REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CONSTITUTIONAL PETITION NO. **E001** OF 2025

KIROKO NDEGWA…….…….…….PETITIONER

-VERSUS-

THE HONOURBALE ATTORNEY GENERAL.....1ST RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION……2ND RESPONDENT

CABINET SECRETARY,

NATIONAL TREASURY & ECONOMIC PLANNING…3RD RESPONDENT

HON. MWANGI WA IRIA……..4TH RESPONDENT

AND

PUBLIC PROCUREMENT REGULATORY

AUTHORITY……..…INTERESTED PARTY

JUDGMENT

This is a public interest petition which seeks to declare the appointment of the 4th respondent as the chairman of the interested party to have been in violation of the Constitution. A total of 12 prayers were sought whose ultimate effect would be to remove the 4th respondent from the aforesaid position. To be specific, the prayers in the petition dated 6th January 2025 are as follows;

1. ***THAT*** *an order of certiorari is hereby issued quashing the appointment of the 4th respondent as the chairperson of the Board of Public Procurement and Assets Disposal Regulatory Authority.*

2. ***THAT*** *an order be and is hereby issued prohibiting and/or restraining the 2nd respondent from clearing the 4th respondent to serve in any public appointive office until he is cleared of the unresolved issues.*

3. *A declaration that the 4th respondent is unfit to hold any public office in the Republic of Kenya on account of the findings that he has violated chapter 6 of the Constitution.*

4. *A declaration that the 4th respondent, unless cleared by the 2nd respondent of the issues touching on his integrity is unfit to hold any state or public office in the Republic of Kenya.*

5. *A declaration that any person who is found, in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened chapter six is unfit to hold a state or public office.*

6. *A declaration that any candidate for appointive and/or elective position unless cleared by the 2nd respondent is not eligible for any state or public office.*

7. *A declaration that any candidate for an appointive position with a pending issue touching on the integrity of that candidate is unfit to hold any public office in the Republic of Kenya unless cleared by the 2nd respondent.*

8. *A determination on what is the procedure of making findings by the 2nd respondent on suitability for appointment/election of a person to any state office.*

9. *A determination on whether the President or any other public officer/body has the power to overturn the findings by the 2nd respondent on suitability for appointment of a person to a state office.*

10. *A declaration that any person under any investigation by the 2nd respondent or the Inspector General of Police should not be allowed to; continue*

holding public office; appointment to state office until completion of the investigation and clearance thereof.

11. *Costs of this Petition.*

12. *Any other or further such other orders as this Honourable Court shall deem just.*

In support of the petition, there are two affidavits sworn by the petitioner. The first is the supporting affidavit dated 6th January 2025 while the second is a further affidavit sworn on 29th July 2025. The summary of the two affidavits are allegations that the 4th respondent is not suitable to hold the position of the chairman of the board of the interested party or any other public office because he has a questionable character that does not pass the test of integrity.

The petitioner's case

The 4th respondent is said to have been elected as a governor for Murang'a County on 4th March 2013 and during his tenure which lasted up to August 2017, he perpetrated unprecedented actions of embezzlement of funds, abuse of office and misuse of public recourses. As a result, he was impeached by the County Assembly of Murang'a in October 2015 and on 21-10-2017. It is averred that latter impeachment was set aside by the Senate although it convicted him on account of violation of provisions of chapter six of the Constitution. Nothing much has been said of the October 2015 impeachment.

The petitioner avers that the 4th respondent has been adversely adjudged by findings of courts in cases related to abuse of office and has featured in myriad of corruption reports specifically in the 2nd respondent's report to the legal affairs committee of the Senate on investigations of corruption within the

Counties which was presented to Parliament on 14th December 2016. It is also averred that in another report, the 2nd respondent recommended that the respondent among other 105 candidates should not be cleared to contest for elective positions in 2017 general elections on account of unresolved integrity issues and these findings were never challenged.

The petitioner added that the 4th respondent is currently facing a case for forfeiture of assets, the same being this court's suit number E001 of 2022. The 4th respondent is also facing a criminal case before the Milimani Chief Magistrates' court anti-corruption case number E012 of 2024 which case involves acts of corruption among them violation of procurement procedures. It is argued that in these circumstances, his appointment to serve in the interested party's board is an irony and ridicule to the rule of law.

