the law.
- 5) Costs of the petition.

The petition is based on the annexed affidavit of Georgiadis Majimbo Advocate, a director and member of the petitioner, the supplementary affidavit by Georgiadis Majimbo filed on 11.07.2019 and upon the following facts and grounds:

- a) The 1st and 2nd respondents have by a vacancy notice No. Ref. V. No/IEBC/C/CEO/1/2019 dated 21.05.2019 signed by the 2nd respondent invited members of the public to apply for the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission. The advertisement was closing on 04.06.2019 at 5.00pm.
- b) On 07.06.2019 the 1st and 2nd applicants informed the public that at close of the applications on 04.06.2019 at 5.00pm 95 applications had been received plus one late application thus making 96 applications. The 1st and 2nd respondents promised to publish the list of all applicants in 14 days together with shortlisted candidates.
- c) The office of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission is very important public office and the recruitment must comply with Articles 10, and, 35 of the Constitution of Kenya and sections 10 and 27 of the Independent Electoral and Boundaries Commission (IEBC) Act, 2011 as well as the 2nd respondent’s Human Resource (HR) Recruitment Policy. The recruitment, selection and appointment process should be open, transparent and competitive. The office is created under Article 250(1) of the Constitution and is crucial to bolstering electoral transparency, accountability and credibility and recruitment process should be beyond reproach, apprehension of interference, conflict of interest or manipulation whatsoever.
- d) On 11.06.2019 the print media reported that 10 candidates out of 97 applicants (and not 96 applicants as earlier published by press release of 07.06.2019) had been shortlisted.
- e) On 17.06.2019 the print media published that Apex Consulting Africa Limited (ACAL) had rejected the 1st and 2nd respondent’s offer to carry out the evaluation and shortlisting exercise for the vacancy on the grounds it had not been involved in the advertisement of vacancy and receiving of the applications.
- f) The applications had been received and processed by the Acting Commission Secretary and Chief Executive Officer one Marjan Hussein who is overtly interested in the vacancy and the petitioners plead conflict of interest in that regard. The 1st and 2nd respondents promptly issued a rejoinder denying the media reports and stating they were misleading.
- g) The 1st and 2nd respondents maintain that section 10 of IEBC Act vests in the 2nd respondent the mandate to appoint a Commission Secretary and CEO.
- h) In petition ELRC No. 51 of 2019 at Nairobi, the respondent’s Human Resource Management Officer one Peter Mulele Enoch filed an affidavit stating that services of an independent and reputable consulting firm to undertake open, transparent, and the competitive test set by the law was necessary. It is the applicants’ case that it was not therefore discretionary for the 1st and 2nd

respondents not to engage such independent and reputable consulting firm in the challenged recruitment process.

i) The applicants have written to the 1st and 2nd respondents to provide information under Article 35 of the Constitution and section 27 of the IEBC Act and requesting for information and documents about the recruitment process including list of applicants, shortlisted applicants, documents on evaluation and review of applicants; scores for each candidate prior to shortlisting the 10 best; scores for the applicants and including those shortlisted, human resource consultants who showed interest and were offered the job to recruit; when the tendering for the human resource consultants was done; criteria used to select the consultants; policy on recruiting the Commission Secretary.

j) The 1st and 2nd respondents have failed to publish the names of all applicants and shortlisted candidates together with reasons thereof.

k) If orders are not granted the person to be appointed will be the most unsuitable candidate to fill the vacancy.

l) The applicants have established a case for granting of the orders as prayed for.

m) The 2nd respondent is required under section 27 of IEBC Act to publish and publicize all important information within its mandate but has failed to do so.

n) The recruitment and selection is being done in complete secrecy mystery yet position is crucial to electoral process and democratization process.

The petitioner's case is that the recruitment of the 2nd respondent's Commission Secretary must be in strict adherence to Articles 10 and 35 of the Constitution of Kenya 2010, sections 10 and 27 of the Independent Electoral and Boundaries Commission (IEBC) Act, 2011 as well as the 2nd respondent's own human resource recruitment policy. Further, the instant recruitment process for the Commission Secretary has breached the said provisions. Section 10 (1) and (2) of the IEBC Act provides that the 2nd respondent shall, through an open, transparent and competitive recruitment process appoint a suitably qualified person to be the Secretary to the Commission; and that a person shall be qualified for appointment as the Secretary to the Commission if the person is a citizen of Kenya; possesses a degree from a recognised university; has had at least five years' proven experience at management level; has proven relevant experience in either electoral matters, management, finance, governance, public administration, law, or political science; and meets the requirements of Chapter Six of the Constitution. Section 27 of the IEBC Act provides that the 2nd respondent shall publish and publicise all important information within its mandate affecting the nation. It is submitted that the respondent is conducting the recruitment process in a secretive manner and the public has not been informed about the progress despite the 1st respondent promising to inform the public accordingly. It is further urged that the process is in breach of Article 10(2) of the Constitution because it is not participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and has not followed the rule of law. Further it is being conducted in secrecy and mystery yet the office of Commission Secretary is crucial to the electoral process and democratisation of Kenya.

