



REPUBLIC OF KENYA
 IN THE HIGH COURT OF KENYA AT NAIROBI
 CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 454 OF 2012

BETWEEN

COMMISSION FOR THE IMPLEMENTATION
 OF THE CONSTITUTION.....PETITIONER

VERSUS

PARLIAMENT OF KENYA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION.....1ST INTERESTED PARTY

INUKA KENYA.....2ND INTERESTED PARTY

AND

KATIBA KENYA.....1ST AMICUS CURIAE

TRANSPARENCY INTERNATIONAL.....2ND AMICUS CURIAE

JUDGMENT

Background and Introduction

1. This petition seeks to challenge the constitutionality of the *Leadership and Integrity Act, No. 19 of 2012* on the basis that it falls short of the constitutional threshold required of an integrity and leadership law contemplated under **Article 80** which is part of **Chapter Six** of the Constitution titled, “*Leadership and Integrity*,” in so far as it does not “*establish procedures and mechanisms for the effective administration this Chapter.*”

2. The petitioner is a constitutional Commission established under **Section 5** of the **Sixth Schedule** to the Constitution of Kenya as well as the *Commission for the Implementation of the Constitution Act, Act No. 9 of 2010*. The functions and objects of the Commission for the Implementation of the Constitution (“the CIC”) are as set out in **Section 5(6)** of the **Sixth Schedule** to the Constitution which are to; (a) monitor, facilitate and oversee the development of legislation and administrative procedures

required to implement the Constitution; (b) co-ordinate with the Attorney General and the Kenya Law Reform Commission in preparing for tabling in Parliament, the legislation required to implement this Constitution, (c) report regularly to the Constitutional Implementation Oversight Committee on-(i) progress in the implementation of this Constitution; and (ii) any impediments to its implementation; and (d) to work with each constitutional commission to ensure that the letter and spirit of the Constitution is respected.

3. **Article 80** mandates Parliament to enact legislation on leadership and integrity provides as follows;

80. Parliament shall enact legislation—

(a) establishing procedures and mechanisms for the effective administration of this Chapter;

(b) prescribing the penalties, in addition to the penalties referred to in Article 75, that may be imposed for a contravention of this Chapter;

(c) providing for the application of this Chapter, with the necessary modifications, to public officers; and

(d) making any other provision necessary for ensuring the promotion of the principles of leadership and integrity mentioned in this Chapter, and the enforcement of this Chapter.

3. Pursuant to **Article 80** Parliament enacted the **Leadership and Integrity Act**, (“the Act”) which the President assented to on 27th August 2012 and it came into force on the same day.

4. The petitioner’s grievance is that the Act lacks the constitutional muster because while it appears to clearly set out ethical and moral requirements similar to those set out in **Articles 73** and **74**, it fails to provide mechanisms and procedures for the effective administration of **Chapter Six**. CIC asserts that Parliament diluted and watered down the Bill prepared by the CIC in consultation with stakeholders during the enactment process as a result of which the final product failed to meet the constitutional threshold as contemplated by **Article 80**. The CIC argues that the Act is an attempt by Parliament to subvert the stringent moral and ethical requirements of **Chapter Six**.

The Petitioner’s case

5. The CIC’s case is as set out in its Petition dated the 4th October 2012 as supported by the affidavit sworn by Charles Nyachae, it’s chairman. The petitioner relies on written skeleton submissions dated the 10th December 2012 and 18th December 2012 supported by numerous authorities.

6. The petition seeks the following reliefs from this court;

i. That a declaration be issued under sections 80 and 261(1) of the Constitution as read with the Fifth Schedule to the Constitution, the 1st Respondent is under a duty to enact legislation to provide for, inter alia, mechanisms and procedures for ensuring effective administration of Chapter 6 of the Constitution, within the deadline stipulated in the Fifth Schedule to the Constitution.

ii. That a declaration be issued that the 1st Respondent has failed to enact legislation to provide for mechanisms and procedures for ensuring effective administration of Chapter 6 of the Constitution, within the deadline stipulated in the Fifth Schedule to the Constitution.

iii. That a declaration be issued that the 1st Respondent’s failure and omission to enact legislation to provide for mechanisms and procedures for ensuring effective administration of Chapter 6 of the Constitution, within the deadline stipulated in the Fifth Schedule to the Constitution is illegal and unconstitutional.

iv. That a declaration be issued that the Leadership and Integrity Act, Number 19 of 2012, as enacted, is not that legislation contemplated under Article 80 of the Constitution. The Act passed in purported compliance with the said Article is therefore null and void ab initio and ought to be struck down so as to pave way for the genuine and authentic legislation to be enacted.

v. That an Order do issue directing the 1st Respondent and 2nd Respondent to take steps to ensure that legislation to provide for mechanisms and procedures for ensuring effective administration of Chapter 6 of the Constitution is enacted within a period of thirty(30) days from the date of the Order or within such period as this Honourable Court may Order, and to report the progress thereof to the Chief Justice

vi. That the costs of, and incidental to, this Petition be awarded to the Petitioner against the Respondents

vii. That this Honourable Court be pleased to grant such further Order or Orders as may be just and appropriate.

