



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 176 OF 2014

BETWEEN

FERDINAND NDUNG’U WAITITU.....APPELLANT

AND

BENSON RIITHO MUREITHI (*Suing on his behalf And on behalf*

of the General Public)1ST RESPONDENT

J. W. WAKHUNGU, CABINENT SECRETARY, MINISTRY OF ENVIRONMENT,

WATER AND NATURAL RESOURCES.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Lady Justice M. Ngugi, J.) dated the 28th day of February, 2014

in

HC. CONSTITUTIONAL PETITION NO. 19 OF 2014)

JUDGMENT OF THE COURT

The Background

[1] **Ferdinand Ndung’u Waititu**, the appellant herein, is dissatisfied with the judgment and order made against him by the High Court, (**Mumbi Ngugi, J.**) in Constitutional Petition No. 19 of 2014. The petition in the High Court was a representative petition brought by **Benson Ritho Mureithi** (*now the 1st respondent*) against **J. W. Wakhungu**, (*now the 2nd respondent*) in her capacity as Cabinet Secretary- Ministry of Environment (herein referred to as Cabinet Secretary), and the Attorney General (*now the 3rd respondent*), herein referred to as AG.

[2] By Gazette Notice No. 115 dated 10th January, 2014, the Cabinet Secretary appointed the appellant as Chairman of the Athi Water Services Board for a term of three years. In his petition the 1st respondent challenged the constitutionality of the appellant's appointment as the Chairman of the Athi Water Services Board contending that the appellant was not a person of integrity, and that in making the appointment the Cabinet Secretary contravened the Constitution as she failed to comply with the provisions of Article 73 in Chapter 6 of the Constitution.

[3] The main orders sought in the petition were declarations regarding the suitability and propriety of the appointment of the appellant as Chairman of the Athi Water Services Board. In particular the 1st respondent sought to have the appointment of the appellant declared null and void *ab initio*. The appellant, who applied and was joined in the petition as an interested party, opposed the petition challenging the jurisdiction of the court, the 1st respondent's *locus standi*, to bring the petition, and the justiciability of the 1st respondent's action. The Cabinet Secretary and AG also similarly opposed the petition.

[4] In her judgment, the learned judge found that there were serious integrity issues that were not resolved during the process of the appointment of the appellant; that no proper inquiry was made regarding the suitability of the appellant as required under the Constitution; that the Cabinet Secretary failed to comply with the requirements of the Constitution as the appointment of the appellant fell below the standard set by the Constitution; and that the Cabinet Secretary failed to exercise her mandate in accordance with the Constitution. The learned Judge therefore declared the appointment of the appellant as the Chairman of the Athi Services Board null and void, and issued an order quashing the appointment.

The Appeal

[5] The appellant is now before us in this first appeal. As per the memorandum of appeal amended on 15th December 2014, the appellant has raised 27 grounds urging the Court to set aside the judgment of the High Court, and substitute thereto an order dismissing the 1st respondent's petition. The grounds posited by the appellant include: the issue of jurisdiction, it being contended that the court erred in assuming jurisdiction when the issues raised in the dispute ought to have been determined under **Article 80** of the **Constitution** as read with **section 4(5)** of the **Leadership and Integrity Act**; and the **Ethics and Anti- corruption Act**; improper exercise of judicial discretion by failing to properly weigh the evidence; and taking into consideration extraneous matters.

[6] Following directions given by the Court, all the parties duly filed and exchanged written submissions. The appellant also filed additional supplementary submissions and a list of supplementary authorities. The parties were given a date for orally highlighting the written submissions but only **Mr. Harrison Kinyanjui**, counsel for the appellant, and **Ms Wambui** represented the Attorney General and the Cabinet Secretary attended Court and highlighted their submissions. Counsel for the 1st respondent not having appeared we have solely relied on their written submissions.

