



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC PETITION NO. 51 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 26th March, 2019)

HENRY MUTUNDU.....PETITIONER

-VERSUS-

THE CHAIRPERSON, INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....INTERESTED PARTY

RULING

1. The Application before the Court is dated 26th February, 2018, brought under Articles 22 and 23 of the Constitution of Kenya; Rules 4 and 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, 2013; Rules 7(1) and 28 of the Employment and Labour Relations Court (Procedure) Rules 2016 and all other enabling Constitutional and Statutory Provisions of the law wherein the Applicant seeks for Orders:-

a) That this application be certified urgent and heard exparte in the first instance.

b) That the Honourable Court do stay the ongoing recruitment by the Respondents by themselves or their servants, agents and representatives as outlined in the Vacancy Notice titled “Vacancy in the of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission – Ref V.NO/IEBC/C/CEO/1/2019” pending the hearing and determination of this application.

c) That the Honourable Court do stay the ongoing recruitment by the Respondents by themselves or their servants, agents and representatives as outlined in the Vacancy Notice titled “Vacancy in the of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission – Ref V.NO/IEBC/C/CEO/1/2019” pending the hearing and determination of the petition.

d) That the Honourable Court do issue a temporary injunction against the Respondents by themselves or their servants, agents and representatives as outlined in the Vacancy Notice titled “Vacancy in the of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission – Ref V.NO/IEBC/C/CEO/1/2019” pending the hearing and determination of this application.

e) That the Honourable Court do issue a temporary injunction the Respondents by themselves or their servants, agents and representatives as outlined in the Vacancy Notice titled “Vacancy in the of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission – Ref V.NO/IEBC/C/CEO/1/2019” pending the hearing and determination of the Petition.

f) That the Honourable Court do issue an Order the Petition herein be heard on a priority basis.

g) That the costs of this application abide in the cause.

2. The Application is premised on the grounds:

1. That the 2nd Respondent through a vacancy notice Ref V.NO/IEBC/C/CEO/1/2019 signed off by the 1st Respondent, invited members of the public to apply for the Position of Commission Secretary/Chief Executive Officer, invited members of the public with the application deadline being 5.00 pm on Wednesday, 31st January, 2019. The Applications were addressed to the 1st Respondent.

2. That the Commission Secretary/Chief Executive (CEO) serves as the head of the 2nd Respondent's Secretariat and is the Accounting Officer and Chief Electoral officer hence the recruitment to this position ought to be in strict adherence to the Constitution and the law.

3. That the position of Commission Secretary/Chief Executive Officer (who serves the Chief Electoral Officer) is underpinned by specific statutory provisions and it is a high position of trust meant to advance electoral democracy and hence the process of recruiting the holder of this position should be beyond reproach.

4. That the current recruitment process is unconstitutional and it is not open, transparent and accountable as prescribed under Article 10 of the Constitution and Section 10(1) of the IEBC Act that requires the recruitment of the Commission Secretary/Chief Executive Officer to be "open, transparent and competitive." Further, the decision made in the course of the recruitment are arbitrary and in contravention of the law, specifically the Article 47 of the constitution and section 5 of the Fair Administrative Action act.

5. That the 2nd Respondent is a constitutional commission that must uphold the highest standards in its operations which include fidelity to the Constitution and the law the Court must never uphold an unconstitutional decision/process taken by the 2nd Respondent.

6. That the Vacancy Notice required candidates for the position of Commission Secretary/Chief Executive Officer to have fifteen (15) years proven relevant experience which requirement is contrary to Section 10 of the IEBC Act, that requires a minimum of five (5) years' experience hence the increase in the number of years of experience violates Article 27 of the Constitution and is discriminatory, arbitrary, illegal, unlawful, null and void for locking our Kenyans who would have otherwise been qualified to apply for the position of CEO.

7. THAT whereas Section 26 of the Independent and Boundaries Commission Act requires the 2nd Respondent to apply the principle of Public Participation, the 2nd Respondent has not taken any steps to ensure that the public actively participates and is kept informed in a timely manner on the recruitment process and has instead conducted the process in secrecy.

8. That the Respondents have disregarded the constitutional principle of good governance under Article 10(2) of the Constitution, in the recruitment process that commenced with the Vacancy notice because the recruitment is not participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and has not followed the rule of law. Further, it has not ensured that the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision making/recruitment process.

9. That immediately following the expiry of the deadline for submission of applications to the 1st Respondent, the 2nd Respondent has never published the total number and the names of the applicants who applies for the CEO position being close to one (1) month since the deadline passed.

10. That the vacancy notice has further provided that the shortlisted applicant's will undergo security clearance by the National Intelligence Service (NIS) a requirement that is contrary to the Constitution and threatens the applicant's right to privacy.

