



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC PETITION NO. 69 OF 2018

(Formerly High Court Constitutional Petition No. 239 of 2017)

(Before Hon. Justice Hellen S. Wasilwa on 3rd December, 2019)

JULIUS OTIENO.....PETITIONER

-VERSUS-

THE NATIONAL POLICE

SERVICE COMMISSIONRESPONDENT

JUDGEMENT

1. The Petitioner a resident of Nairobi County filed the instant Petition in the High Court on 25/5/2017 pursuant to the provisions of Article 22 (1) of the Constitution. He opines that on 9th January, 2017 the Respondent in the Daily Nation newspaper advertised for the following positions:-

- a. *Commission Secretary/Chief Executive Officer*
- b. *Director Corporate Support*
- c. *Director Human Capital Management and Development*
- d. *Director Communication and Outreach*
- e. *Deputy Director Human Capital Management*
- f. *Deputy Director Communications & Public Relations*
- g. *Deputy Director Planning, Research & Policy Development*
- h. *Deputy Director Advocacy & Outreach*
- i. *Manager Corporate Support Services*
- j. *Manager Accounts*
- k. *Manager Records*
- l. *Manager Legal*
- m. *Manager ICT Network & Systems*
- n. *Manager Planning, Monitoring & Evaluation*

o. Finance Officer

p. Supply Chain Management Officer

2. He contends that it was unjust and unfair for the Respondent to replace its office holders without formulating the Regulations envisaged under Section 28 (a) of the NPSC Act as it would amount to unfair labour practice under Article 41 (1) of the Constitution.

3. He seeks the following prayers:

1. A permanent injunction be issued to stop the Respondent from conducting interviews intended to fill the vacancies contained in the Daily Nation newspaper dated January 2019.

2. A declaratory order that any appointment (s) arising from the advertisement contained in the daily Nation newspaper dated 9th January 2017 contravenes the law and is therefore null and void.

3. An order of certiorari do issue quashing the Respondent's decision contained in the letter dated 22nd May 2017 and which was addressed to Mr. Ojango Omumu an referenced NPSC/0010/1991075179/.

4. An order of certiorari do issue quashing the Respondent's letter dated 22nd May 2017 appointing Mr. Longinus Mulondo as the acting Chief Executive Officer/Secretary of the Respondent.

5. A declaratory order that the recruitment for the positions contained in the Daily Nation newspaper dated 9th January 2017 , save for the Commission Secretary/Chief Executive Officer should not be conducted until the Respondent formulates Regulations under section 28 (a) of the National Police Service Commission Act to regulate the appointment, confirmation of appointments, promotions and termination of appointment for holders of the advertised positions.

6. Any other orders that this Honourable Court shall deem just.

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

4. The Petitioner avers that the Respondent embarked on the process of interviewing the candidates to fill the advertised positions without publishing the names of the shortlisted candidates. He avers that the Respondent appointed Mr. Longinus Mulondo the Head of the Vetting Secretariat to perform the functions of the Secretary in an acting capacity.

5. The Petitioner avers that the Respondent's actions were to the effect that it had removed the Secretary without following the procedure laid down in law.

6. The Petitioner avers that the procedure of appointment of the Secretary is provided under the National Police Service Commission (NPSC) Act and that Section 15 (1) of the Act provides that the appointment of the Secretary shall be through an open, transparent and competitive recruitment process.

7. He avers that without shortlisting and publishing names of the candidates for the position of Secretary, it was impossible for the public to submit their objections to the appointment of any candidate on the basis of their personal integrity, competence and suitability.

8. He avers that the failure to shortlist and publish the list of candidates left the Petitioner and the public with a genuine fear that the decision for the appointment of the officers could have been influenced by nepotism , favouritism , other improper motives and corrupt practices contrary to Article 73 (b) of the Constitution.

9. He contends that the Commission Secretary's contract was to run until December 2018 and that his contract could only come to an end by effluxion of time or the removal of office under section 16 of the NPSC Act. Thus, sending the Secretary for compulsory leave and the removal from office was unmerited and a clear contravention of the right to be heard and section 16 of the NPSC Act.

10. He contends that the then officers who the Respondent sought to replace were the first office bearers of those positions and had served the Respondent of 4 years. He further contends that the Respondent is yet to come up with regulations entailing the appointment, confirmations of appointments, promotions and termination of appointments of its staff including those of which the Respondent intended to replace.

11. He contends that the replacement of the entire administration of the Respondent just over a year before the commissioner's exit office is not in the public interest for reasons that the overhaul would destabilise the operations of the Respondent, does not inspire public confidence in the Respondent and that the Respondent is bound by the Constitution under Article 244 (b) of the Constitution.

Respondent's Case

12. The Respondents filed a Replying Affidavit sworn by Johnson Kavuludi, the then Chairperson of the Respondent, on 27th June, 2017.

