

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO 484 OF 2015

In the matter of Articles 1, 2, 3, 73 (1) & (2) (e), 75 (1) (a), (b), (c) & (2) (e) & (b), 103, 260 of the Constitution of Kenya 2010

And

In the matter of sections 3, 4, 7 (1), (2) & (3), 13 (b) & (d), 16 (1), 34 (1) and 41 (1) & (2) of the Leadership and Integrity Act 2012

In the matter of alleged contravention of Chapter Six of the Constitution of the Republic of Kenya 2010 and the Leadership and Integrity Act 2012

In the matter of the Removal from office of the Member of Parliament for Wajir South Constituency, Hon. Abdullahi Diriye

Between

Mohamed Abdi Olge.....Petitioner

versus

Hon. Abdullahi Diriye.....1st Respondent

Ethics and Anti-Corruption Commission.....2nd Respondent

The Speaker of the National Assembly.....3rd Respondent

The Hon. Attorney General of the Republic of Kenya.....4th Respondent

JUDGEMENT

Petitioners case

The petitioner brings this petition on behalf of himself and residents of Wajir County in the Republic of Kenya and as a matter of public interest. It is the petitioners case that the first Respondent, who is their elected member of the National Assembly violated the provisions of the Leadership and Integrity Act^[1] and Chapter Six of the constitution.

Briefly, on or about 27th March 2014, at Jomo Kenyatta International Airport, the first Respondent, a state officer caused a security scare when he attempted to impede security officers who in their ordinary course of duty requested that he and a person in his company identify themselves, but instead he engaged them in altercation, insulted them and trespassed into a restricted area in an attempt to by-pass the requisite security check. As a result of the said conduct, he was subsequently charged in court and convicted on his own plea of guilty.

In support of the foregoing, the petitioner attached to the supporting affidavit court proceedings relating to Chief Magistrates Court, Makadara, Criminal case number 1632 of 2014, *Republic vs Abdulhi Diriye* in which the first Respondent was charged with the offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal Code.^[2] The proceedings show

that he faced two counts, though only page one of the charge sheet was available. He was convicted and fined Ksh. 10,000/= in respect of count one, in default to serve six months jail and Ksh. 40,000/= for the second count, in default he was to serve six months jail. The sentences were to run consecutively. He paid the fine.

The petitioner seeks orders that the first Respondent has violated the provisions of Chapter Six of the Constitution and a further order directing the second Respondent to investigate the first Respondent and that the court directs the third Respondent to direct the relevant committee of the National Assembly to immediately Institute Disciplinary action against the first Respondent.

Respondents case

The second Respondent filed grounds of objection on 17th November 2015 stating *inter alia* that the Respondent cannot be compelled to institute investigations as this would offend sections 13 (2) (c) of the Ethics and Anti-Corruption Commission Act^[3] and section 7 (2) and 25 of the Anti-Corruption and Economic Crimes Act.^[4] (Note section 7 (2) was repealed by act No. 22 of 2011), that the petitioner has not invoked any of the procedures prescribed under section 42 of the Leadership and Integrity Act.^[5]

Also on record are grounds of opposition filed by the fourth Respondent stating *inter alia* that the petition is pre-mature and that there are other avenues open to the petitioner such as recalling the member of Parliament under section 45 of the Elections Act.^[6]

Counsel for the first Respondent filed a notice of preliminary objection on 21st March 2016 stating *inter alia* that this court has no jurisdiction to hear this case, that article 79 of the constitution sets out the procedure for enforcement of chapter six of the constitution and cited article 252 and section 11 of the Ethics and Anti-Corruption Commission Act.^[7] The first petitioner also filed grounds of opposition essentially reiterating the contents of the preliminary objection.

The third Respondent also filed a notice of a preliminary objection on 29th July 2016 stating that there is an established procedure which the petitioner ought to have followed before invoking the jurisdiction of this court.

