



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 385 OF 2012

**CONSORTIUM FOR THE EMPOWERMENT & DEVELOPMENT
OF MARGINALIZED COMMUNITIES1ST PETITIONER
NATIONAL MUSLIM LEADERS FORUM2ND PETITIONER
CENTRE FOR LAW AND RESEARCH
INTERNATIONAL3RD PETITIONER**

VERSUS

**THE CHAIRMAN THE SELECTION PANEL FOR APPOINTMENT OF
CHAIRPERSON AND COMMISSIONERS TO KENYA NATIONAL
HUMAN RIGHTS COMMISSION1ST RESPONDENT
MINISTER FOR JUSTICE NATIONAL
COHESION & CONSTITUTIONAL AFFAIRS.....2ND RESPONDENT
NATIONAL COHESION AND
INTEGRATION COMMISSION 3RD RESPONDENT
COMMISSION ON IMPLEMENTATION
OF CONSTITUTION 4TH RESPONDENT
ATTORNEY GENERAL.....5TH RESPONDENT**

JUDGMENT

Introduction

1. This petition challenges the appointment of members of the Kenya National Commission on Human Rights (KNCHR) on the basis that the 1st, 2nd and 5th respondents failed to meet the constitutional criteria for regional diversity in shortlisting persons for appointment as commissioners. The petitioners, who describe themselves as a consortium of organizations representing marginalized groups, allege that the 1st respondent, (hereafter the ‘**Selection** Petition 385 of 2012 | Kenya Law Reports 2015 Page 1 of 20.

Panel') has breached the provisions of Article 19, 20, 21(3) 22, 23, 35(1) 56, 250(4) and Section 11(3) of the Kenya National Human Rights Act (**The Act**).

2. In the petition dated 3rd September 2012, the petitioners seek the following orders:

1. *A declaration that the 1st, 2nd and 5th Respondents contravened provisions of Article 56 and Article 250(4) of the Constitution.*
2. *A declaration that the 1st, 2nd and 4th Respondents have contravened the provisions of Section 11(3) of the Kenya National Human Rights commission Act, 2011.*
3. *An order restraining the 1st, 2nd and 5th Respondents from selecting and or gazetting the names of Chairperson and Commissioners to the Kenya National Human Rights Commission.*
4. *A declaration that the 1st, 2nd and 5th Respondents contravened constitution and should be ordered to comply with the provisions of the Constitution and Kenya National human Rights commission Act.*
5. *A restraining order be issued against the 1st, 2nd and 5th Respondents and their officers, agents and or servants from appointing or recommending the appointment of the Chairperson or members to the Kenya National Commission of Human Rights.*
6. *A restraining order be issued against the 1st, 2nd and 5th Respondents and their officers, agents and or servants from implementation their proposal to appoint to the Kenya national commission of Human Right the Chairperson and members from only the members who have been shortlisted in the daily nation advertisement dated Aug 23rd, 2012.*
7. *A restraining order be issued against the 1st, 2nd and 5th Respondents from using the flawed report shortlisting candidates which is in contravention with the Constitution and the Kenya National Human Rights Commission Act.*
8. *An order be issued against the 1st, 2nd and 5th Respondents directing them to stop the process of appointing, nominating or recommending Chairperson and Member of the Kenya National Human Rights Commission to anybody or authority.*
9. *A declaration that the 1st, 2nd and 5th Respondent comply with the Provisions of the Constitution and any other written law.*
10. *An order that the 1st, 2nd and 5th Respondent pay the Petitioner's cost of this Petition.*
11. *Any other orders as this Honourable Court shall deem just.*

3. This petition first came before the court under a certificate of urgency on 3rd September 2012 when the petitioners sought conservatory orders to stop the recruitment of the KNCHR commissioners. The basis of their claim was that the Selection Panel had shortlisted proposed members of the Commission in what they termed as a breach of section 11(13) of the Act and Article 250(4) of the Constitution. They alleged that the shortlisting did not take into account regional balance as it did not include persons from North Eastern and Coast regions. The matter was certified urgent and the application for conservatory orders set for inter partes hearing on 5th September 2012.

4. When the matter came up on that day, the court (Mabeya J) granted conservatory orders for a period of 30 days in light of the fact that the process being impugned in the petition was still ongoing.

