



Mugane v Cabinet Secretary, Ministry Public Service, Performance & Delivery Management & another; Media Council of Kenya & 2 others (Interested Parties) (Petition E205 of 2023) [2024] KEHC 16474 (KLR) (Constitutional and Human Rights) (31 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E205 OF 2023
LN MUGAMBI, J
DECEMBER 31, 2024**

BETWEEN

CHARLES MUGANE PETITIONER

AND

CABINET SECRETARY, MINISTRY PUBLIC SERVICE, PERFORMANCE & DELIVERY MANAGEMENT 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

MEDIA COUNCIL OF KENYA INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

NATION MEDIA GROUP LIMITED INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 21st June 2023 was amended on 29th November 2023. The Petition is supported by the Petitioner’s affidavit in support of even date and a further affidavit dated 14th July 2023.
2. This Petition arises from tweets by the 1st Respondent, Hon. Moses Kuria, that were published on 18th and 19th June 2023 on his Twitter account (now called X) which the Petitioner alleges were derogatory. The Petitioner avers that the 1st Respondent’s conduct as a State Officer violates Chapter 6 of *the Constitution*.



3. Consequently, the Petitioner brings this Petition against the 1st Respondent seeking the following reliefs:
 - i. A declaration that the derogatory words uttered by the Cabinet Secretary, Ministry of Public Service, Performance & Delivery Management, Hon. Moses Kuria through his twitter account @HonMoses_Kuria referring to the Nation Media Group as well as its principal shareholder, His Highness the Aga Khan, are unconstitutional thus unlawful for being in contravention of Articles 10, 34(2)(a), 73(1)(a), 75(1) (c) and 232(1)(a) of *the Constitution*.
 - ii. A declaration that the Cabinet Secretary, Ministry of Public Service, Performance & Delivery Management, Hon. Moses Kuria is unfit to hold any public office for failing the leadership and integrity test by the meaning of Chapter 6 of *the Constitution*.
 - iii. A mandatory order be issued compelling the President and the head of the cabinet to terminate the services of the Cabinet Secretary, Ministry of Public Service, Performance & Delivery Management, Hon. Moses Kuria for failing the leadership and integrity test by the meaning of Chapter 6 of *the Constitution*
 - iv. Costs of this Petition be borne by the 1st Respondent herein.
 - v. Such other orders this Court shall deem fit pursuant to Article 23(3) of *the Constitution*.

Petitioner's Case

4. On 18th June 2023, the Daily Nation published a story dubbed 'how the first Cabinet meeting birthed questionable deal' in relation to unlawful tax exemptions for oil imports.
5. Following this publication, it is averred that the 1st Respondent vide his personal X account tweeted, 'message is clear' in relation to a video in which he attacked a journalist and cautioned that government agencies will not be placing their advertisements through the Nation Media Group and that any employee that would go contrary to this directive would lose their employment.
Video link:
6. The Petitioner asserts that the 1st Respondent went ahead and tweeted as follows:

“Kwa wale malaya wa Aga Khan pale Nation Centre. You can still advertise auctioneers and funeral announcements. We will not stop those.”
7. It is further averred that on 19th June 2023 he tweeted as follows:

“Waasherati wa Aga Khan. Muwe na usingizi poa.”
8. According to the Petitioner, these tweets as published by the 1st Respondent were in retaliation to the Daily Nation's cited article. Essentially that the tweets were geared towards intimidating the Media contrary to Article 34 of *the Constitution*.
9. Additionally, it is argued that the derogatory tweets are in breach of Chapter 6 of *the Constitution* as read with the *Leadership and Integrity Act* and also the Public Service Act in respect of threshold of conduct in the public service.
10. The Petitioner protested that the 1st Respondent's conduct promotes discriminatory practice in procurement against the 3rd Interested Party in violation of Article 227 of *the Constitution* that requires public procurement to be fair, equitable and transparent. Moreover, it is a threat to the independence



of the media is contrary to Article 34 of *the Constitution*. Further, the derogatory words are in violation of Articles 10(2), 34(1) & (2), 73(1)(a), 75(1)(c) and 232(1) (a) of *the Constitution*.