11. That the Security Clearance of the applicants is contrary to the provisions of the National Intelligence Service Act, No. 28 of 2012 since security clearance as provided in Section 2 and 17 of the NIS Act relates to members applying to join the service but does not relate to members of the public, as those seeking to be CEO of the 2nd Respondent.

12. That public security clearance of persons applying for public positions will potentially open a lacuna for other commissions and public bodies to require candidates for various positions, to be subjected to a process which they may not have an opportunity to defend and challenge thus setting the stage for gross violation of fundamental rights and freedoms.

13. That the recruitment process is being conducted with secrecy and mystery yet the position of CEO of the 1st Respondent is so crucial to the electoral process and democratisation of Kenya hence the need to ensure that the process does not offend the Constitution and more particularly that it does not violate fundamental rights and freedoms.

3. The Application is supported by the Petitioner's Affidavit a registered voter in Masinga Constituency wherein he reiterates the grounds on the face of the application and added that on 18th January, 2019, the 2nd Respondent advertised a vacancy in the position of Commission Secretary/Chief Executive Officer under the REF. VO. NO/IEBC/C/CEO/1/2019 which vacancy notice was signed by the 1st Respondent which applications were to be received by 31st January, 2019.

4. On the day submission of applications closed, the Respondent did not disclose the number of persons who had applied for the job and the list of shortlisted candidates has not been published to date. He avers that the requirement of five years experience in the public sector effectively discriminates against Kenyans from the private sector who have equivalent or even higher experience.
5. That the notice and recruitment process is therefore unconstitutional, null and void to the extent that it is founded on the vacancy notice that offends the Constitution and the law. He contends that the notice provided that the applicants may be subjected by the Respondents to a security clearance by the NIS which if carried out the Petitioner/Applicant contends will threaten the right to privacy of the shortlisted applicants.
6. The Petitioner is of the view that the security clearance over and above the clearance by the Director of Criminal Investigations (DCI) is unconstitutional and not supported by any law and there is no legal certificate that is granted to the affected persons after the clearance hence an applicant who is shortlisted but not appointed on account of the security clearance has no opportunity to know the allegations made and cannot challenge the allegations in a Court of law. That this process does not relate to persons seeking appointment as public officers and will expose the work and purpose of the National Intelligence Service.
7. That the Respondents are supposed to be independent from executive control and the security clearance is an affront to this independence.
8. The Petitioner avers that he is cognisant that the last two holders of the position of the Commission Chief Executive Officer were vacated from this position after allegations of misuse of public funds allocated to the 1st Respondent and mismanagement of the general elections, hence the need to ensure the current recruitment is above board, constitutional and in strict adherence to the law.
9. That the recruitment process of the 1st Respondent's Commission Secretary/Chief Executive Officer further offends the values and principles of public service, specifically involvement of the people, accountability for administrative actions, transparency and provision to the public of timely, accurate information.
10. It is also the Petitioner's contention that failure to publish the list of person who applied for the position in question together with the documents submitted immediately following the deadline on 31st January, 2019, violates Article 35(3) of the Constitution as it limits the public's right to access information, violates the values and principles of public service of transparency, shrouds the recruitment process with secrecy contrary to Article 10(2) of the Constitution and Section 10(1) of the IEBC Act.
11. That the notice of vacancy violates the Constitution by prescribing fifteen years' experience, five which must be in senior management level preferably in the public sector discriminates against Kenyans working in the private sector. Further prescribing higher experience levels is contrary to Article 24 of the Constitution since this is a limitation of fundamental rights and is unreasonable and unjustifiable in an open democratic society.
12. That the disqualification criteria in the vacancy notice based on the NIS clearance is a duplicity as the clearance is well covered by the EACC and the Director of Criminal Investigations and the Director of Public Prosecutions. That the Court should allow the application as the Respondents have made decisions arbitrarily and without transparency.
13. The Application is opposed by the 1st and 2nd Respondents who have filed a Replying Affidavit sworn by one Peter Mulele Enoch currently serving as the 2nd Respondent's Human Resource Management Officer. He avers that the Commission is mandated under Article 250(12) of the constitution to appoint a secretary to the Commission who shall be the Chief Executive Officer of the Commission.
14. That following the vacancy in the office of the commission Secretary, the Commission placed advertisements on its website inviting interested applicants to submit their applications for the position of Commission Secretary/Chief Executive in accordance with the procedure prescribed therein.
15. Further, in compliance with the requirement of openness and transparency of the recruitment process, the Commission placed other advertisements on two newspapers of nationwide circulation, being the Daily Nation Newspaper of January 23, 2019 and the Standard Newspaper of January 18, 2019, inviting interested applicants to submit their applications for the said position.
16. He avers that in conducting a competitive recruitment exercise for the Commission Secretary's office bearer, the Commission is required under Section 10(1) of the IEBC Act to adhere to the guiding principles of openness and transparency. That in compliance to the same, the Commission resolved to engage services of an independent and reputable consulting firm to conduct the shortlisting, verification and reviewing of applicant's data/documents. That the process of procuring the services of an independent and reputable consulting firm is currently ongoing.
17. That therefore, the Commission cannot continue with process of recruitment of qualified persons to the office of Commission Secretary pending the conclusion of the tendering process to secure the services of an independent and reputable consulting firm to do shortlisting exercises. The process is currently at collating and keeping of data of the applicants pending publication of the names of all applicants.
18. The Respondent avers that in view of the foregoing, the Application is misconceived, not grounded on evidence and based on unfounded apprehension since recruitment process is still ongoing, and the commission cannot at this point proceed with shortlisting pending the conclusion of the tendering process to secure the services of an independent consulting firm.
19. In addition to the foregoing, the Respondents aver that the Claimant has not presented incontrovertible, cogent and credible evidence establishing a prima facie case, what irreparable damage he stands to suffer and the balance of convenience does not tilt in his favour. That the Petitioner has not specifically pointed out any right that the 1st and 2nd Respondent has infringed, threatened and/or denied as the application is couched in general terms.