The petitioner contends that the 4th respondent is a candidate for suspension under Section 62 of Anti-Corruption and Economic Crimes Act and by extension he should not qualify for appointment in a public office.

The petitioner depones further that, the 2nd respondent knew at the time of appointment of the interested party that he was facing criminal charges and forfeiture proceedings for Kshs 542 million. According to the petitioner, this appointment is oxymoronic and an insult to the sovereignty of the people of Kenya and the Constitution.

The respondents' case

The 2nd respondent and the interested party did not actively participate in these proceedings. The 1st and 3rd respondents filed grounds of opposition dated 20th February 2025 but did not file any replying affidavit or submissions. The 4th

respondent opposed the petition through a replying affidavit sworn on 27-01-2025 and a supplementary affidavit sworn on 19th August 2025.

The 1st and 3rd respondents maintained that the reports to and from the Senate cannot be authoritative basis to determine suitability of the 4th respondent as the allegations were dismissed and where they were found to be in violation of the law, they did not meet the threshold of gross misconduct.

It is also argued that the pendency of criminal proceedings and investigations are not a bar to appointment to public office and this court should apply the doctrine of avoidance as the mandate to enforce chapter six of the Constitution rests with the 2nd respondent. It is also averred that Section 62 of Anti-Corruption and Economic Crimes Act does not apply in this case since the 4th respondent was not a public or state officer at the time he was appointed.

The 4th respondent has averred that the criminal case is yet to be determined and granting the prayers in the petition in such circumstances will be a violation of his right to be presumed innocent until proven guilty. He denied ever being impeached or otherwise removed from office.

Analysis and determination

I have carefully read the petition and the affidavits in support and opposition to the same and the grounds of opposition. I have also read the submissions of the petitioner dated 1st September 2025 and those of the 4th respondent dated 23rd September 2025.

There are no submissions filed by the 1st, 2nd, and 3rd respondents and the interested party despite them being at the vantage position to know the issues raised by the petitioner. They hold much of the information which the petitioner

has sought to rely on. It does not augur well when members of the public seem to be the ones more desirous on checking the excesses, illegalities or matters of public interest when the bodies which have been set up and given statutory and constitutional mandate to perform those functions for and on behalf of the people sit in the comfort of their offices and remain mum when issues are raised. It is abhorrent to say the least when such institutions sit pretty and back and watch two private citizens duel it in court.

The 2nd respondent should have been at the forefront and more active in giving this court more information. Its silence in this matter and others of similar nature should not be taken lightly. It must be assumed that there is something it does not want the court or the public to know and I find that conduct a dereliction of duty by such an important institution.

Be that as it may, this court will proceed to analyse and determine the merits of the petition with what has been placed before it and in consideration of what it will perceive to be its boundaries in law. A few things are not in dispute, that is; the 4th respondent was the Governor of Murang'a County between 2013 and 2017, that he was impeached by the County Assembly of Murang'a on 21st October 2017 but was saved by the Senate which set aside the impeachment, that there are civil proceedings against the 4th respondent and others in this court in respect of alleged embezzlement of Kshs 542 million and that the 4th respondent has been charged in the Chief Magistrate's court with offences related to corrupt and procurements irregularities.

Having said the above and read the submissions so far filed, it is my opinion that there arise three issues for determination which are;

a. Whether the issues the 4th respondent is facing are a bar to his appointment to the position of chairman of the interested party?

b. Whether there was breach of the Constitution in the appointment of the 4th respondent?
c. Whether the court should issue the orders sought.

Article 10(2) of the Constitution provides as follows;

The national values and principles of governance include-

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

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

(d) sustainable development.

There is no doubt that the aspirations of Kenyans when they passed a new Constitution on 27th August 2010 were among other good things to have a public service that is bereft of corruption, lethargy, overbearing or that is shrouded in secrecy or mystery. It is the right of Kenyans to have public service that respects their intelligence. The Kenyan citizens deserve a people driven and servant leadership which is illuminated by integrity and competence.

