



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 19 OF 2014

**BENSON RIITHO MUREITHI (suing on his behalf
and on behalf of the general public.....PETITIONER**

VERSUS

J. W. WAKHUNGU, CABINET SECRETARY

MINISTRY OF ENVIRONMENT,

WATER AND NATURAL RESOURCES.....1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

Introduction

1. In the petition dated 15th January 2014, the petitioner challenges the constitutionality of the appointment of the Interested Party as the Chairman of the Athi Water Services Board by the 1st respondent for a term of three years vide Gazette Notice No. 115 dated 10th January 2014.
2. The basis of the petition is that the 1st respondent failed to take into consideration the provisions of Article 73 in Chapter 6 of the Constitution when making the said appointment. The petitioner avers that the Interested Party lacks integrity and it is therefore illegal and unconstitutional for him to hold such an office.
3. It is the petitioner's case that the Constitution, the Water Act and the Public Officers Ethics Act require that when making appointments to public office, the person making such appointment should have regard to the educational qualifications, experience, character and integrity of the person proposed for appointment. He avers in his affidavit sworn on 15th January, 2014 that the Interested Party lacks in character and integrity demonstrated by various incidents which are matters of public knowledge.
4. He enumerates such incidents as including an incident on the 5th of April, 2012 in which the

Interested Party allegedly incited members of the public at Umoja area to demonstrate violently against the police, leading to the injury of a police officer; propagating hatred against the Masai Community leading to the killing of three members of that community, which incident led to his arrest on the 27th of September, 2012 where he was charged with incitement to violence and hate speech; and that the Interested Party was involved in the fraudulent transfer of certain parcels of land belonging to the petitioner's deceased father, whose estate the petitioner is administrator, a matter which is now the subject of litigation in High Court ELC No. 7 of 2012. The petitioner therefore prays for orders as follows:

- a. *That a declaration be issued under Article 73 of the Constitution as read with the Fifth and Sixth Schedule to the Constitution, that the 1st Respondent is under a duty to have regard to personal integrity, character, competence and suitability when making the appointment of the chairman of the Athi Water Services Board.*
- b. *That a declaration be issued that the 1st Respondent has failed to have regard to personal integrity, character, competence and suitability when making the appointment of the chairman of the Athi Water Services Board.*
- c. *That a declaration be issued that the 1st Respondent's failure and omission to have regard to personal integrity, character, competence and suitability when making the appointment of the chairman of the Athi Water Services Board is illegal and unconstitutional.*
- d. *That a declaration be issued to the 1st Respondent to ensure that regard is had to personal integrity, character, competence and suitability when making the appointment of the chairman of the Athi Water Services Board. The appointment of Ferdinand Waititu is therefore null and void ab initio and ought to be struck down so as to pave way for the genuine and constitutional appointment of a candidate.*
- e. *That an Order do issue directing the 1st Respondent and 2nd Respondent to take steps to ensure that regard to personal integrity, character, competence and suitability when making the appointment of the chairman of the Athi Water Services Board.*
- f. *That the costs of, and incidental to, this Petition be awarded to the Petitioner against the Respondents.*
- g. *That this Honourable Court be pleased to grant such further Order or Orders as may be just and appropriate.*

The Response

5. The petition is opposed. The respondents have filed Grounds of Opposition dated 29th January 2014, a Replying Affidavit sworn by **Mr. James Teko Lopoyetum**, the Principal Secretary of the 1st respondent, on 3rd of February 2014, and skeleton submissions dated 4th February, 2014.
6. The respondents contend that the issues of the Interested Party's integrity raised by the petitioner should not be heard and determined by this Court as the first point of reference as there are procedures and guidelines which exist and have not been applied in determining the integrity of the Interested Party. They further argue that the petition is unmeritorious, vexatious, amounts to an *argumentum ad hominem* and offends the doctrine of *sub judice*. The respondents further aver that the 1st respondent appointed the Interested Party in accordance with the requisite law, and prays that the petition be dismissed to enable the Interested Party continue his service to the public
7. On his part, the Interested Party has filed Grounds of Opposition dated 4th February, 2014, a replying affidavit sworn by the Interested Party on 17th January, 2014, and a supplementary affidavit sworn on 28th January 2014, as well as written submissions dated 28th January 2014.
8. The Interested Party denies the allegations of lack of integrity made against him by the petitioner and contends that he is competent to hold the Chairmanship of the Athi Water and Services Board. He agrees with the respondents that the petition should be dismissed with costs.