Respondents' Case

11. In reply to the Petition, the Respondents' filed grounds of opposition dated 8th May 2024 on the basis that:
 - i. This Court lacks jurisdiction to hear and determine the Petitioner's claim, is a claim under the tort of defamation and the same can only be remedied in a civil suit as opposed to a constitutional petition.
 - ii. This Court lacks the jurisdiction to declare the 1st Respondent unfit to hold office as this the mandate of the Ethics and Anti-Corruption commission under Article 79 of *the Constitution*. It is trite law that a court cannot act without jurisdiction.
 - iii. The Court has no jurisdiction to compel the President to dismiss the 1st Respondent as the process of removal of a Cabinet Secretary is well spelt out under Article 152(6)(7)(8)(9) of *the Constitution*.
 - iv. The Petition is otherwise incompetent, misplaced and is an abuse of the court process and the same ought to be dismissed with costs.
12. Furthermore, the 1st Respondent, also filed an undated Replying affidavit.
13. He depones in rebuttal that it is the 3rd Interested Party who published defamatory remarks in its cited article. According to him, the story was offensive and malicious with the goal of ruining his reputation without ascertaining the veracity of the claims therein. He adds that publication tarnished his name publicly thus causing him and his family untold damage. He as well fears that unless this Court intervenes, the 3rd Interested Party will continue tarnishing his name in turn affecting the operations of his Ministry.
14. He further argues that while the 3rd Interested Party has freedom of expression as envisaged under Article 34 of *the Constitution*, the right should be exercised in a way that respects the rights and reputations of other people. Equally he points out that Section 7A (1) of the *Defamation Act* entitles a person a right to reply to any factual inaccuracy which he did. In sum, he stated that the Petition lacks merit and thus should be dismissed.

Interested Parties Cases

1st Interested Party's Case

15. The 1st Interested Party through its Chief Executive Officer, filed its response sworn on 1st August 2023. He in support of the Petitioner's case argues that the conduct of the 1st Respondent was contrary to inter alia, Articles 10, 34(2)(a), 73(1)(a), 75(1) (c), and 232(a) of *the Constitution*.
16. It asserts that the conduct of the 1st Respondent ought to be in a manner that promotes public confidence in the office. It is argued that the *Media Council Act* provides under Section 27 and 31, mechanisms for redress where one is aggrieved by the actions of any of the media practitioner. This channel was however not utilized by the 1st Respondent.
17. Correspondingly, it was argued that the disparaging statements uttered against the 3rd Interested Party by the 1st Respondent, amount to a threat and are in violation of Article 34 of *the Constitution*. This



conduct is frowned upon as is aimed at interfering with the freedom of the media yet all persons must abide by the law and due process.

2nd Interested Party's Case

18. The 2nd Interested Party through its Assistant Director, Emily Ibeere made its response in its Replying Affidavit sworn on 24th October 2023.
19. She informs that *the Constitution* under Article 79 mandates the 2nd Interested Party to ensure compliance with the dictates of Chapter six. In this regard, Section 11 (1) (d - f) of the *Ethics and Anti-Corruption Commission Act*, mandates the Commission to investigate allegations of breaches of Codes of conduct, recommend appropriate action to be taken against state officers or public officers alleged to have engaged in unethical conduct and to oversee the enforcement of codes of ethics prescribed for public officers. This function also stipulated under the *Leadership and Integrity Act*.
20. It is deponed that in this matter, the 2nd Interested Party prepared a status report with regard to the issues raised in this Petition. In a nutshell, she states that the Report emphasizes that all state and public officers should strictly adhere to the laws governing management of public affairs, including the requirements under Chapter Six of *the Constitution* and the *Leadership and Integrity Act*, 2012.

