



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mibei & another v Kirui & 2 others (Constitutional Petition E003 of 2022)  
[2023] KEHC 25709 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25709 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CONSTITUTIONAL PETITION E003 OF 2022**

**JK SERGON, J**

**NOVEMBER 23, 2023**

**IN THE MATTER OF: ARTICLE 72, 74, 75, 76, 77 78, 79 80,  
99 (1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF SECTION 2 (1), 3  
(1), 32 AND 258 (1) OF THE CONSTITUTION OF KENYA,**

**2010**

**AND**

**IN THE MATTER OF: THE LEADERSHIP AND INTEGRITY ACT  
CAP 182, LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION**

**AND**

**IN THE MATTER OF: ADMINISTRATION JUSTICE,  
SAFEGUARDING THE RULE OF LAW**

**BETWEEN**

**RICHARD K. MIBEI ..... 1<sup>ST</sup> PETITIONER**

**KIPYEGON LANGAT ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KIPNGENO KIRUI ALIAS ALFRED KIMUTAI KIRUI ..... 1<sup>ST</sup> RESPONDENT**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION ... 2<sup>ND</sup> RESPONDENT**



## JUDGMENT

1. The petitioner herein has moved to court by way of a Petition seeking the following reliefs;
  - a. A Declaration that chapter six of the constitution sets up a fit and proper test for leadership including the selection of elected and appointed leaders and the 1st Respondent herein fails short of being qualified to continue holding office as a member of county assembly Tebesonik Ward, Bureti Sub-County within Kericho County
  - b. A Declaration that the 2nd Respondent herein who has the primary mandate and finality to vet and clear candidates failed to exercise due diligence in clearing the 1st Respondent herein to vie as a member of the county assembly Tebesonik Ward in Bureti Sub County Kericho County.
  - c. A declaration that the vetting and/or appointing bodies/persons who include the respondents have an obligation to positively determine that a person seeking elective or appointed office is fit and proper.
  - d. A declaration that the 1st Respondent herein is unfit to hold public office in the circumstances having provided falsified information in his self-declaration forms provided to the Independent Electoral and Boundaries Commission and further the 1st Respondent committed an offence under section 46 (1) (d) of the [leadership and Integrity Act](#)
  - e. A declaration be and is hereby issued that the 1st Respondent herein failed and fails to meet any objective test for leadership and integrity as required by chapter six of the [Constitution](#) of Kenya, 2010.
  - f. A declaration be and is hereby issued to set aside the declaration of the 1st Respondent as a member of the county assembly Tebesonik Ward, Bureti Sub County within Kericho county having failed to meet the threshold of leadership and integrity as provided for in chapter six of the [Constitution](#) of Kenya, 2010.
  - g. A declaration be and is hereby issued that the 1st Respondent herein has failed in totality to meet the threshold for leadership and integrity by dint of article 88 (4), (e) & (f), 99 (1) and 193 (1) (b) of the [Constitution](#) of Kenya, 2010 as read with section 13 of the [Leadership and Integrity Act](#), 2012, section 74 (1) of the [Elections Act](#) no 24 of 2011 and section 4 (e) of the [Independent Electoral and Boundaries Commission Act](#) no 9 of 2011.
  - h. A declaration that the process followed by the 2nd Respondent and the 3rd Respondent in nominating the 1st Respondent Kipngeno Kirui alias Alfred Kimutai Kirui submitted to the Independent Electoral and Boundaries Commission was illegal, unlawful thus null and void *ab initio*.
  - i. An order be and is hereby issued compelling the respondents to bear the costs of this petition.
  - j. Consequent to the grant of the prayers above the honourable court be pleased to issue any other further remedy (directions and orders) that the honourable court shall deem necessary to give effect to the foregoing orders and favour the cause of justice.
2. A brief factual background of the petition herein is that the petitioner, a voter at Chemobei Tea Buying Center, Tebesonik Ward avers that upon due diligence and scrutiny of documents presented by the