The Submissions

The Petitioner's Submissions

9. Counsel for the petitioner, Mr. Mwangi, submitted that the Court has jurisdiction to hear the petition as Article 165(3)(d)(ii) of the Constitution grants such jurisdiction; that what the 1st respondent has done in appointing the Interested Party is in exercise of a power under the Water Act 2002; and that the Court has power to interrogate whether the 1st respondent's act was done in accordance with the Constitution and the law.
10. Counsel argued that the petitioner had *locus standi* to bring the petition, placing reliance on the provisions of Article 3 of the Constitution which obliges every person to obey and abide by the Constitution; that among the provisions of the Constitution are the national values and principles of governance under Article 10, particularly the rule of law; and the question raised in this petition was whether the rule of law was followed in appointing the Interested Party; and that Article 259(2)(c) of the Constitution gives every person the right to enforce observance of human rights and of the Constitution.
11. Counsel submitted that in determining this matter, the Court should be guided by the principle of harmonization, so that all the provisions relating to appointment of public servants should be read together; by the principle of purposive interpretation, placing reliance on **S v Acheson (1991) (2) SA 805 (NM)** and that the values that underline the Constitution must permeate every decision.
12. Mr Mwangi further submitted that the petitioner's case was not that the Court should try the Interested Party. Rather, his contention was that relevant factors were not considered in appointing the Interested Party as Chairman of the Board of Athi Water Services; that had they been considered, the appointing authority would have come up with a different decision. According to Mr. Mwangi, one of those factors was Chapter Six of the Constitution, specifically Article 73(1) (a).
13. The petitioner submitted that public power is exercised in trust for the public, and individuals dignify the office and promote public confidence in the office; that the appointing authority must pay regard to the competence, integrity and suitability of the person; and that in making the appointment of the Interested Party, the 1st respondent did not consider the factors required under Article 73. Reliance in this regard was placed on the decision of the Court in **Democratic Alliance of South Africa –vs- President of South Africa and Others Case No 263 of 2011** and **South African Municipal Workers Union –vs- Merafong City Local Municipality and Others Case No. J 1021/21**. Counsel contended that the latter case was relevant as the appointment of the subject of that case was annulled because the appointing authority did not consider an auditor's report imputing that the subject had improperly dealt with public funds.
14. Counsel argued that since the Water Act was enacted before the Constitution, it required to be read, in accordance with section 7 of the Sixth Schedule to the Constitution, in a manner that brings it into conformity with the Constitution.
15. With regard to the matters that, in the petitioner's view, rendered the Interested Party unsuitable to hold public office, the petitioner referred to the proceedings and pleadings in **Milimani High Court ELC No 7 of 2012 Benson Riitho Mureithi vs George Ogalo Oner & Others** in which the Interested Party is an interested party; allegations are made that he has acquired illegally property belonging to the petitioner's father in which the petitioner is the administrator; that there are contempt proceedings pending against the Interested Party for violating court orders in ELC 7/2012, and it was necessary for the Cabinet Secretary to inquire whether the Interested Party was averse to the rule of law.
16. Further, the petitioner alleged that there are allegations made that the Interested Party has acquired public land unlawfully; that there are newspaper reports showing the Interested Party in acts that render him unsuitable for public office; that there are also criminal charges for incitement to and

causing violence as well as hate speech; and that inquiry into hate speech and incitement to violence was necessary because the Board the Interested Party was to chair manages the water of Athi River which runs through several counties in which the Masai and Kamba people are resident, and the question arises as to how the Interested Party will carry out his mandate and whether he will be biased against the said communities. Counsel submitted therefore that the Cabinet Secretary should have made an inquiry about the suitability of the Interested Party before appointing him Chairman of the Athi Water Services Board.

17. The petitioner asked the court to annul the appointment of the Interested Party and directs the Cabinet Secretary to take the factors under Article 73 into account and demonstrate to the public that the petitioner is the most suitable person for the office.

The Respondents' Submissions

18. Learned State Council, Mr. Opondo, submitted on behalf of the respondents that the petition must fail as it is in itself unconstitutional; that Article 79 of the Constitution sets out the procedure for enforcement of Chapter six; and that this Court has no jurisdiction to hear matters regarding the integrity of a state officer as that would be to usurp the powers of a constitutional commission.

19. Counsel contended that the legislations contemplated under Article 79 is in place in the form of the Ethics and Anti-corruption Commission Act 2011 which established the Ethics and Anti-corruption Commission (the Commission); that the Leadership and Integrity Act 2012 had also been enacted; that Chapter 6 of the Constitution on leadership and integrity was crafted to apply to state officers as defined under article 260; that the Interested Party is a public officer to whom Chapter 6 applies by virtue of section 52 of the Leadership and Integrity Act which is the legislation contemplated by Article 80(c).

20. According to the respondents, this Court has no jurisdiction to hear this matter because section 12 of the Leadership and Integrity Act provides for the procedure and mechanism for enforcing Chapter 6; and that the relevant body under section 42 of the said Act is the Ethics and Anti-Corruption Commission. Counsel relied in this regard on the decision of the Court in **Michael Wachira Nderitu and 3 Others vs Mary Wambui Munene & 2 Others High Court Petition No 529 of 2012** and submitted that there was no evidence tendered before the Court that the petitioner has invoked the provisions of the said Act.

21. To the petitioner's argument that it was incumbent on the Cabinet Secretary to inquire about the integrity of the Interested Party, Mr. Opondo contended that such inquiry was not the role of the Cabinet Secretary but of the Commission, and that if the petitioner had any evidence that the Interested Party lacks integrity, he should have presented such evidence to the Commission; and if the Cabinet Secretary had ignored the advice of the Commission, that would have raised serious constitutional issues. While conceding that no-one had any inkling with regard to who was going to be appointed to the Athi Water Services Board, Mr Opondo nonetheless argued that the petitioner had an opportunity to raise the issue with the Commission.

22. Counsel argued further that the petition offends the rules of *sub-judice* as there are other pending cases involving the Interested Party which should be allowed to proceed to their conclusion as addressing them would be violating the doctrine of *sub-judice*.

23. The respondents asked that the petition be dismissed, arguing that if there are reasons why the Interested Party should not take up the position of Chairman of the Board of the Athi Water Services, they should be presented to the Ethics and Anti-Corruption Commission.