3rd Interested Party's Case

21. This party's pleadings and submissions are not in the Court file or Court Online Platform (CTS).

Parties' Submissions

Petitioner's Submissions

22. In the submissions dated 5th February 2024, Mugane Law LLP outlined the issues for discussion as: whether or not the 1st Respondent's tweets undermines the fundamental provisions of the national values and principles of governance, espoused under Article 10 of *the Constitution*, Chapter 6 of *the Constitution* on Leadership and Integrity and the values and principles of public service under Article 232 of *the Constitution*; whether or not the 1st Respondent's tweets undermines the freedom of the media under Article 34 of *the Constitution* and whether or not the Petitioner should be granted the orders sought.
23. The petitioner submitted that the 1st Respondent in publishing the offensive tweets and as a Cabinet Secretary was bound to uphold the law. However, the 1st Respondent failed to carry himself in a manner that brings honour and integrity to the office hence his conduct violated Articles 10, 73(1)(a) & (b), 75 (1), 232 (a) of *the Constitution* and Sections 5 of the Public Service Act, Section 10 of the *Public Service (Values and Principles) Act* as well as Section 3 of the *Leadership and Integrity Act*.
24. Reliance was placed in Nairobi Metropolitan Psv Saccos Union Limited & 25; Others V County Of Nairobi Government & 3 Others [2013] eKLR, where it was held:

“The Preamble of *the Constitution* sets the achievable goal of the establishment of a society that is based on democratic values, social justice, equality, fundamental rights and rule of law and has strengthened this commitment at Article 10(1) of *the Constitution* by making it clear that the national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements policy decisions. Article 10(2) of *the Constitution* establishes the



founding values of the State and includes as part of those values, good governance, integrity and accountability.”

25. On the second issue, Counsel submitted that the freedom of media is guaranteed under Article 34 of *the Constitution*. Furthermore, Article 34 (2)(b) of *the Constitution* provides that the State shall not penalize any person for any opinion or view or publication. On this premise it is asserted that the 1st Respondent’s tweets were in violation of this right as they were a threat to penalize the 3rd Interested Party and undermine the freedom of the Media.
26. To buttress the protection of the media, Counsel cited the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR where the Supreme Court held that:

“ Thus it is clear that the guiding force behind the inclusion of the freedom of the media in *the Constitution*, as cited in the main Judgment, was to safeguard the media against government interference which was identified as one of the greatest threats to the existence of free media.”
27. In view of the foregoing, it was argued that since the Petitioner had established violation of the cited provisions, the relief sought was merited.

1st Respondent’s Submissions

28. Omenke Andeje and Company filed submissions dated 5th March 2024 for the 1st Respondent. The issues for discussion were listed as: whether the 1st Respondent’s tweets undermine national values and Principles of governance under Article 10 of *the Constitution*, Chapter 6 of the Leadership and Integrity and national values and principles of public service under Article 232 of *the Constitution* and whether a mandatory order should be issued compelling the 1st Respondent to remove all derogatory tweets against any Media practitioners.
29. It was submitted in the first issue that the 1st Respondent did not violate these provisions as the remarks made did not refer to the Petitioner nor the employees of the 3rd Interested Party. Counsel further asserted that the 1st Respondent was only exercising his freedom of expression following the cited publication.
30. Further it is argued that the 1st Respondent was also entitled to his right of reply in line with Section 7A (1) of the *Defamation Act*. Conversely it was argued that by publishing the cited publication it was the 3rd Interested Party who defamed the 1st Respondent and caused irreparable damage to his reputation.
31. Counsel on the second issue submitted that owing to the disparaging nature on the 3rd Interested Party’s cited publication, it was the 1st Respondent’s image that was damaged. It was thus submitted that the Court should intervene as the 1st Respondent’s rights under Article 24, 27, 28, 33 and 35 of *the Constitution* were violated by the 3rd Interested Party.
32. Reliance was placed in Ahmed Adan v Nation Group Limited & 2 others [2016] eKLR where it was held that:

“ Whether or not there is libel is primarily a question of fact. In order to grant an interlocutory injunction, the court would have to come to a decision upon that question of fact before trial and upon untested affidavit evidence. It must therefore be manifest that the matter complained of is libelous and that that fact is unlikely to change at trial. The defamation complained of must be obvious, atrocious and wholly unjustified. It must be a kind



inflicting the most serious injury to a plaintiff's character and reputation. Should the court entertain a doubt that the words complained of are defamatory, interlocutory injunction will not be granted, for it is important, in the public interest, that the truth be known.