Chapter 6 of the Constitution provides the tenets of leadership and integrity of a state officer while Article 232 provides for principles of public service. Out of these provisions, Kenyans expect a public service that inspires confidence, trust and adherence to the national values and that is open to public scrutiny. Those who approach the authorities including the courts demanding quality and clean public service should be applauded and seen as champions of advancement of the desires and rights of the people.

However, as we promote the tenets of the constitution and protection of the rights of Kenyans as stated above, it should be remembered that there will always be competing interests between public and individual rights. Where collective rights of Kenyans are at the center of a matter or conflict, there is always private and individual rights which would be affected by the outcome of the push for the Kenya we want as a society. That is to say that we must strike a balance between the rights of Kenyans as a society and that of individuals so that we do not trample on the rights of a person in the name of promoting the larger public good.

The petitioner has stated at paragraph 8 of the supporting affidavit that the 4th respondent was impeached by the County Assembly of Murang'a in October 2015 but I have not seen any evidence to that effect. The only evidence supplied is in respect of impeachment by the said Assembly on 21-10-2017. That evidence is found in the Senate's report which has been produced as exhibit 1 in the supporting affidavit.

The petitioner has told the court that the Senate found the petitioner to have violated the law and has cited several paragraphs of the report. I have looked at those paragraphs and in my view the same do not amount to a conviction by the Senate. If indeed they were, the Senate would not have let the petitioner to go free. The petitoner has cited the paragraphs selectively urging the court to consider part of the sentences instead of the full text. I have looked at the report and the cited paragraphs and what I see therefrom is as follows;

> *'The committee considered whether this violation amounted to a gross violation necessitating removal of the Governor from office and found that the required threshold for removal had not been reached……..*

The Committee unanimously found that although there was violation of the law, the violation did not rise to the level of gross violation and was therefore not substantiated.'

Article 75(3) of the Constitution provides for barring of persons from holding a public or elective office once they are removed from office through impeachment or other process. It states;

'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.'

Clause (2) referred to in the said Article covers conduct of officers in respect to financial probity, dual citizenship and restriction of what the state officers can and cannot do. By relying on the impeachment of the 4th respondent, the petitioner is in essence placing the 4th respondent in the above Article. Impeachment of a public or state officer is not complete until it is approved or adopted by the relevant statutory or constitutional body, in this case, the Senate. This court cannot sit as an appellate body on the findings of the Senate. It is therefore not proper for the court to load the petitioner with the burden of issues of which he was acquitted by the Senate.

The other reasons advanced by the petitioner is that the 4th respondent is facing civil forfeiture proceedings in this court's civil case number E001 of 2022. The petitioner has at paragraphs 5(a) - (cc) of his further affidavit which consists of 29 sub paragraphs extensively broken down how according to him the properties which are subject of the forfeiture suit were acquired. I refrain from discussing the civil matter in this petition for obvious reasons that it is pending before me and it will be improper and prejudicial for me to go into merits of the same before a full trial. The 2nd respondent is the plaintiff in that matter and it is

silent in this petition for reason best known to it. Perhaps it is for the same reasons this court is not going to discuss the case. I need not say more about this.

It is common ground that the 4th respondent has been charged alongside others with offences related to procurement in the criminal case. The case is going on before the Chief Magistrate and as I give my views on this point, I must be careful not to say things which will prejudice or embarrass the trial before the Magistrate's court.

It is true as submitted by the 4th respondent and stated in the grounds of opposition filed by the 1st and 3rd respondents that pendency of a criminal case is not a bar to appointment into a public office. Even after conviction, there could be circumstances which may not necessarily bar someone from appointment to a public office unless the relevant law is clear about that. For instance, where Section 64(1) of Anti-Corruption and Economic Crimes Act applies.

The petitioner has argued that since the 4th respondent would be due for suspension from office under Section 62 of Anti-Corruption and Economic Crimes Act, he was not fit to be appointed to the office complained of. That Section reads;

> *'A public officer or state officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case:*
> *Provided that the case shall be determined within twenty-four months.'*

It is clear from the above Section that the public officer is suspended from the position he held at the time he was charged. The 4th respondent had not been

appointed as at the time he was charged. It follows therefore that the reliance on that Section is a misapprehension.