7. It is the CIC's case that the various constitutional provisions touching on leadership and integrity namely; **Articles 99(2)(h), 193(2)(g) and 194(1)(c)**, which provides for the disqualification of person for running for elective office is the person found to have violated the provisions of **Chapter Six, Article 245(7)(a)** which provides that the Inspector General of Police may be removed for contravention of **Chapter Six** and **Article 251(1)(a)** which provides as a ground of removal of a member of a Commission, contravention of **Chapter Six**. The petitioner emphasized the need for Kenya's leaders to comply with the strict requirements of **Chapter Six**. According to CIC, the Constitution envisaged that one of the mechanisms of ensuring compliance with the **Chapter Six** was to ensure that leaders who do not comply with its provisions either barred from holding public office, or if already holding public office, are removed from such office and therefore the Act as enacted has failed to recognize such enforcement mechanisms.

8. The CIC also took issue with what it describes as the Act's failure to establish procedures and mechanism which would enable Ethics and Anti-Corruption Commission ("the EACC") to enforce compliance with **Chapter Six** as envisaged under **Article 79**.

9. CIC's contends that Parliament disregarded the public views as forwarded to it by Kenyans including civil society groups. The CIC attached various written memoranda to the founding affidavit from civil society groups and other state organs. Among the annexures is a letter dated 8th August 2012 addressed to the chairperson of the Departmental Committee on Justice, Legal and Constitutional Affairs under the heading, "**ADVISORY ON LEADERSHIP AND INTEGRITY BILL, 2012**" In advisory, the CIC voiced various concerns regarding the provisions of the Bill including the fact that, the it failed to provide for, among others, the following;

a. way(s) for the comprehensive administering of the **Chapter Six** as required by **Article 80(a)**.

b. disciplinary mechanisms and penalties as required by **Article 75** and **Article 80(b)**.

c. a mechanism that would allow the EACC to prosecute cases of breach of Chapter Six where the Director of Public Prosecutions refuses to prosecute without good cause as expected by **Article 79**.

10. Mr Regeru, counsel for the petitioner, contended that the court had jurisdiction to determine the matter by dint of **Article 165** arguing that the High court was called upon to assert the supremacy of the Constitution. Mr. Regeru submitted that there were good reasons as to why the provisions on integrity were given prominence saying that this was not accidental. Counsel cited historical context in which this was done in terms of past plunder of public resources, tribalism and corruption. In this respect, the petitioner contended that Parliament has a special responsibility to enact legislation that complied with the Constitution and could be sued as provided **Article 251(5)** and **(6)** to enforce this special obligation. Counsel cited the case of **Trusted Society of Human Rights Alliance v The Attorney General and Others Nairobi Petition No 229 of 2011 [2012] eKLR** where the Court emphasized the place of integrity

and leadership within the new constitutional dispensation.

The Respondents' Case

11. The 1st Respondent opposed on the basis of preliminary objection dated 10th December 2012, grounds of opposition filed on 11th December 2012 and the replying affidavit sworn by Lucy Wanjohi, the second clerk to Assistant to the Public Service Commission and Clerk to the joint committees of Justice and Legal Affairs and the Constitutional Implementation Oversight Committee of the National Assembly (“**the joint committee**”), filed on 17th December 2012. The Party also relied on written skeleton submissions dated 10th December 2012 and Further submissions dated 20th December 2012 and a list of authorities in support.

12. According to counsel appearing for the 1st respondent, Mr Njoroge, there was no justiciable cause and the petition was therefore an abuse of the court process. Counsel further contended that Parliament was not a juristic person and could not be sued as such. The 1st Respondent cited various authorities among them *Goodwill & Trust Investment Ltd and Another v Witt & Bush Ltd*, Nigerian SC 266/2005, *Housing Finance Company of Kenya Ltd v Embakasi Youth Development Project* [2004] 2 KLR 548, *Sietco (Kenya) Ltd v Fortune Commodities Ltd and the Co-operative Bank of Kenya Ltd*, [2005]eKLR and *Owners of Motor Vessel “Lillian S” v Caltex Oil(K) Ltd* [1989] KLR 1.

13. The 1st respondent also opposed the petition on the ground the court lacked the jurisdiction to issue the orders sought and that the remedy, if any, lay under **Article 119(1)** which entitles any person to petition Parliament to enact, amend or repeal any legislation. Mr Njoroge also submitted that the court lacked jurisdiction to entertain the matter under **Article 261** as the legislation had been enacted within the timelines stipulated by the Constitution.

14. Mr Njoroge cautioned that the court to exercise due restraint in dealing with the matter in view of the doctrine of separation of powers. He urged the Court not to overrule or control the function of Parliament as people’s representatives.

15. According to the deposition sworn on behalf of Parliament, the joint committee held joint meetings at which the *Leadership and Integrity Bill, 2012* was considered at length and that during the deliberations, the written submissions by various Kenyans and other legal entities were considered and some agreed to while others were rejected.

