



**Kariuki v Board of the Tourism Regulatory Authority & 2 others; Talam
(Interested Party) (Petition E340 of 2022) [2024] KEHC 7763 (KLR)
(Constitutional and Human Rights) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E340 OF 2022

EC MWITA, J

JUNE 28, 2024

BETWEEN

AGNES KARIUKI PETITIONER

AND

**THE BOARD OF THE TOURISM REGGULATORY AUTHORITY 1ST
RESPONDENT**

THE HON ATTORNEY GENERAL 2ND RESPONDENT

**CABINET SECRETARY MINISTRY OF TOURISM AND
WILDLIFE 3RD RESPONDENT**

AND

NORBERT TALAM INTERESTED PARTY

JUDGMENT

1. On 13th May 2022, the 1st respondent published in the Standard and Nation Newspapers, as well as on its website, an advertisement for a vacancy for the position of the Director general, and called for applications to be submitted by close of business on 27th May 2022, a period of 14 days. The advertisement gave the qualifications and other requirements for the interested applicants.
2. At the close of the period for submission of applications, the applicants were privately contacted inviting them for interviews. The list of those who submitted applications and those shortlisted for interviews was not published.



3. The petitioner filed a petition dated 6th July 2022, challenging the recruitment process, arguing that it violated constitutional principles in Articles 10, 22, 35, 47 and 232 of *the Constitution*. The petitioner also argued that the 1st respondent did not publish the criteria used for shortlisting or invite comments from members of the public (conduct public participation), contrary to those articles of *the Constitution*.
4. At the time of filing the petition, interviews had been scheduled for 11th and 14th July 2022, thus the petitioner sought an interim order to stop the impending interviews which was, however, not granted with the result that the interviews went on and the interested party was appointed as the Director General.
5. The petitioner pleaded that the position of Director General is a public office which ought to be filled through a transparent, competitive, inclusive and merit based process open to public participation. The names of all applicants and interview schedules for the shortlisted applicants ought to be published in the print media and the Commission's website after closure of the timeline for submission of application, which was not done.
6. The petitioner asserted that the 1st respondent failed to comply with constitutional principle of public participation when it failed to disclose the list of applicants; criteria for shortlisting applicants; the shortlisted applicants; advertise interview dates and invite comments from members of the public.
7. The petitioner relied on the decisions in *Okiya Omtata Okoti & 3 others v City county of Nairobi & 3 others* [2014] eKLR (para 122); *Benson Riitho Muriithi v J W Wakhungu & 2 others* (petition no 19 of 2019 (para 84) and *Lengus Lomosi Mudegu v Board, Kenya Water Towers Agency* [2020] eKLR (para 38-44) to support this argument.
8. The petitioner took issue with the period of 14 days for submitting applications, arguing that the period of was too short. Reliance was placed on section B 4 of Public Service Commission Human Resource Manual. The petitioner further relied on the decision in *Republic v Communication Authority of Kenya; Information Technology Association of Kenya (ICTAK) Exparte* [2021] KEELRC 7(KLR).
9. Based on the above arguments, the petitioner sought the following reliefs:
 - A. A declaration that the ongoing recruitment pursuant to the Vacancy Notice titled: "Advertisement for Job Vacancy Director General- Ref: TRA/1/10" offends Articles 10, 22, 23,35,47 and 232(1) of *the Constitution* as read with Section 8 of the *Tourism Act*, 2011 and is thus unconstitutional, unlawful, null and void.
 - B. A declaration that the failure to make public the names of all Applicants and provide meaningful public participation in the recruitment process pursuant to the Vacancy Notice titled: "Advertisement for Job Vacancy Director General- Ref: TRA/1/10 offends Articles 10, 22, 23, 35,47 and 232(1) of *the Constitution*.
 - C. Spent
 - D. Spent
 - E. An order directing the Board of the Tourism Regulatory Authority to observe due process in the advertising, interviewing and selection a Director General in accordance with Article 47 of *the Constitution* of Kenya



- F. An order quashing the Vacancy Notice titled: “Advertisement for Job Vacancy Director General- Ref: TRA/1/10 and entire process of recruitment of Director General and directing the Board of the Tourism Authority to commence a new recruitment process that adheres to the Constitution.
- G. Any other order the court may deem fit to grant.
- Costs of this Petition.