Submissions by the Interested Party

24. In his submissions on behalf of the Interested Party, Learned Counsel, Mr. Kinyanjui raised several grounds in opposition to the petition. The first related to the justiciability of the

- petitioner's claim against the Interested Party. Counsel contended that although the petitioner was allowed to accord the claim with the presence of the Interested Party, he did not. There was therefore only one core order sought with reference to the appointment of the Interested Party that is No 5 in the prayers to the petition. The others seek declarations, costs, and an omnibus plea for the interactions of the court; that a party is bound by his pleadings and the Court cannot venture into the arena of litigation to enable the petitioner panel beat his case. He argued therefore that the petition must fail as it is couched in a prospective manner directed at the respondent; and that it is a plea for a future direction and does not relate to the appointment of the Interested Party; and that the mandate of the Court is to inquire whether, there are constitutional violations of a specific character, as it did not have an advisory capacity.
25. Mr. Kinyanjui agreed substantially with the submissions of Counsel for the respondent with regard to the jurisdiction of the Court. He differed, however, in his view in that he contended that the public entity contemplated under section 42 of the Leadership and Integrity Act is the Cabinet Secretary, not the Commission. In his view, the petitioner has not shown that section 4 and 5 of the Leadership and Integrity Act applies; that if the public entity fails to act as provided under section 4(5) of the Leadership and Integrity Act, then the Commission is mandated to take up the matter and raise it before the Court. It was the Interested Party's submission that the petitioner had rushed to Court in disregard of the law; that the Commission has the sole mandate to execute the provisions of Chapter 6 of the Constitution; and that the petitioner cannot be allowed to usurp this role.
26. According to the Interested Party, the issues that the petitioner raises should have been lodged with the Cabinet Secretary who has the mandate to suspend the Interested Party pending investigations, and who would refer the matter to the Commission for inquiry; and the Commission would follow its mandate under Chapter 6. Mr. Kinyanjui contended that that if the Cabinet Secretary failed to investigate, the Commission would then come to Court under section 4 of the Leadership and Integrity Act and seek orders to compel the Cabinet Secretary to comply. He submitted therefore that the hands of the Court are tied by Article 79 as read with section 4(5) of the Leadership and Integrity Act.
27. Counsel supported the submissions by the respondent with regard to the issue of sub-judice. It was his contention that there is a danger of using the allegations of fraud made against the Interested Party and making a declaration that would otherwise not be made if the allegations were exhaustively canvassed. He referred to the ruling of the Court in **Benson Ritho Muriithi –vs- George Ogalo Oner & Others HC ELC No 7 of 2012** in which it was indicated that the allegations of fraud were still pending before the said Court, arguing that roping in of those matters as constitutional issues before this Court violates the sub-judice rule, which in turn undermines the Interested Party's right to a fair trial under Article 25(c). Counsel contended that the Interested Party was being cast in the light of a quasi – criminal and as being in contempt of Court; that he had refuted the petitioner's allegations in his replying affidavit, and the petitioner had not contradicted his averments; and that he has already assumed office as the Chair of the Athi Water Company and executed his functions.
28. Mr. Kinyanjui submitted that the Court lacks jurisdiction, to determine the matter, placing reliance on the decision of the Court in **International Centre for Policy and Conflict & 4 Others v Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012** for the proposition that the jurisdiction of the High Court does not lie where the Constitution has laid down the procedure for dealing with an issue, and the presumption of innocence applies.
29. It was also Counsel's contention, in reliance on the case of **Luka Angaya Lubwayo Vs Gerald Otieno Kajwang High Court Petition No 120 of 2013**, that even a criminal conviction was not a bar to a public office appointment.

Rejoinder

30. Mr. Mwangi countered the submissions in opposition to the petition by relying on Article 260 of the Constitution under which a public officer is interpreted to mean a state office or any other person holding a public office, submitting that there was no distinction between the two. However, with regard to the application of the Leadership and Integrity Act and the Ethics and Anti-Corruption Act, Counsel contended that the procedure provided in the Leadership and Integrity Act and the Ethics and Anti-Corruption Act apply to an individual who is already serving as a public officer. He contended that the petitioner's case is whether the Minister considered Chapter 6 in making the appointment of the Interested Party, which she was bound to do, and not whether the Interested Party has served in accordance with the provisions of Chapter 6.
31. Mr. Mwangi submitted that the procedures under the Ethics and Anti-corruption Act and the Leadership and Integrity Act would apply if the conduct of the Interested Party while serving in office was being interrogated; but that there is no provision in the two Acts for interrogating whether an act done under the Act has been done in accordance with the Constitution; nor for quashing the Gazette Notice appointing the Interested Party; or for declarations annulling an act done under the Constitution.
32. Counsel distinguished the case of **Michael Wachira Nderitu and 2 Others vs Mary Wambui Munene & 2 Others (supra)** on the basis that the circumstances and the applicable law were very different. While the petitioner in this case could not have anticipated the appointment of the Interested Party as admitted by Counsel for the respondents and only learnt of it upon publication of the Gazette Notice, in the **Michael Wachira Nderitu** case, the issue related to the suitability of a candidate for elective office; there was an opportunity of 3 months before the elections for a party to follow the procedure set out in the Ethics and Anti-Corruption Act; the Elections Act required a prior inquiry which the Water Act under which the Interested Party was appointed did not; and the Water Act must be construed in a manner that brings it into conformity with Chapter 6 of the Constitution.
33. To the contention that the Interested Party had already assumed office, the petitioner's response was that such assumption of office was not a bar to interrogating the issue; that a public officer must also take the oath of office, and before doing so he or she could not be said to have assumed office, relying in this regard on **Judicial Service Commission –vs- Speaker of the National Assembly High Court Petition No. 518 of 2013** in which the Court restrained members of a Tribunal appointed by the President from taking the oath of office.
34. Counsel concluded that it was the duty of the Interested Party to tell the Court that he has a valid defence to the cases facing him, which he had not; that the Court seized of ELC No. 7 of 2012 has determined that there is a prima facie case against him; and that he has not demonstrated that the allegations of lack of integrity are far-fetched. He relied on **Luka Angaya Lubwayo –vs- Gerald Otieno Kajwang (supra)** in which Lenaola J, considered similar circumstances where the respondent had been tried under the Advocates Act. Counsel submitted that while the respondent was cleared, it was because he had been tried, disciplined and struck off the role; and then had been re-instated. It was Counsel's contention that the Court had in that decision observed that if the matters against the respondent had been subsisting, he would have had unresolved issues and therefore would have been unfit to serve.