16. The 1st respondent rejects the CIC’s contention that Parliament failed to comply with **Article 80(b)** to the extent that it failed to provide for penalties urging that **Part V** of the Act prescribed penalties and further that **Part II** set out a comprehensive general leadership and integrity Code and further that the various sections of the Act generally provided for procedures and mechanisms for the effective administration of **Chapter Six**. According to 1st respondent, the EACC is not powerless as **section 54** of the Act empowers it to make regulations for the better carrying out of the provisions of the Act. Mr Njoroge submitted that that this created a sufficient framework for effective administration of the provisions of **Chapter Six**.

17. It is the 1st respondent’s position that the Act provides sufficient procedures and mechanisms for the effective administration of **Chapter Six** as there are other Acts of Parliament that further deal with the administration of **Chapter Six** such as the *Public Officer Ethics Act* and the *Ethics and Anti-Corruption Commission Act* (“the EACC Act”). In this respect the Act avoids duplication of constitutional roles and replicating provisions already contained in other laws. Regarding the mandate of the EACC, Mr Njoroge rejected the suggestion that the Act robbed it of power adding that powers of prosecution were vested in the DPP under **Article 157** and that Parliament had power, in accordance with **Article 157(2)**, to decide on policy to disperse the prosecutorial powers to the EACC.

18. The 2nd respondent supported the positions advanced by the 1st respondent. Mr. Moimbo, counsel

appearing for the Attorney General, submitted that the power to legislate lay squarely with Parliament as delegated to it by the people under **Article 1**. Accordingly, counsel contended that CIC was purporting to usurp the legislative authority of Parliament. In this respect, Parliament was not bound to accept in its entirety the draft legislation proposed by the CIC. Counsel pointed to **section 5(6)(c)** of the **Sixth Schedule** urging that the CIC reports directly to the Constitutional Implementation Oversight Committee of the National Assembly (“the CIOC”) and that it was therefore subservient to Parliament and it could not therefore ‘bulldoze’ Parliament to pass specific legislation.

The Interested Parties

19. Both EACC and *Inuka Kenya*; the 1st and 2nd Interested Parties respectively filed written submissions in support of CIC’s case. EACC adopted the CIC’s stance that while the Act set out strict ethical and moral requirements, it failed to provide for the consequences of failure to comply with the said requirements and fails to provide procedures and mechanisms which would enable it to enforce compliance with the **Chapter Six** and in this respect it fell short of the constitutional standard set out under **Article 79**.

20. EACC relied on the case of *Trusted Society of Human Rights Alliance v Attorney General and Others (Supra)* to support of the proposition that Kenyans intended that the provisions on integrity and suitability of public offices should not be mere aspirations but have substantive bite. EACC urged the court to uphold the letter and spirit of the Constitution by granting such orders and directions as to enable the Act meet the constitutional threshold contemplated under **Article 80**.

21. *Inuka Kenya* expressed similar sentiments stating that Parliament received input on the Bill from Kenyans through the CIC but that in passing the Act, Parliament disregarded the will of the people by disregarding their input contrary to **Article 118** which requires Parliament to promote and facilitate public access and involvement in the legislative process. While conceding that Parliament enacted the Act within the constitutional timelines, *Inuka Kenya* complained that the Act as passed was essentially a toothless legislation that failed to capture the essence of **Chapter Six**. It particularly took issue with **section 4** of the Act claiming that the effect of the section was to make the EACC ineffective and rob it of its unshared constitutional mandate under **Article 80**.

The Amici Curiae

22. Transparency International (“TI”) and *Katiba Institute (“Katiba”)* appeared as *amici curiae* in the Petition. Both Institutions filed submissions which supported the Petitioner’s case.

23. *Katiba* is a not-for profit organization that supports the full implementation of the Constitution through Constitutional research and conducting public interest litigation on constitutional matters. Transparency International (TI) on the other hand is a non-profit non-state organization registered in Kenya in 1999 with the core objective of fighting corruption and advocating for transparency, accountability and integrity within state business and private affairs.

24. *Katiba* submitted that the Act is invalid as it lacked adequate measures to enforce the integrity provisions. It relied on *Doctors for Life International v The Speaker National Assembly and Others 2006 (6) SA 416 (CC)* in support of the proposition that legislation must conform to the Constitution in both its content and manner in which it was adopted and that failure to comply rendered the legislation invalid. Relying on the *Doctors for Life Case*, *Katiba* submitted that the Act was invalid in as far as it ignored views of Kenyans on effective enforcement hence defeating the essence of public participation.

25. According to the *Katiba*, failure for the Act to comply with both the content under **Article 80** and the general spirit of the Constitution rendered the Act constitutionally invalid. In particular, *Katiba* opined that the procedures and mechanisms for effective administration of the **Chapter Six** in addition to the penalties for violation were not adequately provided. On penalties, it was urged that under **Article 80(b)**, Parliament was duty-bound to write more penalties for violation of the Chapter.

26. Citing what it termed as a lack of seriousness on the part of Parliament to consider the views of the public in enacting the law, *Katiba* cited various excerpts of the *Parliamentary Hansard* of 22nd August 2012 where several members of the National Assembly voiced concerns over the weakened stated of the Bill. *Katiba* noted that despite cabinet opinion, Parliament was the body ultimately responsible for enacting a law that complied with the requirements of the Constitution.