The 1st and 2nd respondents have filed on 02.07.2019 the replying affidavit of the 1st respondent, Wanyonyi Wafula Chebukati, and through Professor Tom Ojienda & Associates. The 1st and 2nd respondent also filed on 18.12.2019 the replying affidavit of Mahamud Jabane, the 2nd respondent's Manager for Legal Services and through Maurice Oduor & Company Advocates. It is urged for the respondents as follows:

a) There exist no dispute and employer –employee relationship between the 1st and 2nd respondents on the one hand, and, the petitioner on the other. Further the High Court and not this Court has jurisdiction for alleged breach of Article 35 on the right of access to information, and, as per Article 23(1) and 165(3) (b) of the Constitution.

b) Section 10 of IEBC Act provides, “**10(1). The Commission shall, through an open transparent, transparent and competitive recruitment process, appoint a suitably qualified person to be the secretary to the Commission.**” Thus the 2nd respondent has statutory mandate to appoint its CEO or Commission Secretary. The Commission can do so by itself or through a consultant and even if the Commission has appointed an independent consultant to assist it to undertake the appointment, the Commission's mandate in section 10(1) of the Act is not thereby taken away from the Commission.

c) On 21.05.2019 the Commission declared a vacancy in the office of its Secretary and Chief Executive Officer. The vacancy was advertised on the Commission website and print media on 21.05.2019. The advertisement was closing on 03.06.2019 and the advertisement required the applicants to address their respective applications to the office of the Commission's Chairman. The advertisement also notified that names of all applicants and the interview schedule of the shortlisted candidates be published in the print media and the Commission's website www.iebc.or.ke after the closure of the advert and further, that only shortlisted candidates would be conducted.

d) The Commission resolved to engage a consultant to undertake the recruitment process for the vacancy and the terms of reference included generating the long list of applicants and to shortlist candidates; verify the shortlisted applicant's certificates and other testimonials with relevant bodies; verify that shortlisted candidates had been cleared by Ethics and Anti-Corruption Commission, Higher Education Loans Board, relevant professional bodies, Credit Reference Bureau Africa Ltd or Metropol Credit Reference Bureau; undertake relevant psychometric testing of shortlisted candidates using appropriate tool, and undertake computer literacy and proficiency testing of candidates.

e) Pursuant to section 56 of the Public Procurement and Asset Disposal Act, 2015 the Commission requested several Government entities for prequalified consultancy firms in their system. The Commission then invited 15 consultancy firms and appointed Alpex Consulting Africa Ltd (ACAL) as the winner to provide the service. The Commission notified ACAL about the award by the letter dated 28.03.2019 signed by Martin Hussein Marjan, Ag. Commission Secretary, Chief Executive Officer. By the letter dated

14.04.2019 ACAL acknowledged receipt of the letter dated 28.03.2019 and confirmed availability to undertake the assignment and looked forward to negotiations. The negotiations were held on 30.05.2019 and tender amount agreed at Kshs.1,415,200.00 and a negotiation report was prepared. The report was forwarded to ACAL by an email on 06.06.2019 and ACAL replied by its letter of 06.06.2019 stating that the report had not captured concerns raised by ACAL at the negotiation meeting about a number of anticipated risks associated with the consultancy and which had not been adequately addressed in the report. The concerns included potential conflict of interest whereby applications were to be channelled to the management and not to commissioners; contract management being undertaken by the acting Director HR and Administration who would accept and approve deliverables and which role ought to be played by Commissioners; delays in contractual timelines; approval by the Commission of the ACAL submitted and approved approach and methodology such as participation in the advertisement, verifying and confirming the applications as well as long-list prior to and at closure but which did not take place limiting ACAL's accountability over recruitment process; it was not clear if the Commission had comprehensively adhered to related court rulings and whether adequate legal risk mitigation measures, if any as required, had been put in place and, there was limited clarity on other on-going legal proceedings related to the consultancy and subject; and the request by ACAL to have presence of Commissioners as representatives of the contract supervision committee during the said negotiation meeting was not considered. In the circumstances, the letter conveyed that failure to address the concerns exposed ACAL to non-compliance with the law and professional human resources management practices and ACAL therefore declined the consultancy offer.