20. They aver that due to the magnitude of the responsibilities bestowed upon the Commission Secretary, fifteen years general working experience is with respect to the career development in electoral management, public administration, law and political science is necessary. The Applicant must have served at a senior managerial position as required by section 10(2) of the IEBC Act.

21. They further aver that the process is still ongoing and the public will be invited to participate in the process once shortlisting has been completed by the consulting firm. That the Commission has adhered to and will continue to comply with the requirements of openness and transparency during recruitment exercise.

22. That due to the sensitivity of the position in question and in the exercise of transparency, the Commission has requested the NIS to conduct background checks on shortlisted candidates. The Respondents urge the Court to dismiss the application with costs.

Submissions

23. The Petitioner/Applicant submits that he has established a prima facie case with chances of success as set out in the Application and supporting affidavit and he urges the Court to allow the Application.

24. The Respondent submit that they have adhered to the law as set out in the IEBC Act, Constitution and therefore the Application is misconceived and lacks merit. Further, that the Claimant has not satisfied the requirements for the grant of the Orders sought and as such the Application ought to be dismissed with costs.

25. I have examined the submissions and averments of both parties. The pertinent issue for this Court's consideration in determining this application is whether the Applicant has established a prima facie case to warrant issuance of the orders sought.

26. The Applicant has submitted that the Respondent have breached the law in particular Section 10 and Section 26 of IEBC Act and Article 10(2) of the Constitution which provides parameters to be used in making such a recruitment process.

27. Section 10(1) and (2) of IEBC Act states as follows:-

1) "The Commission shall, through an open, transparent and competitive recruitment process, appoint a suitably qualified person to be the secretary to the Commission.

2) A person shall be qualified for appointment as the secretary if the person:-

a) is a citizen of Kenya;

b) possesses a degree from a recognized university;

c) has had at least five years' proven experience at management level;

d) has proven relevant experience in either:-

i) electoral matters;

ii) management;

iii) finance;

iv) governance;

v) public administration;

vi) law; or

vii) political science; and

e) meets the requirements of Chapter Six of the Constitution.

28. Section 26 of IEBC Act on the other hand states as follows:-

"Except as provided in the Constitution, the Commission shall, in the performance of its functions, not be subject to the direction or control of any person or authority but shall observe the principle of public participation and the requirement for consultation with stakeholders".

29. Section 10(2) as stated above indicates qualifications to be adopted in choosing the Commission Secretary. The qualifications are stated in mandatory terms. This implies there should be no regression, addition or subtraction to the said qualifications.

30. The advertisement by the Respondent for the position of Secretary of the Respondent contains more provisions than has been provided for in the law. On the face of it, it appears that the advertisement would need to be subjected to the test by this Court before the process continues. It is therefore my finding that the application by the Applicant is merited and I therefore allow it in terms of prayer (c), (e) and (f);

a) That the ongoing recruitment by the Respondents by themselves or their servants, agents and representatives as outlined in the Vacancy Notice titled “Vacancy in the of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission – Ref V.NO/IEBC/C/CEO/1/2019” is stayed pending the hearing and determination of the Petition.

b) That a temporary injunction do issue against the Respondents by themselves or their servants, agents and representatives as outlined in the Vacancy Notice titled “Vacancy in the of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission – Ref V.NO/IEBC/C/CEO/1/2019” pending the hearing and determination of the Petition.

c) An Order the Petition herein be heard on a priority basis.

31. Costs in the cause.

Dated and delivered in open Court this 26th day of March, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kimtai for 1st and 2nd Respondents

Wandeto for Petitioner/Applicant