13. He deposes that on 17th January, 2013 the Respondent requested the Ministry of State for Public Service and the Ministry of Devolution and Planning for the secondment of the deployed officers for a period of 3 years as the Respondent developed its own organisational

structure.

14. He avers that on 24th January 2013 and 31st December 2013, the said Ministry communicated to the Respondent that its request for secondment of 13 officers for a period of 3 years which included Jairus Ojango Omumu had been granted. He avers that Jairus Ojango Omumu rose to the position of Chief Executive Officer of the Respondent.

15. He avers that on 18th December 2013 the Ministry approved the secondment of 21 officers to the Commission who were to continue contributing 31% of their salary to the director of pension to service their pension.

16. He however avers that the deployment and/or secondment of officers during the transition period was temporary and there was need for the Respondent to recruit permanent officers to ensure there was succession management, institutional memory and loyalty.

17. He avers that on 6th October 2016, the Respondent resolved to recruit permanent officers on the strength of the Strategic Plan 2014-2018 and the findings of the Public Audit report prepared by the Public Service Commission.

18. He avers that Ojango Omumu continued to serve as the Chief Executive Officer of the Respondent until 24th April 2017 when he was given a notice of termination of his appointment. He contends that the position of Chief Executive Officer was the only position that was to be open, transparent and competitive.

19. He contends that the recruitment was transparent and competitive as it was advertised in the Daily Nation on 9th January, 2017, the Respondent revised the applications of the said positions for completeness and conformity with the requirement of the advertisement and that members of the public including the Petitioner were invited to submit in writing any information of interest to the Respondent.

20. He contends that by the time the interviews were conducted on 2nd June, 2017 no information had been submitted in writing to the Respondent concerning the shortlisted candidates.

21. He avers that the decision to have Mr. Omumu proceed on leave was necessary to ensure fairness and impartiality since one of the positions was that of Chief Executive Officer.

22. He avers that it followed the law when removing Ojango Omumu from office as the extension of the secondment lapsed on 30th June, 2017 and that he was issued with 3 months' notice of the termination of his appointment pursuant to his letter of appointment.

23. He avers that the Respondent on 10th April 2017 requested the Public Service Commission to assist in the recruitment process due to its expertise in such matters which request was accepted on 21st April 2017.

24. He avers that most of the 11 seconded officers who applied for the 16 positions advertised were retained thus the recruitment is not an overhaul. He further avers that if Mr. Omumu applied for the position of Chief Executive Officer the Respondent would have been reluctant to give him priority due to his previous conduct as the holder of the said office.

25. He avers that a suitable Chief Executive officer was appointed by the Respondent which position he accepted and that the interviews on all advertised positions had been concluded.

26. He avers that had the Petitioner invoked his right to information under Article 35 of the Constitution, he would have sought proper guidance from the Respondent on the matter to avoid wasting judicial time.

Petitioner's submissions

27. The Petitioner submitted that the Chief Executive Officer/ Secretary of the Respondent is a state officer as Section 15 (2) of the NPSC Act states that the Secretary to the commission is a state officer for the purposes of Article 260 of the Constitution.

28. The Petitioner submitted that the procedure for the appointment of the Secretary is set out under section 15 (1) of the NPSC Act. He submitted that without the shortlisting and publication for the various positions it is impossible for the public including himself to submit their objections to any appointment as a candidate on the basis of their integrity and suitability and under Chapter 6 of the Constitution.

29. He submitted that the shortlisting and publication of candidates would have enabled the Respondent make an enquiry as to the candidates suitability under Chapter 6 of the Constitution. To buttress this submission, he relied on the case of **Benson Riitho Mureithi v J.W. Wakhungu & 2 others [2014] eKLR.**

30. He argued that Section 15 (4) provides that a secretary shall hold office for a period of 5 years and shall be eligible for re-appointment for a further term. He argued that the employment of a Secretary of the Commission can only come to an end by effluxion of time or the removal of the office in accordance with the Constitution.

31. He submitted that section 16 (1) of the Act provides that the removal of the Secretary of the Respondent has not made out/alluded to any grounds in the letter dated 22nd May 2017.

32. He further argued that the secretary was not informed of the reasons for removal as required under section 16 (2) of the NPSC Act. He

therefore argued that the removal of the Secretary was in contravention of the right to be heard as envisaged in the Constitution and under Section 16 of the NPSC Act.

33. He submitted that it was unjust for the Respondent to replace the current office holders without formulating the regulations provided by section 28 (a) of the NPSC Act as it violates the practices under Article 41 (1) of the Constitution. According to the Respondent, the Regulations would have set out among other things the conversion of employment from contractual to permanent and pensionable and the procedure of dealing with the staff seconded to the Respondent by the Public Service Commission Act.