Issues for Determination

35. The petitioner contends that the 1st respondent failed to consider the provisions of the Constitution contained in Chapter 6 with regard to the competence, suitability and integrity of the Interested Party before appointing him as the Chairman of the Athi Water Services Board. The respondents and the Interested Party argue that this Court has no jurisdiction to deal with this matter as there is a procedure provided by the Leadership and Integrity Act which should be followed before a party can approach this Court; and that it is not the petitioner who has a right to approach the Court but the Ethics and Anti-Corruption Commission. In addition, it is contended for the Interested Party that the petition before the Court raises issues that are the subject of proceedings before other

courts, and this petition therefore breaches his right to a fair hearing.

36. It is the view of this Court, upon consideration of the pleadings and submissions of the parties, that the petition raises three main issues for determination:
- i. *Whether the Court has jurisdiction to deal with the issues raised in the petition;*
 - ii. *Whether the petitioner has the locus standi to lodge this petition;*
 - iii. *Whether the 1st respondent was under an obligation to consider the provisions of Chapter 6 of the Constitution; and finally,*
 - iv. *What reliefs if any to grant in the circumstances of this case.*

Analysis and Determination

Jurisdiction

37. I begin by addressing the issue of jurisdiction raised by the respondents and the Interested Party. As the Court of Appeal observed in the case of **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1:**

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

38. The Supreme Court expressed itself with regard to jurisdiction in the case of **Samuel Kamau Macharia v. Kenya Commercial Bank and Two Others, Civ. Appl. No. 2 of 2011**, as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

39. The petitioner contends that **Article 165 (3) (d)** of the Constitution grants the High Court jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of whether anything said to be done under the authority of the Constitution or of any law is inconsistent with the Constitution. On their part, the respondents take the position that the issues raised by the petitioner regarding the integrity of the Interested Party do not fall within the jurisdiction of this Court; and that there are procedures provided by law which the petitioner has not invoked before coming to this Court.
40. The respondents allege that issues of integrity fall for determination under the provisions of the **Leadership and Integrity Act** and **The Ethics and the Anti-Corruption Commission Act**. Counsel for the respondents has called in aid Article 79 of the Constitution which provides for the establishment of the Ethics and Anti-Corruption Commission and the case of **Michael Wachira Nderitu & Others v Mary Wambui Munene & Others [2013] eKLR** for the proposition that where mechanisms and procedures have been established by statute, in this case the Leadership and Integrity Act and the Ethics and Anti-corruption Commission Act, to address questions touching on the integrity of a public officer, the Court has no jurisdiction to deal with the matter.
41. On his part, the Interested Party questions the jurisdiction of the Court on two fronts. First, he contends that the petition fails to raise instances of constitutional violation warranting the intervention of the Court, charging that the prayers sought are advisory in nature and thus fall outside the jurisdiction of this Court. Like the respondents, the Interested Party argues, further, that the issues raised in this petition fall for determination under the provisions of the Leadership and Integrity Act and the Ethics and Anti-corruption Commission Act; that the petitioner should have made a complaint to the 1st respondent who would have referred the matter to the Commission, and if the 1st respondent failed to Act on the recommendations of the Commission,

then the Commission should have come to Court pursuant to the provisions of section 4(5) of the Leadership and Integrity Act.

42. The jurisdiction of the High Court is set out under **Article 165(3)** in the following terms:-

“(3) Subject to clause (5), the High Court shall have—

a. unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) 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...

43. There is, I believe, no serious dispute with regard to the unlimited jurisdiction of the Court as provided under the above Article, which gives the High Court jurisdiction to hear and determine the issues raised in this petition touching on the integrity of the Interested Party. The petitioner challenges the exercise of powers granted under the Water Act, 2002 by the 1st respondent. He questions the manner of exercise of those powers in the appointment of the Interested Party, alleging that they have been exercised in violation of the provisions of Chapter 6, specifically Article 73, of the Constitution. The acts of the 1st respondent are said to be exercised under statute, and they must meet constitutional muster as provided under Article 2 of the Constitution. As was observed by the Court in the case of **International Centre for Policy and Conflict and Others –vs- Hon. Uhuru Muigai Kenyatta & Others (supra)**:

105. “All the parties in this petition acknowledge the High Court’s unlimited jurisdiction under Article 165 (3) (a) of the Constitution. This unlimited original jurisdiction however, cannot be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by the petitioners. See Speaker of National Assembly vs Njenga Karume [2008] 1 KLR 425, which held that:

“In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

44. Having come to the conclusion that the High Court has unlimited jurisdiction and can deal with the issues raised in the petition, two issues then arise. First, whether there are other procedures and

mechanism provided by law that would require that this Court does not exercise its jurisdiction as provided under the Constitution in order to allow the operation of the procedures and mechanisms provided in legislation.

45. The respondents and the Interested Party allege that there are such mechanisms and procedures, provided for in the Leadership and Integrity Act and the Ethics and Anti-corruption Commission Act. They rely in this regard on sections 4, 42 and 52 of the Leadership and Integrity Act, and section 12 of the Ethics and Anti-corruption Commission Act.

46. Section 11 of the Ethics and Anti-Corruption Commission Act contains what are described in the headnote as **Additional functions of the Commission** and provides as follows:

1. ***“In addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—***

(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 anticorruption;

(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 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 Act, 2003 (No. 3 of 2003), 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.

(2) Any person who contravenes subsection (1)(i) commits an offence.

(3) The Commission may cooperate and collaborate with other State organs and agencies in the prevention and investigation for corruption...

47. Section 12 of the Act is headed “**General principles**” and states as follows:

“In fulfilling its mandate, the Commission shall, in addition to the values and principles under Article 10 of the Constitution, observe the following principles—

- (a) accommodate the diversity of Kenyan people;***
- (b) impartiality and gender equity; and***
- (c) the rules of natural justice.”***

48. The respondents and Interested Party also place reliance on the **Leadership and Integrity Act**, specifically sections 4 and 42 thereof. I begin with Section 3 titled “**Guiding values, principles and requirements**” which provides as follows:

(1) The primary purpose of this Act is to ensure that State officers respect the values, principles and requirements of the Constitution.