[7] During the hearing of the appeal the appellant's counsel informed the Court that during the pendency of these proceedings the appellant had been elected to the position of Member of Parliament, and that someone else had subsequently filled the position of Chairman of Athi Water Service Board. Notwithstanding this development the appellant was still pursuing the appeal as a matter of principle as in his view the judgment of the High Court is setting a bad precedent.

Appellant's submission

[8] The appellant's submissions were in two parts. The first part was in the written submissions filed on 29th September 2014 in which the appellant addressed mainly the issue of jurisdiction; the wrongful exercise of discretion, the 1st respondent's bad faith; and taking into consideration extraneous matters; the appellant argued that the constitutional court lacked the jurisdiction to hear and determine the 1st respondent's petition, because the petition was grounded on claims under **Article 79** and **80** of the Constitution, and under these constitutional provisions the 1st respondent's claim should have failed as he had not complied with **section 4(5)** of the **Leadership and Integrity Act**.

[9] Further, the appellant submitted that the learned judge failed to appreciate and apply the full scope of the **Leadership and Integrity Act**; that the judgment of the constitutional court was a nullity as it was outside the mandate prescribed by Parliament under the Constitution; and that it was only the Ethics & Anti-corruption Commission that could move the court for orders if a public body failed to comply with the requirements of the Leadership and Integrity Act.

[10] The appellant asserted that there were no allegations that he had failed to act professionally, or was likely to act unprofessionally in the execution of his mandate as Chairman of the Athi Water Services Board; that the trial judge failed to give due weight to his (appellant's) defence regarding jurisdiction; that the trial judge should have downed his tools, in light of the court's want of jurisdiction; and that the trial judge had no judicial basis for departing from the principles set in earlier cases regarding the exercise of discretion.

[11] In addition, the appellant contended that the trial judge misdirected herself in considering the weight of the evidence, and failed to consider that the *sub judice* rule was violated. He argued that the learned judge failed to take seriously the findings in ELC No. 7 of 2012; and the fact that the 1st respondent lodged his petition with ulterior motives considering the dispute in ELC No. 7 of 2012. He reiterated that the 1st respondent did not demonstrate good faith in invoking the jurisdiction of the court as he failed to invoke the proper legislative process, but instead pre-empted the statutory set procedures that are commensurate with the constitutionally envisaged process under **Article 79 of the Constitution**.

[12] Further, the appellant argued that the learned judge misdirected herself in failing to consider that **Article 23 (1)** of the **Constitution** did not take away the procedure provided under statute; that the Cabinet Secretary did not fail to accord the integrity test in appointing the appellant to Chairmanship of the Athi Water Services Board; that the 1st respondent never sought any information from the Cabinet Secretary regarding the basis of the appellant's appointment nor did he give the appellant a fair chance of being heard.

[13] The appellant ended the first part of his submissions urging that the learned judge took into consideration extraneous matters by issuing an order nullifying and quashing the appointment of the appellant when no specific relief had been sought against the appellant; that the learned judge failed to place any weight on the evidence of the Cabinet Secretary who explained that the relevant terms of the Constitution had been met; that the 1st respondent exhibited bad faith in failing, in the first instance, to serve the appellant and in seeking orders that were not motivated by public interest; that the 1st respondent failed to disclose that the appellant had already taken up the position of Chairman of Athi Services Board and had commenced the execution of his mandate; that the 1st respondent's suit was solely intended to unfairly and illegally set up a case for use in High Court ELC No.7 of 2012; and that the learned judge failed to take into account that the appellant was ventilating his constitutional right to due process under **Article 25 (c)** of the **Constitution**. The appellant therefore, urged the Court to allow his appeal.

[14] In the supplementary submissions filed on 24th February 2015, the appellant addressed 8 issues. The first issue was whether the learned judge erred in law and fact by failing to consider that the 1st respondent's petition did not satisfy the principle in **Anarita Karimi Njeru v Republic (1976-1980) KLR [1272] (Anarita Karimi Njeru Decision)**, that requires that a constitutional petition be pleaded with reasonable precision by setting out the provisions of the Constitution that are alleged to have been contravened, and the manner in which they were contravened.