27. Mr Sing'oei, counsel for *Katiba*, faulted the Act's failure to provide for the provisions to guide the removal and determine ineligibility criteria of State officers and contended that the Act failed the constitutional muster as it fell short of the aspirations enunciated in both the **Chapter Six** and the **Preamble** and urged that a purposive interpretation by Parliament would have yielded more robust statutory provisions.

28. These submissions were echoed by *TI*. In its written submissions, *TI* concurred that the Act in its current form would not be able to meet the constitutional standard of an 'effective administration' and 'enforcement' as required of it under **Article 80(a)** and **(d)**. *TI* urged court to make a decisive finding that the Act contravened the provisions of **Article 80(a)** and **(d)**.

29. Regarding prayers to issue, *TI* was of the opinion that the court in considering whether to grant the prayers of *mandamus*, it would need to interrogate the issue as to whether Parliament could be sued as an entity; as '*Parliament of Kenya*'. However, *TI* pointed out that the Petitioner should not in either way be non-suited as the Attorney General, the 2nd Respondent, was party to the suit.

30. On separation of powers, *TI* opined that the Judiciary cannot dictate to Parliament on what it should pass and that the court could only deal with the legislative results of parliamentary action. *TI* also drew attention to Parliamentary immunity noting that the **National Assembly (Powers and Privileges) Act, Chapter 6 of the Laws of Kenya** guarded parliamentary proceedings and decisions from being questioned in court. However, *TI* submitted, that the Constitution overrode statutory provisions and that checks and balances were a key part of constitutionalism.

31. Mr Norwojee, S.C., counsel for *TI*, contended that weak legislation does not enhance integrity but creates a cynical ethos of corruption that weakens constitutional values. Counsel submitted that Parliament, in enacting the legislation, had acted as if the word '**effective**' were absent in the Constitution. Making reference to the **Trusted Society of Human Rights Alliance v Attorney General and Others** (Supra), counsel further submitted that the 'enforcement' mechanism provided under the Act did not meet the degree required. Mr Nowrojee further submitted that the Act was vague and lacked a central authority to enforce or monitor enforcement of **Chapter Six** as the mechanism provided is diffuse which are likely to lead to delay, overlaps and eventual impunity. Counsel pointed to **sections 40, 41 and 42** of the Act which provided for ineffective delegation.

Analysis and Determination

32. A number of issues have been canvassed by the Parties and *Amici curiae* in this matter. For purposes of disposing of the matter, I have narrowed down matters of contention into two broad issues for determination as follows;

(a) Whether the court has jurisdiction to entertain the matter in particular whether subject matter is amenable to challenge in a court of law.

(b) Whether the **Leadership and Integrity Act, No. 19 of 2012** is unconstitutional

Whether the court has jurisdiction

33. A question has been raised as to whether this court has the requisite jurisdiction to entertain the matter. Contending that this court lacks jurisdiction to entertain the matter, the Respondents have invoked the doctrine of separation of powers and raised the question of justiciability of the legislative arm of government. I will address these two issues concomitantly.

34. **Article 258** of the Constitution entitles every person a right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. In interpreting the Constitution, this court is enjoined under **Article 259** to interpret it in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this court and indeed all courts are obliged under **Article 159(2)** to protect and promote the purpose and principles of this Constitution.

35. **Article 165(3)** which provides for the jurisdiction of this Court in the following terms;

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

(e) unlimited original jurisdiction in criminal and civil matters;

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

(g) 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;

(h) 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; and

(i) any other jurisdiction, original or appellate, conferred on it by legislation. [Emphasis added]

36. **Article 1** provides that all sovereign power belongs to the people to be exercised only in accordance with the Constitution and further delegates the sovereign power to various state organs among them Parliament and the legislative assemblies in the county governments. **Article 1(3)** is clear that the state organs upon which such power is to be delegated “shall perform their functions in accordance with [the] Constitution.” It then follows that no person or state organ is above the Constitution and their actions are amenable to the Constitution. This notion is further underlined by the Supremacy clause, that is, **Article 2. Article 3** places an obligation on every person to respect, uphold and defend the Constitution while **Article 10** enjoins all state organs, state officers, public officers and all persons to abide by the national values and principles

37. I have gone taken the trouble to reference the above Constitutional provisions to drive the point home that the Constitution is the Supreme law of the land and that it binds every person, every state organ, state officer, public officer and authority. It is the obligation of every person to respect, uphold and defend the Constitution. And that includes the Parliament. As was articulated in the case of **Trusted Society of Human Rights Alliance v Attorney General & 2 others, Nairobi HC Petition 229 of 2012[2012] E KLR**, at Para. 71, “...there is nothing like supremacy of Parliament outside the Constitution. There is only supremacy of the Constitution. Given that the Constitution is supreme, every organ of State performing a constitutional function must perform it in conformity with the Constitution. Where the State fails to do so, the State as the ultimate guardian of the Constitution, will point out the transgression. As the cases cited above demonstrate, however, there is a legitimate question of how far the authority of the Court to review the decisions of other State Organs which exercise independent

constitutional authority go. There are some areas where the Court can simply not go; some outer limits on its power to review the decisions and actions of other branches and State Organs.”

