



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 20th May, 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

JUDGEMENT

1. The Petitioner filed this Petition seeking orders that:-

A. A declaration that the Vacancy Notice titled “Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission Ref V.NO/IEBC/C/CEO/1/2019 offends Articles 10, 24, 27, 31, 35 and 47 of the Constitution and is thus unconstitutional, null and void.

B. A declaration that the ongoing recruitment pursuant to the Vacancy Notice titled: “Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission – Ref: V.NO/IEBC/C/CEO/1/2019” offends articles 10, 24, 27, 31, 35, 47, 55, 232(1), (c), (d), (f) and 250(12) of the Constitution as read with Section 10 of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 and is thus unconstitutional, unlawful, null and void.

C. A declaration that the increase of the required years of relevant experience from five to fifteen violates Article 10, 24, 27, 41 and 55 of the Constitution and Section 10 of the Independent Electoral and Boundaries Commission Act N. 9 of 2011 and is thus unconstitutional null and void.

D. A declaration that the requirement that five of the required fifteen years of relevant experience from five to fifteen violates Articles 10, 24, 27, 41 and 55 of the Constitution and Section 10 of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 and is thus unconstitutional null and void.

E. A declaration that security clearance of shortlisted candidates violates and/or threatens to violate the shortlisted respondent’s right to privacy under Article 31 of the Constitution.

F. A declaration that the disqualification criteria outlined in the Vacancy Notice titled Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission Ref V.NO/IEBC/C/CEO/1/2019 violates Article 24, 27, 38 of the Constitution as read with Section 10(2) of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011.

G. A declaration that the failure to make public the names of all respondents and provide meaningful public participation in the recruitment process pursuant to the Vacancy Notice titled Vacancy in the position of Commission Secretary/Chief Executive

Officer, Independent Electoral and Boundaries Commission Ref V.NO/IEBC/C/CEO/1/2019 violates article 10, 35, (3), 232 (1) (d) (e) and (f) of the Constitution.

H. The Honourable Court do issue an order of certiorari to quash the vacancy Notice titled Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission Ref V.NO/IEBC/C/CEO/1/2019.”

I. The Honourable Court be pleased and do hereby grant a judicial review order of prohibition to prohibit the 1st Respondent from proceeding with the ongoing recruitment pursuant to the Vacancy Notice titled “Vacancy in the position of Commission/Chief Executive Officer, Independent Electoral & Boundaries Commission – Ref V.NO/IEBC/C/CEO/1/2019”.

J. Costs of the Petition be borne by the Respondents.

K. Any other orders that this Honourable Court may deem fit for the purpose of enforcement of the Petitioner’s fundamental rights and freedoms.