f) The 1st and 2nd respondents protested the withdrawal by ACAL and it is its case that ACAL's letter of declining to accept the offer of consultancy went to the press in breach of confidentiality. Further on 14.06.2019, the Acting Commission Secretary and CEO Marjan Hussein Marjan wrote to Public Procurement Regulatory Authority as a formal complaint requesting the Authority to take appropriate action in view of the alleged breached of confidentiality by ACAL.

g) On 07.06.2019 the Commission held a plenary meeting to discuss the developments and the way forward in so far as the recruitment of the CEO was concerned. The Commission resolved to carry out the recruitment by itself as per section 10(1) of the IEBC Act. The resolution was that Commission's Human Resources, Training and Administration Committee undertakes the preliminary selection or shortlisting exercise with the support of the Human Resource Directorate Staff. The minutes show that the Acting Commission Secretary and CEO Marjan Hussein Marjan attended the meeting of 07.06.2019 as one of the plenary members and the other plenary members being the 1st respondent, Commissioner Prof. Abdi Yakub Guliye, and Commissioner Boya Molu. The further resolution was thus, **"iii. Interviews to be done thereafter by all members of the plenary."**

h) The supporting affidavit narrates the criteria applied by the Commission's Human Resources, Training and Administration Committee to shortlist included Kenyan citizen; relevant degree from recognised university; relevant masters as added advantage; at least five years proven experience; proven relevant experience in electoral matters, management, finance, governance, public administration, law or political science; membership in a professional body and in good standing will be an added advantage; working knowledge and thorough understanding of public finance management public procurement and asset disposal processes will be an added advantage; and requirement of chapter 6 of the Constitution of Kenya as cleared by prescribed agencies.

i) As at close of advertisement, 95 applications were received within time and 2 were received late. In shortlisting, the 2 late applicants were dropped. Of the 95 timely applicants, 3 lacked bachelor's degree and were dropped. 92 applicants then proceeded to next level and 27 who lacked masters' degrees were dropped. Of the remaining 65 applicants, 55 lacked at least 5 years' experience in the relevant fields. Thus 10 applicants were left as the shortlisted candidates and as per the minutes of the meeting of the Committee held on 10.06.2019.

j) On 13.06.2019 the respondents published in the Daily Nation and Star Newspapers the list of all applicants and the list of shortlisted candidates.

k) Thus the recruitment process had therefore so far been open, transparent, and beyond any reproach.

l) There was no legal requirement to publish the names of all applicants and shortlisted candidates in the Commission's website. The names had been published in two newspapers and that was sufficient. Any applicant can write to the Commission and will be informed why he or she may not have been shortlisted.

m) Under clause 4.5.1.9 of the Commission's Human Resource and Administration Policies and Procedures Manual, 2010 it is stated thus, **"When deemed necessary, and especially in the recruitment of senior management positions, the Commission may use professional recruitment consultants who will be sourced in accordance with the procurement policy. In such instances, the appointed consultants will follow the recruitment and selection policies and procedures laid out by the Commission."** Thus it is not mandatory for the Commission to use an independent consultant in the instant recruitment process.

n) It is not true that the petitioner has failed to provide information to the applicant in terms of Article 35 of the Constitution and section 27(1) of the Independent Electoral and Boundaries Commission Act because it was on 20.06.2019 at 4.00 pm that the respondent delivered the written request and without allowing time for a reply, the applicant filed the petition and the application on 21.06.2019.

The parties filed their respective submissions. The Court has considered the material on record and makes findings as follows.

To answer the 1st issue for determination the Court returns that the petitioner has established that the 2nd respondent violated section 10(1) and 27 of the IEBC Act and the national values and principles of governance in Article 10 of the Constitution as claimed and as prayed for. The violated provisions provided for recruitment of the Commission Secretary through an open, transparent, and competitive process and appointment of a suitably qualified person. As submitted for the petitioner, the evidence shows that the 2nd respondent made a decision to undertake the recruitment process through an independent consultant and thereafter decided to undertake the recruitment by itself. The Court finds that the shifting of the decisions as was done and without notifying the public cast a shadow of doubt on the integrity of the process.