38. Therefore, as regards the question as to whether the court has jurisdiction to entertain the petition, the answer can only be in the affirmative; as to what lengths the Court can actually go in doing so is a second level inquiry based on the circumstances of each case. The jurisdiction of the High Court to adjudicate on constitutional matters is wide and is now settled in a series of cases; ***Federation of Women Lawyers of Kenya (FIDA – K) and others v Attorney General and Others Nairobi Petition No. 102 of 2011 (Unreported)***, ***Trusted Society of Human Right Alliance v Attorney General Nairobi Petition No. 299 of 2012 (Unreported)*** and ***Jeanne W Gacheche and 6 others v Judges and Magistrate’s Vetting Board and 2 Others Nairobi Judicial Review No. 295, 11, 433, 434 and 438 of 2012 (Unreported)***.

39. My reasoning is further fortified by the holding of the South African Constitutional Court regarding the constitutional duty of this court in the case of ***Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216, 248*** at paragraph 99, where it stated; *“The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.”* [emphasis mine]

40. I have been cautioned that the doctrine of separation of powers forbids this court from straying into what is seen as the sphere of Parliament. I have also been warned that ‘Parliament of Kenya’ as a state organ cannot be sued by its own name. I think the latter issue is effectively answered by the question of jurisdiction I have discussed above. In any case, and on this I agree with Mr. Regeru, counsel representing CIC that a reading of **Article 261(5) and (6)** contemplates Parliament as the Party to any Petition that may be filed therein. The provision reads that, ***“If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.”***

41. I therefore reject the respondent’s contention that Parliament, as a State organ, cannot be sued by its own name at least for purposes of this suit. I think the common law notions of whether regarding capacity to be sued must yield to the Constitution which recognizes Parliament as a State organ and imposes on its specific responsibilities. The doctrines of legal personality must be read against the beam of the rich provisions of our Constitution.

Separation of Powers

42. The early scholars of governance structures, the crusaders of the doctrine of separation of powers recognized the need for a separation of powers. It is at this point that I adopt the sentiments of court in the ***Trusted Society Case (Supra)*** where it was stated that, *“The Constitution consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two....this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent. Yet...the courts have an interpretive role-including the last word in determining the constitutionality of all governmental actions. That, too, is an incidence of the doctrine of separation of powers.”*

43. These scholars however acknowledged the need for mutual checks and balances as a pertinent ingredient for a sound, democratic constitutional order. The principle of separation of powers is at the heart of the structure of our government; each organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans. The role of the Judiciary within the framework is to state what the law is and to ensure that every authority conforms to the dictates of the Constitution when called upon to do so. In

Kenya Youth Parliament & 2 others v Attorney General & another, Nairobi Petition No. 101 of 2011 (Unreported) the court observed that, “We state here, with certain affirmation, that in an appropriate case, each case depending on its own peculiar circumstances, facts, and evidence, this Court clothed with jurisdiction as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit and the letter of the Constitution but the Court would hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure.”

44. The Supreme Court in the **In the Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (Unreported)** also addressed the matter of separation of powers, it stated; “The effect of the Constitution’s detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.’ Following this dicta, I stated in **Jayne Mati & Another v Attorney General and Another; Nairobi Petition No. 108 of 2011 (Unreported)** that, “[33] These sentiments, in my view, apply with equal force to the legislature and legislative processes. For the Constitution has ushered in a new era, not of Parliamentary supremacy but one of supremacy of the Constitution. The superintendents of the Constitution are the courts of law which recognize that each organ in its own sphere working in accordance with law not only strengthens the Constitution but ensures that the aspiration of Kenyans are met.”

Constitutionality of the Leadership and Integrity Act, 2012

The Principles

45. Before I proceed to determine the constitutionality or otherwise of the impugned Act, I find it important to set out the relevant principles. First, there is a general presumption that every Act is constitutional and the burden of proof thus lies on any person who alleges otherwise save that where there are limitations to fundamental rights, the onus is on the body restricting the right to show that such limitation was justified (See **Ndyanabo v Attorney General [2001] EA 495**).

46. I adopt the words of court in **Pearlberg v Varty [1972] 1 WLR 534**, as cited in **Re Application by Bahadur [1986] LRC 545 (Const.)**, where it was stated, “I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown...” In the same vein I will reiterate that this court will start from the presumption that a statute as enacted by Parliament is constitutional, is fair unless the contrary is proven.

47. Second, in determining whether an Act is constitutional, the overall object and purpose of the Act must be considered. Such has been the established principle a long line of cases including that of **Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)**, **Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)**, **Hon. Chirau Ali Mwakwere v Robert Mabera & 4 others, Nairobi Petition No. 6 of 2012 (Unreported)**.

48. The third principle is that the Constitution should be given a purposive liberal interpretation. As adopted by the Supreme Court in the case of **Re The Matter of the Interim Independent Electoral Commission (Supra)**, “The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a mirror reflecting the “national soul” the identification of ideas and...aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.” (See also **John Harun Mwau and Others v Independent Electoral and Boundaries Commission and Others [2012] eKLR**).