2. The Petitioner brings the Petition in public interest to stop the continued violation of constitutional rights, freedoms and principles.
3. The Petitioner avers that on 19th January, 2019, the 2nd Respondent notified the general public on a vacancy in the position of Commission Secretary/Chief Executive Officer under the reference V.NP/IEBC/C/CEO/1/2019 which applications were to be received by the 1st Respondent.
4. He contends 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 Independent Electoral and Boundaries Commission (IEBC) Act. Further, that the decisions made in the course of the recruitment are arbitrary and in contravention of the law, specifically Article 47 of the Constitution and the Fair Administrative Action Act.
5. That the vacancy notice contained an important notice to the effect that the names of all applicants and interview schedule of the shortlisted candidates shall be published in the print media and in the Commission’s website after the closure of the advert and to date this information has not been made public.
6. The Petitioner claims that the Respondents introduced additional higher qualifications than the minimum provided in the law by requiring candidates to have ‘fifteen years’ proven relevant experience yet the Independent Electoral and Boundaries Commission (IEBC) Act only provides for a minimum of five years. He is of the opinion that this action automatically discriminated and locked out of the recruitment process persons who would be otherwise qualified under the Constitution and the law.
7. It is also his contention that the Respondents did not conduct public participation on the increase of the minimum experience level from 5 years to 15 and that there has been no amendment to Section 10 of the Independent Electoral and Boundaries Commission (IEBC) Act to increase the threshold which is contrary to Article 10, 24 and 232 of the Constitution.
8. The notice further provided that of the fifteen years, five of which must be at a comparable senior management level preferably in the public sector’ this effectively discriminated against the youth who would not have secured employment in the public service but who have equivalent experience from the public sector.
9. That the requirement of five years’ experience in the public sector effectively discriminates against Kenyans from the private sector who have equivalent or higher experience which in his view is contrary to Section 10(2) of the Independent Electoral and Boundaries Commission (IEBC) Act and Article 24 of the Constitution.
10. He alleges that the recruitment notice had a provision for security clearance over and above the Clearance by the Director of Criminal Investigations (DCI) not supported by any law; no legal certificate is granted to the affected persons after the clearance hence a respondent who is shortlisted but not appointed on account of security clearance has no opportunity to know the allegations made against him and cannot challenge the allegations in a Court of law. That this is in violation of privacy rights under Article 31 and 27 of the Constitution.
11. The Petitioner also contends that the disqualification criteria of any person adversely mentioned in any report by a Commission of Inquiry is contrary to Article 67 of the Constitution.
12. That people centric rights are not only concerned about the final decision of who becomes the Chief Executive Officer (CEO) but it matters that the process of arriving at this decision is in compliance with the Constitution.
13. That According to the NIS Act the impugned security clearance only relates to persons who are admitted to the service, who may be subjected to security clearance by the NIS.
14. That the Chief Executive Officer (CEO) provides the linkage between the 1st Respondent’s Secretariat and Commissioners and plays a key role in the election process hence the need for the recruitment for the Chief Executive Officer (CEO) to be done strictly in compliance with the Constitution and the law, and in particular ensure meaningful public participation, openness and accountability to the people of Kenya.
15. That the imposition of higher experience levels by the 1st Respondent is contrary to Article 24 of the Constitution since this is a limitation

of fundamental rights that is not supported by the Constitution and the law. The Petitioner urges the Court to allow the Petition.

Petitioner's Submissions

16. It is submitted on behalf of the Petitioner that the Court has jurisdiction to entertain the Petition and that the Petitioner is suited to file the Petition both in his interest and capacity as a registered Kenyan voter and secondly in the public interest on behalf of the Kenyan people as well settled in the Constitution and judicial precedents.

17. That the impugned vacancy notice is illegal as it does not conform to Section 10 (2) of the Independent Electoral and Boundaries Commission (IEBC) Act, which sets out the minimum qualifications for candidates applying for the Secretary/Chief Executive Officer (CEO) position.

18. That the decision to increase number of relevant experience from 5 to 15 years' violates the Constitution in the following manner: -

a) It violates Article 10 that requires state organs to adhere to the principle of inclusiveness, equality and non-discrimination, since it locks out persons who would have otherwise been entitled to apply for the CEO position.

b) It violates Article 27 since it unlawfully discriminates against people with less than 15 years' experience since they cannot apply for the said position.

c) It violates Article 41 of the Constitution denying Kenyans, who would have otherwise been eligible to apply, their right to fair labour practices.

d) It violates Article 55 of the Constitution by denying the youth an opportunity to apply. For comparative purposes, fifteen (15) years is the experience level required of a candidate for the position of Chief Justice and Judges of the Supreme Court in Article 162 of the Constitution. It denies the youth the Equality of Opportunity that was envisaged by the new Constitutional architecture.

e) As deponed in paragraphs 7,8,9 and 10 of the Further Supplementary Affidavit, it could not have been the intention of Parliament to set the bar so high, even as compared with provisions on CEO's in other Constitutional Commissions.

19. It is submitted that the Respondents have no mandate to alter such a critical qualification criteria. They rely on the case of **Joy Brenda Masinde -v- Law Society of Kenya and Another, Petition No. 54 of 2015 [2015] eKLR** where it was held:-

"Thus the statute which forms the basis for the qualifications required of the role of the post of Secretary/CEO lists only two (2) such qualifications. Yet in the impugned advertisement dated 20th August 2015 the 1st Respondent added a third qualification being that an applicant for the position of Secretary/CEO must additionally be a CPS holder of five years standing. The use of the word 'shall' in Section 26(4) makes this a mandatory requirement. Section 26(4) states that in order to be 'eligible' for appointment as Secretary/CEO an applicant is required to meet only the two stated qualifications. The term 'eligible' is defined in Blacks Law Dictionary 9th Edition as:- Page | 7

"fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege or status."