In view of the above, my answer to the first issue as framed above is in the negative. The actions or events complained of were not a bar to the appointment of the respondent.

The second issue is whether there was a breach of the Constitution in the appointment. The actions or events attributed to the 4th respondent may not have been a bar to the appointment but where the appointment of a public or state officer is found to have violated the law or the Constitution, this court would be justified to intervene and give appropriate declarations. The appointment of the Chairperson of the interested party is made under Section 11(1) Public Procurement and Asset Disposal Act Chapter 412C of the Laws of Kenya which states as follows;

A person shall not be appointed as a chairperson of the Board unless that person-

(a) possesses a university degree in a relevant field from a university recognised in Kenya;

(b) has knowledge and experience of not less than ten years in any of the following fields-

(i) procurement and supply chain management;

(ii) finance;

(iii) law;

(iv) accounting; or

(v) economics; and

(c) meets the requirements of Chapter Six of the Constitution.

I have already held that there was nothing barring the respondent from being appointed to a public office. I have also not seen anything that would mean that the 4th respondent does not meet the requirement of chapter six of the Constitution. The body mandated to make a determination on whether someone meets the requirement of the chapter six of the Constitution is the 2nd respondent who has unfortunately remained mute on the issues in this matter.

All that I have on record is that the 2nd respondent sent a report to the Senate dated 14-12-2016 which gave status of cases on corruption in the Counties which were under investigations in which the 4th respondent featured. There is also a report on suitability of persons who were seeking elective positions in 2017 in which the 2nd respondent recommended that 106 candidates including the 4th respondent should not be cleared to contest on account of their unresolved integrity issues.

That reports do not indict the 4th respondent as failing to meet the requirements of chapter six of the Constitution. In any event, the 4th respondent was cleared for general elections of 2017 which came after the alleged reports and served his full term. If indeed the respondent did not meet those requirements, there were avenues of challenging his nomination to run. In that regard, it is not in the purview of this court to evaluate the suitability of the 4th respondent whereas that mandate is given to the 2nd respondent pursuant to Article 79 of the Constitution and Section 11 of the Ethics and Anti-Corruption Commission Act Chapter 7H of the Laws of Kenya.

Where the law has given functions, powers and mandate to statutory and constitutional bodies, the courts should exercise restraint in overstepping into those mandates unless it is shown that the bodies have violated the law. Constitutionalism includes respecting the boundaries set up by the law for

performance of state and other functions. The courts of law cannot be the overseer of all the functions of the government bodies. They can only come in to keep the government bodies or organs within the law. In ***Omondi Michael Haya & 4 others v University of Nairobi (2017) KEHC 1615 (KLR),*** the court held that;

> *'Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court.'*

It has not been stated to this court which of the qualifications given in Section 11(1) Public Procurement and Asset Disposal Act, the 4th respondent did not possess other than the issues surrounding his integrity which I have found insufficient to warrant the prayers sought against him. The answer to the second issues is therefore in the negative. I have not identified any breach of the Constitution or the law in the process of the appointment.

Having answered the first two issues in favour of the 4th respondent, it follows without much discussion that the majority of the orders sought in the petition are not available. Prayers 1, 2, 3 and 4 are couched in a way that intends to have effects of removing the 4th respondent from office which would go against my findings above.

Payers 5, 6, 7 and 10 are too general for this court to grant. Making such declarations would amount to amending or adjusting the words and effect of Sections 62, 63 and 64 of the Anti-Corruption and Economic Crimes Act. The Legislature was very clear on the limits and extent of disqualification and

suspension of persons charged with or convicted for corruption and economic crimes. By use of the words 'convicted' in these Sections, the Legislature intended that the finding of culpability of the persons be only reserved for the courts and making the declarations sought in these prayers, this court will be extending the intention of the lawmakers to include persons who are found culpable by other institutions other than the court.