5. On 28th September 2012, on the application of Mr. Bitta for the state and with the consent of the other parties, I varied the orders issued on 5th of September 2012 to allow the process of appointment of the Chairperson of KNCHR to start afresh and directed that the Selection Panel be permitted to re-advertise and commence the process of recruiting the KNCHR Chairperson. I also directed that the interim orders restraining the appointment of the members of the Commission do remain in force pending the hearing and determination of the petition. I also gave directions with regard to the filing of submissions on the petition and scheduled the matter for mention for further directions on 9th November 2012.

6. On that date, the matter was mentioned before Lenaola, J who fixed it for mention on 27th November 2012. It was not listed on that date and was again scheduled for mention on 14th December 2012. There was no appearance for the petitioners on that day, and the matter was again set for mention on 12th February 2013. The court record indicates that it was not listed on that date and was next scheduled for mention on 18th February 2013 before Lenaola, J, but the court was not sitting.

7. I note from the letter from the petitioners' Advocates, Garane and Company Advocates, dated 3rd June 2013 that an attempt had been made in April 2013 to fix the matter for mention but the petitioners had been informed by the Registry that the file could not be located. The petitioners were eventually able to take a date in June 2013 when the matter was listed for

mention before Majanja on 4th June 2013 and the court directed that it be listed for mention before me on 21st June 2013. On 6th June 2013, the KNCHR applied and was permitted to participate in the proceedings as an Interested Party. There was this quite a regrettable delay in the hearing and disposition of the matter.

8. The matter was canvassed before me on 26th June 2013 and judgment reserved for 26th July 2013. Mr. Kibungi presented the case for the petitioners, Mrs Ngugi for the Interested Party, while Mr. Bitta appeared for the 1st, 2nd and 5th respondents.(hereafter the respondents) Mr. Jotham Arwa, who, it appears, had been interviewed for the position of Chairperson of the KNCHR, had applied and been permitted to participate in the proceedings as an interested Party. He did not, however, subsequent to filing his affidavit sworn on 21st September 2012, take part in the rest of the proceedings. The 3rd and 4th respondents did not file any pleadings or participate in any way in the matter.

The Petitioners' Case

9. The case for the petitioners is simple. It is their contention that the Selection Panel contravened, among others, the provisions of Article 56 of the Constitution and section 11 of the KNCHR Act as it did not shortlist the people of North Eastern and Coast regions for interviews as members of the Commission. The petitioners allege that no reasons were given for not shortlisting people from the two regions, and that it was not just members of the Muslim faith who were left out but entire regions.

10. Mr. Kibungi relied on the affidavit sworn on 3rd September 2012 by **Mr Yasin Mugeni Ibrahim** in support of the petition as well as the petitioners' written submissions dated 7th November 2012. In his affidavit, Mr. Ibrahim avers that he and the other petitioners are adversely affected in their individual capacity and collectively as organization working with members of minority and marginalized communities. He asserts that minority and marginalized groups are protected under the Constitution and denying them representation is a violation of their fundamental rights. The petitioners aver that they are aggrieved by the decision of the Selection Panel published in the Daily Nation on Thursday 23rd August 2012 as the Selection Panel did not take into consideration the provisions of the Constitution and in particular contravened the provisions of Articles 19, 20, 21(3), 22, 23, 35(1), 56, 250(4) as well as section 11(3) of the Kenya National Human Rights Act. They allege that they wrote to the Selection Panel requesting it to comply with the Constitution but their letter was not responded to. They have annexed to the affidavit of Mr. Ibrahim as **YMI1** and **YMI2** respectively what they state is a copy of the list published in the Daily Nation of 23rd August 2012 and their letter dated 28th August 2012.

11. The petitioner's contend that the Selection Panel did not take into consideration relevant provisions of the Constitution in selection of the members of the Commission such as regional and ethnic diversity and its decision is therefore a nullity, and that as organizations representing the interests of marginalized communities, they are entitled to ensure enforcement of the provisions of the Constitution relating to minority and marginalized communities and ensuring that constitutional commissions are representative in accordance with the Constitution.