(2) A State officer shall respect the values, principles and the requirements of the Constitution, including—

(a) the national values and principles provided for under Article 10 of the Constitution;

(b) the rights and fundamental freedoms provided for under Chapter Four of the Constitution;

(c) the responsibilities of leadership provided for under Article 73 of the Constitution;

(d) the principles governing the conduct of State officers provided for under Article 75 of the Constitution;

(e) the educational, ethical and moral requirements in accordance with Articles 99(1)(b) and 193(1)(b) of the Constitution;

(f) in the case of County governments, the objectives of devolution provided for under Article 174 of the Constitution; and

(g) in so far as is relevant, the values and principles of Public Service as provided for under Article 232 of the Constitution.

(3) Nothing in this Act shall be construed as in any way diminishing or derogating from the values and principles under subsection (2).

49. With regard to the implementation of the Act, section 4 provides as follows:

“(1) Every person has the responsibility of implementing the provisions of this Act to the extent required by this Act.

(2) The Commission is responsible for overseeing and enforcing the implementation of this Act.

(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. (Emphasis added)

50. At section 42, the Act provides with regard to the lodging of complaints and investigations, as follows:

(1) A person who alleges that a State officer has committed a breach of the Code, may lodge a complaint with the relevant public entity and the public entity shall register and inquire into the complaint.

(2) A public entity may authorize any of its officers to inquire into a complaint on its behalf and determine whether a State officer has contravened the Code.

(3) An investigation may be made at the instance of a public entity.

(4) A State officer being investigated under this section shall be informed by the investigating authority, of the complaint made against that State officer and shall be given a reasonable opportunity to make a representation relating to the issue, before the investigation is concluded.

(5) A person who has lodged a complaint against a State officer shall be entitled to be informed of any action taken or to be taken in respect of the complaint and shall be afforded a hearing. Where an investigation under this section is initiated while the State officer is in office, it may be continued even after the person under investigation has ceased to be a State officer.

(7) Subject to the Constitution and any regulations for the enforcement of the Code made under this Act, a State officer may be suspended from office pending the investigation and determination of allegations made against that State officer where such suspension is considered necessary.

(8) The Commission shall prescribe disciplinary mechanisms and procedures to be followed in the event of contravention of the Code, and those mechanisms and procedures shall comply with Article 47 of the Constitution or any other applicable written law for the time being in force.

(9) The public entity or an authorized officer may take disciplinary action against a State officer serving in the public entity.

51. It is also worth mentioning the definition of a public entity under the interpretations section contained at section 2 of the Act as follows:

“public entity” means—

(a) the Government, including the National or County Government, or any department, State organ, agency, service or undertaking of the National or County Government;

(b) the National Assembly or the Parliamentary Service Commission;

(c) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

(d) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition; and (e) statutory public bodies;

52. The section defines a “public officer” as having the meaning assigned to it under Article 260 of the Constitution. At section 52, the Act states that **“pursuant to Article 80(c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 shall apply to all public officers as if they were State officers.”**

53. I have deliberately set out the provisions of the two Acts relied upon by the respondents and the Interested Party and considered their provisions against the constitutional provisions that confer jurisdiction on this Court. It appears to me that there is nothing in the said provisions that contains a mechanism or procedure for dealing with issues of integrity as contemplated under Chapter 6 of the Constitution with regard to the question whether a person slated for appointment as a public officer meets the constitutional threshold set by Chapter 6 of the Constitution.

54. What we have in the above provisions is a system for ensuring observance of the Code of Ethics for public and state officers who are in office; with its reach extending to investigation of state officers after they leave office. The two statutes do not, however, provide a procedure or mechanism under which a person who has concerns about the suitability of a person proposed for appointment to public office can be examined.

55. The situation is thus clearly unlike that obtaining with regard to persons seeking elective office, where the Independent Electoral and Boundaries Commission has a very clear constitutional and legislative mandate with regard to determining the eligibility of a person intending to vie for elective office as the Court found in the case of **Michael Wachira Nderitu and 3 Others vs Mary Wambui Munene (supra)**.

56. It is indeed worth observing that the cases in which the High Court has recently held that it could not exercise its jurisdiction with regard to suitability for office for reasons of integrity because there was a mechanism provided related to elective office—see **International Centre for Policy and Conflict –vs- The Attorney General and Michael Wachira Nderitu –vs- Mary Wambui Munene (supra)**. Code. In the **Otieno Kajwang** case which was also election related, the Court exercised jurisdiction to hear a matter pertaining to the integrity of the respondent because it found that the Independent Electoral and Boundaries Commission (IEBC), which had the mandate to deal with the issue, had failed to exercise its mandate.

57. In the present case, as is evident from the provisions of the law set out in extenso above, I can find no mechanism provided by law for addressing the issues raised by the petitioner. Consequently, I am persuaded that in the circumstances of this case, the Court can properly inquire into the issue regarding the propriety of the appointment of the Interested Party as the Chairman of the Athi Water Services Board.

Locus Standi

58. The second argument raised against this petition by the respondents and Interested Party is that the petitioner has no locus to bring the petition and, according to the Interested Party, since the Interested Party has already assumed office as the Chairman of the Athi Water Services Board, the Court has no jurisdiction to deal with the issue. Both these contentions are, I believe, easily

disposed of.
59. With regard to the *locus standi* of the petitioner, Article 258 of the Constitution provides as follows:

258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a)...;

(b)...;

(c) a person acting in the public interest; or

(d) ...

