



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 254 of 2012**

**ISAAC ALUOCH POLO ALUOCHIER.....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE SPEAKER OF THE NATIONAL ASSEMBLY (2<sup>ND</sup> RESPONDENT)....2<sup>ND</sup> RESPONDENT**

**THE PARLIAMENTARY SERVICE COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING**

**THE PETITION**

1. This Petitioner dated 11<sup>th</sup> June 2012 was filed by the Petitioner herein, **Isaac Aluoch Polo Aluochier**. According to the Petitioner:

**1) The state, through its organ Parliament, has contravened, and is continuing its contravention of, Article 27(4) of the Constitution, in that it is discriminating directly or indirectly against the people of Kenya, by not upholding, respecting and defending Article 27(1) of the Constitution. For by allowing several members of Parliament (MPs) to break, and to continue breaking, the law, without enforcing the law against these lawbreaking MPs, the state portrays Kenya and also manifests its failure to provide the people of Kenya their right to equal protection of the law – protection of the people of Kenya against the effects of the violation of the law by Mps.**

**2) Section 40 of the former Constitution, currently effective under the provisions of section 3(2) of the Sixth Schedule of the Constitution, has been violated by several MPs sponsored to Parliament by parliament parties. A list summarizing the names of the affected MPs, their constituencies and**

their sponsoring parliamentary parties, is contained in Annex 1APA/001 of the petitioner's affidavit accompanying this petition.

3) The Speaker of the National Assembly, despite possessing constitutional authority as shown by section 44 of the former Constitution, currently effective under the provisions of section 3 (2) of the Sixth Schedule of the Constitution, has failed to declare vacant, without unreasonable delay and within 21 days, the parliamentary seats of MPs sponsored by parliamentary parties who have resigned from the said parliamentary parties. By this omission the Speaker has contravened Article 259(8) of the Constitution section 16(3) of the Elections Act, and additionally failed to uphold, respect and defend the constitution, in contravention of Article 3(1).

4) MPs who have resigned from the parliamentary parties that sponsored them to parliament, yet have not "forthwith" vacated the parliamentary seats they occupy, have violated and continue to violate Articles 73(1)(a), 73(2)(b), 73(2)(c) and 75(1) of the Constitution.

5) The Speaker, by his failure to declare vacant, without unreasonable delay and within 21 days, such parliamentary seats, has violated Article 73(1)(a), 73(2)(b), 73(2)(c) and 75(1) of the Constitution.

6) Pursuant to Articles 99(2) (h), 137(1) (b), 148, 180 (2), 180 (5), 193(2) (g) and 260 of the Constitution, such MPs have contravened Chapter Six of the Constitution, and are therefore disqualified from, or ineligible to stand for, elective state offices, commencing the next general elections.

7) Pursuant to Article 2(4) of the Constitution, the MPs' omission, in failing to "forthwith", in failing to declare vacant, without unreasonable delay and within 21 days, such parliamentary seats became constitutionally vacant, i.e., de jure, upon the resignations of such MPs, notwithstanding that such seats were not, de facto, vacated "forthwith".

8) Contrary to Article 40(3) of the constitution, the state has deprived the people of Kenya of property, or interests in property, or rights over property, unlawfully provided to or on behalf of such MPs, who are not entitled to such property pursuant to Article 40(6) of the Constitution, on account of their unlawful occupation of parliamentary seats they should have "forthwith" vacated upon their resignation from the parliamentary parties that sponsored them to Parliament.

## **PRAYERS**

2. In the Petition, the Petitioner seeks the following orders:

1. The court determines this petition expeditiously, pursuant to Article 259(8) of the Constitution, as the issues raised need early resolution well before the forthcoming general elections, to allow the people of Kenya to elect appropriate persons to serve them in the executive and the legislatures, in both the national and county governments. Also, should this petition, and any consequential appeals arising from it, not be determined before the nomination of candidates for the forthcoming general elections, a situation may arise where some candidates affected by this petition may be elected in the general elections, and subsequently be declared to have been ineligible for the elections, thereby leading to by elections, which are a significant charge against public funds. Therefore, in the interest of prudent public financial management, through avoiding potentially huge by-election costs, and in the interests of complying with the spirit of the Constitution in Article 105(2), though not yet in effect, it is humbly requested that this petition be expeditiously determined.

2. The court declares that MPs who have resigned from parliamentary parties should have forthwith vacated the parliamentary seats they occupied upon their resignations, pursuant to section 40 of the former Constitution.