12. The petitioners allege in their written submissions that the Selection Panel did not shortlist anyone from the Northern or Coast region, or *'persons whose ethnicity or religious persuasion is from the Islamic region, despite these people making up a large portion of the population.'*

13. In his oral submissions, Mr. Kibungi distinguished the decision of the court in **Mohamed Osman Wafra & Others –vs- Public Service Commission High Court Petition No. 77 of 2013** on the basis that in the present case, it is not just Muslims who had been left out but people from the entire region. He contended that while not all regions can be represented in all commissions, persons from all regions should be shortlisted to be interviewed. He asked the court to grant the orders sought in the petition.

14. In presenting the case for the respondents, Mr. Bitta relied on the affidavit of Mr. Gichira Kibara sworn on 20th September 2012 and the written submissions dated 6th November 2012. In the said affidavit, Mr. **Kibara**, then the Acting Permanent Secretary in the Ministry of Justice, National Cohesion and Constitutional Affairs, deponed that the Ministry was represented in the Selection Panel as provided under Section 11(2) of the KNCHR Act, and that the panel completed its work and forwarded the names of eight persons interviewed and shortlisted to the President as required under Section 11(5) of the Act on 30th August 2012.

15. Mr. Kibara avers that the shortlisting of candidates was in accordance with the provisions of the Constitution as well as the KNCHR Act, and the shortlisting process was transparent and open. He has set out in the said affidavit at some length the process that the Selection Panel followed in arriving at the names of the eight persons shortlisted and the

criteria for selection which included the constitutional provisions and consisted of academic and professional qualifications, knowledge and relevance of the qualifications, diversity of Kenya's people, representation of persons with disability and the minority, gender equity, and compliance with Chapter 6 of the Constitution with regard to integrity.

16. According to the respondents, the issues raised in this petition have been dealt with by the High Court in its decision in the case of **Mohamed Osman Wafra & Others –vs-Public Service Commission (supra)**, where the arguments advanced then were exactly the same as in this case. Mr. Bitta pointed out that the court in that case had also quoted with approval two other decisions on the same issue, namely **John Waweru Wanjohi & Others –vs- Attorney General High Court Petition No. 373 of 2012** as consolidated with **Kipngetich Maiyo & Others –vs-Kenya Land Commission Selection Panel & Others High Court Petition No. 426 of 2012**.

17. Mr. Bitta submitted that in those cases, the court had considered the provisions of Article 250 of the Constitution and set the principle that the party alleging breach of the Article must present a list of all other appointees to all other commissions as the appointments to constitutional commissions are to be taken cumulatively. He contended that it is humanly impossible for regional, ethnic and other considerations to be balanced in one commission.

18. On the facts, Mr. Bitta pointed out that from the affidavit in support of the petition, it was clear that the petitioner did not annex the entire list of those shortlisted. He drew attention to the affidavit sworn by Gichira Kibara, specifically annexure ‘**GK1**’ which is a list of the persons who were shortlisted by the Selection Panel and submitted that all regions in the country were represented, as were minorities as defined under Article 260.

19. According to the respondents, Kenya is now divided, under Article 8 of the Constitution, into Counties; that Counties are the constitutionally contemplated basis of regional representation; and it would be fallacious for any party to rely on the former provinces as a basis for regional representation. He asked that the petition be found to be without merit and dismissed with costs.

The Interested Party’s Case

20. KNCHR's application for joinder as an interested Party was supported by the affidavit of **Ms. Evelyne Samba**, the Deputy Secretary of the Commission, sworn on 3rd June 2013. This is the affidavit relied on at the hearing together with written submissions dated 19th June 2013. According to Ms. Samba, the membership of the Commission consists of a Chairperson and four other members appointed in accordance with the Constitution and the provisions of the KNCHR Act. The term of the previous Chairperson ended on 26th November 2012 and the appointment process for the new Chairperson commenced in 2012 but is yet to be concluded. Consequently, the Commission does not have a substantive Chair. She avers that the Commission can only function effectively if the Chairperson and all the four members are appointed and in office. However, the terms of three of the Commissioners expired on 26th November 2012, leaving only one Commissioner. She avers that KNCHR is therefore not properly constituted as required under its constituting Act and cannot fully carry out its functions under the law.

21. KNCHR submitted that the petitioners were no longer interested in pursuing this matter and were only intent on maliciously using the judicial process to hamper the functioning of a constitutional commission.