60. The petitioner contends that the Constitution has been contravened by the 1st respondent through the appointment of the Interested Party who does not meet the leadership and integrity criteria set out in Chapter 6 of the Constitution. He thus has the right to challenge the constitutionality of the appointment of the Interested Party, both as a citizen in the public interest, but also as one who alleges to have been personally affected by the acts of the Interested Party whom he alleges lacks integrity.

Assumption of Office

61. The Interested Party contends that he has already assumed office as Chairman of the Athi Water Services Board and therefore the issue is beyond the reach of the Court. It is not clear from the material before the Court whether or not the Interested Party has assumed office as he alleges. However, as correctly argued by the petitioner in reliance on the case of **Federation of Women Lawyers–(FIDA – K) & Others -vs- the Attorney General & Anor, High Court Petition Number 102 of 2011**, the fact that a person has assumed a particular office does not put him or her beyond the reach of the Court. In the FIDA-K case, the three-judge Bench (Mwera, Warsame and Mwilu, JJ, as they then were), when dealing with the issue of appointments to various state offices which were alleged to have been made in contravention of the Constitution, had this to say:

“If the process of the appointment is unconstitutional, wrong, unprocedural and illegal, it cannot lie for the Respondents to say that the process is complete and this Court has no Jurisdiction to address the grievance raised by the petitioners. In our view, even if the five appointees have been sworn in, this Court has jurisdiction to entertain and deal with the matter.”

62. The Court finds therefore that the fact that the Interested Party may have assumed office as Chairman of the Athi Water Services Board is no bar to the exercise of the jurisdiction of the Court.

Whether Appointment was in Accordance with the Constitution

63. The third issue for consideration in this matter, and indeed the core issue that the petition raises, is whether the 1st respondent was under an obligation to consider the provisions of Chapter 6 of the Constitution in making the appointment to the Athi Water Services Board; and as corollaries, whether she did consider the said provisions; and if she did not, whether the appointment of the Interested Party was in accordance with the Constitution and the **Water Act, 2002**. The petitioner contends that while the power of the 1st respondent to appoint the Chairman of the Board of Athi

Water Services is derived from section 51 of the Act, the Constitution of Kenya contains, at Article 73 (2) thereof, the pre-requisites for such appointments.

64. The petitioner also relies on the provisions of Section 22 of the Public Officers Ethics Act and Rule 2 of the First Schedule to the Water Act of 2002. He contends that these provisions require that the guiding principles of leadership and integrity include selection on the basis of personal integrity, competence and suitability, which he alleges the Interested Party lacks, and he should therefore not be allowed to hold a public office.

65. On his part, the Interested Party contends that the petition is actuated by malice, is based on extraneous reasons, and is intended to further the petitioner's claim in **ELC No. 7 of 2012**. He argues, further, that no evidence has been provided to prove the allegations made that the Interested Party uttered words amounting to hate speech that led to the deaths of two people; that the present proceedings violate the *sub judice* rule and are likely to lead to a violation of the Interested Party's rights under Article 25 and 50 of the Constitution. Reliance was placed on the decision of Lenaola J in the case of **Luka Angaiya Lubwayo & Another –vs- Hon. Gerald Otieno Kajwang' & Another (supra)** where the respondent had been found guilty of professional misconduct by the Law Society of Kenya yet the Court dismissed the allegations of breaching Chapter 6 of the Constitution.

66. As I understand it, the petitioner's case in this matter is not that the Court should find the Interested Party unsuitable to serve as the Chairman of the Athi Water Services Board. Rather, his claim is directed at the 1st respondent: that in exercise of powers under the Water Act 2002, the Cabinet Secretary failed to consider the provisions of the Constitution and therefore appointed a person who fell short of the constitutional criteria, and the appointment should therefore be declared null and void.

67. In considering this issue therefore, it must be borne in mind that the Court is not making any judgment one way or the other with regard to the character, integrity or suitability of the Interested Party. What the Court is concerned with is whether the 1st respondent, in appointing him Chairman, took into consideration what she was required to take into account by the Constitution.

68. Article 2 of the Constitution provides at sub-article (1) and (2) that:

2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution.

69. At Article 10, the Constitution sets out the national values and principles of governance as follows:

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 marginalised;

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

(d) sustainable development.

70. At Article 73, the Constitution states as follows with regard to leadership and integrity:

“(1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.”

71. Finally, section 7 in the Transitional Provisions in Schedule 6 of the Constitution requires that all law enacted prior to the promulgation of the Constitution should be construed with the alterations, adaptations, exceptions and qualifications necessary to bring it into conformity with the Constitution.

72. At the hearing of this matter, Counsel for the respondents conceded that there had been no opportunity for the petitioner or anyone else to raise any concerns about the suitability or otherwise of the Interested Party to hold the office that he was appointed to. There was also

nothing presented by the respondents that demonstrated that any attempt was made by the 1st respondent to establish the integrity or suitability of the Interested Party through a process that allowed public participation in his appointment.

73. In the Replying Affidavit of **Mr. James Teko Lopoyetum**, the Principal Secretary in the Ministry of Environment, Water and Natural Resources, it is deponed, among other things, that the petitioner attacks the character of the Interested Party instead of showing how his appointment is unconstitutional; that he did not raise the issue of the Interested Party's integrity during the 2013 general elections when the Interested Party vied for the more demanding post of Governor, and that the Interested Party had been given a clean bill of health by all the relevant authorities, including the Ethics and Anti-corruption Commission. At paragraph 20-23, Mr. Lopoyetum concedes that there are pending cases against the Interested Party when he depones as follows:

20. THAT as can be gleaned from paragraph 5 of the Petitioner's Supplementary Affidavit dated the 30th day of January 2014; the Petitioner has clearly stated that there are pending proceedings in court.

21. THAT I am advised by the State Litigation Counsel on record, which advice I verily believe that this out rightly offends the well-established doctrine of sub judice.