[15] The appellant contended that the petition contained blanket allegations; that although reference was made to various Articles of the Constitution, there were no particularizations of the precise contraventions; and that in some instances contraventions were alleged without setting out the specific provisions of the law or Constitution. The appellant urged that the petition did not meet the threshold established in the **Anarita Karimi Njeru Decision**, and cited **Thuku Kirori & 4 others v County Government of Muranga [2014] eKLR**; and **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (Mumo Matemu Decision)**; in support of his submissions.

[16] The second issue addressed by the appellant was whether the learned judge erred in law and in fact in holding that the character and integrity of the appellant was not in question; and in basing her decision on issues not pleaded by the 1st respondent in the petition. The appellant pointed out that notwithstanding the fact that the petition did not dispute the appellant's competence or suitability, nor challenge the procedure or process of appointing the appellant, or allege violation of Chapter 6 of the Constitution, in his submissions, the 1st respondent departed from the averments in the petition and brought in new allegations. As a result the trial judge framed new issues dealing with procedure and suitability, which issues had not been raised in the petition. Counsel relied on **Independent Electoral Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR** for the proposition that for the sake of certainty and finality each party is bound by their pleadings and cannot be allowed to raise a different or fresh case without a proper amendment being made.

[17] The third issue was whether the trial judge erred in law and fact by failing to consider that the petition was lodged in bad faith and that the 1st respondent had no *locus standi* to lodge the petition. The appellant maintained that although the 1st respondent indicated that he had brought the suit in public interest, the petition was in fact filed in bad faith to gratify the 1st respondent's personal vendetta against the appellant arising out of a dispute subject of ELC No. 7 of 2012, which material facts the 1st respondent failed to disclose. The appellant relied on the holding in the **Mumo Matemu Decision** that a person who brings a petition on behalf of the general public must act bona fide with a view to vindicating the cause of justice and not out of personal gain, private profit, political motivation or other oblique consideration.

[18] The fourth issue was whether the trial judge erred in law and fact by failing to appreciate that Chapter six of the Constitution, and the Leadership and Integrity Act No. 19 of 2012, apply to assumption of office for both public officer and State officers. The appellant submitted that since his appointment by the Cabinet Secretary as the Chairperson of Athi Water Services Board was published in a gazette notice as required by law, and he had assumed office, his removal for alleged lack of integrity could only be done through the procedure provided under the Leadership and Integrity Act No 19 of 2012, and not by way of petition. The High Court decision of **Evans Nyambega Akuma v Attorney General & 2 others [2013] eKLR** was cited in support.

[19] The Fifth issue was whether the trial judge erred by usurping the powers of the Ethics and Anti-Corruption Commission by enforcing the provisions of leadership and integrity under Chapter six of the Constitution. The appellant argued that Parliament enacted the Ethics and Anti-Corruption Commission for purposes of ensuring enforcement and compliance with Chapter 6 of the Constitution, that as per the **Mumo Matemu Decision**, the intention of the Legislature was to place the responsibility of overseeing and enforcing implementation of these provisions on an independent commission and not on the court.

[20] The next issue was whether the trial judge erred in shifting the burden of proof to the Cabinet Secretary, to prove that she performed her mandate in accordance with the Constitution. Referring to sections 107, 109 and 112 of the Evidence Act, and the interpretation of these provisions by the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others [2014] eKLR**, the appellant submitted that the law placed an obligation on the 1st respondent to discharge the initial burden of proof before the evidential burden could be shifted to the Cabinet Secretary; that the 1st respondent did not discharge this obligation as he did not demonstrate how in appointing the appellant the Cabinet Secretary failed to exercise her mandate in accordance with the Constitution; and that the evidential burden ought not to have been shifted to the Cabinet Secretary.

[21] The penultimate issue was whether the trial judge erred by failing to appreciate that there was no material placed before the court to warrant the making of the various findings that she made. In this regard, the appellant pointed out that the 1st respondent pegged his claims on newspaper reports that had no evidential value, and which ought not to have been admitted.