The test in defamation cases should therefore go beyond that obtaining in ordinary cases. It will not be sufficient merely for the plaintiff to establish a prima facie case with a probability of success and irreparable loss. There are also instances when interlocutory injunction will be very difficult to obtain no matter how strong the plaintiff's case. These instances include where justification is pleaded. Where the defendant pleads that he will be able to prove that the words complained of are true, unless the court is clearly satisfied that he will not be able to do so, it will not grant interlocutory injunction."

33. Comparable dependence was placed in *Standard Limited & 2 others v Christopher Ndarathi Murungaru* [2016] eKLR.

2nd Respondent's Submissions

34. Principal State Counsel, Anne Mwangi filed submissions dated 8th May 2024 and highlighted the issues for discussion as: whether the words uttered by the 1st Respondent are unconstitutional in view of Articles 10, 32(2)(a), 73(1)(a), 75(1)(c) and 232(1)(a) of *the Constitution*; whether the 1st Respondent is unfit to hold any public office for failing the leadership and integrity test within the meaning of Chapter 6 of *the Constitution*; and whether the President can be compelled to terminate the services of the 1st Respondent.
35. On the first issue, Counsel submitted that the Petitioner's claim is under the tort of defamation and hence the Petition does not qualify as a constitutional petition. Accordingly, Counsel submitted that the Petitioner ought to follow the provided procedure. As such, the sought prayers should not issue.
36. Reliance was placed in *Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd* [2013] eKLR where the Court citing the opine in *Minister of Home Affairs v Bickle & others* [1985] LRC Cost 755 stated as follows:

"It is an established practice that where a matter can be disposed off without recourse to *the Constitution*, *the Constitution* should not be invoked at all. The court went further to state that, "Courts will not normally consider a constitutional question unless the existence of a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition, a breach of the Declaration of Rights.

...

Where there is a remedy in Civil Law, a party should pursue that remedy...My mind is clear however that not every ill in society should attract a constitutional sanction as in *AG v S.K. Dutambala Cr. Appeal No.37 of 1991*(Tanzania Court of Appeal), such sanction should be reserved for appropriate & really serious occasions. The complaint in this case is not so serious as to attract constitutional sanctions."

37. Counsel further argued that the 1st Respondent's tweets were made in his personal capacity not in his official capacity while exercising his freedom of expression as envisaged under *the Constitution*. Accordingly, any matter arising from this dispute fall under private law not constitutional law.



38. Reliance was placed in *Teitiwinnang and Ariong & others* [1987] L.R.C Const.517 at page 599 where it was noted that:

“Dealing now with the question can a private individual maintain an action for declaration against another private individual on individual or individuals for breach of the fundamental rights provisions of *the Constitution*. The rights and duties of individuals and between individuals are maintained by private law.”

39. On the second issue, Counsel relying in *Owners of the Motor Vessel ‘Lillian S’ v Caltex Oil(Kenya) Ltd* [1989]eKLR submitted that this Court lacks jurisdiction to entertain this matter. This is because it is a constitutional mandate bestowed on the 2nd Interested Party under Article 79 of *the Constitution*. It is argued thus that making such a determination would be tantamount to usurping the 2nd Interested Party’s mandate. On this premise, Counsel asserted that the proper forum to lodge this complaint is before the 2nd Interested Party not this Court.