22. In her submissions at the hearing of this matter, Mrs. Ngugi submitted that the intention of the Interested Party in seeking to appear in the petition was to point out the adverse effect that the petition was having on its operations. She submitted that the Commission had been grounded for 7 months, and relied on the decision in **Trusted Society of Human Rights -vs- The Attorney General High Court Petition No. 292 of 2012** where the court pointed out that a petitioner should be vigilant to file and present its matter expeditiously. She urged that the matter be dispensed with expeditiously and guidelines set with regard to such matters so that government processes are not held hostage.

Determination

23. Having considered the pleadings and the respective submissions, oral and written, of the parties in this matter, I believe that this petition raises a sole issue for determination: **whether the Selection Panel violated any of the provisions of the Constitution or the rights of the petitioners in shortlisting the candidates for the positions of members of the KNCHR.**

24. In dealing with this issue, I will not address the matter in so far as it concerns the appointment of the Chairperson of KNCHR. I had made an order, as far back as 28th September 2012 and with the consent of all the parties, that the position of the Chairperson could be re-advertised and filled. It is not clear from the submissions made before me by the parties on 26th June 2013 why that has never been done.

25. The petitioners are aggrieved by what they perceive as the failure of the Selection Panel to shortlist persons from North Eastern and Coast regions, or members of the Muslim faith, for selection for membership of the KNCHR. They allege violation of the provisions of Articles Article 19, 20, 21(3) 22, 23, 35(1) 56, 250(4) and Section 11(3) of the KNCHR Act.

The Applicable Law

26. Articles 19, 20, 21(3) 22, and 23 fall under Part I of the Constitution titled **General Provisions Relating to the Application of The Bill of Rights**. They present the general principles with regard to the Bill of Rights, including who may file a petition alleging violation of constitutional rights and the powers of the court in dealing with such a petition. They do not contain any substantive right capable of violation. Article 35 contains the constitutional guarantee to access information, while at Article 56, the Constitution guarantees the rights of minorities and marginalized groups by providing as follows:

56. The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups—

(a) participate and are represented in governance and other spheres of life;

(b) are provided special opportunities in educational and economic fields;

(c) are provided special opportunities for access to employment;

(d) develop their cultural values, languages and practices; and

(e) have reasonable access to water, health services and infrastructure.

27. With regard to constitutional commissions such as the KNCHR, as indeed with all other appointments to elective and appointive positions, the Constitution requires adherence to the national values and principles of governance contained in Article 10:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

28. Article 250 contains provisions with regard to the mandate and composition of constitutional commissions, and provides in specific terms at Article 250 (4) that:

(4) Appointments to commissions and independent offices shall take into account the national values mentioned in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.

29. This provision is partly echoed in section 11(13) of the KNCHR Act where it requires, in the process of appointment of the Chairperson and members of the commission, that:

(13) In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.

30. These two provisions form the core of the petitioners' grievance in that the petitioners assert that the failure by the Selection Panel to shortlist a person from what they refer to as the North Eastern and Coast regions or of the Muslim faith is a violation of their rights and of the constitutional and statutory provision.

31. Two questions arise in this matter. First, was there a failure by the Selection Panel to observe any of the constitutional provisions cited in this matter, and therefore a violation of the petitioners' rights? In his affidavit in support of the petition, Mr. Ibrahim depones as follows at paragraphs 2-18:

2. That the Petitioners are adversely affected in their individual capacity and collectively as organization working with members of minority and marginalized communicates.

3. That I am advised by my advocates on record which advice I verily believe to be true that minority, marginalized and groups are protected under the Constitution and denying us them representation is a violation of our fundamental rights.

4. That the Petitioners are aggrieved by the decision of the Selection Panel for the Selection of Candidates for Appointment of Chairperson and Members of the Kenya national Commission on Human Rights ("Selection Panel") published in the daily nation on Thursday August 23rd, 2012. Annexed hereto and marked to as "YMII" is the said publication. The Petitioners wrote to the Selection Panel requesting for compliance with the Constitution, which letter was never replied to. Annexed hereto and marked as "YM12" is a copy of the said letter.

5. That I am advised by my Advocates that the Selection Panel in short listing candidates did not take into any consideration provisions of Constitution. In particular the Selection Panel contravened the provisions of Articles 19, 20 21(3) , 22, 23, 35(1), 56, 250(4) and Section 11(3) of the Kenya National Human Rights Act.