Further, it is only by the replying affidavit that the 2nd respondent disclosed that the independent consultant engaged had declined to sign the contract forcing the respondent to decide to undertake the process by itself. In the ruling delivered herein on 26.07.2019 the Court found that the recruitment process as undertaken by the 2nd respondent by itself was marred by conflict of interest when the Court stated thus,

“In the circumstances, the Court finds that the declaration of interest was belated and even after the declaration of interest, there were no elaborate measures put in place to manage the conflict of interest except that he would not participate in deliberations on recruitment of the secretary and chief executive officer. Despite that strategy to manage the conflict of interest, the immediate minute No. 10.07.2019 on status update on recruitment of commission secretary and chief executive officer, it is the same acting secretary and chief executive officer who reported that ACAL had declined to accept the consultancy offer. He informed the meeting the reasons for the decline being application letters not sent directly to the firm; adverse reporting of the Commission by media; the legal tussle about the recruitment process; and concluded thus, “He concluded by noting that there is a risk of a delay in the recruitment exercise owing to the decline by the consultant.” The Court notes that the potential conflict of interest as raised by ACAL was not referred to at all by the acting secretary in his brief to the Commission plenary meeting and it is not stated that the letter by ACAL was tabled for the members to read and make decision accordingly. The Court returns that to that extent, the plenary was misled particularly about the ACAL concerns about the potential conflict. The Court further finds that nowhere is it recorded that the acting secretary left the meeting but instead his participation was entrenched in the entire process when the plenary resolved that the plenary (of which the acting secretary was a member) would conduct the interviews. The same acting secretary and chief executive officer then signed the minutes on 13.06.2019 for circulation. In the circumstances, the Court finds that the decision to undertake internal recruitment, selection and appointment process was saddled by the established conflict of interest and there was no established design or resolution by the 2nd respondent on how that conflict would be managed in the subsequent recruitment, selection and appointment stages. The Court finds that there was failure to declare the personal interest at the appropriate time and when it was declared, there were no effective and efficient measures to handle or manage the conflict. The Court further finds that the exceptions to when a conflict of interest exist as per regulation 11 of the Public Officer Ethics Regulations, 2003 were not established in the instant case. The Court follows the holding in the judgment delivered on 12.07.2019 in Teachers Service Commission –Versus- Kenya National Union of Teachers (KNUT) and Another [2019]eKLR, thus, “...The Court holds that in the concept of conflict of interest, avoidance of the conflict of interest is desirable but in practice the primary focus is not avoidance but managing or handling situations of conflict of interest through measures such as declaration of interests; disqualification where appropriate; and undertaking remedial or mitigating measures as appropriate.” The respondents have not established such strategies put in place for managing the conflict of interest and it is the Court’s advisory that the respondents seriously consider instituting both standing and *ad hoc* measures that may apply in circumstances such as in the present case and especially if it opts to undertake all the recruitment and selection process for its secretary and chief executive officer exclusively by itself as urged in the present case.”

The Court finds that there is no subsequent material before the Court to change that finding and the breach of the constitutional and statutory provisions as submitted for the petitioner was blended with clear impairment of the outcome of the otherwise continuing recruitment process.

The Court further finds that no subsequent material has been placed before the Court to warrant the change of the finding in the ruling delivered herein on 26.07.2019 thus,

“The Court returns that the 2nd respondent is entitled to appoint its secretary and chief executive officer but in strict compliance with the constitutional and statutory provisions on principles and values applicable to recruitment, selection and appointment of public and state officers. In the instant case the 2nd respondent will in addition be expected and required to adhere to provisions of section 10(2) of the IEBC Act setting out the qualifications for a person to be appointed as its secretary and chief executive officer. While making that finding it is clear that there is no constitutional and statutory provision that the 2nd respondent must engage an independent consultant to recruit its chief executive officer. The Court holds that even where the option to involve an independent consultant is exercised, the responsibility, accountability and any liability of the appointment process remains with the 2nd respondent as the principal. Further, the Court holds that where an independent consultant has been hired, subject to any applicable statutory or contractual provision, the 2nd respondent may by itself discontinue the consultancy and continue the recruitment, selection and appointment process as the 2nd respondent may consider reasonable in the circumstances. The Court holds that throughout the recruitment, selection and appointment process the 2nd respondent remains obligated to uphold the cited and applicable constitutional and statutory provisions. The Court therefore returns that it was misconceived for the applicants to urge that it was mandatory for the 2nd respondent to engage a consultant to undertake the process. It could be that hiring an independent consultant is desirable to enhance the recruitment, selection and appointment methodologies and efficiency or to remove unnecessary burdens that can conveniently be outsourced or to deal with likely situations of conflict of interest when done internally by the 2nd respondent but it is not mandatory for the respondent to hire a consultant. While making that finding, the Court further returns that it is most desirable for the 2nd respondent to engage an independent consultant for the recruitment and selection of its secretary and chief executive officer in view of the highest professionalism, transparency, accountability and management of any instances of conflict of interest (as will be shown latter in this ruling) may not be easily achieved through an exclusively internal recruitment, selection, and appointment process.”