- 1st Respondent who was elected as a member of the County Assembly (Tebesonik Ward) he realized that the 1st Respondent despite having been cleared by the 2nd Respondent and officers deriving authority and instructions from the 2nd Respondent presented various conflicting documents to wit two different national identity cards bearing different numbers and two police clearance certificates from the National Police Service with the same serial number, however, one of the clearance certificates was indicative that he had a criminal history and had been charged with an offence of stealing from a person with the results of the trial indicated as outstanding. The Petitioner maintains that the only plausible explanation is that the 1st Respondent is an imposter who knowingly used a false identity to present himself as a voter in order to hoodwink the relevant agencies and the people of Tebesonik Ward to vote for him despite his long criminal background.
3. The Petitioner contends that the gist of the instant petition is to have this court to interpret the application of chapter six of the *constitution* as it relates to the electoral process and in particular the general elections that were conducted on 9th August, 2022 moreso in Tebesonik Ward.
  4. The Petitioner contends that chapter six of the *constitution* is central to the transformative nature of the *constitution* and that this honourable court should not shy away from giving it an elaborate interpretation and more specifically with regards to the instant petition.
  5. The petitioner reiterated that the centrality and importance of the constitutional provisions on leadership and integrity in governance cannot be understated given the history of our country and cited the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* (2012) eKLR in which the court stated the following with regard to chapter six and Article 73 of the *Constitution* of Kenya; “... Yet Kenyans were singularly desirous of cleaning up our political and governance structures by insisting on high standard of integrity among those seeking to hold public office. They intended that chapter six and article 73 be enforced in the spirit in which they included them. The people of Kenya did not in any way intend that these provisions be mere suggestions, superfluous or ornamental, they did not intend to include this provisions as lofty suggestions.”
  6. The Petitioner reiterated that the people of Tebesonik Ward were hoodwinked into electing an individual devoid of any decency or integrity as contemplated in article 73 and chapter six of the *constitution* and that the trend of allowing individuals with dubious past to be elected in elective positions hampers good governance, transparency and accountability and undermines the constitution.
  7. The Petitioner was therefore seeking an interpretation on eligibility of the 1st Respondent’s suitability to continue holding office by virtue of chapter six of the *constitution*.
  8. The Petitioner faulted the 2nd Respondent for failing to discharge its mandate and making the requisite finding into the 1st Respondent’s suitability more specifically his moral and ethical probity to hold public office and the fact that they issued with a certificate that paved way for the election of the 1st Respondent as a elected representative.
  9. The Petitioner maintains that despite demands made to respondents to shed more light as to the identity of the 1st Respondent and/or several demands to make amends the respondents have neglected and/or reneged to do so.
  10. The Petition is supported by grounds on the face of it and the affidavit in support of the petition sworn by Richard Mibei with the authority of the 2nd Petitioner herein.
  11. The Petitioner avers that the thrust of the instant petition is to have this court to interpret the application of chapter six of the of *Constitution* of Kenya, 2010 as it relates to the electoral process and



in particular the general elections that were conducted on 9th August, 2022 and moreso in Tebesonik Ward.

12. The Petitioner avers that the 1st Respondent has neglected and/or reneged to give full disclosure of the numerous criminal trials he is facing in different courts within the Republic of Kenya.
13. The Petitioner avers that the 1st Respondent possesses two different identities which fact the petitioner is alive to and further that it is an elaborate and deliberate scheme by the 1st Respondent who is a delinquent by all definitions to hide his criminal past.
14. The Petitioner avers that chapter six of the constitution is central to the transformative nature of the constitution and that this honourable court should not shy away from giving it an elaborate interpretation and more specifically with regards to the instant petition.
15. The Petitioner avers that he has every reason to believe that the 1st Respondent owing to his rich criminal history could have provided false information in his self-declaration forms provided to the Independent Electoral and Boundaries Commission (I.E.B.C) and as such was not qualified to subscribe to any leadership and integrity code once he assumed office.
16. The Petitioner avers that the 1st Respondent herein was elected as a member of the County Assembly of Tebesonik Ward despite the fact that he had been arrested on numerous occasions and charged with among other offences as being involved in a car theft syndicate in Eldoret and Narok Town.
17. The 1st Respondent filed a replying affidavit which was sworn by Kipngeno Kirui the current validly elected Member of the County Assembly of Kericho representing Tebesonik Ward in Bureti Constituency within Kericho County.
18. The 1st Respondent avers that the Petitioners herein are supporters and agents of his then closest competitor Nancy Chebet Kimetto who is on a witch-hunt given that she had not accepted the fact that he had defeated her on an Independent Ticket in the August 2022 General Elections despite her having won the nominations on a UDA ticket.
19. The 1st Respondent avers that the petitioner alongside four others had earlier instituted an Election Petition no E001 of 2022 at the Chief Magistrate's Court at Kericho which was heard and dismissed with costs for lack of merit and instead of preferring an appeal, the petitioners herein decided to file the instant vexatious constitutional petition.
20. The 1st Respondent avers that the petitioners prior to filing the said election petition, made a complaint against him with the DCI Office at Kericho Police Station that he was an imposter with two (2) Police Clearance Certificates from the National Police Service and two (2) identities. The complaint was investigated and thrown out by the DCI Office after having found no evidence to back the said complaints, the petitioners filed the election petition which was heard and subsequently dismissed with costs for lack of merit. The petitioners proceeded to file the instant constitutional petition.
21. The 1st Respondent contends that the allegations were unfounded and in the event that these allegations were true, he would not have been cleared to vie for an elective position.
22. The 1st Respondent contends that the issues raised in the petition were raised in the Election Petition no E001 of 2022 at the Chief Magistrate's Court at Kericho which was heard and determined and therefore the said issues and the petition herein is *res judicata*. The 1st Respondent therefore urged the court to dismiss the instant petition with costs.
23. The 1st Respondent filed submissions in which he contended that the petition herein raised similar issues which had been heard and determined by a competent court in Kericho Chief Magistrates Court