Contrary to the submissions by the 1st Respondent this additional qualification was not expressed to be merely as an ideal qualification in the way that an advanced degree was expressed to be an added advantage. Rather this additional CPS qualification was stated as a mandatory minimum requirement for consideration for the post advertised. Thus a person not in possession of a CPS of five years standing was deemed not eligible to apply. It was therefore a requirement that determined whether or not a person would apply for the position... The 1st Respondent's powers as donated by Section 26(4) of the Law Society of Kenya Act was to appoint as secretary/CEO persons who have qualified as for the Act in a transparent and competitive recruitment process. The 1st Respondent did not have the power under the Act to determine the minimum qualifications for secretary/CEO or to set out the threshold of competence or eligibility..."

20. That Section 10 (2) of the Independent Electoral and Boundaries Commission (IEBC) Act provides otherwise, it provides that a person shall be qualified for appointment as a Secretary if the person has had at least five years' proven experience at management level and has proven relevant experience in either- electoral matters, management, finance, governance, public administration, law or political science.

21. It is submitted that the Independent Electoral and Boundaries Commission (IEBC) Act does not make any preference to 'Public sector experience' and to this extent the vacancy notice is illegal and invalid for the reason that if a person with private sector experience fails to make the shortlist, one can easily allege bias by the Respondents.

22. Further that the specific preference for public sector experience violates the Constitution as follows:-

a) It violates Article 10 for being discriminatory and not being inclusive by clearly showing a bias for public sector candidates which is not supported by the IEBC Act.

b) It violates Article 24 of the Constitution by introducing an unlawful limitation to the right fair labour practices.

c) It violates Article 27 of the Constitution for openly discriminating against Kenyans from the private sector. The Constitution

and Section 10 (2) law was enacted for all Kenyans.

d) It violates Article 41 (1) of the Constitution by showing an openly biased recruitment criteria that is not approved by the law.

e) It violates Article 55 since this openly denies the youth with private sector experience and denies them the equality of opportunity.

f) It violates the values and principles of public service in Article 232 (1) (g) of fair competition and merit as the basis of appointments and promotions as read with article 232 (1) (1) and (i) that requires state organs to afford adequate and equal opportunities for appointment.

23. That the requirement that a Security Clearance, during the recruitment process of Secretary/ Chief Executive Officer (CEO) of the 2nd Respondent is unconstitutional, illegal and invalid as it is not supported by any law. They contend that this requirement for a security clearance is illegal and constitutional for the following reasons:-

a) The process threatens the applicant's right to privacy in Article 41 of the constitution as it amounts to a total invasion of one's life.

b) The process is not supported by the NIS Act as it is reserved for persons joining the NIS.

c) That there is no known security clearance certificate that is issued to the applicant.

d) The security clearance is not part of the Integrity Clearance that is founded in chapter 6 of the Constitution.

e) That Section 10 (2) of the IEBC Act only approved an integrity test under chapter 6 but not a security clearance.

f) The security clearance is a return to the old order where the state's intelligence organ is allowed to unconstitutionally invade one's private life.

g) The fact that all shortlisted candidates may be subjected to a security clearance means it is envisions as a stage in the recruitment process. However, the possibility of subjecting one to a security clearance yet are ends up missing on the appointment has the potential to compromise the person the person's right to privacy and further compromise the work of the NIS.

24. It is also submitted that the disqualification criteria discriminates against applicants in a manner not approved by the law. The criteria is not enshrined in Section 10 (2) of the Independent Electoral and Boundaries Commission (IEBC) Act hence the Vacancy Notice is invalid in this respect. That the allegation by the Respondent that the additional qualifications are enshrined in its Human Resource Manual is not supported by evidence and in any event that provisions of the Human Resource Manual cannot override provisions of the law.