40. Reliance was placed in *International Centre for Policy & Conflict and 4 others v the Hon. AG and 5 others* [2013] eKLR where it was held that:

“Jurisdiction of the High Court does not lie where *the Constitution* has laid down the procedure for dealing with an issue.” It went on further to state that, “The mechanisms of inquiry would be set out in the parent statute e.g. the Independent and Electoral Boundaries Commissions Act and the Ethics and Anti-Corruption Act, which are bestowed with the necessary powers to conduct, inquire and take disciplinary action. The Court should therefore not descend into that arena of inquiry.”

41. Equal dependence was placed in *Benson Ritho Mureithi v J.W. Wakhungu and 2 others* [2014] eKLR, and *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425.

42. Correspondingly, in the second issue, Counsel submitted that *the Constitution* under Article 152 (5) (c) provides the appropriate mechanism. The procedure is by a resolution adopted under clauses (6) to (10). This process commences with a motion introduced in the National Assembly and is successful, if supported by at least one-third of the members of the House. Consequently, without following this procedure it is argued that the same would amount to procedural impropriety against the 1st Respondent contrary to Article 47(1) of *the Constitution*.

1st Interested Party’s Submissions

43. Kipkenda and Company Advocates for this party filed submissions dated 14th March 2024 and set out the issues to consider as follows: whether the 1st Respondent adhered to due process in lodging his grievances and whether the 1st Respondent’s tweet undermined the freedom of media under Article 34 of *the Constitution*.

44. Counsel in the first issue, submitted that the *Media Council Act* and the Kenya Information and Communication Act, provide adequate mechanisms for persons aggrieved by media practitioners conduct. It is contended that the 1st Respondent failed to utilize these mechanisms before making the impugned statements. In particular, Section 27 of the *Media Council Act* establishes the Media Complaints Commission which is empowered to adjudicate such disputes and equally provide the necessary remedies to an aggrieved party.

45. On second issue, Counsel asserted that the 1st Respondent violated Article 34 of *the Constitution*. Primarily, Article 34(2) provides that the State should not exercise control over or interfere with the



functions of media practitioners. This directive is also echoed in the Banjul Declaration of Principles on Freedom of Expression in Africa, 2002. It was argued that the 1st Respondent's statements have the effect of controlling and interfering with the freedom of the media which is unlawful yet all parties ought to follow due process and the law.

46. To buttress this point reliance was placed in *Standard Limited & 2 others v Christopher Ndarathi Murungaru* [2016] eKLR where it was held that:

“There is no doubt that this history of egregious favouritism, official interference and arbitrary licensing regimes, coupled with low State tolerance for dissent, informed the constitutional guarantee for freedom and independence of the media. The blatant violation of the right to the private property of the owners of media printing works and newspapers is a path *the Constitution* did not want to continue.”

47. Like dependence was placed in *Pennekamp v. Florida* 328 US 331 (1946), *Boniface Waweru Mbiyu vs. Mary Njeri & Another Nairobi HCCC No. 639 of 2005*, *Christopher Ndarathi Murungaru v Standard Limited & 2 others* [2012] eKLR and *Nation Media Group Limited & 6 others v Attorney General & 9 others* [2016] eKLR.

2nd Interested Party's Submissions

48. On 25th July 2024, the 2nd Interested Party filed submissions through its Counsel Olga Ochola. Counsel sought to discuss: whether the 1st Respondent's tweets undermined the provisions Articles 10, Chapter 6, Article 75 and 232 of *the Constitution*.
49. Discussing the various provisions and reiterating the 2nd Interested Party's case, Counsel submitted that being that the 1st Respondent is a State Officer, he is required to conduct himself in the office in accordance with Article 73(1) (a) (i) (ii) (iii) (iv) and Article 75 (1) (c) of *the Constitution*.
50. Reliance was placed in *Benson Riitho Mureithi* (supra) where the Court observed as follows:

'An objective assessment of one's personal and professional life ought to reveal whether one has integrity. In *The Shorter Oxford English Dictionary on Historical Principles* (1988), inter alia, the following are the meanings attributed to the word 'integrity': 'Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty, sincerity.' *Collins' Thesaurus* (2003) provides the following as words related to the word "integrity": 'honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.' Under 'opposites' the following is noted: 'corruption, dishonesty, immorality, disrepute, deceit, duplicity.' On the available evidence the President could in any event not have reached a conclusion favourable to Mr. Simelane, as there were too many unresolved questions concerning his integrity and experience. To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in *the Constitution*. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behaviour, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. As the Democratic



Alliance case held, it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity....