34. He further submitted that although the Respondent made regulations known as the National Police Service Commission (Recruitment and Appointment) Regulations 2015 the same do not extend to staff.

35. He submitted that the Commissioners of the Respondent were appointed on 3rd October 2012 pursuant to Article 250 (6) (a) of the Constitution for a period of 6 years and therefore they were to hold office until 2nd October 2018.

36. He submitted that the replacement of the entire administration of the Respondent a year before the commissioners exit of the office was not in the public interest for reasons that the first commission spent a considerable amount of time in building the administrative structure that the overhaul would destabilise the operations of the Respondent and did not inspire public confidence in the Respondent. He therefore urged the Court to allow the Petition.

Respondent's submissions

37. The Respondent submitted that though the Petitioner claims to derive his locus under Article 22 (1) and Article 258 of the Constitution, the locus provided under the said articles are specific to the circumstances provided thereunder.

38. It further submitted that the Petitioner has failed to show that a Bill of right or a fundamental freedom has been denied, violated or infringed or that the Constitution had been contravened or threatened.

39. The Respondent submitted that it had advertised for positions in the Daily Nation on 9th January 2017 and that it reviewed the applications for the positions with completeness and in conformity with the requirements of the advertisement.

40. It further submitted that members of the public were invited to submit any information of interest to the Respondent. It therefore submitted that it did more than was required under the law and that it complied with Article 250 (2) and Article 73 (2) of the Constitution and section 15 of the NPSC Act. In support of this argument, it relied on the decision in **Caleb Okech v Chief Justice and 2 others [2013] eKLR.**

41. It submitted that the termination of the Chief Executive Officer/Secretary was in line with Article 47 of the Constitution and section 16 of the National Police Service Act.

42. It submitted that there was no violation of Section 28 of the NPSC Act due to the failure to enact regulations thereunder. It was its submission that the Respondent's members of staff were not prejudiced for reason that the Respondent adopted the regulations of the Public service Commission and that the recruitments and terms of employment were pursuant to the adopted regulations.

43. It submitted that Respondent's current office holders were not employees of the Respondent and could be recalled anytime by their respective ministries therefore leaving a vacuum at the Respondent.

44. It submitted that out of 55 positions only 16 positions were advertised, therefore the Commission did not replace its entire staff. It submitted that the order seeking to reinstate Mr. Omumu to the position of Chief Executive officer is not tenable, as the said office has since been filled by a suitable individual.

45. In conclusion, the Respondent submitted that there was need for it to replace the deployed/seconded officers with permanent officers to ensure that there was succession in management, if not the seconded staff was to be recalled by the Ministry.

46. I have considered the averments and submissions of both Parties. The issues for this Court's determination is as follows:-

1) Whether the recruitment process following advertisement of 9.1.2017 contravened the law and is therefore null and void.

2) Whether the Petitioner is entitled to the remedies sought.

47. On this issue, the Petitioner submits that though the Respondent proceeded to conduct the recruitment process of various officers including the Chief Executive Officer, the process was flawed.

48. The Petitioner explains that the law is clear on qualification of a person to be appointed as the Respondent's Chief Executive Officer as provided under Section 15(2)(e) of the National Police Service Commission and even Chapter 6 of the Constitution on Integrity and Leadership.

49. The Petitioner however contends that the Respondent went ahead to shortlist people to be interviewed for the position of Chief Executive Officer but never published these shortlists to enable the public submit their objections to the appointment of any such candidate on the basis

of their personal integrity, competence and suitability.

50. The Petitioner contends that this omission left him and the public in general with a genuine fear that the decision for the appointment of the officer was influenced by nepotism, favourism and other improper and corrupt motives contrary to Article 73(2) (b) of the Constitution.

51. The Respondents on their part have averred that they followed the law and that the Petition should be dismissed.

52. On 16/7/2019, this Court observed that the main prayer sought in the Petition had been overtaken by events save for prayer (b) which sought a declaration that the appointments arising from the advertisements contained in the daily Nation of 9.1.2017 contravenes the law and is therefore null and void.

53. In this regard, I note that after the advertisement of the position in question the Respondent published the names of the shortlisted candidates on its website as per their annexures JK16 and JK17. Members of the public were invited to submit any information of interest to the Respondent.

54. In this respect, the names of the candidates having been published on the Respondent's website, there was information in the public of who the shortlists were and any member of the public would have made their comments on the candidates accordingly.

55. Section 15 of the National Police Service Commission did not oblige the Respondent to publish the said names in the daily newspapers as submitted by the Petitioner. In this Court's view then, there is no right of the Petitioner that was breached in the recruitment process as submitted.

56. I find this Petition as a whole lacks merit. I therefore dismiss it with no order as to costs.

Dated and delivered in open Court this **3rd day of December, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Petitioner – Absent

Miss Ougo holding brief Kirui for Respondent – Present