25. On public participation it is submitted that the same must be real and not illusionary as the Court observed in the case of **Abdi Ahmed Abdi -v-CS Interior and Coordination of National Government and 7 others, H.C Petition No. 238 Of 2015**, as follows:-

"Public participation ought to be real and not illusionary and ought not to be treated as a mere formality for the purpose of fulfilment of the Constitutional dictates....engagement with the public is essential. Public participation informs the public of what is to be expected. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public, the result can never be an informed decision.0"

26. That the Respondents have not adhered to public participation for reasons of:-

1. Failure to disclose the list of all applicants immediately following deadline for applications.

2. Failure to disclose to the public that shortlisting will be carried out by a third-party consultant.

3. Failure to involve the public in the decision to recruit a consultant.

4. Failure to advertise the tender for the consultant.

5. Failure to disclose in the vacancy notice that a third party will carry out the shortlisting.

6. Failure to inform the public the terms and conditions under which the consultant is being recruited.

27. That the Respondent has not adhered to Section 5 of Fair Administrative Actions Act and as such and for the foregoing reasons the Petition should be allowed with costs.

The Response

28. The Petition is opposed and the 1st and 2nd Respondents 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.

29. That following the vacancy in the office of the Commission Secretary, the Commission placed advertisements on its website inviting interested respondents to submit their applications for the position of Commission Secretary/Chief Executive in accordance with the procedure prescribed therein. Further and 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 Star Newspaper of January 18, 2019, inviting interested respondents to submit their applications for the said position.

30. 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 Independent Electoral and Boundaries Commission (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 respondent's data/documents. That the process of procuring the services of an independent and reputable consulting firm is currently ongoing.

31. 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 respondents pending publication of the names of all Respondents.

32. 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.

33. The Respondents 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 Respondent must have served at a senior managerial position as required by Section 10(2) of the Independent Electoral and Boundaries Commission (IEBC) Act.

34. 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.

35. 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 Petition with costs.

Respondents' submissions

36. It is submitted on behalf of the Respondents that Vacancy Notice titled "Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission - Ref V.NO/IEBC/C/CEO/1/2019" is compliant with the requirements of the governing laws. That the Petitioner herein has challenged the legality and validity of the Vacancy Notice advertising the position of the Commission Secretary/Chief Executive Officer of the 2nd Respondent herein.

37. The grounds upon which it is challenged are the requirements of fifteen years general work experience, preference of public sector and security clearance by National Intelligence Service. That the Respondent complied with the law as Article 250 (12) (1) of the Constitution states that:-

"...there shall be a Secretary to each commission who shall be (a) appointed by the commission and (b) the chief executive officer of the commission..."

Further, Section 10 (2) of the Independent Electoral and Boundaries Commission Act No. 9 of 2011 (the IEBC Act) provides that:-

"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 recognised 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.

38. That the Honourable Court should distinguish between the five years, 7 proven years of experience at management level stipulated in Section 10 (2) (c) and the provisions of Section 10 (2) (d) with respect to the relevant experience in either electoral matters; management;

finance; governance; public administration; law; or political science whereby the Act do not prescribe the number of years that an respondent has worked and gained experience in the foregoing fields.

39. That the Constitution of Kenya as well as the Independent Electoral and Boundaries Commission (IEBC) Act are silent on the minimum number of years required for general work experience for one to be eligible to be appointed as Commission Secretary, thus leaving it to the discretion of the 2nd Respondent to prescribe the minimum years of general work experience in accordance with its Human Resource Policy guidelines taking into account the previous experience with former Commission Secretaries, the nature of job specifications and preferences.

40. In Commissioner for **Human Rights & Justice v Kenya Maritime Authority 2018 eKLR**, it was stated that in public appointments as in the present case, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and must act rationally in accordance with the powers conferred upon it.

41. That since Section 10 (2) (d) of the Independent Electoral and Boundaries Commission (IEBC) Act is silent on the number of years required for work experience, the 2nd Respondent herein rationally clarified and/or prescribed fifteen (15) years of general work experience as requirement, taking into account the magnitude of the responsibilities bestowed upon the Commission Secretary, the sensitivity of the office, the job specifications and preferences as well as the functions and roles stipulated in Section 10 (7) of the Independent Electoral and Boundaries Commission (IEBC) Act.

42. Accordingly, the 2nd Respondent herein cannot be said to have breached, violated and or threatened the above provision of Independent Electoral and Boundaries Commission (IEBC) Act, which does not provide the minimum years of general work experience, in its decision to specify that a Respondent should possess at least fifteen years proven experience in the electoral matters; management; finance; governance; public administration; law; or political science, with at least five (5) years at management level.