- Election Petition no E001 of 2022 and reiterated that the substantive law on *res judicata* is found in section 7 of the [Civil Procedure Act](#) cap 21 Laws of Kenya which provides that; "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."
24. The 1st Respondent contended that the petitioners had initially lodged a complaint to the DCIO Kericho with allegations that the 1st Respondent was an imposter with two police clearance certificates from the National Police Service and two national identity cards, the said complaint was investigated and thrown out by the DCIO having found no evidence to back the allegations. The petitioners subsequently filed an election petition which was thrown out and further that the instant constitutional petition was a clear indication of witch-hunt.
25. The 1st Respondent contended that the petitioners had raised serious allegations of a criminal nature and relied on questionable documents to wit forgeries or mere printouts of unverified and/or uncertified documents as documentary evidence in support of their case, the court could not therefore rely on these documents unless produced by the authors or issuing authorities of the said documents. The 1st Respondent therefore maintained that the allegations contained in the petition were unfounded. The 1st Respondent faulted the petitioners for failing to provide sufficient evidence to support the allegations in the petition and cited the case of [Musyoka v Returning Officer, Independent Electoral and Boundaries Commission, Machakos County & 3 Others](#) (Constitutional Petition E004 of 2021) [2022] KEHC 160 (KLR) (11 February 2022) (Judgement) the honourable G.V Odunga, Judge (as he then was) relied on the case of [John Harun Mwau & 2 others v IEBC & 2 Others](#), Supreme Court Presidential Election Petitions 2 & 4 of 2017, the Supreme Court restated this requirement as follows; "As stated in both Raila 2013 and 2017 decisions, the burden of proof, at all times, lies on a petitioner and generalized claims, without evidence that meets clear threshold, are of no value. The petitioner must supply evidence in support of their claims and this proof must be supplied to the required standard."
26. The 1st Respondent contended that whereas section 27 of the [Civil Procedure Act](#) cap 21 Laws of Kenya clothes the court with the discretion to grant costs and notwithstanding the fact that costs follow the event, the 1st Respondent was adamant that the costs of the suit be borne by the petitioners who had failed to prosecute their frivolous petition to the required standards.
27. I have considered the petition and I have also had an opportunity to examine the proceedings in lower court, and I concur with the 1st Respondent that the instant petition raises issues which were heard and determined by a competent court in Kericho Chief Magistrates Court Election Petition no E001 of 2022 and judgment delivered. In the Supreme Court Case of [Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another](#) [2016] eKLR the Supreme Court observed that whenever the question of *res judicata* is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. I find that the election petition was heard and determined by a duly gazetted Election Court and that the Petitioners had the opportunity to appeal, however, they did not appeal to the High Court and instead filed the instant petition raising similar issues to those heard and determined in the election petition.
28. In the end, I find the petition herein to be lacking in merit. The same is hereby dismissed with costs to the 1st Respondent.



**DELIVERED, SIGNED AND DATED AT KERICHO THIS 23RD DAY OF NOVEMBER 2023.**

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**J.K. SERGON**

**JUDGE**

In the presence of:

C/Assistant - Rutoh

No Appearance for the Parties