On 14th March 2017, I directed that the parties do proceed with the hearing of the petition and that the preliminary objections and issues raised in the petition be determined together. All the counsels filed written submissions which they also highlighted orally in court.

Petitioners' Counsels submissions

Counsel for the petitioner submitted that the first Respondents conduct which led to the conviction in question was a gross violation of chapter six of the constitution and also cited several other provisions of the constitution and the provisions of the Leadership and Integrity Act.^[8] Counsel submitted that the purpose of chapter six of the constitution is to set higher standards of integrity for state officers and supported this argument with the decision rendered in *International Centre for Policy and Conflict & 4 Others vs Hon. Uhuru Kenyatta & Others*.^[9]

Counsel urged the court to adopt the holding of the South African constitutional court in *Democratic Alliance vs The President of the Republic of South Africa*^[10] and find that all state officers are constitutionally required to bring honour to their office in both their private and public dealings and submitted that the petitioner established sufficient grounds to warrant issuing of the orders sought.

Respondents' counsels submissions

Counsel for the first Respondent submitted that the court is not the right forum to undertake an assessment of integrity of persons holding public office and cited article 79 of the constitution, hence the petitioner was obliged to raise a complaint with the second Respondent before invoking the jurisdiction

of this court and that article 252 and section 11 of the Ethics and Anti-Corruption Commission Act^[11] bestows in it immense powers to deal with matters of Leadership and Integrity and cited the provisions of section 42 (1) of the Leadership and Integrity Act^[12] and that this court can only exercise its jurisdiction under article 165 (3) (4) and (5) of the constitution in instances where the has failed to carry out its mandate. Counsel cited several cases among them *Michael Wachira Nderitu & 3 Others vs Mary Wambui Munene & 4 Others*.^[13]

Counsel also cited the principle of separation of powers arguing that it is not for the court to direct Parliament what to do and cited two cases^[14] among them *International Centre for Policy and conflict vs A.G & Another*.^[15] However counsel is silent on the phrase in the passage cited from the said case which reads "*The court cannot supervise or direct their daily work unless there is a breach of the of the constitution*." Counsel also submitted that having been convicted and fined by a court, any attempt to curtail his political rights amounts to double jeopardy, hence unreasonable.

The Second Respondents Counsels submissions essentially adopted the submissions made by first and second Respondents counsels.

On the issue of Jurisdiction

A Court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court in *the matter of the Interim Independent Electoral Commission*,^[16] at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner; " *Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent*." Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.^[17]

Article 165 (3) of the Constitution provides as follows:-

(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

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

Article 79 of the constitution cited by the Respondents provides that:- "Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this Chapter."

Section 42 (1) of the Leadership and Integrity Act[18] provides that "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."

Further, section 43(1) of the Leadership and Integrity Act[19] cited by the Respondents provides that "If upon investigation under this Part, the public entity is of the opinion that civil or criminal proceedings ought to be preferred against the respective State officer, the public entity shall refer the matter to—

(a) the Commission or the Attorney-General, with respect to civil matters;

(b) the Director of Public Prosecutions, with respect to criminal matters; or

(c) any other appropriate authority.

I am alive to the fact that under Article 259 of the constitution, the court is enjoined to interpret the constitution 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 in a manner that contributes to good governance. Further, 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[20] and also the spirit of the constitution must preside and permeate the process of judicial interpretation and judicial discretion.[21]

The question that follows is whether or not the above provisions oust the jurisdiction of the High Court. The wording of section 43(1) cited above is clear. It reads "If upon investigation under this Part, the public entity is of the opinion that civil or criminal proceedings ought to be preferred against the respective State officer." There is already a conviction by a court of competent jurisdiction. There is nothing to investigate. The decision has never been appealed against. The facts in the authorities cited can be distinguished in the present case in that in the present case there is a conviction by court of competent jurisdiction. I find no clear provision ousting the jurisdiction of this court.

Whether or not the first petitioner ought to vacate his parliamentary seat pursuant to Article 103 (1) (g) of the constitution.