We are persuaded that this is the only approach to the interpretation of Article 73 of *the Constitution* which maintains fealty to *the Constitution* and its spirit, values and objects. Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in *the Constitution*. They were singularly aware that *the Constitution* has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in *the Constitution*.”

51. Like dependence was placed in Fredrick Otieno Outa versus Jared Odoyo Okello [2014] eKLR and Trusted Society of Human Rights Alliance -vs- The Attorney General and Others, Nairobi High Court Petition No 229 of 2012.

Analysis and Determination

52. Upon consideration of the pleadings and submissions, I find that the issues arise that fall for determination are as follows:
- i. Whether in the light of the prayers sought, the instant Petition is sustainable in view of supervening events
 - ii. Whether the 1st Respondent's conduct violated Articles 10, 32(2)(a), 73(1)(a), 75(1)(c) and 232(1)(a) of *the Constitution*.
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Whether the light of the prayers sought, the instant Petition is sustainable in view of supervening events

53. The 2nd Respondent had challenged the instant Petition on two fundamental aspects; that the Court cannot compel the President to terminate the services of Hon Moses Kuria as a Cabinet Secretary and two, it is not this Court's mandate to find the 1st Respondent is unfit to hold a public office in the light of Chapter 6 of *the Constitution*.
54. This Court's jurisdiction to entertain constitutional matters is founded in Article 165 (3) (d) of *the Constitution* which provides as follows:

Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

- i. the question whether any law is inconsistent with or in contravention of this Constitution;
- ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and



iv. a question relating to conflict of laws under Article 191.

55. The Supreme Court In the Matter of the Interim Independent Electoral Commission (Applicant) [2011] KESC 1 (KLR) held:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.” [30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”

56. The *Evidence Act* Section 60 provides for facts that the Court may take judicial notice of. In particular, Section 60 (1) (f) provides that the Court can take judicial notice of accession to office, names, titles, functions and signatures of public officers if the fact of their appointment is notified in the Gazette.

57. It is imperative therefore for this Court juncture for this Court to take judicial notice that Hon. Moses Kuria is no longer the Cabinet Secretary, Ministry of Public Service, Performance & Delivery Management. The President through Gazette Notice Number 8440 VOL. CXXVI NO. 102 dated 11th July, 2024 vide Executive Order NO. 6 of 2024 dismissed all the Cabinet Secretaries pursuant to Article 152 (5) (b) of *the Constitution* and among those dismissed was Moses Kiarie Kuria, H.S.C.

58. This in view of the reliefs sought in this Petition brings up one of the justiciability principles: the principle of mootness.

59. The concept of justiciability was discussed in Wanjiru Gikonyo, Paul Kemunche Masese & Edwin Mutemi Kiama v National Assembly of Kenya, Senate of the Republic of Kenya, Cabinet Secretary of the National Treasury, Attorney General & Affirmative Action Social Development Fund Board [2016] KEHC 5536 (KLR) as follows:

“The citadel of the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based however on the rather universal concept or principle of justiciability. This concept has found much favour in most jurisdictions. It also gathers much support from the engraved supplementary doctrines of ripeness, avoidance and mootness.

By justiciability it is meant a matter “proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”: see Black’s Law Dictionary 9th Ed,pp 943-944.In other words, courts should only decide matters that require to be decided. Thus in *Ashwander –v- Tennessee Valley Authority* [1936] 297 U.S 288, the US Supreme Court stated that courts should only decide cases which invite “a real earnest and vital controversy”.



Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.

