



**Dwasi v Cabinet Secretary for Environment and Natural Resources & another
(Petition 35 of 2017) [2019] KEELRC 2562 (KLR) (22 November 2019) (Judgment)**

Jane Akinyi Dwasi v Cabinet Secretary for Environment and Natural Resources & another [2019] eKLR

Neutral citation: [2019] KEELRC 2562 (KLR)

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

PETITION 35 OF 2017

NJ ABUODHA, J

NOVEMBER 22, 2019

BETWEEN

DR. JANE AKINYI DWASI CLAIMANT

AND

**CABINET SECRETARY FOR ENVIRONMENT AND NATURAL
RESOURCES 1ST RESPONDENT**

JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

JUDGMENT

1. By a notice of motion dated December 22, 2017 the applicant sought an order of mandamus to remove in the honourable court and compel the respondent, her agents, representatives, employees and or servants to appoint and gazette the applicant as the chairperson of the national environmental tribunal pursuant to her nomination by the Judicial Service Commission on interim basis for one more year with effect from September 14, 2017 as communicated by the letter dated on even date from FSC.
2. The application was based on grounds set out in the applicants statutory statement and the matters set out in the verifying affidavit and other reasons to be adduced at the hearing and mainly that:
3. The interested party filed an affidavit through one Winfrida Mokaya in which she deponed in the material part as follows:
 - (a) I am the registrar of the judicial service commission, the interested party herein (hereinafter 'JSC'). I am conversant with matters in this judicial review application and have been duly authorized to make this affidavit on behalf of JSC.
 - (b) I have read and understood and also had explained to me by the interested party's advocate on record, the notice of motion application dated December 22, 2017, the statutory statement and



supporting affidavit thereto sworn by Dr. Jane Dwasi together with all exhibits and annexures thereto and I make this affidavit on behalf of the Interested Party.

- (c) The National Environment Tribunal hereinafter “NET” is a body established under section 125 Part XII of the *Environment Management and Coordination Act* EMCA “No 8 of 1999 with the mandate to among others receive, hear and determine appeals arising from decisions of the National Environment Management Authority (NEMA) on issuance, denial or revocation of Environment Impact Assessment (EIA) licensees among other decisions.
- (d) Section 125 (1) (a) of *EMCA* provides that the Chairperson of NET is to be nominated by JSC and subsequent gazette and appointed by the 1st respondent.
- (e) In the year 2014, Dr. Jane Dwasi being qualified, applied, was interviewed and was subsequently nominated by the JSC as the Chairperson of NET for a term of 3 years. She was thereafter notified of this nomination by a letter dated June 10, 2014. In and marked as WM-1 is a copy of the letter appointing the Applicant.
- (f) Upon the jsc forwarding the name of Dr. Dwasi to the 1st respondent she was gazette and appointed by the 1st respondent for a 3-year term commencing July 18, 2014 through Gazette Notice Vol CX-VI No 85, 1793 of July 18, 2014.
- (g) On April 10, 2017 Dr. Jane Dwasi wrote to the JSC seeking for renewal of her term in office citing among other reasons part heard cases which were pending before the Tribunal.
- (h) On June 6, 2017, the JSC considered Dr. Jane Dwasi’s request for renewal of her term and requested for a confidential report from the respondent through a letter to the Principal Secretary dated June 8, 2017 to enable it evaluate Dr. Jane Dwasi’s performance. Dr Jane Dwasi was also required to file an Appraisal on her performance.
- (i) On June 21, 2017, the JSC’s Human Resource Management Committee ‘HRMC’ recommended that Dr. Jane Dwasi be re-appointed for a term of 3 years but before the recommendation of the Committee was submitted to the full JSC for approval, a complaint was lodged by other members of NET against Dr. Jane Dwasi prompting the agenda to be deferred.
- (j) On August 2, 2017, the Judicial Service Commission deliberated on the complaint lodged by the members of the Tribunal against Dr. Jane Dwasi and resolved that the same proceeds for an oral hearing to allow both parties ventilate their side on the complaint.
- (k) As at the time of the term of office of the chairperson lapsed, the members of the tribunal had not convened as required under section 125(5) of the *EMCA* to elect a vice chairperson and as such there was nobody to act as the Chairperson after the expiry of term in office/ in her absence. This situation was threatening to ground the operations of the Tribunal.
- (l) On August 31, 2017, the JSC resolved to re-appoint Dr. Jane Dwasi for an interim period of 1 year pending the hearing and determination of the complaint lodge against her by the members of the Tribunal and to forestall a crisis in the operations of the Tribunal which had come to a On standstill, to allow for the conclusion of part heard matters that had been litigated before the Tribunal and in which Dr. Dwasi had sat as the Chairperson and as JSC competitively recruited for the position.