- 3. The court declares that the Speaker has constitutional authority to declare vacant the parliamentary seats of MPs who have resigned from parliamentary parties, pursuant to section 44 of the former Constitution.**
- 4. The court declares that the speaker is constitutionally required to declare vacant, without unreasonable delay and within 21 days, such parliamentary seats, pursuant to Article 259 (8) of the Constitution.**
- 5. The court declares that MPs who have resigned from parliamentary parties, yet have not “forthwith” vacated the parliamentary seats they occupy, have violated and have continued to violate Articles 73 (1) (a), 73(2)(b), 73(2)(c) and 75(1) of the Constitution.**
- 6. The court declares the immediate vacancy of all such parliamentary seats, [as per the schedule attached to this order \*\*\*], pursuant to section 44 of the former Constitution, currently in effect pursuant to section 3(2) of the Sixth Schedule of the Constitution, on account of the Speaker’s failure or omission to declare vacant, without reasonable delay and within 21 days, such seats.**
- 7. The court declares, pursuant to Article 75 (3) of the Constitution, that any such MP whose seat has been declared vacant by either the court or the speaker is disqualified from holding any other State office.**
- 8. The court declares that the Speaker, by his failure to declare vacant, without unreasonable delay and within 21 days, such parliamentary seats, has violated Article 73 (1) (a), 73(2) (b) and 73 (2) (c) of the Constitution.**
- 9. The Court declares, pursuant to Articles 99(2)(h), 137(1)(b), 148, 180(2), 180 (5), 193(2) (g) and 260 of the Constitution, that such MPs, and the Speaker, have contravened Chapter Six of the Constitution, and are therefore disqualified from, or ineligible to stand for, elective State offices, commencing the next general elections.**
- 10. The court declares that, pursuant to Article 2(4) of the Constitution, such MPs’ omission, in failing to “forthwith” vacate such parliamentary seats, and the speaker’s omission, in failing to declare vacant, without unreasonable delay and within 21 days, such parliamentary seats became constitutionally vacant, i.e., de jure, upon the resignations of such MPs, notwithstanding that they were not, de facto, vacated “forthwith”.**
- 11. The court declares that the State, by providing property to or on behalf of MPs unlawfully occupying parliamentary seats, contrary to section 40 of the former Constitution, contravened Article 40(3) of the Constitution in depriving the people of Kenya of property provided to or on behalf of such MPs.**
- 12. The court orders the State to recover all property unlawfully provided to or on behalf of all such MPs, including prosecuting to conviction all such MPs, to recover the said property.**
- 13. The court declares that all public officers, present or past, including Parliamentary Service Commission members, the clerk of the National Assembly and other staff in the parliamentary service, who directed or approved the unlawful provision of property to or on behalf of all such MPs, are liable for any loss arising from such provision, and orders that they make good the loss, pursuant to Article 226(5) of the Constitution.**
- 14. The court declares that the State, through its organ Parliament, and through its State officer the Speaker, has violated Article 27 of the Constitution, by discriminating in favour of such MPs, as against the people of Kenya. For by allowing several MPs to break, and to continue breaking, the law, without enforcing the law against these lawbreaking MPs, the State portrayed before the people of Kenya that MPs are not equal to the rest of the people of Kenya, and also manifested its failure to provide the people of Kenya their right to equal protection of the law – protection of the**

**people of Kenya against the effects of the violation of the law by MPs.**

**15. The court orders general damages and exemplary damages, payable by the Respondents.**

**16. The court order that costs consequent upon this Petition be borne by the respondents.**

3. Before the Petition could be heard and determined the 10<sup>th</sup> Parliament was dissolved with the result that prayers 1 to 7 of the Petition were overtaken by the events.

4. What triggered this Petitioner was what is what has become known in this country as party hopping. Party hopping is an unfortunate conduct where Members of Parliament who are sponsored to vie for election by certain parties do midstream the life of Parliament change their allegiance by forming other political party, joining in the formation of other political party, joining other political parties; or publicly advocating for the formation of other political parties.

5. According to the Petitioner the actions of the said members was contrary to the provisions of the law and hence their seats ought to have been declared invalid and fresh elections ordered by the Speaker of the National Assembly. He hence sought for a declaration that the affected Members had ceased to be Members of Parliament hence they ought to refund all the emoluments they received by virtue of their being such Members. According to him they also ought to pay damages and since they were in breach of Chapter 6 of the Constitution which deals with Leadership and Integrity hence they ought not to hold any state office.

6. The Petitioner's case was hinged upon Article 73 of the Constitution which provides as follows:

***(1) Authority assigned to a State officer—***

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

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

***(ii) demonstrates respect for the people;***

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

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

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

7. It is the Petitioner's position that MPs are categorized as "State Officers" since Article 260 of the Constitution provides that 'State office' means, inter alia, Member of Parliament while State officer means a person holding a State office. Since the said Members have breached public trust posited in them, they are not conducting themselves in a manner consistent with the purposes and objects of the Constitution.

