



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

**PETITION NO 120 OF 2013**

**LUKA ANGAIYA LUBWAYO.....1ST PETITIONER**

**KITUO CHA SHERIA.....2ND PETITIONER**

**AND**

**HON. GERALD OTIENO KAJWANG.....1ST RESPONDENT**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND  
RESPONDENT**

**JUDGMENT**

1. The 1st Petitioner, Luka Angaiya Lubwayo is a Kenyan citizen and a registered voter who has brought this Petition purportedly in public interest.
2. The 2nd Petitioner, Kituo Cha Sheria is a non-governmental organisation dealing with issues of human rights, legal aid, access to justice for the poor, marginalised and vulnerable members of society and it also seeks to promote the understanding and implementation of the Constitution, 2010 through public interest litigation and advocacy. It claims that it is keen on the full implementation of **Chapter Six** of the **Constitution** on leadership and integrity by all persons wishing to hold public or state offices.
3. The gist of the Petitioners' case is that the 1st Respondent does not meet the constitutional threshold for nomination and or election to the position of Senator of Homabay County. They claim that he was admitted to practice as an Advocate of the High Court of Kenya in 1984 and has severally misappropriated client's funds during his practice as an Advocate and subsequently, he has been subjected to disciplinary proceedings by the Disciplinary Committee established by the Advocates Act and was found guilty of professional misconduct by the Law Society of Kenya on 9 occasions in Causes No. 84 of 1997, 144 of 1998, 17 of 2003, 169 of 2002, 65 of 2001, 8 of 2004, 69 of 2002, 10 of 2001 and 134 of 2001. As a result he was struck off the Roll of Advocates between 1999 and 2006.
4. That following his Application made on 2nd July 2012, he was reinstated to the Roll of Advocates, although with certain conditions to wit that after the reinstatement, he practices law for a period of 24 months under the supervision of an Advocate of at least 35 years' standing and not to practice on his own or in partnership with any other advocate during that period. Further, that during his first 12 months after reinstatement, he should make a minimum of five presentations during the Law Society of Kenya Continuing Legal Education seminars on topics he has expertise in.
5. It was the Petitioner's contention therefore that the 1st Respondent lacks integrity, honesty and

trustworthiness for the reasons above and submitted that although he was reinstated to the Roll of Advocates, the reinstatement has not overruled the findings of professional misconduct nor does it clear him of past dishonest and disreputable conduct that has led to the taking of the disciplinary measures. It was thus their position that the 1st Respondent should not be cleared to contest for the Senatorial seat of the Homabay County.

6. They further claimed that the 2nd Respondent, the Independent Electoral and Boundaries Commission (IEBC) failed to give consideration to the question of integrity or the suitability of the 1st Respondent to run for and hold the office of Senator as mandated by **Article 88(5)** of the **Constitution** which obligates the 2nd Respondent to exercise its powers and perform its functions in accordance with the Constitution and national legislation. They referred the Court to **Section 22(1)(a)** of the **Elections Act** which provides that a person may be nominated as a candidate for an election only if that person is qualified to be elected to that office under the Constitution and **Section 24(2)** thereof which provides that a person is disqualified from being elected as member of Parliament if the person is found, in accordance with any law, to have abused public office or in any way contravened Chapter Six of the Constitution.

7. That the 2nd Respondent's Dispute Resolution Committee had an opportunity to determine the issues raised in this matter but ruled that it had no jurisdiction to entertain the question of whether or not the 1st Respondent met the constitutional threshold to warrant being nominated to vie for the Senatorial seat of Homabay County, and that the said issue can only be determined by a Court of competent jurisdiction.

8. They thus claim that the failure of the 2nd Respondent to ascertain for itself whether the 1st Respondent met the integrity or suitability threshold together with the failure to adequately apply the constitutional test rendered the clearance of the 1st Respondent fatally defective and violates the spirit and letter of the Constitution and is null and void. In defining integrity, the Petitioners adopted the definition made by this Court in the case of ***Trusted Society of Human Rights Allainace v Attorney General & 2 Others Petition No. 229 of 2012*** and I will revert to this definition later in this judgment.

9. It was also the Petitioners' position that the 2nd Respondent having failed to discharge its obligation as set out above, then this Court is obligated to step in and investigate whether the 1st Respondent meets the constitutional and other legislative requirements to run for the seat of Senator.

10. The Petitioners submitted that in interpreting the Constitution, this Court should be guided by **Article 259 of the Constitution** and must move from the plain language meaning of a provision and embrace the purposive approach of constitutional interpretation which goes beyond the plain meaning to the intention of the provision. They contend that the plain meaning of Chapter Six is that although it relates to State Officers, they urged the Court to adopt a broad interpretation that would mean that Chapter Six also includes "*prospective State Officers*". That this interpretation would promote the spirit of the Constitution and if this interpretation was to be adhered to, then it would disqualify persons who lack integrity and who would bring disrepute to State Offices from serving as State Officers anywhere in Kenya.