- (m) On September 5, 2017, the respondent wrote to the JSC requesting that the JSC to nominate and forward the name of the person to be appointed as the chairperson of the National Environment Tribunal.
- (n) On September 7, 2017 the JSC wrote to the respondent informing it that the JSC had nominated Dr. Jane Dwasi for an interim period of 1 year to allow the JSC to conclude on the complaint filed against Dr. Dwasi and to competitively recruit for the position.
- (o) Simultaneously, on September 14, 2017, Dr. Jane Dwasi was notified of her reappointment for a period of 1 year. She received the said communication and accepted the appointment.
- (p) On September 25, 2017, the respondent wrote back to JSC indicating that they had considered the matter of her nomination and were of the view that the JSC should nominate another person other than Dr. Jane Dwasi.
- (q) Prior to the above letter dated September 25, 2017 rejecting the nomination of Dr. Dwasi by the JSC , the respondent had written to the JSC through its Principal Secretary , Mr. Charles T. Sunkuli on August 14, 2017 recommending Amb. Julius Sunkuli and Mr. Gideon Solonka Kilakoi for consideration for appointment as Chairperson of the National Environment Tribunal.
- (r) On October 5, 2017, the JSC wrote to the respondent indicating that the nomination of Dr. Jane Dwasi was for an interim period of 1 year and was to ensure that she concludes part heard matters before NET and that further the respondent was notified that it did not have powers to reject, vet or approve a nominee from JSC to NET.
- (s) On October 13, 2017, the respondent wrote to the secretary to JSC informing the JSC that its nominee for chairperson of NET was not acceptable to the Ministry.
- (t) As the JSC and the respondent exchanged correspondence on the issue of appointment of Dr. Jane Dwasi, members of NET resolved to nominate Mrs. Christine Kipsang Mwikali to act as chairperson pending the appointment of a substantive chairperson, this was allegedly done in accordance with section 125 (8) of EMCA.
- (u) On November 24, 2017, the respondent sought a legal opinion from the Hon. Attorney General on the validity nomination of Mrs. Kipsang as the acting chairperson and through an opinion dated November 27, 2018, the Attorney General advised that the same was proper and in accordance with section 125(8) of EMCA.
- (v) In the said opinion the Hon. Attorney General also advised the Ministry to submit its objection to the reappointment of Dr. Jane Dwasi in accordance with Section 10 of the Judicial Service Act.
- (w) On November 30, 2017, the respondent wrote to JSC declining to gazette Dr. Jane Dwasi on the basis of the advice from the Attorney General.
- (x) On January 26, 2018, the JSC after hearing the complaint against Dr. Jane Dwasi by members of NET as stated in paragraph 10 above, dismissed the same as being frivolous and without merit. This was communicated to Dr. Jane Dwasi members of NET and the Cabinet Secretary.
- (y) I have been advised by the interested party's advocate on record which advise I verily believe to be sound that the JSC discharged its mandate under the Act in good faith by nominating



Dr. Jane Dwasi for an interim period 1 year to ensure that the operations of the NET were not brought to a standstill.