The facts in this petition bring into sharp focus the provisions of article 103 which provides that:-

103. (1) The office of a member of Parliament becomes vacant—

(g) if the member becomes disqualified for election to Parliament under Article 99 (2) (d) to (h).

Article 99 (2) of the constitution provides that :- A person is disqualified from being elected a member of Parliament if the person—

(g) is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election;

However, I note that none of the parties in this petition deemed it fit to address the above provision nor did the petitioner seek any orders from this court falling under Articles 103 and 99 cited above. Since the parties did not address the said issue and in absence of specific prayers in the petition expressed under the said provisions, I decline to invoke the said provisions.

Whether the first Respondent violated the provisions of Chapter Six of the Constitution.

Article 75 (1) of the constitution on conduct of State officers provides as follows:-

75. (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

(c) demeaning the office the officer holds.

(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2)—

(a) shall be subject to the applicable disciplinary procedure for the relevant office; and

(b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.

(3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other State office.

To me, the facts of this case are clear. There is a conviction by a court of competent jurisdiction. The conviction is conclusive evidence under the Evidence Act.^[22] I find that the petitioner has demonstrated that the conduct by the first Respondent which led to the conviction is a violation of article 75 (1) (c) above. Consequently, I find that prayer (1) of the petition is merited.

Prayer (2) of the petition has two parts, namely, an order be and is hereby granted directing the second respondent, namely, Ethics and Anti-Corruption commission to immediately commence investigations into the first respondents actions **and** a directive do issue towards the third respondent, namely, The Speaker of the National Assembly directing the relevant house committee of the national assembly to immediately institute disciplinary action against the first respondent.

With regard to the second part of the above prayer, the alleged conduct took place outside Parliament, hence, I do not think it would be appropriate to invoke Parliamentary rules to punish the first Respondent for conduct outside Parliament and even if the conduct in question took place in Parliament, I do not think it would be appropriate for this court to direct the Speaker on what to do in matters happening within the precincts of Parliament on account of the doctrine of separation of powers and the independence of Parliament.

Part one of the above prayer is appropriate., but the way it is framed is in my view not appropriate because there is a judgement rendered by a court of competent jurisdiction which has not been appealed against. What remains is for someone to invoke the provisions of Article 103 cited above, but as stated earlier, the said prayer was not sought from this court.

The only relief which remains and which to my mind has not been contested anywhere by the Respondents including the first Respondent is prayer one which I find has been proved. In any event, the evidence adduced demonstrates that the first Respondent conducted himself in a manner demeaning to the office of a Member of the National Assembly. Accordingly, allow this petition and order as follows:-

- a. **That** a declaration be and is hereby issued that the first Respondents violated the provisions of Chapter six of the constitution of the Republic of Kenya and the provisions of the Leadership and Integrity Act.^[23]
- b. **That** the first and second Respondents do pay the costs of this suit to the Petitioner

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 12th day of May 2017

John M. Mativo

Judge

[1] Act No. 19 of 2012

[2] Cap 63, Laws of Kenya

[3] Act No. 22 of 2011

[4] Act No. 3 of 2003

[5] Supra

[6] Act No. 24 of 2011

[7] Act No. 22 of 2011

[8] Supra

[9] Pet. No. 552 of 2012

[10] Case CCT 122/11 [2012] ZACC 24

[11] Supra

[12] Supra

[13] {2013}eKLR

[14] Commission for the Implementation of the constitution vs Parliament & 5 Others {2013}eKLR

[15] Supra

[16] Constitutional Application No. 2 of 2011 (unreported)

[17] Samuel Kamau Macharia v. Kenya Commercial Bank and Two others, Civ. Appl. No. 2 of 2011

[18] Supra

[19] Supra

[20] See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[21] These words expressed in the Namibian case of State vs Acheson{1991} 20 SA 805

[22] Cap 80, Laws of Kenya

[23] Supra