49. Last and no less important, is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other. (See *Tinyefuza v The Attorney General of Uganda, Constitutional Appeal No. 1 of 1997, Centre for Rights Education and Awareness (CREAW) and Others v Attorney General, Nairobi Petition No. 16 of 2011(Unreported)*).

The Leadership and Integrity law

50. The centrality and importance for legislation on Leadership and Integrity in Kenya's governance cannot be underestimated given the history of our country. The court aptly captured this in the recent case of *Trusted Society of Human Rights Alliance v the Attorney General and 2 Others, (Supra)* when it stated; “[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.”

51. In the present case, the CIC, Interested Parties and the *amicus* contend that the ***Leadership and Integrity Act*** as enacted is invalid in as far as it fails to provide for certain provisions as required of it under **Article 80**. They have termed the Act as minimalistic in nature and a skeleton devoid of the intention of the spirit and letter of the Constitution and accuse parliamentarians of ‘diluting’ the essence of the law in total disregard of the constitutional threshold required of leadership and integrity legislation and public views as expressed to it through the CIC. In particular, the Parties have canvassed that the Act as passed undermines the mandate of the EACC in as far as it fails to provide procedures and mechanisms for it to use in the enforcement of the Act. Further, that the **section 4** to the Act purports to rob the EACC of its full mandate by making provision that it can share it with other bodies. The section reads as follows;

4. (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.

52. Parliament does not legislate in a vacuum but within an overall framework of existing laws and institutions framework and unless it is clear that a latter statute intends to repeal or otherwise replace the corresponding existent legislation, each legislative enactment continues to have the full force of law and is enforceable accordingly. As such, an Act of Parliament must be considered with reference to the state of the law subsisting when it came into operation. The Constitution creates various State organs which are

charged with implementing various aspects of the Constitution and whose mandate may converge with that of the Ethic and Anti-Corruption Commission in respect of its functions under **Chapter Six**. As the Constitution is binding on every person and every person and authority is obliged to implement the Constitution, it cannot be argued that the Ethics and Anti-Corruption Commission is the exclusive body to enforce the **Chapter Six** but rather is it the body charged with ensuring that **Chapter Six** is adhered to and in this respect the legislation enacted must give it power and authority to achieve this supremely important task. Hence **Article 79** provides that the Ethics and Anti-Corruption Commission is intended to ensure compliance with and enforcement of **Chapter Six** and **section 4** of the Act which provides a statutory basis for the Commission to carry out its constitutional mandate.

53. **Article 79** mandates Parliament to enact legislation to establish an independent ethics and anti-corruption commission for purposes of ensuring compliance with and enforcement of the provisions of **Chapter Six**. In fulfillment of this mandate, Parliament enacted the *Ethics and Anti-Corruption Commission Act, 2011, Act, No. 22 of 2011* whose object according to its long title is, “...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 purposes” **Section 11** of the **EACC Act** provides for additional functions of the Commission. I note in particular that **section 11(4)** of EACC Act vests with the EACC broad powers in the following terms; “(4) *The Commission shall have all powers necessary or expedient for the efficient and effective execution of its functions, under the Constitution, this Act or any other written law.*”

54. What then are the procedures and mechanisms provided by the *Leadership and Integrity Act? Part II (sections 6 to 36)* of the Act provides a *General Leadership and Integrity Code* which prescribes a general leadership and integrity code for state officers and incorporates the provisions of **Chapter Six**. In addition, it incorporates the provisions of the *Public Officer Ethics Act, No. 4 of 2003* into the Code in so far as it is not inconsistent with the provisions of the Act.

55. **Part III** of the Act (**sections 37 to 39**) obliges every public entity to prescribe a Leadership and Integrity Code which shall include all the requirements in the *General Leadership and Integrity Code* under **Part II**. Under **section 39** of the Act, the public entity is required to submit the specific Leadership and Integrity Code to the Ethics and Anti-Corruption Commission for approval.

56. **Part IV (sections 40 to 45)** provides for enforcement of the Leadership and Integrity Code. **Section 40** of the Act provides that upon appointment or election, a State officer shall sign and commit to the specific Leadership and Integrity Code issued by the relevant public entity at the time of taking office or within seven days of assuming a State office. **Section 41** provides that a breach of the code by a State officer amounts to misconduct for which the State Officer may be subjected to disciplinary proceedings. Where the allegation of breach has been made in respect of a State officer for whom the Constitution or any other law provides the procedure for removal or dismissal, the question of dismissal or removal shall be in accordance with the Constitution or that other law.

57. **Section 42** of the *Leadership and Integrity Code* provides for the lodging of complaints. A person who alleges a State Officer has breached the code may lodge a complaint with the relevant public entity which must be investigated in accordance with the rules of natural justice. Such an investigation may be commenced at the instance of the public entity. **Section 2** of the Act defines “*Public entity*” as including the Government, the National Assembly of the Parliamentary Service Commission, any corporation, council, board, committee which is acting pursuant to any written law.

58. **Section 43** of the Act provides that upon investigation the public entity may, if it is of the opinion that civil or criminal proceedings ought to be preferred against the respective State officer, refer the matter to the Ethics and Anti-Corruption Commission or the Attorney General with regard to civil matters or the Director of Public Prosecutions with respect to criminal matters or any other appropriate authority to take action.