11. They claim that **Article 99** of the **Constitution** sets out the criteria of eligibility to stand as a Member of Parliament and specifically **Article 99(2)(h)** disqualifies any person from contesting as a candidate if he or she is found '.....to have contravened Chapter Six'. They further claim that the assertion that Chapter Six only applies to persons who become or are State Officers and not "*prospective State officers*" ignores this critical provision of the Constitution.

12. The Petitioners now seek a declaration that the 1st Respondent does not meet the constitutional requirements of Chapter Six of the Constitution and is thus not fit to stand for election as a Senator of Homabay County. They also seek for an order restraining the 2nd Respondent from printing the 1st Respondent's name on any ballot paper and also that the 1st Respondent be restrained from standing for any elective post in the oncoming general elections.

### **1st Respondent's case**

13. Mr. Nyakundi presented the 1st Respondent's case and he conceded that the 1st Respondent is an Advocate and has practised as such and that he was indeed struck off the Roll of Advocates and that reinstatement is a fact and the conditions attached with it were set merely to effect the reinstatement.

14. It was his submission that the electorate is allowed to elect a person of their choice and referred the Court to **Article 73(2)(a)** which refers to an election as being 'free and fair' as opposed to selection which is on the basis of personal integrity, competence and suitability. He claims that unlike in the *Trusted Society of Human Rights Alliance v Attorney General & 2 Others (supra)* case there are no outstanding issues with regard to the 1st Respondent since the striking out issue has been resolved by fact of reinstatement. He urged me to dismiss the Petition.

### 2nd Respondent's case

15. Mr. Mungai for the 2nd Respondent while recognizing the unlimited original jurisdiction of this Court in adjudicating over criminal and civil matters, as well as determining constitutional questions under **Article 165 (3)(a) and (b)** of the Constitution, submitted that this unlimited original jurisdiction cannot be invoked in this particular instance because Parliament has specifically expressed the procedure for handling the grievances pleaded by the Petitioner. He claimed that the alleged grievances do not constitute justiciable controversies as defined by the Constitution. He referred the Court to the case of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd (1989) KLR* where the Court stated that without jurisdiction a Court cannot take any further step and must down its tools.

16. The 2nd Respondent contended that the IEBC is mandated under **Rule 13 of the Elections (General) Regulations Act** to arbitrate on any matter relating to the nomination or any dispute arising from nomination of candidates to elective office(s) of nomination or dispute arising from nomination and thereafter make a decision. He claims that the Petitioner have not demonstrated that they have followed the steps set out in the Regulations before approaching this Court and having failed to invoke that mechanism, this Court cannot now exercise its jurisdiction and review the matter. He referred the Court to the Court of Appeal decision in *Narok County Council v TransMara County Council, (2000) 1 EA 161* and *Speaker of the National Assembly v Karume (2008) 1 KLR* where the Court held that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed.

17. It was his further position that since the Petitioners have not demonstrated a dereliction of its Constitutional and statutory mandate by IEBC, this Court cannot now entertain the suit as pleaded by the Petitioners. On that point, he relied on the decisions in *Francis Gitau Parsimei & 2 Others v The National Alliance Party & 4 Others (2012) e KLR*, *Michael WACHIRA Nderitu and Others v Mary Wambui Munene & Others Petition No. 459 of 2012* and *Janet Ndago Ekumbo v Hon. Attorney General & Others Petition No. 39 of 2013*.

18. The 2nd Respondent further contended that IEBC is an independent Constitutional Commission under **Article 249** of the **Constitution** and in performance of its functions is not subject to direction or control of any person or authority, including this Court. Similarly, **Section 26 of the IEBC Act**, reinforces the Commission's independence and that this Court can only exercise its jurisdiction over IEBC under **Article 165(6) and (7)** of the **Constitution** in instances where the IEBC demonstrates either expressly or constructively that it has failed to carry out its constitutional mandate or in carrying out the mandate it does so in a manner which results in a grossly unfair or perverse decision.

19. Finally, Mr. Mungai urged me to dismiss this Petition for being an abuse of the Court process.

### Determination

20. I will begin by taking judicial notice of the fact that party nomination of candidates to participate in the 4th March 2013 general election was finalised by 31st January 2013 which was the deadline in accordance with the law. Thereafter, persons and parties with any dispute regarding those nominations were required to lodge their complaints with the Returning Officer who who would make a determination

at the first instance and persons who were dissatisfied with that determination would lodge a review to the IEBC in line with **Regulation 13 of the Elections Regulations**. Many complaints were indeed heard and determined, and one such complaint was the one lodged with regard to the 1st Respondent and the issues raised were the same as the matters now subject of this Petition. The 2nd Respondent's Dispute Resolution Committee ruled in that regard that it had no jurisdiction to determine whether or not the 1st Respondent is qualified under **Chapter Six of the Constitution** to run for elective office. According to that Committee, it is this Court that is charged with that responsibility.