This court cannot go beyond or outside the spirit of the said Sections. Section 64 talks of disqualification upon one being convicted but not one with a pending issue under investigations and I believe for good reasons. If we were to go the way proposed by the petitioner, all that would be required to disqualify candidates will be filing of an allegation with the 2nd respondent whether merited or not. We live in a society where political and other administrative competitions are at their own levels and one can only imagine how it would be easy to get competitors out of the way by making an allegation against them. This court is not ready to cause such confusions by making a declaration that expands the meaning of what the law intended.

Sections 62 and 63 of Anti-Corruption and Economic Crimes Act provide for suspension of public officers who have been charged with corruption or economic crimes. Prayer 10 seeks this court to expand the meaning of these Sections to include those who are under any investigations by the 2nd respondent or the Inspector General of Police. As things stand now, the law provides for suspension of those who have been charged with corruption and economic crimes. The petitioner wants the court to expand this to include any person who is under investigations of any nature. Clearly, it is not the role of the court to amend laws or add meaning beyond the spirit of the law. The role of the court is limited to interpretation and enforcement of the laws and if there would be any need to amend the law, it can only make observations or recommendation.

Honourable LM Mugambi held in ***Benjamin v Attorney General & 6 others; Maraga & 23 others (Interested Parties) KEHC 4645 (KLR)*** that;

> *'In determining matters relating to discharge of functions by various organs of State, courts must take cognisance of the doctrine of separation of powers and avoid any unjustified incursions into affairs that properly fell within the realm of another arm or organ of government.'*

Prayers 8 and 9 asks me to make a determination of the procedures to be taken by the respondent in making its findings on suitability of a person and whether the President or any other officer has the power to overturn the findings by the 2nd respondent on suitability for appointment of a person to a state office. This court has no mandate to provide for procedures of how statutory or constitutional bodies conduct their businesses. Doing so will be micromanaging the institution with the effect of constricting their operational discretions and most likely produce undesirable results. The Court of Appeal held in ***Kenya Deposit Insurance Corporation v Richardson & David Limited & another (2015) KECA 4 (KLR),*** that;

> *'The law does not give the court the power to substitute itself in place of an institution where the latter is alleged to have erred in discharge of its duty. The role of the court is to sanction what is done in the right way or invalidate what is improperly done. The court is not entitled to discharge the duties of the institution it censures or whose decisions it invalidates. Parliament has not given the court the power to step into the shoes of such institution.'*

It was also held in ***Margaret Wanjiku Kiiru v Attorney General, Nakuru County Assembly Service Board, County Government of Nakuru, Clerk County Assembly of Nakuru & Family Bank Limited (2017) KEHC 5556 (KLR)*** that;

'It is trite law that where powers are conferred in a body, those powers should be exercised by that body. Under the doctrine of separation of powers each of the bodies set up under the Constitution is independent and autonomous and is not subject to the control of the other in performing its functions and duties.'

Prayer 9 is asking for declaration of the obvious. The 2nd respondent is an independent Commission which must work without interference by any authority. This is by virtue of Article 79 as read together with Chapter 15 specifically Article 249 of the Constitution. Its decisions are not amenable to be set aside by any other authority other than the courts of law and for good reasons. This is not to say that by appointing the 4th respondent, the President or the 3rd respondent overturned any decision of the 2nd respondent as I have not seen any such situation. Although it is obvious and that is what the law provides, I see no harm in making the declaration for purpose of prosperity and clarity.

Consequently, and going by what I have stated above, the petition only succeeds in terms of prayer 9 and I proceed to give the following orders;

a. A declaration is hereby issued that the President or any other public officer or body except a court of law have no powers to overturn a decision of the 2nd respondent.

b. All the other prayers in the petition dated 6th January 2025 are dismissed.

c. Since this is a pubic spirited petition, there will be no orders as to costs.

Dated signed and delivered at Nairobi this **28th** day of **November** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of;

Miss Mwangi holding brief for Mr. Kiroko Ndegwa for the petitioner;

Miss Kenduiwa for the send respondent;

Mr. Orenge for Mr. Ng'ang'a Mbugua for the 4th respondent; and

In absence of the 1st, and 3rd respondents and the interested party