[22] The final issue was whether the trial judge misdirected herself in failing to find that the criteria for qualification of an individual to hold a public office, is the same criteria to be applied to qualification of an individual seeking to hold a State office under Chapter Six of the Constitution, and under the

Leadership and Integrity Act. The appellant faulted the learned judge for failing to take into account the uncontested fact that the appellant had qualified, was nominated, and contested for the office of Governor of Nairobi County where he emerged first runner up, and that neither his integrity nor his competence or credibility had been questioned in that process.

1st Respondent's Submissions

[23] The 1st respondent submitted that under **Article 165(3)(d)(ii)** of the **Constitution**, the High Court has power to hear any questions touching on the interpretation of the Constitution, including the determination of the question whether anything said to be done under any authority of the Constitution or any law, is inconsistent with or in contravention of the Constitution; that the High Court had jurisdiction to deal with the matter as there is no mechanism provided by law for addressing the issues that were raised by the petitioner; that the 1st respondent's case at the trial was that relevant factors with regard to **Chapter 6** of the **Constitution** were not considered in the appointment of the appellant; that if this was done the appointing authority would have come up with a different decision; and that neither the Ethics and Anti-Corruption Act nor the Leadership and Integrity Act, have any provision for interrogating the constitutionality of any act done under these legislation.

[24] The 1st respondent supported the learned judge for refusing to follow the case of ***International Centre for Policy and Conflict & Others v Hon. Uhuru Muigai Kenyatta & Others, Petition No. 552 of 2012***; and ***Speaker of National Assembly v Njenga Karume [2008]*** 1 KLR 825, contending that the High Court could not exercise jurisdiction in those cases as there was a mechanism provided for dealing with issues of integrity regarding suitability for elective office which was different from the appellant's position which was an appointive office.

[25] The 1st respondent asserted that the High Court was vested with jurisdiction to determine the constitutionality of the appellant's appointment. The Court's attention was drawn to the **Mumo Matemu Decision** where this Court emphatically rejected the argument that the High Court had no jurisdiction to set aside a similar questioned appointment, because it would amount to removal in regard to which under section 42 of the Leadership and Integrity Act it is the Ethics and Anti-Corruption Commission that had to initiate. The Court stated in part as follows:

"We disagree with this approach and are not prepared to hold as urged by the appellant as such an approach would pose a re-characterization risk in similar forms of Constitutional litigation. In our considered opinion, the petition before the High Court was not instituted as a removal procedure nor as a complaint against the appellant in his capacity as a State Officer. The petition was a challenge to the constitutionality of the process and manner of the appellant's appointment."

[26] With regard to the pleadings and the 1st respondent's alleged failure to plead the alleged contraventions with reasonable precision, the 1st respondent pointed out that he had specifically sought a declaration that **Article 73** of the **Constitution** as read together with Schedule 5 and 6 of the Constitution were infringed; that paragraph 15, 16, 17 and 18 of the petition set out the particulars of the alleged infringement; and that the infringement was in regard to the appellant's integrity and suitability in the process of appointment. Relying on ***John Kipng'eno Koech & 2 Others v Nakuru County Assembly & 5 Others [2013]*** eKLR, the 1st respondent argued that the High Court was under an obligation to determine the petition on merit even where the particulars of the breach had not been specifically pleaded.

[27] Further, the 1st respondent maintained that the petition was drafted in a way that gave notice to the appellant, the Cabinet Secretary and AG, the nature of the claim, such as to enable them to adequately prepare for their case. The following quote from the High Court decision in ***Trusted Society of Human Rights Alliance v Attorney General & 2 others, [2012]*** eKLR was relied upon:

"The test does not demand mathematical precision in drawing constitutional petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions, which, are alleged to have been violated. The test is a substantive one and inquires whether

the complaints against the respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

[28] On *locus standi*, the 1st respondent maintained that under the Constitution, any person has a right to institute court proceedings where a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or is threatened with violation; that any person has *locus standi* to institute proceedings in their own interest or in public interest; that the 1st respondent had a genuine interest in the functioning of the Athi Services Board and the appointment of the Chairman; and that it was the appellant who had shown bad faith.