43. It is further submitted that the Petitioner has not adduced any evidence to demonstrate that the requirements of fifteen years general work experience discriminated against him as a candidate or it prevented him from applying for the advertised position. In fact, the Petitioner has not indicated that he was interested in applying for the position. Therefore, the present Petition lacks factual basis upon which this Honourable Court will adduce actual prejudice against the Petitioner or any other persons.

44. On the Petitioner's allegation that preference of candidates who have served at senior managerial position in public sector is likely to discriminate those who have worked in private sector and discriminates against the youths is unfounded as the above requirements are mere expressions of the preferred qualifications for the ideal candidate which are based on job specifications and/or performance taking into account the inherent requirements of the functions and duties of the Office of the Commission Secretary as enumerated in Section 10 (7) of the Independent Electoral and Boundaries Commission (IEBC) Act.

45. The Respondents rely on Article 1 of the International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (No.III) which defines discrimination as follows:-

"For the purpose of this convention the term discrimination includes -

1) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

2) such other distinction exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers' and workers' organizations where such exist, and with other appropriate bodies".

46. They also cite the case of **Joy Brenda Masinde v Law Society of Kenya & Another (2015) eKLR**, where the Court observed that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds under Article 27 (4) of the Constitution like race, sex creed or due to unfair practice and without any objective and reasonable justification.

47. They submit that the same cannot be deemed to be discrimination under Article 27 of the Constitution as they are not premised on any of the grounds stated therein or contemplated by Article 27(4) nor can the stated preference be said to amount to an illegitimate consideration. That these are distinctions based on job preference and/or performance, and are inherent requirements of the job which thereof shall not be deemed to be discrimination pursuant to Article 1 (2) of the International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (No.III), thus same does not amount to discrimination under Article 27 of the Constitution.

48. The Respondents urge the Honourable Court to find that the impugned vacancy notice for the position of Commission secretary was advertised procedurally as mandated by the law and that the requirements and qualifications prescribed therein are based on job specifications and/or the requirements of the functions and duties of the Office of the Commission Secretary enumerated in Section 10 (7) of the Independent Electoral and Boundaries Commission (IEBC) Act, and the same cannot be deemed to be discriminatory under Article 27 (4) of the Constitution.

49. On whether the recruitment process for the position of Commission Secretary pursuant Vacancy Notice titled "Vacancy in the position of Commission Secretary/Chief Executive Officer. Independent Electoral and Boundaries Commission - Ref V.NO/IEBC/C/CEQ/1/2019" is in accordance with the provisions of the governing laws it is submitted that Section 10 of the Independent Electoral and Boundaries Commission (IEBC) Act outlines the process for the appointment of the Commission Secretary, and subsection 1 requires the Commission shall, through an open, transparent and competitive recruitment process, appoint a suitably qualified person to be the Secretary to the

Commission, and only those who meet the qualification and relevant experience are shortlisted.

50. That although Article 10 (2) of the Constitution read together with Section 10 of the Independent Electoral and Boundaries Commission (IEBC) Act requires that the appointment of the Commission Secretary to be done in an open, transparent and competitive process, there is no constitutional, legislative or policy standard of what constitutes transparency, accountability and good governance in matters of public appointments.

51. It is the Respondent's submission that the Commission is left with discretion as it was stated in **Consumers Federation of Kenya (COFEK) vs Attorney General & 2 Others (2012) eKLR**, that where there are no specific constitutional, legislative or policy standard of what constitutes transparency, public participation, accountability and good governance in matters of public appointments, the appointing authority, the Commission herein, has discretion to put in mechanisms to facilitate public involvement in the recruitment of the Commission Secretary as the Constitution sets a base standard, but then leaves a leeway in fulfilling it, which must be rational.

