

How to Challenge the Powers of Appointing Authorities in Kenya

“Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority; still more when you super add the tendency of the certainty of corruption by authority.” - Lord Acton 1843-1902

Administrative law is an area of the law that regulates the operation and procedures of government agencies. The constitution of Kenya in Article 10 sets out national values and principles of governance which bind state officials, state organs and all people in the application of the constitution and interpretation or implementation of public policy. The national values enumerated under Article 10 are democracy, participation, accountability, transparency, citizen participation, equality, rule of law, among others.

In spite of the above values having been laid down in the Constitution, individuals and organisations still flout these noble principles of governance. For this reason Constitutional and Administrative law comes in to cure the illegalities and excesses of individuals exercising powers on behalf

of the public. As a result, where an appointing authority misapplies the law, the Courts have the powers to overrule such decisions through Judicial Review orders.

The constitution seeks to hold public authorities to account through a number of its provisions. Such provisions include Article 3 of the Constitution which provides that every person has the obligation to respect, uphold and defend the constitution. Article 258 of the Constitution of Kenya, provides that every person has the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. A person can also institute court proceedings to protect personal interest, public interest, the interest of a person who does not have the capacity to institute a suit or on behalf of a class or group of people.

Articles 23 and 165 of the Constitution give the High Court the mandate to hear and determine applications for denial or infringements or threats to the rights enshrined in the Bill of rights. Private citizens can therefore influence policy or decision making through litigation.

An instance where an individual successfully challenged the improper exercise of power by a public authority is seen in the case of *Benson Riitho Mureithi versus Judy Wakhungu and 2 others* where the



petitioner sued on his behalf and the general public on grounds that the Cabinet Secretary for Environment had appointed an officer in contravention of Article 73 of the constitution which enumerates the guiding principles of leadership and integrity. The petition stated in part that the officer (who was the interested party in that petition) had been involved in uncouth conduct which was in the public domain and therefore lacked integrity making his appointment unconstitutional. The Court stated that Article 10 of the Constitution made it mandatory for there to be public participation in the recruitment or appointment of members of Boards of state corporations to allow public consideration of the suitability and integrity of potential appointees. For the reason that the Cabinet Secretary had not initiated mechanisms for the public to participate in the consideration

of the suitability and integrity of the appointed officer, the Court quashed the Cabinet Secretary's decision on the basis that it had failed to adhere to constitutional requirements.

In a nutshell, the appointing authorities have to ensure that there is public participation and transparency in the appointment of officers to public office. The appointee should also pass the test of leadership and integrity as listed in Article 73 of the Constitution.

The constitution is a living document and cannot exist in a vacuum; individuals should therefore foster constitutionalism by utilizing litigation as a powerful social engineering tool that provides an important avenue for nurturing our democracy.

