



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**

**PETITION NO. 19 OF 2018**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**THE PRESIDENT OF KENYA.....1<sup>ST</sup> RESPONDENT**

**THE PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**KENNEDY OGETO..... INTERESTED PARTY**

**RULING**

1. This matter was scheduled for highlighting of submission on 1<sup>st</sup> March, 2019 however the court would like to make the following observations.
2. The Petitioner seeks orders among others that the decision by the 1<sup>st</sup> Respondent to wit H.E. The President Uhuru Muigai Kenyatta to handpick and nominate the interested party as Solicitor General without being identified and recommended by Public Service Commission through a competitive and merit based recruitment process is invalid, null and void *ab initio* and of no legal effect. The petitioner further sought an order quashing the 1<sup>st</sup> respondent's nomination of the interested party as the Solicitor General as announced by the 1<sup>st</sup> respondent in its's statement released to the public on 13<sup>th</sup> February, 2018.
3. The Petitioner has previously and severally appeared before me but of significance and relevant to this petition is his appearance in Petition Numbers 114 of 2016, 24 of 2018 and 103 of 2017.
4. Petition No. 114 of 2016 and 103 of 2017 concerned the issue of whether interested parties in those petitions namely Isaya M.S. Osugo, Omar Tawne Gudal and John Karimi Njiraini could continue to remain in office or be re-appointed on a local contract whose expiry is past their 60<sup>th</sup> birthday. According to the petitioner mandatory retirement age in public service was 60 years and no person could be appointed on contract which would keep them in office beyond attainment of 60 years
5. The Court heard both petitions and considered arguments by all parties and after carefully analyzing the same vis a vis the law and the Constitution came to the conclusion that it was not unconstitutional for a public servant serving on a fixed term contract to remain in office beyond their 60<sup>th</sup> birthday for the full term of their contract. The court further found that there was nothing unconstitutional about appointment into public service of a person who is over 60 years on a fixed term contract. That is to say Clause B20 of the Public Service Code of regulations permitted appointment on contract terms.
6. In petition number 24 of 2018 involving the petitioner and Head of Public Service Joseph Kinyua and Public Service Commission one of the issues was whether the office of Chief of Staff and Head of Public Service was inconsistent with the Constitution.
7. The petitioner sought that the court declares among others that the designation of the 1<sup>st</sup> respondent as Chief of Staff and Head of Public Service to be inconsistent with the Constitution and other laws of Kenya.
8. The Court however among others found that under Article 132 (4) 9(a) of the Constitution the President may establish an office in Public

Service in accordance with recommendation of the Public Service Commission. The Court noted that there was evidence that the office of the Chief of Staff and Head of Public Service was indeed created by the President after consultations with Public Service Commission.

9. The present petition before me involves the same petitioner and more or less the same respondents. Further the issues are around the constitutionality of nomination for appointment by the President of the Interested Party as the Solicitor General of the Republic of Kenya.

10. The arguments and background documents and precedents are more or less the same. In the three previous petitions referred to earlier in the ruling, the court heard hotly contested arguments by the parties and after carefully considering the same resolved the dispute in the manner the court did. It is the courts view that it has become intellectually saturated by the contestation around public appointments between more or less the same parties.

11. The legal reasoning as well as conclusions reached in the three petitions have been consistent. To this extent the court is of the view that the outcome of the present petition might not be different from the previous decisions referred to above. In order to avoid this predictable outcome I feel I should not proceed to decide this petition. It would not be conscientious to preside over a matter whose outcome can be predicted based on the previous decisions by the court.

12. The court believes its decisions were justly arrived at in the context of the law and the constitution however my decisions are not binding on judges of concurrent jurisdiction. They are merely persuasive. They may agree with my conclusions, they may not, but that is for them to decide. I would in the circumstances and for reasons set out above find it appropriate to recuse myself from this petition and direct that the same be mentioned before the Principal Judge on 17<sup>th</sup> April 2019 for allocation to another judge for disposal.

13. It is so ordered.

**Dated at Nairobi this 1<sup>st</sup> day of March, 2019**

**Abuodha J. N.**

**Judge**

**Delivered this 1<sup>st</sup> day of March, 2019**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the claimant

.....for the Respondent

**Abuodha J. N.**

**Judge**