22. THAT I am advised by the State Litigation Counsel on record, which advice I verily believe that it is generally considered inappropriate to comment publicly on cases sub judice, which can be an offence in itself, leading to contempt of court proceedings and further that publicly discussing cases sub judice may constitute interference with due process.

23. THAT it is in the interest of justice that the pending cases in other courts against the Interested Party are left to go through due process to their full and final determination.

74. Thus, other than the strong defence of the Interested Party and the condemnation of the petitioner for what the deponent describes at paragraph 24 of his affidavit as the petitioner's personal vendetta against the Interested Party, there is nothing in Mr. Lopoyetum's affidavit that indicates that the 1st respondent considered any of the constitutional provisions with regard to appointments to public office which I have set out above. Neither, it would seem, did the 1st respondent address her mind to whether or not the Interested Party, who on the 1st respondent's own admission, has pending cases in Court, is a suitable person for appointment to the public office of Chairman of the Athi Water Services Board.

75. The Interested Party relies on the decision of Lenaola J in **Luka Angaya Lubwayo –vs-Gerald Otieno Kajwang (supra)** in which the suitability of the respondent to vie for an elective office was in question. Counsel for the Interested Party cites the words of Lenaola J in that case where he observes as follows with regard to Article 99(2) of the Constitution:

“...it must be noted that a conviction per se is not a disqualification for anyone running for a state or public office.”

76. The Court in that case did observe, however, with respect to the respondent, that he had been disbarred, but had ultimately been re-instated. In the words of Lenaola J:

“From a concise reading of the definition of integrity as espoused above and as can be seen from the Trusted Society Case (Supra) definition, a person would be said to lack integrity if he has unresolved issues. To my mind, the issues concerning the 1st Respondent have been resolved. He has faced the Law Society of Kenya's

Disciplinary Committee, and while it is not disputed that he was struck off the Roll of Advocates, he has also been reinstated to the same. The Petitioner's position that the process has not been finalised cannot be true. He has been reinstated to the Roll of Advocates, although with certain conditions and it is thus clear to me that the issues revolving around him are all now settled.

77. It would appear from the material before the Court that the question of the Interested Party's suitability for public office was not addressed in accordance with the requirements of the Constitution. The Cabinet Secretary, the 1st respondent, had power of appointment under section 51 of the Water Act which provides that:

51. The Minister may, by notice published in the Gazette,--

(a) name a water services board proposed to be appointed under this section: and

(b) specify the members' appointed to it and their respective qualifications.

78. At section 2 of the First Schedule to the Act, it is provided that those proposed for appointment as Board members of Water Services Boards must be appointed on the basis of educational qualifications, experience, character and integrity of potential candidates for membership. Similar provisions are contained in section 22 of the Public Officers Ethics Act.

79. The 1st respondent, however, had a duty, imposed on her by the people of Kenya, to consider the Interested Party's suitability under the Constitution, and to make the appointment to the Board in accordance with the dictates of the Constitution.

80. What does the Constitution require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10. In **David Kariuki Muigua –vs- Attorney General & Another Petition No. 161 of 2011**, which dealt with an appointment by the Minister for Industrialisation of the Chairman of the Standards Tribunal, the Court observed at Paragraph 13 and 15 as follows:

13. "However, it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of the Constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that

'All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.'

Any appointments under the Standards Act should have been done in conformity with the provisions of the constitution and should have observed the national values and principles.

15. There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of

the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles.”

81. Counsel for the Interested Party argues in the written submissions filed on behalf of the Interested Party that the petitioner has not exhibited a single letter or email of inquiry to the 1st respondent’s office seeking the criteria, suitability or qualifications sought by the 1st respondent in appointing the Interested Party to head the Athi Water Services Board, and he concludes that without such an inquiry, the petitioner demonstrates bad faith.

82. It has been conceded by Counsel for the respondents, however, that no-one knew or had any inkling that the Interested Party was going to be appointed as Chairman of the Water Services Board; and consequently, there was no opportunity for the petitioner or any other person to seek information about the appointment, or raise objections to the appointment, which objections would be expected to be considered by the Minister, and if found to be valid and sufficient to bar the appointment, the intended appointment ought not to be made.

83. It seems to me therefore that the primary responsibility lay on the 1st respondent, and indeed on any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of members of Boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as the Constitution now demands.

84. It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution. As observed by the Court in the case of **International Centre for Policy and Conflict & 4 Others -vs- Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012**

‘On the issue canvassed by the parties on the threshold of integrity required to be met, we note that the purpose of Chapter Six is to set higher standards of integrity for persons seeking to serve as State officers. Integrity is the firm adherence to moral and ethical values in one’s behaviour. Integrity is therefore not only about an individual’s own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to State office be like Caesar’s wife: they must be beyond reproach. ’

85. In **Trusted Society of Human Rights Alliance –vs- The Attorney General and Others, Nairobi High Court Petition No 229 of 2012**, the Court expressed itself with regard to the provisions of Chapter 6 as follows:

“According to Black’s Law Dictionary (2nd Edition), “integrity, as occasionally used in statutes prescribing the qualifications of public officers, trustees etc., means soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts; it is synonymous with “probity,” “honesty,” and “uprightness.”

86. The Court went on to cite with approval the approach taken in the **Democratic Alliance Case v President of the Republic of South Africa (supra)** by the Supreme Court of Appeal of South Africa with regard to the integrity of public officers:

'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.' (Emphasis added)

87. The Court concluded as follows with regard to the constitutional provisions on leadership and integrity:

102. 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. The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice."