- (z) The decision to appoint Dr. Jane Dwasi for 1 year was to allow competitive recruitment by JSC which ordinarily takes at-least 3 months to conclude and to allow the conclusion of pending cases, some of which were partly heard before the Dr. Jane Dwasi in her capacity as the Chairperson.
 - (aa) As at the time of Dr. Jane Dwasi's reappointment for an interim period of one (1) year, the members of the tribunal had not convened to nominate Mrs. Kipsang as the acting chair and as such JSC had to act with speed to forestall the crisis that was looming in the Tribunal.
 - (bb) The refusal by the Minister to gazette and appoint the JSC's nominate for the position of chairperson to the National Environment Tribunal is in violation of the law, an affront of the independence of JSC and against well-established precedent which provided that when an Act of Parliament gives a body the right to nominate and another body the role to gazette and appoint, the role of the later is merely facilitative.
2. The applicant further filed an affidavit on July 12, 2018 in which she deponed on the main that: -
- (i) That I do recognize, based on past and present occurrences involving the national environment tribunal (hereinafter, the tribunal) that there are , truly, power games between the ministry of environment and natural resources and the judiciary, over the control of the tribunal and i honestly believe , based on my experience , that the power games are precipited and perpetuated by the key officers of the ministry of environment and the games are detrimental to the tribunal, which was established to determine critical questions concerning environment and sustainable development of this country.
 - (ii) That I honestly believe that in the context of the power games, there are specific objectives, especially on the part of some of the Ministry officials, to reward relatives or cronies with positions.
 - (iii) That Mr. Chalres Sunkuli, the principal secretary of the Ministry of Environment and natural resources was involved in the making of the former cabinet secretary's decision to refuse to gazette me as chairperson of the Tribunal as requested by the Judicial Service Commission (JSC) and I honestly believe that he influenced that decision. Attached is a copy of his letter to me dated 9th October,2007, by which he responded to my request to the Cabinet Secretary to facilitate my gazette in the interest of the public.
 - (iv) That there was actual bias in the apparently, negatively influenced Cabinet Secretary's decision to decline to gazette me as Chairperson of the Tribunal because the said principal Secretary, Ministry of Environment, wanted his brother or a named person from his tribe, to be the chairman of the Tribunal. Attached is a copy of a letter dated August 14, 2017 which was written by the Principal Secretary to the JSC, directing the JSC to appoint either his brother, Ambassador Julius Lekakeny Sunkuli or Gideon Solonka Kilakoi, as the chairman of the Tribunal. It is marked "JAD2".
 - (v) That it emerges, from the letter aforesaid that the Cabinet Secretary's refusal to gazette me was influenced by tribalism and/or nepotism and a desire to reward relatives and/or cronies with appointment to a public position and not by any wrong doing on my part.
 - (vi) That the cabinet secretary's decision not to gazette me was also made in breach of the constitutional requirements of fair administrative action expressed in articles 47 and 50 of the



national Constitution and , also , in breach of the principles of natural justice, specially, a denial of my right to be heard because at no time did the cabinet secretary, principal secretary or any official of the Ministry inform or notify me of any complaint that members of the Tribunal, all appointed by the same Cabinet Secretary, had presented to the Cabinet Secretary , or the Ministry , as stated in paragraph 18 of the her Affidavit sworn on January 22, 2018. I was never notified of any complaint that members of the Tribunal may have presented to the Cabinet Secretary or her Ministry, neither was I given any chance to respond to any complaint to the Ministry and that failure, in my honest belief, constitutes a ground for allowing the present application.

- (vii) That it is my considered view that if the Cabinet Secretary made a decision based on undisclosed, uncontested and partial information or complaint from her appointees, her decision not to gazette me was, to that extent, also unreasonable and that constitutes another ground to allow this application.
 - (viii) That there was no basis upon which the Cabinet Secretary could become dissatisfied with my functions as Chairperson of the Tribunal as stated in paragraph 18 of her Affidavit sworn on January 22, 2018 because the Cabinet Secretary and her officers did not, at all visit the Tribunal even to find out how it was performing, or where its offices were, neither was any evaluation exercise conducted by her Ministry or officials to determine my performance. Therefore, her allegation that she or her Ministry was dissatisfied with my performance lacks basis. Even if she had been dissatisfied with my performance, any dissatisfaction that the Ministry might have had, for whatever reason, was not brought to my attention, neither were any reasons for any dissatisfaction presented to me, or to the Judicial Service Commission. Also, the Environment Tribunal was, at all materials times, functioning in the Judiciary and it is the Judiciary that was exercising oversight functions over the Tribunal. In its functions, the JSC did perform an evaluation of my performance, which determined that I was suitable for reappointment by the Interested Party herein.
3. The respondent filed a replying affidavit through the Cabinet Secretary Mr. Kariako Tobiko in which he stated in the main that: _
- (i) The ex-parte applicant was first nominated as the chairperson of the National Environment Tribunal by the Judicial Service Commission (JSC) through a letter dated June 10, 2014 after a competitive process of recruitment and subsequent interview. Her name was subsequently forwarded to the Cabinet Secretary, Ministry of Environment, Water and Natural Resources for appointment pursuant to the provisions of section 125(2) of the Environment Management and Co-ordination Act.
 - (ii) Through Gazette Notice No.4883 dated 18th July, 2014 the *ex parte* applicant was officially appointed the chairperson of the National Environment Tribunal for a period of three (3) years with effect from 18th July,2014 by the Cabinet Secretary, Ministry of Environment, Water and Natural Resources, Prof. Judi W. Wakhungu.
 - (iii) The ex-parte applicant faithfully and diligently executed her duties during her term which was to end on July 11, 2017. In a letter dated April 10, 2017, the ex-parte applicant requested the JSC through the Chief Registrar of the Judiciary to extend her term citing pendency of part heard cases, quorum hitches and inexperience of other Tribunal members among others as the reason for seeking extension.