21. The law with regard to resolution of nomination disputes is well articulated. Under **Article 88 (4) (e)** of the **Constitution**, the IEBC is vested with the following powers:

*“the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”*

This is reiterated under **Section 4(e) of the IEBC Act** which recognises the statutory function of the IEBC in settling electoral disputes relating to nominations before elections. **Section 74(1)** of the **Elections Act** further confirms this as follows:

*“Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”*

22. The Petitioners acknowledge the law as set out above, but argue that since the 2nd Respondent does not qualify to be nominated by the IEBC, and the Dispute Resolution Committee having failed to determine the issue conclusively, then this Court has jurisdiction to grant the prayers sought. According to the Petitioners, this is not a dispute on the nomination of the 2nd Respondent but rather, his non-compliance with Chapter Six of the Constitution.

23. I acknowledge this Court's unlimited jurisdiction under **Article 165 (3) (a)** of the **Constitution**. However, I am in agreement with the sentiments expressed by this Court in **International Centre for Policy and Conflict & 4 Others v The Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012** where the Court held that the unlimited original jurisdiction of this Court cannot not be invoked where Parliament has specifically and expressly prescribed procedures for handling grievances raised by a Petitioners. The Court of Appeal has also upheld this reasoning in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**, where it 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.”*

24. The 2nd Respondent submitted that even if it was to be argued that the 2nd Respondent does not meet the integrity and leadership qualification as spelt out under **Chapter Six of the Constitution**, then the institution with the Constitutional and statutory recognition to determine the matter would be the IEBC under **Article 88 (4) (e)** of the Constitution and **Section 74 (1)** of the **Elections Act** as read with **Section 4(e)** of the **IEBC Act**. Those provisions read with the decisions above would divest this Court of its original jurisdiction and has placed an exclusive mandate on IEBC with the Court left to exercise its power of judicial review in the usual manner.

25. I am in agreement with those Submissions. However, the Petitioner's chief complaint as I understand it is that the IEBC, the body vested with the mandate of determining the qualification of the 1st Respondent failed and/or refused to carry out that Constitutional mandate and has instead referred the same to this Court.

26. While I am cognisant of the important tenet of the concept of the rule of law expressed above that this court before exercising its jurisdiction under **Article 165** of the **Constitution** in general, must exercise restraint and must first give an opportunity to the relevant constitutional bodies or State organs to

deal with the dispute as envisaged under the relevant statute, the failure of the IEBC to exercise that jurisdiction is of great concern and without saying more, where such a situation obtains, then it is my view that this Court has the mandate to determine the matter. In stating so, I find support in the the case of *Narok County Council v Trans Mara County Council [2000] 1 EA 161 at page 164* where the Court of Appeal stated that;

*“It seems to me to be plain beyond argument that the jurisdiction of the High Court can only be invoked if the Minister... refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter case his decision Page 15 of 24 can be challenged by an application to the High Court for a writ of certiorari because under the relevant section, the decision is to be made on a fair and equitable basis.” (Emphasis mine)*

I wholly agree and will not shy away from determining the issues in dispute in view of the prevailing circumstances.

27. That being my finding, it is clear to me that it is only prayer 1 of the Petition that deserves attention and in that prayer, the Petitioners seek a declaration that the 1st Respondent does not meet the constitutional requirements of **Chapter Six** of the **Constitution** and is thus unfit to vie for election as a Senator of Homabay County.

28. In that regard, I am alive (*as stated above*) to the fact that this Court under **Article 165 (3)(a)**, cannot enter into matters reserved for another body established by statute. I am also aware that this Court, under **Article 165 (3) (d) (I) and (ii) of the Constitution** can exercise its jurisdiction to determine whether any law or anything done under the authority of the Constitution is inconsistent with the Constitution. **Article 165 (3) (a)** of the **Constitution** states that the High Court can;

*“hear any question relating to the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the court.”*

**Article 258** of the Constitution then grants every person the right to institute court proceedings where the Constitution has been violated.

29. In my view therefore, the Petitioners have invoked the jurisdiction under **Article 165 (3) (d) (I) and (ii)** to determine this matter and in particular whether the 1st Respondent has generally qualified under Chapter Six of the Constitution to run for the office of Senator. This is within the jurisdiction of this Court as stated elsewhere above and so inspite of my findings and misgivings above, I find the Petition to be properly before me and in the circumstances of the dispute between the parties, I reiterate that I have jurisdiction to determine them.