The Court has considered the submissions on record and further finds that there was no further material filed for the Court to deviate from the findings in the ruling delivered herein on 26.07.2019 thus,

“Third, the Court finds that whereas the 2nd respondent’s replying affidavit has set out the considerations that were taken in shortlisting the 10 successful candidates, there was no documented criterion and which was predetermined to guide the shortlisting process. Similarly there was no predetermined criterion that would guide the interviews as was scheduled to take place. The Court considers that the development of such score sheets that are objective and take into account the considerations in Articles 232(1) (g), (h) and (i) and Article 73(2) (a) of the Constitution and section 10(2) of the IEBC Act is a

highly professional engagement which then makes it desirable that the 2nd respondent engage a professional and independent consultant. The Court considers that for example, it was not sufficiently convincing that all candidates who had a recognised university degree per section 10(2) of the IEBC Act were automatically knocked out in priority to a master's degree and which was never a statutory requirement but introduced by the shortlisting committee without any explanation. The kind of experience that was required and scored accordingly in knocking out some candidates was not disclosed at all. The Court further finds that it was not explained why the master's degree which was not a statutory requirement was invoked to knock out many candidates with the minimum statutory requirement of first degree and who may have possessed the best and suitable experience. The Court considers that it was not lawful for the 2nd respondent to knock out candidates who had all the prescribed statutory requirements while shortlisting others upon qualifications described as added advantage and which were not prescribed in the statute at all. The Court holds that an objective and predetermined score sheet taking into account the qualifications in section 10(2) of the IEBC Act was crucial and mandatory. Similarly the Court holds that it was mandatory to have an objective and predetermined score sheet for the interview process or other method invoked to recruit and select the most suitable candidate on headings contemplated in Articles 232(1) (g), (h) and (i) and Article 73(2) (a) of the Constitution and section 10(2) of the IEBC Act so as to demonstrate fairness and transparency and other values and principles in Articles 10, 232, and 73 of the Constitution. The score sheet must be completed for the candidates who have the basic prescribed qualifications at the shortlisting stage and then for each candidate progressing to the subsequent steps such as oral or written interviews. The Court holds that the 2nd respondent enjoys the discretion on the weight of scoring under any such headings in the score sheet but must show it was predetermined and objectively applied to all applicants. It is that individual scores are held in confidence to be disclosed to the concerned individual as he or she may request – but the score sheets and the related documentation guiding the process must be available for ascertaining the compliance in the recruitment process. In absence of such documentation of scores upon predetermined and objective criteria, the Court returns that it is difficult to make a finding of a recruitment, selection and appointment process that is consistent with the relevant statutory and constitutional provisions. The Court therefore returns that taking the material on record into account, it cannot be said that the recruitment, selection, and appointment process as challenged is continuing in accordance with the law.”

To answer the 2nd issue for determination the Court finds that it enjoys the relevant jurisdiction to hear and determine the petition. The 1st and 2nd respondents' submissions filed through Maurice Oduor & Company Advocates urged that the Court lacks jurisdiction because a dispute did not exist between the petitioner and, the 1st and 2nd respondent and there exist no employer-employee relationship in the matter. Further the High Court and not this Court has jurisdiction for alleged breach of Article 35 on the right of access to information, and, as per Article 23(1) and 165(3) (b) of the Constitution. The Court finds that the dispute is clearly about the appointment of the Commission Secretary. The Court's jurisdiction flows from Article 162(2) (a), Article 165 (5) (b) and the provisions of the Employment and Labour Relations Court Act, 2011. The Court considers that appointment of Commission Secretary is clearly a human resource function and falling under the jurisdiction of the Court. Section 12(1) of the Employment and Labour Relations Court Act, 2011 is clear that the Court has exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law. Section 12 (2) of the Act further provides that an application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. The Court holds that by that provision, it is clear that by the instant petition the petitioner has lodged a complaint against an employer, the 2nd respondent. The Court further holds that by reason of section 12(2) of the Act the proceedings are not limited to parties listed in section 12(1) of the Act but the jurisdiction spreads to disputes about employment even by and against persons not being employees or employers or parties to the contract of service. The Court holds that to be the position especially in view of Article 162(2) as read with Article 165 (5) (b) of the Constitution.