59. **Section 44** provides that a State Officer or public entity may request the Ethics and Anti-Corruption Authority to give an advisory opinion on any issue relating the application of **Chapter Six**. **Section 45**

provides that the Ethics and Anti-Corruption Commission shall submit an annual report on the enforcement and compliance with the provisions of the Act.

60. **Section 54(1)** of the Act mandates the EACC to make regulations for the better carrying out of this Act. The sum conclusion of my reading is that the Act and read within the entire legislative framework cannot be said to be unconstitutional. Failure to provide a ‘one stop-shop’ of all the procedures and mechanisms in one Act cannot in itself be sufficient ground to invalidate a statute.

61. The outline of the provisions of the Act I have set out show that there are in place procedures for the administration of **Chapter Six**. The purpose of the **Chapter Six** is to impose a standard of conduct on every State and public officer. This is achieved through the prescribing a code to which every officer subscribes to and therefore assumes personal responsibility. It is like a covenant and it is enforce at the first instance by each public entity that permits members of public to make complaints and the public entity to commence investigations. The effect of the covenant is to subject the State and public officer to enforcement proceedings through disciplinary mechanisms provided under the specific codes enacted by the public entities pursuant to the **Public Officer Ethics Act**. It is noteworthy that a certain category of State officer is subject to constitutionally established enforcement and disciplinary mechanisms. For example, judges of the Superior Courts are subject to removal proceeding under **Article 168**, the Director of Public Prosecutions under **Article 158** and members of Commissions under **Article 251**.

62. **Part IV** of the Act provides procedures and mechanism for enforcement of the **General Leadership and Integrity Code** and by extension the principles set out at **Chapter Six**. These mechanisms are to be supplemented by rules and regulations passed by the EACC. I am therefore constrained to agree with the respondents’ position that there are mechanisms in place for the EACC to discharge its functions.

63. The question then is whether all these provisions are “effective” within the meaning of **Article 80(a)**. This word must be given its plain and ordinary meaning. **The Concise Oxford English Dictionary, 2011** defines “Effective” as “**producing a desired effect or intended result.**” As I have demonstrated above, the Act provides a means of achieving the objects of **Chapter Six** through various mechanism and procedures. Whether to have a “one stop-shop” or have a various public entities involved in the implementation of **Chapter Six** under the umbrella of EACC is a matter for the legislative policy. Attractive and weighty arguments can be marshaled for either position but it is not a matter in which the Court should delve into unless the Constitution is contravened. As was stated by court in **Mount Kenya Bottlers Limited & 3 others v Attorney General and Others, Nairobi Petition No. 72 of 2011 [2012] eKLR**, “it must be upheld and as Wiles J. stated in *Leev Bude in Torrington Ry (1871) L.R. 6, the Courts cannot act as “regents” over what is done in Parliament because such an authority does not exist.*”

64. The other stone cast on the impugned legislation is that the Act does not provide for penalties in addition to those provided under **Article 75** as required of it under **Article 80(b)**. The Respondents on the other hand have rejected this line of argument stating that **Part V** of the Act prescribes penalties. **Article 80(b)** enjoins Parliament to enact legislation, “**Prescribing the penalties, in addition to the penalties referred to in Article 75 that may be imposed for a contravention of this chapter.**”

65. Apart from the penalties adopted by reference to the **Public Officers Ethics Act** and other legislation which deal with matters concerning integrity, the Act sets out specific offences. **Section 46(1)** of the Act creates offence of obstruction or hindering any person undertaking any duties under the Act, concealing or misleading the Commission or a public entity carrying out duties under the Act, destroying, altering, concealing or removing documents or records which may be relevant to an investigation or proceedings under the Act and providing false information to the Commission or public entity or to a person acting under the Act. A person who contravenes this provision is liable, if convicted to a fine not exceeding Kshs. 5 million or to a term of imprisonment for a term not exceeding five years or both. This is the same penalty provided for any offence under the Act for which a penalty is not prescribed.

66. The Act also provides for forfeiture and compensation. **Section 49** provides as follows;

49. (1) Where a State officer is proven to have obtained any property in breach of this Act, the State

officer shall, subject to any appeal which the officer may make, forfeit the property and the property shall be held by the Commission or by an agent appointed by the Commission in trust for the Republic, until it is lawfully disposed of.

(2) The Commission may order a State officer referred to in subsection (1) to pay by way of compensation to the State such sum, including interest, as may be determined by the Commission as just, having regard to the loss suffered by the Government or public entity and such order shall be deemed to be a decree under section 25 of the Civil Procedure Act (Cap. 21) and shall be executed in the manner prescribed under Part III of that Act.

(3) For the purposes of subsection (2), the rate of interest on any property or money irregularly obtained shall not be less than the prevailing lending rates and shall be payable with effect from the day such property or money was obtained.

(4) The money or proceeds of the sale of property which is forfeited to the Government under this section shall be paid into the Consolidated Fund.

67. An analysis of the provisions of **Part V** of the Act are clear that there are criminal and civil penalties for infraction of the provisions of the Act. Apart from these, reference to the **Public Officer Ethics Act**, includes disciplinary action to an officer who contravenes not only the **General Code on Leadership and Integrity** but also the **Code of Conduct and Ethics** of the relevant public entity.