6. *That I am advised by my advocates that Article 19 of the Constitution protects the rights of every Kenyan including marginalized and minority groups.*

7. *That I am advised by my Advocates that Article 21 mandates that all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities and the State shall enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.*

8. *That I am advised by my advocates that under Article 22 of the constitution that every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

9. *That I am further advised by my advocates on record that under Article 56 of the Constitution the State is required to put in place affirmative action programs designed to ensure that minorities and marginalized groups.*

a) participate and are represented in governance and other spheres of life;

b) are provided special opportunities in educational and economic fields;

c) are provided special opportunities for access to employment;

d) develop their cultural values, languages and practices; and

e) have reasonable access to water, health services and infrastructure.

10. *That I am further advised by my advocate's record that Article 250(4) of the Constitution provides that Appointments to commissions and Independent Offices shall take into account the national values.*

11. *That I am advised by my advocates that under Article 250(4) that Appointments to Commissions and Independent Offices shall take into account the national values.*

12. *That I am advised by my advocate on record that Section 11(3) of the Kenya National Human Rights Commission Act of 2011 mandates the selection panel to observe principles of regional and ethnic balance.*

13. *That the Selection Panel did not take into consideration relevant provisions of the Constitution. The said decision is a nullity and should not stand.*

14. *That I am advised by my advocates on records that the Selection Panel did not consider the provision of Article 250(4) of the Constitution and its said decision should not stand.*

15. *That I am further advised by my advocates on record that by not ensuring there is regional diversity the Selection Panel contravened the provisions of Article 250(4) of the Constitution and its said decision should not stand.*

16. *That as organizations representing the interests of marginalized communities petitioners are entitled to ensure enforcement provisions of the Constitution relating to minority and marginalized communities ensuring that Constitutional Commissions are representative in accordance with the Constitution.*

17. *That the Selection Panel has already undertaken the process of interviewing the shortlisting candidates and would be recommending the same for appointment to the relevant authority.*

18. *That unless injunction is granted, the 1st and 5th Respondents will pursue and implement their illegal decisions and the minority and marginalized community their fundamental rights of fair and equitable representation would be breached.*

32. As a basic minimum, the petitioners are required to not only cite the provisions of the constitution which have been violated, and the manner in which they have been violated with regard to them-see **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012**. In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation. From the averments by the petitioners set out above, there is not a single fact adduced on the basis of which the court could conclude that there has been a violation of rights. What the petitioners have done in their affidavit is set out matters of law on the basis of advice from their advocates, which clearly do not in any way demonstrate a violation of rights. This is the kind of pleading that Majamja J decried in his judgment in **John Waweru Wanjohi & Others – vs- Attorney General** (supra) when he observed at paragraph 71 thereof as follows:

*71. Before I conclude this matter I would be remiss if I did not comment on the pleadings and depositions filed in Petition No 373 of 2012. The key purpose of pleadings is to set out facts which constitute a cause of action. Similarly, the purpose of an affidavit is to depone to facts which the deponent known of his knowledge, information and belief. Affidavits should not express the deponent's opinions or those of the advocate. These matters are better left for submissions. I do not think that this obligation is lessened merely because the matter is one filed to enforce fundamental rights and freedoms under Article 22 of enforce the constitution under Article 258. Argumentative pleadings, devoid of facts obscure the real issues in controversy and more often than not undermine the objective of expeditious disposal of matters (see *Meme v Republic [2004] 1KLR 645* and *Tito Alai Okumu v Commissioner of Customs and Another Nairobi No. 240 of 2011 (unreported)*).*

33. I wholly agree with this view. Such evidence as there is can only be gleaned from the annexures in the affidavit in support of the petition and in the affidavit sworn in opposition to the petition by the respondents.

34. The evidence before me indicates that the Selection Panel, constituted in accordance with the provisions of section 11 of the KNCHR Act, advertised the positions in question, and invited all who were interested in the positions to apply. From the newspaper advertisement annexed to the affidavits in support and in opposition to the petition, it is clear that Kenyans from various parts of the country and diverse ethnic origin applied for the positions. The petitioners have not questioned the composition of the Selection Panel or the process that it followed in arriving at the short-list published on 23rd August 2012. What they are aggrieved by is that none of the shortlisted candidates is from the North Eastern or Coast region, or of the Muslim faith.