103. It follows, therefore, that those organs and officials to whom the authority to select officials to certain State Organs and institutions are delegated have an obligation to ensure that the persons selected for the various positions meet the criteria set out in the Constitution and other legislation for those positions. Where there are allegations that these organs have failed to discharge this obligation, the Court is obligated to step in, when called upon to do so, to investigate whether the process of recruitment and the individuals recruited meet the constitutional requirements. The High Court is the ultimate guardian of the Constitution on behalf of the people of Kenya. Where the people feel that an individual who was appointed to some office does not meet the requirements of

that office, the High Court cannot turn them away simply because the responsibility for that appointment is reserved by the Constitution to the Executive or Legislature. Whereas the appointment is a preserve of the Executive and the right of concurrence is given to Parliament, the enforcement of the Constitution is left to the High Court.” (Emphasis added)

88. I entirely agree with the sentiments of the Court expressed in the words cited above.

89. In the present case, as the respondents tacitly concede, there are serious unresolved questions with regard to the integrity of the Interested Party which do not appear to have been considered by the 1st respondent in making the appointment to the Chairmanship of the Athi Water Services Board. It is the duty of the 1st respondent to consider the issues and, in exercise of the powers vested in her office under section 51 of the Water Act, applied in accordance with the Constitution, make a determination of the suitability of the Interested Party under Chapter 6 of the Constitution.

90. In the premises, this petition succeeds to the extent that the Court finds that the 1st respondent failed to act in accordance with the Constitution, and her appointment of the Interested Party as Chairman of the Athi Water Services Board fell below the standard set by the Constitution.

91. The Interested Party has relied on the words of the Court in the case of **International Centre for Policy and Conflict –vs- Hon. Uhuru Muigai Kenyatta & Others (supra)** where the Court observed as follows at paragraph 137 and 138 of its judgement:

137. In our view, the key question is whether this Court is the right forum, in the first instance, to undertake an assessment of the integrity of persons presenting themselves for public office. The court ideally operates in an environment of competing legal claims founded on evidence. However, in the private sector, the enforcement of general standards of ethical conduct or professional responsibilities are, by their nature, generally collegial exercises, where peers must judge the conduct of those within their own group, profession, or own organization. In the public sector, enforcement of ethics is, to a large extent, similar to the above procedure in the private sector save that the same is regulated by statute. The mechanisms of inquiry would be set out in the parent statute. Such institutions, for example the IEBC and Ethics and Anti-Corruption Commission (EACC) are bestowed with the necessary powers to conduct, inquire and take disciplinary action.

138. “The Court should not descend into that arena of inquiry. Its proper role is to ensure that the inquiry is undertaken to the acceptable standards set by the Constitution. This is what distinguishes the present petitions from the one in the Trusted Society of Human Rights Alliance case (supra). In the Trusted Society case some form of inquiry had been undertaken, and the Court found that despite the said inquiry, there were still unresolved questions about the integrity of the candidate in question. There is no evidence before us of any such inquiry having been undertaken in respect of the 3rd and 4th Respondents’ integrity by the relevant institutions established by statute...”

92. In the present case, the Court has found that no inquiry was made with regard to the suitability of the Interested Party under the Constitution, a responsibility that fell on the 1st respondent under the provisions of the Water Act as read with section 7 of the 6th Schedule to the Constitution. The responsibility still remains to make that inquiry. It is a responsibility that the Court does not deem proper to assume, but should require its proper exercise by the office vested with the authority to exercise it- the 1st respondent.

Conclusion

93. The Court is empowered by the Constitution to make appropriate orders in matters pertaining to the Constitution that arise for determination before it. In the present case, taking all matters into consideration as set out above, the Court issues declarations as follows:

- a. *That the 1st respondent is under a duty to exercise powers under the Water Act, 2002 in accordance with the provisions of Article 2, 10 and Article 73 contained in Chapter 6 of the Constitution when making the appointment of the Chairman of the Athi Water Services Board.*
- b. *That the 1st respondent is under a duty under Article 73 in Chapter 6 of the Constitution read with the Fifth and Sixth Schedule to the Constitution, to have regard to the personal integrity, character, competence and suitability when making the appointment of the Chairman of the Athi Water Services Board.*
- c. *That the 1st respondent has failed to have regard to the personal integrity, character, competence and suitability of the Interested Party when appointing the Interested Party as the chairman of the Athi Water Services Board.*
- d. *That the 1st respondent's failure and omission to have regard to personal integrity, character, competence and suitability when making the appointment of the Chairman of the Athi Water Services Board is unlawful and unconstitutional.*
- e. *That the appointment of the Interested Party as Chairman of the Athi Water Services Board is therefore null and void and is hereby quashed.*

94. I direct that the 1st respondent, in exercise of the powers vested in her office by section 51 of the Water Act 2002, commence the process of appointment of the Chairman of the Athi Water Services Board in accordance with the provisions of Article 73 in Chapter 6 of the Constitution, paying due regard to the personal integrity, character, competence and suitability of the appointee, and ensure that there is in place a mechanism to allow public participation in the process as required under Article 10 of the Constitution.

95. As I close, I emphasise once again that the findings of the Court in this matter are not related to nor are they a commentary on the character or integrity of the Interested Party, or his suitability to hold the Chairmanship of the Athi Water Services Board. They relate to the failure of the 1st respondent to exercise her mandate in accordance with the Constitution, particularly Chapter 6 thereof. It may well be that after a process undertaken in accordance with the Constitution, the Interested Party may emerge the most suitable candidate for the office in question.

96. As this matter raises issues of public interest, there shall be no order as to costs.

Dated Delivered and Signed at Nairobi this 28th day of February 2014

MUMBI NGUGI

JUDGE

Mr. Mwangi instructed by the firm of Rahma Jillo & Co. Advocates for the Petitioner

Mr. Opondo, Litigation Counsel, instructed by the State Law Office for the Respondents

Mr. Kinyanjui instructed by the firm of J Harrison Kinyanjui & Co. Advocates for the Interested Party