[29] In regard to the contention that the learned judge improperly exercised her discretion, the 1st respondent drew the attention of the Court to paragraph 56 of the judgment of the trial judge, in which the learned judge stated as follows:

“56. It is indeed worth observing that the cases in which the High Court has recently held that it could not exercise its jurisdiction with regard to suitability for office for reasons of integrity because there was a mechanism provided related to elective office. See International Centre for Policy and Conflict -vs- The Attorney General; and Michael Wachira Nderitu –vs- Mary Wambui Munene (supra). In the Otieno Kajwang case which was also election related, the Court exercised jurisdiction to hear a matter pertaining to the integrity of the respondent because it found that the Independent Electoral and Boundaries Commission (IEBC), which had the mandate to deal with the issue, had failed to exercise its mandate.”

[30] The 1st respondent submitted that the trial judge distinguished the cited judgments as they related to persons seeking elective offices; that the IEBC has a clear constitutional and legislative mandate in determining the eligibility of persons vying for elective office; that the High Court could not exercise jurisdiction in regard to suitability of persons for elective office as there was a mechanism provided; that the appellant’s appointment was not an elective appointment; and that in regard to the appellant’s appointment there was no mechanism in place for determining suitability for office for reasons of integrity.

[31] As regards the *sub judice* rule, the 1st respondent argued that in referring to previous litigation he was not commenting on matters before the court so as to make the interested party not enjoy a fair hearing or cause prejudice; that the issue before the trial judge was whether the Cabinet Secretary in exercise of powers under the Water Act failed to consider the provisions of the Constitution, and therefore appointed a person who fell short of the constitutional criteria. It was not to try the appellant to determine whether he was unsuitable for the position. Nor could the fact that the appellant had already assumed office oust the jurisdiction of the court.

[32] As regards the issue of bad faith, the 1st respondent asserted that in allowing and determining the petition, the trial judge properly exercised her jurisdiction in accordance with **Article 165** of the **Constitution**; that the 1st respondent filed the suit to defend the provisions of **Article 10** and **Chapter 6** of the **Constitution**; that there were relevant factors that were not considered in the appointment of the appellant as Chairman of the Water Services Board; that if these relevant factors were considered there was a possibility that the Cabinet Secretary may have come to a different decision; that the learned judge properly came to the conclusion that there were constitutional provisions that were not addressed in regard to the appointment; and that the issue of bad faith could not stand as the 1st respondent’s sole purpose was to defend the Constitution.

[33] Further, that the burden was on the appointing authority and the appellant to demonstrate that the appointing authority considered the facts leveled against the appellant, and the provisions of the Constitution, and still found him suitable for the position; and that the appointing authority and the appellant failed to discharge this burden.

[34] Finally, the 1st respondent submitted that the major issue before the Court was whether the

appointment of the appellant was in accordance with the Constitution; that the principles of leadership and integrity included selection on the basis of personal integrity, competence and suitability, which the 1st respondent maintained the appellant lacked; that the 1st respondent relied on relevant documents including conveyances, court records, and newspaper reports; and that there was no consideration of extraneous matters. The 1st respondent therefore urged the Court to dismiss the appeal with costs.

The Cabinet Secretary & the AG's submissions

[35] The Cabinet Secretary and the AG had opposed the petition on the grounds that it offended the doctrine of *sub judice* and amounted to “*argumentum ad hominem*”. These two respondents identified three issues for consideration in the appeal. These were: whether the High Court had jurisdiction to hear the petition; whether the appointment was made as per the provisions of the law; and whether the petition was *sub judice*.

