



**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.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION....2<sup>ND</sup> RESPONDENT**

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

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> July, 2019)

**RULING**

The petitioner filed on 21.06.2019 the petition and an application by way of a notice of motion dated 21.06.2019 and through P. Ogeni & Company Advocates. The application was under Articles 19, 20, 22, 23, 24, 35, 262, and section 23(1) of the sixth schedule to the Constitution of Kenya, 2010; rule 23(1), (2) and rule 24 (1) of the Constitution of Kenya ( Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 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. The applicant prays for an order that the Honourable Court do issue an order stopping the on-going recruitment process for the position of the Commission Secretary and Chief Executive Officer as stipulated in the vacancy notice called “Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and

**Boundaries Commission – Ref. V. No/IEBC/C/CEO/1/2019**” dated 21.05.2019 as well as the interview of the ten(10) shortlisted candidates, scheduled for 24<sup>th</sup> to 26<sup>th</sup> June 2019 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, either by themselves or through their servants, agents, and representatives and/or by any other person (natural or juridical) pending the hearing and determination of the petition herein. The applicant also prayed for orders that the petition is heard on priority basis and for costs of the application to be borne by the respondents.

The application is based on the annexed affidavit of Georgiadis Majimbo Advocate, a director and member of the petitioner and upon the following grounds:

- a) The 1<sup>st</sup> and 2<sup>nd</sup> respondents have by a vacancy notice No. Ref. V. No/IEBC/C/CEO/1/2019 dated 21.05.2019 signed by the 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> respondents promptly issued a rejoinder denying the media reports and stating they were misleading.
- g) The 1<sup>st</sup> and 2<sup>nd</sup> respondents maintain that section 10 of IEBC Act vests in the 2<sup>nd</sup> respondent the mandate to appoint a Commission Secretary and CEO.
- h) In petition ELRC No. 51 of 2019 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 competitive test set by the law was necessary. It is the applicants’ case that it was not therefore discretionary for the 1<sup>st</sup> and 2<sup>nd</sup> respondents not to engage such independent and reputable consulting firm in the challenged recruitment process.
- i) The applicants have written to the 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> 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 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> respondents have filed on 02.07.2019 the replying affidavit of the 1<sup>st</sup> respondent, Wanyonyi Wafula Chebukati, and through Professor Tom Ojienda & Associates. It is urged for the respondents as follows:

- a) The entire petition should be dismissed with costs because the applicant has not filed its resolution to file the suit.

b) The applicant has failed to satisfy the principles for grant of temporary injunctions and in particular a *prima facie* case with probability of success; suffering of irreparable injury has to be established; and the balance of convenience does not tilt in favour of the applicant.

c) 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 2<sup>nd</sup> 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.

d) 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](http://www.iebc.or.ke) after the closure of the advert and further, that only shortlisted candidates would be conducted.

e) 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.

f) 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.

g) The 1<sup>st</sup> and 2<sup>nd</sup> 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.

h) 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 1<sup>st</sup> 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.**”

i) 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.

j) 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.

k) 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.

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

m) 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.

n) 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.

o) 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 4.00pm 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 3<sup>rd</sup> respondent filed grounds of opposition through Schola Mbilo, Principal Litigation Counsel. The 3<sup>rd</sup> respondent relied on the grounds of opposition and opted not to make submissions. The grounds of opposition are summarised as follows:

a) The 2<sup>nd</sup> respondent is an independent commission subject only to the Constitution and the law per Articles 88 and 249 of the Constitution.

b) The 2<sup>nd</sup> respondent is entitled to recruit its secretary and chief executive officer per section 10 of the IEBC Act, 2011.

c) The petitioner has not shown that the recruitment process in issue is continuing in contravention of law and Constitution. The petition does not raise substantive constitutional issues to be determined by the Court.

d) The application does not pass the test for grant of interlocutory injunctions.

e) Stopping the recruitment will not be in the public interest in view of the respondent's constitutional and statutory mandate.

f) The application is frivolous, vexatious and an abuse of Court process.

g) The 3<sup>rd</sup> respondent is not a proper party as no remedy is sought against the Attorney General.