- (iv) The respondent wrote to the interested party through the Chief Registrar in a letter dated September 5, 2017 requesting that the interested party do recruit a new chairperson of the NET since the *ex-parte* applicant's term had expired.
- (v) The interested party conducted an appraisal on the *ex-parte* applicant and on September 14, 2017 reached a decision to appoint the *ex-parte* applicant on an interim basis for one more year with effect from September 14, 2017 to allow the *ex-parte* applicant to finalize the part heard appeals pending before the tribunal and further to allow the commission ample time to competitively recruit for the position of the chairperson. This decision was communicated both to the *ex-parte* applicant and the respondent. The *ex-parte* applicant accepted her appointment through her acceptance letter dated September 26, 2017.
- (vi) In a shocking letter dated September 25, 2017 addressed to the interested party through the registrar of the Judiciary, the respondent purported to illegally and unreasonably reject the JSC's nominee and further purported to advise JSC to nominate "a new candidate" for gazettelement.
- (vii) The interested party replied the said letter of September 25, 2017 through a letter dated October 5, 2017 wherein JSC informed that respondent that section 12(1)(a) of EMCA exclusively mandated the JSC to nominate the chairperson of the Tribunal and the respondent's role under section 125(2) is limited to gazetting the nominee. The JSC thus rightfully pointed to the respondent that the respondent's role is purely facilitative and must be in accordance with the recommendation of the JSC. In the same letter, the JSC rightfully noted that EMCA does not grant the respondent power to reject a nominee from the nominating bodies and advised the respondent to expedite the appointment of the *ex-parte* applicant.
- (viii) In a letter dated October 13, 2017, the respondent again purported to reject the recommendations of the JSC with impunity and usurped its functions to purport to give an appraisal of the *ex-parte* applicant's performance and recommended the issues the JSC should have put in to consideration during its nominations. The respondents further took upon herself the responsibility of interpreting the stature (section 125(4)(a) of EMCA) and asserted that her role in the appointment of the chairperson is more than to just rubber stamp.
- (ix) The membership of the tribunal is provided for under section 125(1) of EMCA as follows; _
 - (1) There is established a Tribunal to be known as the National Environment Tribunal which shall consists of the following members: -
 - (a) A chairman nominated by the Judicial Service Commission, who shall be a person qualified for appointment as a judge of the High Court of Kenya.
 - (b) An advocates of the High Court of Kenya nominated by the Law Society of Kenya.
 - (c) A lawyer with professional qualifications in environmental law appointed by the Ministry and
 - (d) Three people with demonstrated competence in environmental matters, including but not limited to land, energy, mining, water, forestry, wildlife and maritime affairs.
- (x) The Tribunal thus is improperly constituted as at present since it lacks the chairperson. Consequently, the decisions being delivered by the Tribunal now and generally its processes



and proceedings could be challenged in future as being invalid by virtue of its improper constitution. This would lead to major crises.