Conversely, the court is also prevented from determining an issue when it is too late. When an issue no longer presents an existing or live controversy, then it is said to be moot and not worthy of taking the much sought judicial time. The exception it must be noted exists where the court is allowed by law to offer advisory opinions. A good example is Article 163(6) of *the Constitution* on powers of the Supreme Court of Kenya to give advisory opinions at the request of the national government on matters concerning county governments... It is clear from a review of the above case law that there is now a distinct and coherent jurisprudence within our jurisdiction on the justiciability dogma. There is settled policy with clear arguments as well as out of repetitive precedent that courts and judges are not advise-givers. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either.

It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined.”

60. There are three major prayers or reliefs that the Petitioner sought against the 1st Respondent and all related to his being relieved of his official capacity as a Cabinet Secretary. The three main reliefs sought in the Petition are follows:
1. A declaration that the derogatory words uttered by the Cabinet Secretary, Ministry of Public Service, Performance & Delivery Management, Hon. Moses Kuria through his twitter account @HonMoses_Kuria referring to the Nation Media Group as well as its principal shareholder, His Highness the Aga Khan, are unconstitutional thus unlawful for being in contravention of Articles 10, 34(2)(a), 73(1)(a), 75(1) (c) and 232(1)(a) of *the Constitution*.
 2. A declaration that the Cabinet Secretary, Ministry of Public Service, Performance & Delivery Management, Hon. Moses Kuria is unfit to hold any public office for failing the leadership and integrity test by the meaning of Chapter 6 of *the Constitution*.
 3. A mandatory order be issued compelling the President and the head of the cabinet to terminate the services of the Cabinet Secretary, Ministry of Public Service, Performance & Delivery Management, Hon. Moses Kuria for failing the leadership and integrity test by the meaning of Chapter 6 of *the Constitution*.
61. The 1st Respondent is no longer holding the position of the Cabinet Secretary, Ministry of Public Service, Performance & Delivery Management. The three major reliefs are incapable of being granted in the manner specified in the Petition as they have been overtaken by the supervening event of the dismissal of the 1st Respondent from that position which rendering significant the prayers moot as they are principally tied to the official position of the 1st Respondent as the Cabinet Secretary, Ministry of Public Service, Performance & Delivery Management which has since vanished. This has substantial impact on the substratum of the Petition.



62. The further consideration I need to make is the invitation on this Court to examine conduct complained of and determine if it conforms to the Constitutional threshold that aims to protect image, integrity, honour and the reputation of the public service.
63. Article 75 provides for the conduct of State Officers. Article 75 (1) (c) in particular states that a state officer shall behave, while in public and in private life, in a manner that among others, avoids demeaning the office the officer holds.
64. The mandate of ensuring that public officers do not derogate from the Constitutional and legislative values aimed is primarily the responsibility of the Ethics and Anti-Corruption Commission.
65. Article 79 of *the Constitution* thus:
- Legislation to establish the ethics and anti-corruption commission Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, enforcement of, the provisions of this Chapter.
66. Under Article 66, Parliament is required to, and has enacted, the *Leadership and Integrity Act* which under Article 66 (a) establishes procedures and mechanisms for effective administration of the Chapter and 66 (b) provides that the legislation shall prescribe the penalties, in addition to penalties referred to in Article 75, that may be imposed for contravention of Chapter 6.
67. Under the Ethics and Anti-Corruption *Act No. 2 of 2015*; the preamble states that it is ‘An Act of Parliament to establish the Ethics and Anti-Corruption Commission pursuant to Article 79 of *the Constitution*, to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purpose.’
68. Section 11 provides for additional functions of the Commission by stating thus:
69. In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall—

Section 11 (1)

- (a) in relation to State officers, —
- (i) develop and promote standards and best practices in integrity and anti-corruption;
- (ii) develop a code of ethics;
- (b) work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;
- (c) receive complaints on the breach of the code of ethics by public officers;
- (d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of *the Constitution*;
- (e) recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;



- (f) oversee the enforcement of codes of ethics prescribed for public officers;
- (g) advise, on its own initiative, any person on any matter within its functions;
- (h) raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes (Cap. 65) as to confidentiality;
- (i) subject to Article 31 of *the Constitution*, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
- (j) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.