The Court has considered the material on record including the submissions made for parties. The Court makes findings as follows:

**First**, the Court finds that under Article 250 (12) of the Constitution it is provided that there shall be a Secretary to each constitutional commission (such as the 2<sup>nd</sup> respondent) who shall be appointed by the commission, and, be the chief executive officer of the Commission. Section 10(1) of the IEBC Act implements that constitutional provision by stating that the Commission shall, through an open, transparent, and competitive recruitment process, appoint a suitably qualified person to be the secretary to the Commission. The section is in line with Article 232(1) on the values and principles of public service and in particular (g), (h) and (i) thereof and Article 73(2) (a) as well as Article 10. The court upholds its opinion in **Robert Muriithi Ndegwa –Versus- Minister for Tourism, Petition No. 41 of 2012 at Nairobi**, where it stated thus, "**....Article 232 of the Constitution provides for the values and principles of public service to include:**

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

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

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

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

e) **accountability for administrative acts;**

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

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

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

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

service of men and women; the members of all ethnic groups; and persons with disabilities.

**Section 22 of the Public Officer Ethics Act, 2003 provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections. Thus, by the Constitution and by statute, the standards for undertaking public employment have been determined. In the instant case, the petitioner was recruited competitively and it is not said that he lacks qualifications. The court holds that there would be no suitability or merit in public employment in event of presence of bribery, cronyism, nepotism, tribalism, and in absence of qualifications, competence, competition, integrity and respect for inclusion and diversity....”**

The Court returns that the 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> respondent may by itself discontinue the consultancy and continue the recruitment, selection and appointment process as the 2<sup>nd</sup> respondent may consider reasonable in the circumstances. The Court holds that throughout the recruitment, selection and appointment process the 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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.

**Second**, the applicants lament that the Acting Commission Secretary and CEO Marjan Hussein Marjan who was shortlisted suffered a conflict of interest by involving himself in the recruitment, selection and appointment process thereby making the entire process not tenable. The law on conflict of interest as applicable in the instant case is clear. In particular Section 12 of the Public Officer Ethics Act, 2003 provides thus, **“12. (1) A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties. (2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership of other body, directly or through another person, if holding those shares or having that interest would result in the public officer’s personal interests conflicting with his official duties. (3) A public officer whose personal interests conflict with his official duties shall-(a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and(b) refrain from participating in any deliberations with respect to the matter.(4) Notwithstanding any directions to the contrary under subsection (3)(a), a public officer shall not award a contract, or influence the award of a contract, to-(a) himself;(b) a spouse or relative;(c) a business associate; or(d) a corporation, partnership or other body in which the officer has an interest.(5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.(6) In this section, “personal interest” includes the interest of a spouse, relative or business associate.”**Pursuant to subsection 12 (5) of the Act, regulation 11 of the Public Officer Ethics Regulations, 2003, provides thus, **“11.The personal interests of a public officer do not conflict with the official duties with respect to a matter, for purposes of section 12 of the Act, if the following are satisfied-**

**a) the personal interests of the public officer are not specific to the public officer but arise from the public officer being a member of a class of persons who all have personal interests in the matter;**

**b) it would be impractical for the public officer and all other public officers who have personal interests in the matter to refrain from participating in deliberations with respect to the matter; and either the personal interests of the public officer are obvious or the public officer declares his personal interests to his superior or other appropriate body or person.”**

In the instant case the advertisement was on 21.05.2019 and it is not shown that as at that date the acting secretary had declared his interest to apply and by reason of his official capacity, there is no reason to doubt that he had advantage of information or involvement in the advertisement. It is true that the advertisement invited applicants to address the applications to the office of the 1<sup>st</sup> respondent but who in ordinary course of work would be facilitated by the secretariat staff who worked under the acting secretary. Upon close of the advertisement on 03.06.2019, there is no record of the proceedings for opening of the applications. A register of applicants is provided but once again that opening of applications must have been facilitated by officers working under the acting secretary. It is clear that when ACAL was offered the consultancy in that regard, it replied and declined raising concerns of potential conflict of interest in circumstances whereby the commissioners had delegated the work to the secretariat. It is the acting secretary prior to the advertisement such as on 28.03.2019 who wrote to ACAL about the award. The subsequent correspondence was addressed to him by ACAL and he would reply or act accordingly. It is officers working under him who undertook the negotiation and subsequently he was part of the meeting making resolution of 07.06.2019 and for the first time declared his interest at that meeting that he was interested in the vacancy of secretary and chief executive officer. As at that date, ACAL had already declined to accept the consultancy offer. 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 2<sup>nd</sup> 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.

**Third**, the Court finds that whereas the 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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 2<sup>nd</sup> 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.