4. In her submission the applicant stated that the respondent failed to notify her of her decision to refuse to gazette her as the Chair of NET as requested by the JSC contrary to article 47(1) of the Constitution and Section 4(1) of the FAA Act. Both provisions emphasize that administrative actions including decisions should be procedurally fair. In the present case there was no procedural fairness because the respondent did not at all notify her of its decision to refuse to gazette her as the chair of NET. She as well as the public were kept in limbo for too long. The respondent only stated the reason for refusal to gazette in her replying affidavit to the application where she stated that there were several complaints against the applicant by members of the Tribunal but neither the CS nor any of her officers provided her with the opportunity to respond to the allegations against her.
5. The applicant also complained that there was bias on the part of the respondent in favour of her principal secretary's brother or kinsman. The PS wrote a letter dated August 14, 2017 in which he was asking the JSC to appoint his brother ambassador Julius Lekakeny Sunkuli or Gideon Solonka Kilikai is the chairperson of NWET. This according to the applicant should there was predetermined tendency to favour the married relatives of the respondent's PS. There was further abuse of power on the part of the PS who evidently influenced the decision not to gazette the applicant by writing to JSC dictating the person to be appointed.
6. The respondent in its submissions stated among others that the appointment for one year as proposed by the JSC was contrary to section 125 of the Environmental Management and Coordination Act (EMCA) and the issue was taken up with JSC and the same was not responded to. The JSC instead advertised for the position of the Chair NET on 6th February, 2015 and was yet to recruit.
7. The respondent further submitted that by [Stature Law Miscellaneous Amendment Act, 2018](#) section 125(5) of the [EMCA](#) was amended and now provided that the members of the tribunal shall in their first meeting elect from among themselves a chairperson to the NET among persons appointed under paragraph (a), (b) and (c) of subsection 1 and a vice chairperson to the tribunal from among all members. For this the respondent submitted the JSC no longer nominates a chairperson to the tribunal.
8. The respondent further submitted that the nomination of the applicant by JSC for one year could therefore not be affected since it was contrary to law. The term was fixed and could not be varied by JSC.
9. Counsel for the JSC conceded that after stature law miscellaneous amendments, the JSC no longer appoints the chairperson of NET however according to him JSC discharged its mandate according to law counsel further submitted that the one-year extension that had been granted to the applicant has since lapsed since it was to run from September 14, 2017 to September 14, 2018. The suit according to Counsel had already been taken over by events.
10. An order of mandamus is a judicial writ issued as a command to an inferior Court or ordering a person to perform a public or statutory duty. The duty must either be statutory or public. That is to say it must be provided for by statute and even the duty towards the public must be lawful one. The applicant initially moved the court *ex parte* by an application dated December 1, 2017 and the Court granted her the orders sought pending hearing inter partes. The orders were immediately contested by the respondent who moved the Court through an application dated January 22, 2018 seeking their discharge or variation. This application was argued before me on February 14, 2018 and by a ruling delivered on March 2, 2018 the court observed among others that the chairperson NET acted diligently in requesting for an extension of her term to enable her complete certain tasks as outlined in her letter of request dated April 10, 2017. JSC however responded to the request on September 14, 2017 almost



two months after the end of the applicant's term. The respondent on the other hand requested JSC to nominate a new person to replace the chairperson on September 5, 2017 some one and a half months after the expiry of the applicant's appointment.

11. The court went further to observe that NET was a very important Tribunal in environmental governance hence it would be irresponsible for the Court to sit back and watch helplessly as power games take stage between the respondent and the interested party. The Court further noted that while section 125(4) provided that all appointments to NET shall become vacant at the expiry of three years from date of appointment, the Act was silent on what happens if no replacement was made immediately upon expiry of the appointee's term. The Act was further silent on request for extension by on appointee as was done by the applicant.
12. The court therefore in exercising its judicial authority under article 159 of the Constitution countermanded the JSC's letter appointing the applicant on interim basis since it was issued way after the expiry of the applicant's term and without any clear legal authority and in the interest of the public in having functioning NET appointed the applicant on transitory capacity pending the recruitment of her successor.
13. From the submissions by Counsel for the interested party the one-year extension which in any event was countermanded by the Court lapsed on September 14, 2018.
14. Further section 125(4) of NET has since been amended and JSC no longer appoints the chair of NET. These developments coupled with fact that the court in its ruling delivered on March 2, 2018 had installed the applicant as a transitory choice of NET pending recruitment of her replacement which the court believes may have since been done, the orders sought in the application dated December 22, 2017 have become superfluous and incapable of being granted.
15. The court therefore declares the application spent and that each party shall being their own costs.
16. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2019

ABUODHA JORUM NELSON

JUDGE

DELIVERED THIS 22ND DAY OF NOVEMBER, 2019

ABUODHA JORUM NELSON

JUDGE

In the presence of:-

.....for the Claimant and

.....for the respondent.