70. From the above reading, it is apparent that Service in Public Service is guided by codes of conduct which constitutionally and legislative wise, Ethics and Anti-Corruption Commission is given the oversight role on their implementation and has the power to recommend appropriate action against State or Public officers that are alleged to have breached the codes. This is the power which EACC can exercise either on its own motion or upon receipt of a complaint (Section 11 (g)).

71. Likewise, under the *Leadership and Integrity Act* whose preamble states it is ‘An Act of Parliament to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of *the Constitution* and for connected purposes’ Section 4 (2) gives the responsibility of overseeing the implementation of the Act to the Ethics and Anti-Corruption Commission.

72. In terms of the procedures to enforce compliance with the provisions of the Act, Section 4 (3), (4) & (5) are relevant. They provide thus: In 3) In undertaking its mandate, the Commission may request a state organ to assist it in ensuring compliance with and enforcing Chapter Six of *the Constitution* and this Act.

(4) The Commission may require any public entity to carry out such functions and exercise such powers as may be necessary under this Act.

(5) Where a public entity has failed to comply with the requirements under subsection (3), the Commission may make an application before a High Court judge for appropriate orders requiring the public entity to comply.

73. Under Section 11 of the *Leadership and Integrity Act*, the following standards are prescribed on professionalism:

Professionalism

A State officer shall—

- (a) carry out duties of the office in a manner that maintains public confidence in the integrity of the office;



- (b) treat members of the public and other public officers with courtesy and respect;
- (c) not discriminate against any person, except as is expressly provided by the law;
- (d) to the extent appropriate to the office, maintain high standards of performance and level of professionalism within the organisation; and
- (e) if the State officer is a member of a professional body, observe and subscribe to the ethical and professional requirements of that body in so far as the requirements do not contravene *the Constitution* or this Act.

Evidently, the allegations levelled against the 1st Respondent are matters that would fall for investigation or inquiry by EACC which has both the Constitutional and legislative mandate to enforce integrity and Ethics in Public Service. Further, EACC has the power to require any State Organ to action for the breach of the Act EACC under ‘Where a public entity has failed to comply with that requirement, the Commission may under Section 4 (5) make an application before a High Court judge for appropriate orders requiring the public entity to comply’

- 74. It follows therefore, that the first port of call for lodging of any conduct which is considered to be in breach of Chapter 6 is with the EACC, which may however act on its own initiative as well.
- 75. The Court can only compel the performance of a legal or Constitutional by a public body if it is demonstrated that if there has refusal or default to undertake that specific legal mandate. It is the EACC that has a Constitutional duty ensure the conduct state officers and public officers does not derogate from the Constitutional and legislative principles and where necessary, take the appropriate prescribed legal action. The law has equally given Ethics and Anti-Corruption Commission the power to enforce compliance through an application to the High Court where its directions are ignored by any State Agency in that regard.
- 76. This Court is constitutionally bound to accord deference to coordinate branches of government and public bodies to execute their respective legal mandates and its intervention can be called for only if the public body concerned is proven to have failed or neglected to undertake its legal obligation to the detriment of any person or the public.
- 77. In the instant case, the Ethics and Anti-Corruption Commission (2nd Interested Party) through the Replying Affidavit of the Assistant Director Mary Ibeere sworn on 24th October, 2023 revealed that the 2nd Interested Party prepared a status report with regard to the issues raised in the Petition in which it emphasized the need for all state and public officers to strictly adhere to the laws governing management of public affairs, including the requirements of Chapter Six of *the Constitution* and the *Leadership and Integrity Act*.
- 78. The Commission having confirmed that the issues were addressed and having thus found no need to seek enforcement of its decision under Section 4 (5) of the *Leadership and Integrity Act*, the Petition must inevitably fail.
- 79. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 31ST DAY OF DECEMBER, 2024.



.....
L N MUGAMBI
JUDGE