Respondents’ case

10. The respondents filed a replying affidavit sworn by Sila Mathuva, Director, Corporate Services of the 1st respondent. The respondents stated that section 14(1) of the Tourism Act requires the Cabinet Secretary (C S) in consultation with the 1st respondent, to appoint a director general through a competitive process, while section 14(2) provides for qualifications for a person to hold that office.
11. It was stated that the 1st respondent in consultation with the CS declared a vacancy which was published in the Daily Nation and The Standard Newspapers of 13th May 2022, calling for applications from qualified persons, to be received by 27th May 2022. The 1st respondent asserted that it did not violate any law regarding the time within which applications were to be received.
12. The 1st respondent received 50 applications and applicants were shortlisted according to the criteria outlined in the advertisement, including gender balance and regional consideration. Successful applicants were then invited for interviews which were conducted between 12th and 15th July 2022. Three names of the top three applicants were sent to the CS on 18th July, who appointed the interested party as the Director General.
13. The respondents argued that there was no violation of any law by not publishing the list of shortlisted applicants in the newspapers as argued by the petitioner. There was also no request for information on the applicants or recruitment from the petitioner or any citizen.
14. According to the respondents, the advertisement of the vacancy and the process leading to the interested party’s appointment met the requirement of public participation. Reliance was placed on the decision in *Okiya Omtata Okiiti v The Board, Kenya Pipeline Company Limited & 2 others*; John Ngumi (Chairman) & 10 others (Interested Parties) [2020] eKLR, that advertisement is sufficient invitation to members of the public to participate by either applying or seeking information about the applicants.
15. Reliance was also placed on *Consumer Federation of Kenya (COFEK) v Public Service Commission & another* [2013] eKLR; *Solomon Chemjor & 7 others v Commission of University Education & 3 others* [2017] eKLR and *North East Professionals Association (NEPA) v Attorney General & 3 others* [2013] eKLR, that the recruitment process met the requirements of public participation, was transparent and complied with the law.
16. The respondents maintained that with 9 out of 11 members, it had quorum to conduct business being more than half as required by paragraph 4 of the Second Schedule to the Act. Further, according to clause 1.1 of Mwongozo, board membership of State Corporations is between 7 and 9, thus there was quorum.
17. The respondents took the view, that it had invested a lot of public funds in the exercise up to the appointment of the interested party, thus the process having been concluded, the petition had been overtaken by events.



Interested party's response

18. The interested party opposed the petition through replying affidavit. He supported the position taken by the 1st respondent asserting that due process was followed in accordance with the [Tourism Act](#), the [State Corporations Act](#) and all relevant regulations governing the recruitment and appointment of public officials.
19. The interested party posits that on 13th May 2022, he came across a declaration of a vacancy and advertisement for position of CEO/ director general of the 1st respondent in the Daily Nation, Standard Newspapers and the 1st respondent's website. The advertisement contained the qualifications for candidate. He sent his application within the prescribed timeframe.
20. His application was successful and he was shortlisted and invited for an interview on 12th July 2022. He emerged among the top three candidates and his name was submitted to the 2nd respondent for appointment.
21. It is the interested party's case that there is no legal requirement for the 1st respondent to publish names of applicants or shortlisted candidates. Further, that articles 10,22, 23, 35, 47 and 232 of the [Constitution](#) do not compel the 1st respondent to invite the public to give views on the shortlisted candidates. The appointment was made in accordance with the objectives of the [Constitution](#) and the [Tourism Act](#).
22. According to the interested party, the requirement of public participation was met in the advertisement which complied with section 37 of the [Public Service Commission Act](#). The interested party relied on the decisions in [Okiya Omtatah Okoiti v The Board, Kenya Pipeline Company Limited & 2 others; John Ngumi \(Chairman\) & 10 others \(Interested party\)](#) (*supra*); [Nairobi Metropolitan PSV Saccos Union Limited and 2 others vs County of Nairobi Government and 3 others](#) [2013] eKLR and [Independent Policing Oversight Authority & Another v Attorney General & 660 Others](#) [2014] eKLR.
23. The interested party further relied on sections 107, 109 and 112 of the [Evidence Act](#) and the case of [Law Society of Kenya v Attorney General & 2 others](#) [2013] eKLR, that the petitioner had failed to discharge the burden of proof on the alleged violations, unconstitutionality and illegality.
24. On article 35, the interested party argued that the petitioner did not request for any information regarding the process of appointment. The petitioner did not also demonstrate that she was denied such information upon request, thus there was no violation of the right of access to information.

Analysis and determination.

25. I have considered the petition responses and arguments by parties. The issue for determination is whether the recruitment of the interested party met the constitutional and legal requirement. The petitioner argues that it did not while the respondents and interested party urge that the process complied with the [constitution](#) and the law.
26. There is agreement between the petitioner, the respondents and the interested party that the vacancy was advertised in two daily newspapers with a wide circulation namely, the Daily Nation and The Standard on 13th May 2022. The advertisements gave applicants fourteen days to submit their application to be received by 27th May 2022. The vacancy was also published in the website of the 1st respondent. The interested party was one of the applicants.