30. I now turn to the issue raised by the Petitioners that the 1st Respondent is not qualified under **Chapter Six** of the **Constitution** as he lacks integrity since he has been struck off the Roll of Advocates 9 times and therefore that he cannot be allowed to hold State office.

31. Chapter Six of the Constitution lays down the principles upon which State Officers should conduct themselves. The Chapter makes it clear that the power exercised by State Officers is a public trust that is to be exercised to

serve the people. In exercising this power, State officers are required to demonstrate respect for the people of Kenya, make decisions objectively and impartially, refuse to be influenced by favouritism or corruption, serve

selflessly and be accountable for their actions. **Article 73 (2)** provides that the principles of leadership and integrity are to 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.”*

32. In interpreting the provisions of Chapter Six, I am guided by **Article 10** and **Article 259** of the Constitution which obliges this Court to apply the national values and principles when interpreting the Constitution, to include values and principles of good governance, integrity, transparency and accountability. In *The International Centre for Policy and Conflict case (Supra)*, the Court stated as follows;

*'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. '*

33. In *Trusted Society of Human Rights Alliance vs The Attorney General and Others, Nairobi High Court Petition No 229 of 201* the Court expressed itself 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.”*

*The Court then went on to uphold the approach taken in the Democratic Alliance Case v President of the Republic of South Africa Case No. 263 of 2011 where the Supreme Court of Appeal of South Africa said this of 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 mine)

34. I agree and I adopt the same reasoning generally but will shortly make a distinction of the same.

35. 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.

36. It must be noted that a conviction per se is not a disqualification for anyone running for a State or Public office. I say so because in **Article 99(2)** of the **Constitution**, the following terms inter-alia are used as the basis for disqualification; that the candidate for such an office;

i) is an undischarged bankrupt,

ii) is subject to a sentence of at least Six months imprisonment, as at the date of registration as a candidate,

37. The import of the above provisions is that a discharged bankrupt is actually qualified to run for office and a person who is subject to a sentence of of less than six month's imprisonment is also qualified to run for office despite the conviction. The provisions may sound unreasonable as does **Article 99(3)** which allows a convict whose sentence is on appeal to run for office but they exist in the Constitution and must be given effect.

38. It follows therefore that the mere fact that the 1st Respondent was "*convicted*" by the Disciplinary Committee of the Law Society of Kenya is per se not a ground for disqualification once the "*conviction*" was "*served*" and the 1st Respondent reinstated to the Roll of Advocates.

39. Further, I am quick to remind the Petitioners that the position sought for by the 1st Respondent is an elective position as opposed to an appointive position. The Constitution at **Article 73 (2)(a)** anticipates the two situations as follows;

i) ***In appointive position, the criteria is "personal integrity, competence and suitability"***

ii) ***In elective positions, the criteria is "election in free and fair elections"***.

40. This distinction is important because in elective positions, it is the electors who determine those to elect based on their assessment of the candidates including on their honesty, rectitude, uprightness and scrupulousness. That is why **Article 38(2)** of the **Constitution** provides that every citizen has "*the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors ...*" (emphasis mine)

41. The People of Hom Bay county are entitled to the free expression of that will without hindrance except in circumstances that are known to the Constitution.

42. I have said that the 1st Respondent has no unresolved issues with his professional body, the Law Society of Kenya. But suppose in fact, he had not been reinstated to the Roll of Advocates? In that case, my view would be that the IEBC would and should have looked at his case with that fact in mind and determine his suitability or otherwise, without absconding that mandate as it did in the present case and

this Court would then address the issue within its judicial review mandate and not otherwise.

43. I should only say this is passing; **Chapter Six** of the **Constitution** uses the words “*State officer*” more than ten times. That is telling; it is targeting State officers as defined by **Article 260** of the **Constitution**. It also makes reference to a State office as opposed to a private office. These words have specific meanings and any extrapolation to include all and sundry is attractive to a casual mind but that was never the intention of those who painfully argued for and later crafted that Chapter.

### **Conclusion**

44. It is obvious that save for the one issue I have determined above, all other prayers in the Petition deserve no attention as they have been overtaken by events upon the March 4th General Elections. I have said why the remaining prayer cannot be granted.

45. The Petition is therefore dismissed with the further order that since the issues raised are of a public nature, let each party bear its own costs.

46. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 15TH DAY OF MARCH, 2013**

**ISAAC LENAOLA**  
**JUDGE**

### **In the presence of:**

*Irene – Court clerk*  
*Mr. Gumbo holding brief for Mr. Mungai for Respondent*  
*No appearance for Petitioner*

### **Order**

*Judgment duly read.*

**ISAAC LENAOLA**  
**JUDGE**  
**15/3/2013**