52. Accordingly, that the Commission designed and/or tailored the procedure for appointment of the Commission Secretary/Chief Executive Officer (CEO) as hereunder:

i. Declaration of vacancy in the office of Commission Secretary/CEO by way of public advertisement;

ii. Receiving applications from interested respondents within specifically prescribed timeline;

iii. Longlisting of applications - which involves the collating and keeping the data of the respondents after the close of applications;

iv. Publications of all the names of the respondents in print media and in the Commission's website (www.iebc.or.ke):

v. Shortlisting of applications - which involves the review, scrutiny and verification of the respondent's documents by an independent and reputable Consulting Firm;

vi. After shortlisting, the Consulting Firm shall recommend names of the shortlisted eligible respondents to the Commission;

vii. Thereafter, the Commission shall immediately cause to be published in print media and on its website the names of shortlisted candidates inviting them for interviews on specific dates;

viii. Public participation - the Commission shall, on the advertisement, invite members of the public to give any information and comments concerning the shortlisted respondents to the Commission within a specific time, but prior to date of interviews;

ix. During this period of public participation, the Commission may on its own motion seek information pertaining the respondents from other government institutions like National Intelligence Service;

x. Interviews - the Commission shall interview each shortlisted respondent;

xi. Appointment - the Commission shall deliberate upon the data and information collecting during interviews and thereafter select the most suitable respondent to be Commission Secretary for the five (5) year renewable term in accordance with Section 10 (4) of the IEBC Act;

xii. Gazettement - the name of the newly appointed Commission Secretary/CEO shall be published in Kenya Gazette as well as in print media to notify the public; and

xiii. Oath or Affirmation - the pursuant to Section 10 (3), the newly appointed Commission Secretary/CEO shall subscribe to the oath or affirmation of office before assumption of office”.

53. Further that Section 10 (3) of the Independent Electoral and Boundaries Commission (IEBC) Act provides that the Commission Secretary must take and subscribe to the oath and affirmation of office as prescribed in the Third Scheduled of the Act, and shall hold office for a term of five years subject to reappointment for a one term in accordance with subsection 4.

54. That accordingly, in commencing the process of recruitment, section 10 (5) of the Independent Electoral and Boundaries Commission (IEBC) Act contemplates that the Commission shall cause the vacancy in the office of the Commission Secretary to be advertised at least three months before expiry of the term of the incumbent where the Commission does not intend to reappoint.

55. That following the exit of the former Commission Secretary, the 2nd Respondent declared vacancy and widely advertised the vacant position in the newspapers of nation-wide circulation, being the Daily Nation Newspaper of January 23, 2019 and the Star Newspaper of January 18, 2019, and on its website (<https://www.iebc.or.ke>) to enable Kenyans who qualify to apply for the said position.

56. That the impugned adverts are clear in the requirements as per Section 10 (2) as read with Section 10 (7) of the Independent Electoral and Boundaries Commission (IEBC) Act and the medium adopted by the 2nd Respondent to advertise the vacancy, which are website and daily newspapers of nation-wide circulation, did not deny a chance for Kenyans to participate by making applications to be considered.

57. That the process was highly competitive as it attracted a wider array of more than 100 respondents. They therefore submit that the 1st and 2nd Respondents by advertising the vacancy on its website and on daily newspapers of nation-wide circulation, the ongoing recruitment of the Commission Secretary was done in an open, transparent and competitive manner pursuant to the provisions of Section 10 of the Independent Electoral and Boundaries Commission (IEBC) Act and Human Resources and Administrative Policies and Procedures Manual.

58. That the Commission will publish on its website and in daily newspapers the names of all the respondents as well as the names of shortlisted candidates after longlisting, which shall demonstrate that the recruitment process meets the object of public participation and transparency in tandem with Article 10 (2) of the Constitution.

59. The Respondents cite the **Court of Appeal in Independent Electoral and Boundaries Commission vs National Super Alliance (NASA) & 6 Others (2017) eKLR**, stated that the mode, degree, scope and extent of public participation in both legislative and appointment processes is to be determined on case by case basis, and what is important is that the public are given reasonable opportunity to participate. The reasonableness of the opportunity to participate is to be determined from the nature, the importance and the intensity of the impact of the decision to be made.

60. The 1st and 2nd Respondents submit that the aspect of public participation transparency as values in matters of public appointments are relative to the context of the case, and the Court must determine each case on its own merits.

61. In light of the foregoing, the 1st and 2nd Respondents submits that the public will have an opportunity to participate in the process of recruitment of Commission Secretary as they will be invited to send any reports, objections or comments on any of the persons who have been shortlisted for the interviews.

62. Additionally, those who have not been shortlisted will be given an opportunity to make inquiries as to why they have not been shortlisted pursuant to Article 47 of the Constitution, which requires any decision-maker to give reasons for the decision arrived at.