27. Interviews were conducted July 2022 and names of the top three applicants were sent to the CS who appointed the interested party as the Director General. The issue is whether this process met the constitutional and legal requirements.
28. The 1st respondent is a public entity under the ministry of Tourism. As a public body, the values and principles of public service in article 232 (1) of *the Constitution* apply. These values include: (d) involvement of the people in the process of policy making;(f) transparency and provision to the public of timely, accurate information (g), fair competition and merit as the basis of appointments and promotions.
29. The petitioner's argument is that the process leading to the appointment of the interested party did not meet constitutional principles of public participation. The petitioner's concern was that the names of the persons shortlisted for interviews were not published in the newspapers and members of the public were not invited to give their views. Further, that the names of shortlisted applicants were not posted in the 1st respondent's website.
30. The petitioner does not deny that the vacancy was advertised in the newspapers with nationwide circulation. The petitioner does not also deny that the vacancy was advertised on the 1st respondent's portal. Indeed, the Interested party confirmed that he saw the declaration of vacancy and call for applications both in the newspapers and the 1st respondent's website/portal and that was how he applied for the position.
31. The petitioner did not also argue that the declaration of the vacancy and call for applications in the newspapers did not contain qualifications and mode of application. The 1st respondent also stated that it received about 50 applications from which it shortlisted those who qualified and set dates for interviews.
32. The fact that the vacancy was advertised in the newspapers with nationwide circulation and on the website of the 1st respondent was, in my respectful view, an open and transparent declaration of vacancy and call for applications. This open and transparent process enabled qualified and interested Kenyans to submit applications for consideration, leading to interviews and subsequent appointment of the Interested party.
33. The respondents stated that the shortlisting and interviews were conducted in compliance with the criteria in the requirements and qualifications in advertisement. I must emphasize that *the Constitution* demands fair competition and merit as the basis of appointments and promotions in the public service and, for that reason, the burden is on the person who alleges that this constitutional principle was not complied with to demonstrate through credible evidence that this was the case.
34. I have carefully gone through the petitioner's concerns on this aspect of her case. She did not show that those who submitted applications were not qualified, or that the recruitment did not meet the qualitative values of merit and fair competition. For instance, the petitioner did not show that she was qualified and applied but was not considered and no explanation was given. She did not give any instance in which any qualified applicant was not considered and therefore, fair competition and merit was not complied with.
35. The petitioner again argued that the period of 14 days given to the applicants to submit applications was not sufficient. The petitioner did not, however, point out any law that gives the timelines but which was violated. Unless the law has set the timeline within which applications must be submitted, it is difficult to agree with the petitioner that the period of 14 days given to the applicants was inadequate.



36. Section 14 (1) of the *Tourism Act* provides for the appointment of the Director General. It states that the Minister shall, in consultation with the Board of the Authority and subject to subsection (2), appoint the Director-General of the Authority through a competitive process and with the “prior approval of the National Assembly.”
37. I have read the petition and supporting affidavit but could not trace an allegation that the interested party’s appointment was not subjected to prior approval by the National Assembly. So the issue of whether the interested party’s appointment had been subjected to approval by the National Assembly does not arise in this petition. In a constitutional petition, just like any civil suit, issues for determination arise from the parties’ pleadings so that the issue of public participation with regard to the interested party’s appointment would indeed arise during the approval hearings in the National Assembly and not so much during the interview process.
38. The petitioner had a duty to plead with specificity and prove her case to the required standard of a balance of probabilities. In *Phillips & others v National Director of Public Prosecutions* [2005] ZACC 15; 2006(1) SA 505(CC), the Constitutional Court of South Africa stated that a constitutional challenge should be explicit, with due notice to all affected, a requirement that ensures all interested parties have an opportunity to make representations and lead the relevant evidence, if necessary.
39. This position was reinforced by the Supreme Court in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (at paragraph 349), that the necessity of a link between the aggrieved party, the provisions of the *Constitution* alleged to have been contravened, and the manifestation of contravention or infringement plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
40. It is my considered view, that any public participation in the recruitment process was to have been conducted by the National Assembly during the approval process in line with article 118 of the *Constitution*. Article 118 requires (Parliament (National Assembly) to conduct its business in an open manner, and its sittings and those of its committees to be open to the public; and facilitate public participation and involvement in the legislative and other business of Parliament (National Assembly) and its committees.
41. The petitioner did not plead and clearly allege that the interested party’s appointment did not meet this constitutional imperative, in the National Assembly to enable the respondents respond and lead appropriate evidence, if required. Instead, the petitioner seemed to concentrate her effort on the advertisement and interview process and overlooked the critical part involving the National Assembly where representatives of the people undertake public participation and even members of the public present views and memoranda.
42. I note that the interested party stated in the replying affidavit, that his appointment was subjected to approval by the National Assembly, a fact that was not controverted by the petitioner. Furthermore, the petition was filed before to conclusion of the interested party’s appointment and that was why the petitioner had sought a conservatory order to stop the recruitment. Once the process concluded and the interested party appointed, the petitioner did not amend her petition to challenge the substantive appointment. In essence, with the appointment, the substratum of the petition changed substantially affecting is the prayers in the petition.
43. Regarding access to information, article 35 (1) (a) is clear that every citizen has the right of access to information held by the State, which includes a public body. The *Access to information Act*, 2016 provides the procedure for seeking and providing the information. (See sections 8 and 9). There is no



evidence that the petitioner sought information in accordance with the law but the information was not provided. No blame can, thus be placed on the 1st respondent absent evidence to the contrary.

Conclusion

44. In conclusion, having considered the petition responses and submissions by parties, the inescapable conclusion I come to, is that the petitioner has not proved that the recruitment of the interested party violated *the Constitution* or the law.

Disposal

1. The petition is dismissed.
2. I make no order on costs

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2024

E C MWITA

JUDGE