68. Once again I think it is at this point I should set straight the extent of the mandate of this Court in assessing whether an impugned legislation is in violation of the Constitution. The dissenting decision of the Supreme Court in *U.S v Butler*, 297 U.S. 1[1936], cited by the 1st Respondent read in part that, **“The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.”** In its majority opinion, the court held that, **“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”**

69. Declaring a statute as unconstitutional, needless to say is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established. On this, I agree with the Transparency International, the 2nd *Amicus curiae* on the point that it is not for this court to dictate to Parliament what it should or should not pass as that is the sole prerogative of Parliament. The court can only deal with the legislative results of Parliament.

Public participation

70. Before I conclude this judgment, I would like to address the issue of public participation which was raised by the parties in this matter. The **Leadership and Integrity Act** has also been attacked on the basis that it failed to comply with the process required by the Constitution. **Katiba Institute** directed the court to the case of **Doctor’s for life International v The Speaker National Assembly and Others (CCT12/05) [2006] ZACC II** where the South Africa Constitutional Court stated, “[208] It is trite that legislation must confirm to the constitution in terms of both content and the manner in which it is adopted. Failure to

comply with the manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid.”

71. The golden thread running through the Constitution is one of sovereignty of the people of Kenya. **Article 1** articulates this fact clearly. **Article 10** makes public participation a national value. **Article 94** vests legislative authority of the people of Kenya in Parliament and **Article 118(1)** provides as follows;

118. (1) Parliament shall—

(a) conduct its business in an open manner, and its sittings and those of its committees shall be open to the public; and

(b) facilitate public participation and involvement in the legislative and other business of Parliament and its committees.

(2) Parliament may not exclude the public, or any media, from any sitting unless in exceptional circumstances the relevant Speaker has determined that there are justifiable reasons for the exclusion.
[Emphasis mine]

72. In the **Doctors of Life Case (Supra)**, the Court explained that the duty to facilitate public involvement in the legislative process is an aspect of the right to political participation recognized in affairs of state is enabled and anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information. All these rights and fundamental freedoms are to be found in **Articles 33, 36** and **35** respectively of our Constitution.

73. The **Doctor’s Life Case** (Supra at para. 105) stated that, *“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.”*

74. The National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public. Indeed, as Sachs J observed in **Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others** 2006 (2) SA 311 (CC) at para. 630, *“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”*

75. The **Leadership and Integrity Act** is one of the statutes that were required to be enacted within a specific time frame, that is, two years from the date of promulgation in accordance with **Article 261(1)** as read with the **Fifth Schedule** to the Constitution. Such legislation is governed by the specific procedure set out in **section 6** of the **Sixth Schedule** to the Constitution which states that the CIC, *“shall coordinate with the Attorney General and the Kenya Law Reform Commission in preparing, for tabling in Parliament, the legislation required to implement this Constitution.”*

76. In order to determine whether there has been public participation requires the court to interrogate the entire process leading to the enactment of the legislation. It is not in dispute that the CIC carried out substantial public consultation and came up with a draft bill that it states captured public sentiments. The bill was thereafter presented to the legislature having been approved by the Cabinet. According to the unchallenged deposition of Lucy Wanjohi, the Joint Committee in its deliberations considered various memoranda and submissions made by Kenyans and other legal entities and thereafter prepared a report for consideration of the National Assembly. Thereafter, the National Assembly proceeded to pass the Act

in the present form.

77. I must state that although the Act was condemned on the basis of lack of public participation, the parties who impugned the Act on the basis did not demonstrate to the Court how the National Assembly had failed to achieve public participation within the constitutional parameters taking into account the process from the time the bill was initiated by the CIC upto its enactment. The parties did not address me on the standard to apply in order to assess the level of public participation in the legislative process. I am therefore unable to find and hold that the Act is unconstitutional for want of public participation.

Disposition

78. I have come to the finding that the *Leadership and Integrity Act* is not to the extent suggested by the petitioner unconstitutional. I therefore dismiss the petition.

79. I wish to commend the tenacity exhibited by the Petitioner, the Interested Parties and indeed the two *amicus* in their spirited fight in defending the constitutional spirit. If I may borrow the words of court in *Federation of Women Lawyers Kenya (FIDA-K) and Others v Attorney General and Another [2011]eKLR*, to the petitioner and supporters, remain vigilant and keep the State and the Legislature on its toes, keep your missiles to their launch pads until the spirit and letter of the Constitution and ultimately the fruit of the Constitution is realized and enjoyed by all. It is for this reason I shall not award costs.

80. I wish to thank all the Counsel who appeared for their extensively researched and presentation. If I have not referred to all the authorities referred to, it is not because they were not illuminating in the determination of this case.

81. Finally, I wish to apologise for the delay in rendering this decision which has been due to the heavy workload in the Division.

DATED and DELIVERED at NAIROBI this 7th day of February 2013

D.S MAJANJA
JUDGE

Mr Regeru with him Mr Thuo instructed by the firm of Njoroge Regeru Advocates for the Petitioner

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