63. That even the persons selected for appointment as the Commission Secretary will still be advertised and/or gazetted giving an opportunity to participate in the process.

64. It is by reason of the advertisement/gazettement of the person so appointed, that Kenyans will also participate in the process by launching a challenge to the process of appointment.

65. The Respondents submit that the Petition is not only predicated on alarmist, misconceived, merely anticipatory allegations, the same is premised on unfounded apprehensions.

66. In light of the foregoing, the 1st and 2nd Respondents submit that this Honourable Court do find that the ongoing recruitment process is open, transparent and competitive as it was widely advertised in the newspapers of nation-wide circulation and on the website of the Commission, and the public will still have a chance to participate as demonstrated hereinabove. Accordingly, the Petition herein is premature and based on unfounded apprehension that the process might not be transparent.

67. As to whether the 1st and 2nd Respondents herein have breached, violated and/or threatened the Petitioner's constitutional rights and fundamental freedoms while undertaking the appointment of Commission Secretary vide the impugned vacancy notice it is submitted that, the purported subjection of the respondent information to the security clearance by National Intelligence Service is not a violation the Petitioner's right to privacy under Article 31 of the Constitution.

68. That this right to privacy is not an absolute right such as those recognized under Article 25 of the Constitution. It follows that this right may be limited at any time and such limitation must be in compliance with Article 24 of the Constitution.

69. It is submitted that section 2 of the National Intelligence Service Act No. 28 of 2012 defines "security clearance" as an authorization entitling a person to have access to classified information, whereas 'classified information' means information of a particular security classification, whose unauthorized disclosure would prejudice national security.

70. Further that Section 61 of National Intelligence Service Act read together with Article 35 (3) of the Constitution and section 4 of the Access to Information Act No. 31 of 2016, entitles the Director General of the National Intelligence Service to release certain information upon request by a person taking into account the nature of information sought and sensitivity of the matter with respect to national security.

71. That by using the phrase Respondents may be subjected by the Commission to security clearance by National Intelligence Service (NIS).' signified that it is not a mandatory for the shortlisted candidates' information to be subjected to this process. However, where necessary for the Commission to verify the veracity, reliability and authenticity of the information and comments received from the public concerning the shortlisted candidates, especially the information given anonymously on criminal allegations like money laundering, terrorism and fraud, such information may be subjected to security clearance by NIS.

72. The 1st and 2nd Respondents submit that the information regarding the ongoing recruitment of the Commission Secretary is available on request. They rely on the case of **Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR**, that:-

"...The Constitution is therefore clear that information held by the state is accessible by citizens and that information is available on request. What this means is that once a citizen places a request to access information, the information should be availed to the citizen without delay..."

73. That there is no evidence produced in this Honourable Court to demonstrate that the Petitioner herein requested any information or clarification regarding the ongoing recruitment process, and was not availed to him.

74. Further, that Section 6 (c) of the Access to Information Act read together with Article 24 of the Constitution prohibits publication of information that could result to unwarranted invasion of the privacy of the Respondents. Accordingly, the 1st and 2nd Respondents submit that at the moment, all the data, documents and information pertaining to the respondents remains to be confidential, and cannot be released to the public pending conclusion of the longlisting and shortlisting. In any event, there is no prescribed time limit within which the Commission is required to publish the names of all the Respondents.

75. In light of the foregoing, the 1st and 2nd Respondents humbly submit that the allegations of violation of article 35 of the Constitution are unfounded for reasons that the Commission has continuously released the information pertaining recruitment and will continue to make them public once longlisting and shortlisting have been concluded.

76. On violation of right to fair administrative action under Article 47 the 1st and 2nd Respondents submit that Article 47 read together with Section 4 (3) of the Fair Administrative Action Act mandates the administrator to take administrative decision in a lawful, effective and efficient manner, especially in situations where the decision is likely to adversely affect the rights and freedoms of persons.

77. The Respondents rely on the case of **Kenya National Commission on Human Rights & another v Attorney General & 3 others (2017) eKLR** where it was stated that for the right to administrative action to be violated, the Petitioner must established with cogent evidence that:-

a) The Commission has made a conclusive administrative decision with respect to the ongoing recruitment of the Commission Secretary;

b) The said administrative decision must have effect on the Respondents or the public;

c) The rights of the public and/or the Respondents must be affected; and

d) The effects of the administrative decision on the rights of the Respondents and/or public must be material and adverse.