To answer the 3rd issue for determination the Court returns that while the case was partly based on the request for information by the petitioner as per Article 35 of the Act, the case was largely that the 1st and 2nd respondents were proceeding in contravention of section 10(1) of the IEBC Act and Article 10 of the constitution. As submitted for the 1st and 2nd respondents, it is true that the request for information was made on 20.06.2019, the request was received on 21.06.2019, and the following day on 21.06.2019 the petition was filed. Section 9(1) of the Access to Information Act required the 2nd respondent to avail the requested information as soon as possible but in any event not more than 21 days of receipt of the application and, section 9(3) allowed for a further extension of 21 days. The Court reckons that in the instant petition the petitioner did not pray that the information be provided but the petitioner wanted the impugned recruitment process arrested. Thus while the regime on access to information is set out in the law as submitted and urged for the 1st and 2nd respondents, it is obvious to the Court that the petitioner would have suffered prejudice if it did not move to court promptly for want of exhaustion of the statutory procedure on access to information. Further, the Court finds that after full disclosure in the replying affidavit filed by the 1st respondent, it has been established that the petitioner's fears, concerns and claims were valid because the recruitment process has been established to have been proceeding contrary to law and with manifest conflict of interest. The independent consultant hired declined the engagement with the result that the recruitment process was continuing without informing the public the milestones therein as required by law; with manifest conflict of interest; and without the due role of the required human resource expertise and professionalism that was lost when the independent consultant avoided the scene. Thus, the Court returns that the petitioner's failure to exhaust the statutory procedure on access of information did not impair the petition at all. The pertinent question is whether the recruitment process is proceeding contrary to statutory and constitutional provisions as urged for the petitioner and the Court returns that the answer is in the affirmative.

To answer the 4th issue for determination, the Court finds that the petitioner is entitled to the remedies as prayed for only that the judicial review order for certiorari will issue in alternative to avoid the superfluous effect of granting the two concurrently and with respect to the same notice inviting applicants for the office of the Commission Secretary and Chief Executive Officer (CEO).

Further, the petitioner is successful and the 2nd respondent will pay petitioner's costs. While making that finding the Court has considered the submissions dated 23.09.2020 filed for the 3rd respondent by the learned Principal Litigation Counsel Schola Mbilo that the 3rd respondent was not a proper party and the dispute was between the petitioner and the 1st and 2nd respondent – and the 2nd respondent should bear the costs. However, the matter being of great public and state interest and being a constitutional petition, in view of the functions of the 3rd respondent in Article 156(4) as the principal legal adviser to the government, the Court returns that the 3rd respondent was indeed a proper party to the suit. The Court returns that all the respondents will bear own costs of the proceedings.

In conclusion judgment is hereby entered for the petitioner against the respondent for:

- 1) The declaration that the recruitment process ensuing from the vacancy notice called “**Vacancy in the position of Commission Secretary / Chief Executive Officer, Independent Electoral and Boundaries Commission Ref. No. IEBC/C/CEO/1/2019**” dated 21.05.2019 is unconstitutional and in violation of the law.
- 2) The order of judicial review of certiorari hereby issues to bring into the Court for purposes of quashing all and any recruitment process ensuing from the vacancy notice called “Vacancy in the position of Commission Secretary / Chief Executive Officer, Independent Electoral and Boundaries Commission Ref. No. IEBC/C/CEO/1/2019” dated 21.05.2019.
- 3) In alternative to order (2) above, the order of judicial review of prohibition hereby issues prohibiting the respondents from carrying on the process of recruitment ensuing from the vacancy notice called “**Vacancy in the position of Commission Secretary / Chief Executive Officer, Independent Electoral and Boundaries Commission Ref. No. IEBC/C/CEO/1/2019**” dated 21.05.2019.
- 4) A declaration that the recruitment process of the Secretary to the Commission or CEO be commenced afresh by the 2nd respondent and in strict compliance with the applicable law.
- 5) The 2nd respondent to pay the petitioner’s costs of the petition.

Signed, dated and delivered in court at **Nairobi** this **Friday 16th October, 2020**.

BYRAM ONGAYA

JUDGE