35. Article 250(4) and section 11(13) of the KNCHR Act do indeed require that there should be regional and ethnic balance in the appointment of commissioners, and that there should be a reflection of the regional and ethnic diversity of Kenya. The question is how this is to be achieved in a situation, such as the case now before me, where only a limited number of positions is to be filled. According to section 9 of the KNCHR Act:

The Commission shall consist of a chairperson and four other members appointed in accordance with the Constitution and the provisions of this Act.

36. As correctly argued by the respondents, the Constitution has now divided the country into 47 Counties, so that the administrative units known as provinces or regions on which this petition is based are no longer in existence. Would regional diversity require that all the 47 counties have representation in every commission? Does consideration of regional and ethnic diversity demand that every tribe in Kenya is represented in every institution that is established under the Constitution in order for the institution to be deemed to have been constituted in compliance with the constitution? What happens, were that argument to be carried to its logical conclusion, when an institution under the Constitution requires only a specific, limited, number of persons, in this particular case, only five positions?

37. Happily, with regard to constitutional commissions and independent offices, the Constitution itself provides an answer in Article 250(4), which is worth setting out again:

Appointments to commissions and independent offices shall take into account the national values mentioned in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya. (Emphasis added)

38. I believe that the operative words in this provision are 'taken as a whole,' implying that one cannot take a single constitutional commission or independent office and argue that, because a particular region or ethnic group has not been represented, or the appointee(s) are not from particular ethnic groups or regions, then there has been a breach of the Constitution. To hold otherwise is to lead to an absurdity, and to make the composition of any commission or appointment to an office well-nigh impossible.

39. To impugn the decision of the Selection Panel in this case on the basis that it has left out persons from the North East and Coast region successfully, the petitioners must show that after considering all appointments to all other constitutional commissions and independent offices, there has been no representation from these regions, and it was therefore necessary for them to be represented in this particular commission. My view of this matter is bolstered by decisions of the court in recent cases in which similar arguments as are raised in this case have been the subject of determination.

40. In the case of **John Waweru Wanjohi & Others -vs- Attorney General (supra)** as consolidated with **Kipngetch Maiyo & Others -vs-Kenya Land Commission Selection Panel & Others**, the complaint before the court was that some specific regions of the country had been excluded in the appointment of commissioners to the National Land Commission. In particular, it was argued that the Coast, Central, Masailand, Kisii and Nairobi were excluded from consideration; that members of the Kalenjin community were left out, and that the Somali community was over represented. In his judgment in which he dismissed the consolidated petitions, Majanja J observed at paragraph 66 as follows:

66. The petitioners seem to ignore the fact that there (sic) country has at least 42 ethnic groups and 47 counties. The ethnic groups are not even homogeneous. As provided in the Constitution there can only be nine members of the Commission and I do not think it would be realistic to expect the Commission to have representation of all the ethnic groups. What the appointing authorities are required to do is do the best they can to accommodate the requirement of diversity in all its form.

41. In **Mohamed Osman Wafra & Others –vs- The Office of the President and Others High Court Petition No. 77 of 2013**, the Court (Majanja J) observed as follows:

14. The nucleus of the petitioners’ case rested on the allegation that there was a breach of Article 250(4). In order to prove non-compliance with this provision, the petitioner bears the burden of showing that the Commissions and independent offices, taken as a whole, do not reflect ethnic diversity.

42. The Court further observed in the said case as follows:

In John Waweru Wanjohi & Others v the Attorney General & Others, Kipngetich Maiyo & Others v the Kenya Land Commission Selection Panel (Supra), a similar issue was raised in reference to the National Land Commissions, the Court stated, “[65]The petitioners complain that the Kalenjin Community was under represented in the Commissions that had been constituted contrary to Article 250(4). The petitioners cited two commissions to make its case; that is the Independent Electoral and Boundaries Commission (IEBC) and the Commission on the Implementation of the Constitution. In my view, the Commissions cited are not the only commissions established under the Constitution and the law. There are other Commissions established in the Constitution like the Judicial Service Commission, the Salaries and Remuneration Commission, the Public Service Commission, the Teachers Service Commission, National Human Rights Commission and others whose membership was not put into the matrix of the petitioners’ complaint. I also take judicial notice of the fact that the other Commissions continue to be constituted. I consequently find that no merit in this argument.”

15. Likewise in this case, the petitioners have not provided any evidence of the composition of the other Commissions and Independent offices. Without such evidence, the Court cannot proceed to carry out an inquiry to interrogate compliance with Article 250(4).