78. That the 2nd Respondent has not reached any administrative decision with respect to the ongoing recruitment of the Commission Secretary. Therefore, the 1st and 2nd Respondent submit that there is no evidence to substantiate that Petitioner's rights to administrative action were violated, threatened and/or breached by the Commission, and the same must be dismissed forthwith.

79. On whether the Petitioner is entitled to the reliefs sought in the Petition, it is submitted that there are no real and vital issues for determination by Court as the process of recruitment is still ongoing, thus it will be too early for the Court to determine the case and the Court will be engaging in an academic exercise. The Respondents urge the Court to dismiss the Petition with costs.

80. I have considered all the submissions and averments of both parties. The main contention of the petitioner is that the advertisement for the vacancy in the office of commission secretary of the Respondent is flawed and unconstitutional. This Court therefore needs to determine whether the impugned advertisement meets the requirements of the law. I made a ruling on this matter on the 26th March 2019 where I alluded to the fact that the advertisement in as much as it included extras not provided for the law, it was flawed hence the decision to stay the recruitment process.

81. In the said ruling, I considered the fact that Section 10 (2) of the Independent Electoral and Boundaries Commission (IEBC) Act is couched in mandatory terms and therefore there could be regression, addition nor subtraction of the qualifications for the Chief Executive Officer (CEO) for Independent Electoral and Boundaries Commission (IEBC).

82. The Respondent have submitted that they were within the law in the advert placed and breached no legislation. They sought to rely on **Human Rights & Justice v Kenya Maritime Authority 2018 eKLR**, where it was stated that in public appointments as in the present case, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and must act rationally in accordance with the powers conferred upon it.

83. Their contention is that since Section 10 (2) (d) of the Independent Electoral and Boundaries Commission (IEBC) Act is silent on the number of years required for work experience, the 2nd Respondent herein rationally clarified and/or prescribed fifteen (15) years of general work experience as requirement, taking into account the magnitude of the responsibilities bestowed upon the Commission Secretary, the sensitivity of the office, the job specifications and preferences as well as the functions and roles stipulated in Section 10 (7) of the Independent Electoral and Boundaries Commission (IEBC) Act.

84. Indeed the law is clear that the Respondent cannot couch an advertisement outside the legislative scope and their mandate. The Respondents however have a mandate to carry out their function within the law which function also includes hiring the best manpower to carry out their functions.

85. Section 10 of the Independent Electoral and Boundaries Commission (IEBC) Act, does not provide the minimum years of general work experience that the Chief Executive Officer (CEO) must have but this does not preclude the Respondent from making a decision on how best to carry out the recruitment process within its scope of work and the functionality of the office bearer. In carrying out this work, the Respondent must however work within the law.

86. I do not wish to belabour on this issue since I have already pronounced myself on the same in my ruling alluded to herein.

87. In determining this petition, I agree that the Respondent couched the advertisement for the position of the Independent Electoral and Boundaries Commission (IEBC) Chief Executive Officer (CEO) outside the provisions of the Independent Electoral and Boundaries Commission (IEBC) Act and the same cannot be sustained as is worded.

88. This Court cannot rewrite for the Respondent the correct version of the advertisement. However, this Court can order a fresh advertisement to be placed within the parameters of the law and for ensuring the right candidate gets hired.

89. I therefore agree with the Petitioner as submitted that the Respondent acted in contravention of the express provisions of the law and hence make the following orders:-

A. A declaration that the ongoing recruitment pursuant to the Vacancy Notice titled: “Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission – Ref: V.NO/IEBC/C/CEO/1/2019” offends Articles 10, 24, 27, 31, 35, 47, 55, 232(1), (c), (d), (f) and 250(12) of the Constitution as read with Section 10 of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011 and is thus unconstitutional, unlawful, null and void.

B. A fresh recruitment process be commenced bearing in mind the express provisions of the law.

C. There will be no order as to costs.

Dated and delivered in open Court this 20th day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wandeto for Petitioner – Present

Sisule for 1st and 2nd Respondents – Present