8. The respondents, however, raise the issue that this Court has no jurisdiction to determine this petition based on the 5 judge bench decision in the case of **International Centre for Policy and Conflict & Others vs. Attorney General & Others Constitutional Petition No. 552 of 2012**. In that case the judges expressed themselves as follows:

**“...any question relating to the qualification or disqualification of a person who has been duly nominated to contest the position of President of the Republic of Kenya can only be determined by the Supreme Court. This includes the determination of the question whether such a person meets the test of integrity under Chapter Six of the Constitution in relation to Presidential elections. These two questions cannot be determined or**

considered by this Court outside the context of the elections that are due to be held on 4th March, 2013. The High Court has also rendered several decisions touching on its jurisdiction to interpret and enforce the Constitution. In John Harun Mwau & 3 Others v Attorney General and 2 Others, Petition No. 65 of 2011 [2012] eKLR, the High Court held as follows:

“We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy. In this case the dispute before the court falls squarely within the province of Article 258 of the Constitution.”

In Charles Omanga and Anor v IEBC & 2 Others, Nairobi HCC Petition No. 2 of 2012, the Court held that:

“...the doctrine of separation of powers and checks and balances which run throughout our Constitution deliberately obligate the High Court to determine 'any question whether any law is inconsistent and in contravention of the Constitution'.”

In light of the above, the question placed for determination by the petitioners in this case essentially addresses issues that boil down to asking this court to make declarations whose ultimate aim would result in the determination of the question, whether the 3<sup>rd</sup> and 4<sup>th</sup> Respondents are qualified to offer their candidature for the office of President and Deputy President respectively. This is an issue which is within the exclusive jurisdiction of the Supreme Court. In the premises therefore, we are in agreement with the Respondents that the High Court lacks jurisdiction to deal with a question relating to the election of a president...This is not to say that the High Court is divested of jurisdiction to inquire into matters of integrity relating to elective and appointive public office. The only caveat is that this particular matter is so intertwined to the issue of presidential elections in relation to the 3rd and 4th Respondents. [Emphasis mine]. We therefore find that in light of the provisions of Articles 163 and 165, our jurisdiction in this matter has been limited to interpreting the provisions of the Constitution in respect of the provisions of Chapter Six.”

9. If I understood the Judges correctly, they did not hold that the High Court has no power to investigate allegations of the failure by a State Officer to meet the qualifications of Chapter 6. What they held was that the issue that was before them was so intertwined with the issue of Presidential Election that it was not possible to divorce it from the issue touching on the qualification of a Presidential Candidate which is an issue whose determination is the preserve of the Supreme Court.

10. In Trusted Society of Human Rights Alliance vs. Attorney General & Others Petition No. 229 of 2012, this Court composed of 3 judges expressed itself as follows:

“It is not in doubt that the High Court is the right forum for cases challenging the constitutionality of actions done under the authority of the Constitution. Article 165 of the Constitution provides that:

*165(3)(d) subject to clause (5), the High Court shall have—*

*(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—*

*(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.*

Based on the above provision of the Constitution, we take the view that this case has been rightly filed before the High Court...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 any State organ fails to do so, the High Court, as the ultimate guardian of the Constitution, will point out the transgression.....The Constitution has bequeathed to Parliament the task of vetting appointees to the Commission – including the position of Chairperson -- and to the Executive the prerogative of appointment to the office. That much is clear and uncontested. However, both State Organs must do so in accordance with the law. That law, in our view, has two aspects: the procedural aspects are that the laid down procedures must be followed for the appointment to be constitutionally valid. But there is a second aspect: the substantive one. The appointees must also meet the constitutional threshold; the qualifications for appointment. If the correct procedures are followed, and the test of legality is substantively met, then the two coordinate political branches can appoint whomsoever they wish to the constitutional office. It is, for example, within their constitutional discretion to pick from among competing candidates as long as they are all qualified; and as long as the correct procedures are followed. As other jurisdictions put it (see, for example, *The State ex rel. The Attorney General v Porter* 1ALA. 688; 1840 WL 243 (ALA.)), the Court is “powerless” to determine whom the Legislature or Executive should appoint once the two tests are satisfied because such a determination would present a political question; an inappropriate one for the Courts. However, the Court has both the power and the duty to determine whether a particular appointee is constitutionally unqualified to fill the vacant office...Other jurisdictions have come up with a similar test for determining the outer limits of the doctrine of separation of powers in the context of appointments to State or Public Offices. The South African Supreme Court of Appeal in the *Democratic Alliance* case earlier cited has taken the approach that where there is evidence that an appointee does not meet the prescribed test of “fit and proper person” the Court will interrogate whether the appointing authority undertook a “proper inquiry” before pronouncing whether the appointee has reached the constitutional threshold for appointment. In other words, the Court will not merely be satisfied by the fact that the appointment process seemed to have gone through the procedural hoops. The Court enunciated the rule of law that when the Executive or other State Organ is given power to act by the Constitution, their action must be rational and in compliance with the Constitution and the doctrine of legality. The constitutional standard emerging from these cases, which we now adopt, is that the Court is entitled to review the process of appointments to State or Public Offices for procedural infirmities as well as for legality. A proper review to ensure the procedural soundness of the appointment process includes an examination of the process to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the constitutional requirement. The absence of any evidence that such an inquiry was conducted, or, the availability of evidence that such an inquiry was, in fact, not conducted, would lead to the conclusion that the procedural aspects of this constitutional test have not been satisfied. Additionally, the Court must review the appointment decision itself to determine if it meets the constitutional threshold for appointment. The test here is one for rationality: can it be said that the appointing authority, after applying its mind to the constitutional requirements, reached a rational conclusion that the appointee met the constitutional criterion? While the appointing authority has a sphere of discretion and an entitlement to make the merit analysis and determination of the question whether the appointee actually meets the constitutional criteria, Courts will review that determination where, rationally, a reasonable person would not have reached that determination. The test, then, is one of reasonableness: substantively, the Court will defer to the reasonable determination of the appointing authority that a proposed appointee has satisfied the constitutional criterion. Where such a determination is unreasonable or irrational, however, the Court will review it. To this extent, therefore, the constitutional review is not for error but for legality.”

11. It follows that where an act is purportedly taken under the Constitution the Court has the jurisdiction to entertain a dispute touching the exercise of such Constitutional mandate. In my view the mere fact there exists an alternative avenue for settling such an issue does not oust the jurisdiction of the High Court though the Court takes into account the existence of such an alternative avenue in deciding whether or not to grant the remedy sought.

12. In *Jimmy Mutinda vs. Independent Electoral and Boundaries Commission & Others High Court Miscellaneous Application No. 2 of 2013*, I held that the jurisdiction of the High Court may,

however, be limited or restricted by an Act of Parliament in which case resort must be had to the special procedure. That, however, does not necessarily amount to ouster of jurisdiction of the High Court.

13. It is therefore my view and I so hold that the High Court cannot abdicate its Constitutional mandate to ensure that any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

14. It follows that this Court has jurisdiction to determine the issue whether or not the former Members of Parliament qualify to be State Officers as opposed to merely being Members of Parliament.

15. On the merits of the Petition, it is clear that the said former Members of Parliament who are adversely mentioned by the Petitioner are not parties to this suit. It is true that on 28<sup>th</sup> September 2012, **Warsame, J** (as he then was) directed that all the affected parties be served. In my view the said affected parties were to be served so that they could decide whether or not to participate in these proceedings by making an appropriate application to be joined. However, the primary responsibility of ensuring that all the parties against whom adverse orders were likely to be made was on the Petitioner.

16. It cannot be gainsaid that the orders sought in this Petition were and are likely to have far reaching consequences on the Constitutional rights of the former Members of Parliament hence it was necessary that they be made parties to the Petition.

17. Since the said persons are not parties to this Petition, even if the Court were to grant the orders sought, the same would not bind them since it is trite that a Court order does not bind a non-party. See **Earnest Orwa Mwai vs. Abdul S. Hashid & Another Civil Appeal No. 39 of 1995.**

18. To grant such an order would itself be unconstitutional since Article 50 of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. A determination cannot be said to be fair when persons likely to be affected thereby are not afforded an opportunity of being heard. In **Dalip Singh Karam vs. Anderji Odhavji Nathwani [1949] LRK 49** it was held that every judicial or quasi-judicial tribunal must apply the fundamental principles of natural justice and natural justice will not allow a person to be jeopardised in his person or pocket without giving him an opportunity of appearing and putting forward his case. ,

19. I therefore do not find it necessary to consider the other issues raised. Consequently the Petition in so far as it seeks orders that are likely to adversely affect non-parties is incompetent and is struck out but with no order as to costs since the bulk of the orders sought in the Petitioner were overtaken by events outside the control of the Petitioner.

**Dated at Nairobi this 1<sup>st</sup> day of March 2013**

**G V ODUNGA  
JUDGE**

*Delivered in the presence of:*

*Petitioner in Person*

*Mr. Etemesi for Mr Etole for Hon Musalia Mudavadi*