**Fourth**, the Court returns that as submitted for the respondent and as was held in **Lempaa Vincent Suyianka –Versus- Commission on Administrative Justice Selection Panel & Another [2018]eKLR**, the person seeking information must allow adequate time to respond. In this case it is clear that the petitioner served the request and proceeded to file the petition the following day and it cannot be said that as at the time of filing the petition, the petitioner had violated Articles 35 and 27 of the Constitution as was urged for the applicant. In any event the respondent has established that the list of all applicants and the shortlisted applicants was published in the print media.

**Fifth**, the Court returns that the petitioner being a company has urged that a board meeting was held on 14.06.2019 and resolved that the petition be filed. The resolution is exhibited as GM1 on the supplementary affidavit of Georgiadis Majimbo filed on 11.07.2019. In absence of any other material before the Court, the Court returns that there was a board resolution that the petitioner files the petition. The respondents’ case that the petition and application should fail for want of such resolution will fail.

**Sixth**, has the petitioner established a case to justify the Court’s intervention in the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ exercise and discharge of their human resource power and function to recruit, select and appoint the commission secretary and chief executive officer? The Court follows the holding by Rika J in **Alfred Nyungu Kimungui Vs Bomas of Kenya [2013]eKLR** thus, **“The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether.”**

And further, “14. The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by the management of its rights at the workplace should be avoided. Termination of employment, and initiation of disciplinary processes at the work place, are presumed to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages otherwise the Court would be deemed to be directing the employers in regulation of their employees.”

In such cases seeking to interfere with the employer’s powers, the court follows its opinion in the ruling in Geoffrey Mworira-Versus-Water Resources Management Authority and 2 others [2015]eKLR thus, “The principles are clear.

**The court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”**

In the present case the Court has found that there was nothing wrong with the advertisement. The problem was the absence of measures to handle the conflict of interest that has been established to have existed, the absence of predetermined and objective score sheets to guide the shortlisting and interviews and, taking into account the mandatory statutory qualifications without arbitrarily disadvantaging the applicants in that regard.

Thus the Court considers that the applicant has established that the process is continuing in violation of applicable constitutional and statutory provisions. To that extent, the applicant has established a *prima facie* case with high chances of success. There is no remotest suggestion that the injury would be cured by an award of damages. The balance of convenience demand that the process which otherwise is continuing unlawfully would be liable to being temporarily arrested by Court order but subject to the 2<sup>nd</sup> respondent undoing the shortlisting and proceeding in accordance with the law, including shortlisting, and interviewing candidates upon the basis of a predetermined and objective score-sheet devoid of impairment of the established conflict of interest and with liberty to involve a lawfully appointed independent consultant. The 1<sup>st</sup> and 2<sup>nd</sup> respondent have admitted the duty to inform such as by publishing the names of all applicants and shortlisted candidates and that obligation is hereby upheld in the continued process as will be necessary.

In conclusion, the application by way of the notice of motion dated and filed on 21.06.2019 is hereby determined with orders:

- 1) That pending the hearing and determination of the petition herein and subject to order (2) below, an order is hereby issued stopping the on-going recruitment process for the position of the Commission Secretary and Chief Executive Officer as stipulated in the vacancy notice called “**Vacancy in the position of Commission Secretary/Chief Executive Officer, Independent Electoral and Boundaries Commission – Ref. V. No/IEBC/C/CEO/1/2019**” dated 21.05.2019 as well as the interviewing of the ten(10) shortlisted candidates, scheduled for 24<sup>th</sup> to 26<sup>th</sup> June 2019 or other date by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, either by themselves or through their servants, agents, and representatives and by any other person (natural or juridical).
- 2) Notwithstanding order (1) above and pending the hearing and determination of the petition or further orders by the Court, the respondents are at liberty to set aside the shortlisting of the 10 candidates in order 1 above and with respect to the vacancy, the respondents are further at liberty to proceed in accordance with the law (including shortlisting and interviewing candidates as well as appointing the successful candidate thereof and informing the public as appropriate) and upon the basis of a predetermined and objective score-sheet as well as being devoid of the established or other conflict of interest and with further liberty to involve a lawfully appointed independent consultant as the respondents may deem appropriate.
- 3) The parties to take steps towards the hearing and determination of the petition on priority basis.
- 4) The costs of the application in the cause.

Signed, dated and delivered in court at Nairobi this Friday 26<sup>th</sup> July, 2019.

**BYRAM ONGAYA**

JUDGE