43. Similarly, nothing has been presented before me by the petitioners on the basis of which I could find reason for impugning the decision of the Selection Panel in selecting the candidates that it did. As submitted by the respondents, the Selection Panel shortlisted 8 candidates who included, among others, the following:

- i. *Vincent Lempaa, who is from a marginalized community;*
- ii. *Mr. Robert Shaw from a minority community;*
- iii. *Mr. Eric Ogwang who is a person with physical a disability; and*
- iv. *Dr. Samuel Kabue who has a visual disability.*

44. The court takes judicial notice of the composition of other constitutional commissions as set out in the same submissions, including the composition of the **Independent Electoral & Boundaries Commission (IEBC)**, the **Commission on Administrative Justice CAJ**, and the **National Cohesion and Integration Commission (NCIC)** in which, as submitted by Mr. Bitta, there is representation of persons from the Northeast and the Coast, and from the Muslim community. The composition of these commissions is as follows:

IEBC

Ahmed Isaack Hassan (Chair)

Lilian Bokeeye Mahiri-Zaja

Albert Bwire

Kule Galma Godana

Amb. Yusuf Nzibo

Eng. Abdullahi Sharawe

Thomas Letangule

Muthoni Wangai

Mohammed Alawi Hussun

CAJ

Otiende Amollo (Chair)

Regina Mwatha

Saadia Mohammed

NCIC

Mzalendo Kibunja (Chair)

Milly Lwanga

Fatuma Mohammed

Alice Nderitu

Halakhe Wago

Jane Kiano

Lawrence Bomet

Ahmed Yassen

45. It is a regrettable illustration of the divisions, within our society that while the petitioners in the case of **John Waweru Wanjohi & Others –vs- Attorney General (supra)** as consolidated with **Kipngetich Maiyo & Others –vs- Kenya Land Commission Selection Panel & Others** were complaining about over-representation of persons from the Northeast and Coast and members of the Muslim Faith in the National Land Commission, the petitioners in this case are complaining about the exclusion of the same communities. Hopefully, the day will come when the people of Kenya will begin to look at institutions, not to check who is from which ethnic or religious community, but to see whether the institution is serving the people of Kenya, regardless of their ethnic or social origin, or their religious persuasion, efficiently, competently and with integrity. It is also our hope as a society, I believe, that the day will come when one is appointed to public office, not because of his or her ethnic or social background or religious belief, but on the basis of his or her competence, suitability for the job and personal and professional integrity as Article 73 of our Constitution demands of holders of public office.

46. In any event, before we reach that happy dawn, the constitutional requirement is that there should be regional and ethnic diversity in the composition of constitutional commissions and independent offices, 'taken as a whole.' There is no requirement, and it is humanly impossible in any event, to have every shade of difference in Kenya represented in every commission. There is therefore no basis for impugning the decision of the Selection Panel in this matter, particularly so in the absence of any evidence from the petitioners that would justify interference by the court with the Selection Panel's decision, and in light of the fact that persons from the North east and Coast of Kenya are clearly well represented in other constitutional commissions.

47. In the circumstances, I find that there is no merit in this petition and it is hereby dismissed but with no order as to costs.

48. The Interested Party has called on the court, in view of the delay in hearing and determination of this petition, to issue guidelines with respect to the hearing of petitions such as this so that the work of government is not adversely affected or held hostage. The court notes that the parties had filed their pleadings and respective submissions by November 2012, and the reason the petition did not proceed to hearing expeditiously was due, partly to the court's diary but mostly to inefficiencies in the Court Registry which resulted in the file not being listed when it should have been and thereafter not being available to the petitioners for the purpose of taking a hearing date.

49. Such a situation is regrettable, but is one that is becoming increasingly rare and should have been brought to the court's attention as soon as it arose. In the circumstances, there are no guidelines necessary as the rule is that all matters are disposed of expeditiously.

50. I am grateful to the parties for their respective submissions and authorities in this matter.

Dated Delivered and Signed at Nairobi this 16th day of August 2013

MUMBI NGUGI

JUDGE

Mr. Kirunga instructed by the firm of Garane & Co. Advocates for the Petitioners

Mr. Bitta instructed by the State Law Office for the 1st, 2nd and 5th Respondents

Mrs. Ngugi instructed by the Interested Party.



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