[36] On the issue of jurisdiction, the Cabinet Secretary and the AG argued that pursuant to **Article 79 and 80 of the Constitution**, Parliament has enacted the Ethics and Anti-Corruption Commission Act, and the Leadership and Integrity Act; that these statutes deal effectively with matters of integrity in the public sector; that the statutes have completely divested the constitutional Court, of any jurisdiction to entertain a claim such as that put forward by the 1st respondent; and that the trial judge had no jurisdiction to deal with the issues raised in the petition as it amounted to sitting in judgment on the character and integrity of the appellant, a matter that was not within her mandate.

[37] Referring to **section 42 of the Leadership and Integrity Act**; and **section 11 of the Ethics and Anti-corruption Commission Act**, the two respondents maintained that the two legislations provided a procedure for dealing with issues of integrity of a State Officer including a provision for the initiation of a complaint by any person to the relevant public entity, or EACC, in regard to breach of code of ethics. The two respondents also relied on the case of ***Michael Wachira Nderitu & Others v Mary Wambui Munene & Others [2013] eKLR***, in which it was held that the High Court has no jurisdiction where there are procedures and mechanisms in place to deal with a situation.

[38] In regard to the legality of the appointment, it was contended that under **section 51 of the Water Act**, it was within the mandate of the Cabinet Secretary in the Ministry of Water to make the appointment as she did. On the issue of *sub judice*, it was submitted that **section 6 of the Civil Procedure Act** prohibits a court from dealing with a matter that is already directly and substantially in issue in another suit; that this protects a party from having two sets of cases against him over the same issue; that the 1st respondent was asking the court to determine the appellant's character and integrity based on cases that were still pending in another court; and that this was not only a violation of the appellants right, but also goes contrary to the overriding objective of the Civil Procedure Act as contained under **section 1B** regarding the efficient use of the available judicial and administrative resources.

[39] Finally, the Cabinet Secretary and the AG relied on the **Anarita Karimi Njeru** Decision for the proposition that where a person is alleging a contravention of a constitutional right, he must set out the right infringed, and the manner of infringement. It was maintained that the 1st respondent did not discharge this obligation. The Cabinet Secretary and the AG thus urged the Court to allow the appeal and set aside the judgment of the High Court.

Analysis and Determination

[40] We have considered this appeal, the submissions made before us and the authorities cited. Several issues arise for our determination. These are: whether the High Court had jurisdiction to deal with the 1st respondent's petition; whether the 1st respondent had locus standi to institute the proceedings; if the court had jurisdiction and the 1st respondent had locus standi, whether the 1st respondent's petition was properly pleaded, and if so, whether the issue of the process regarding the appellant's appointment arose from the pleadings; whether the court properly exercised its discretion in handling the matter; and whether the orders given by the learned judge quashing the appellant's appointment were proper.

[41] It is not disputed that the Cabinet Secretary appointed the appellant as the Chairman of Athi Water Services Board for a period of three years with effect from 10th January 2014. This appointment was published in the Kenya Gazette through Gazette Notice No.115 of 10th January 2014. Under Article 260 of the Constitution, “public office” means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament; and a “public officer” means any (a) State officer or (b) any person, other than a State officer who holds a public office.

[42] The appointment of the appellant having been made under section 51 of the Water Act that empowers the Minister to appoint members and constitute a Water Service Board as a statutory corporation, we are in agreement with the trial judge that the position of the Chairman of the Board of Athi Water Services is a public office and the holder, a public officer. Having examined Chapter six of the Constitution and the provisions of the Leadership and integrity Act, we are also in agreement with the trial judge that the application of Chapter six of the Constitution on Leadership and Integrity has been extended to public officers.

[43] The issue of jurisdiction of the High Court to hear and determine the 1st respondent’s petition was pertinent. In order to address this issue, it is important to put the subject of the 1st respondent’s petition in context by examining the grounds upon which the 1st respondent sought his reliefs. As revealed from the petition, and the 1st respondent’s affidavit sworn in support of the petition, the main basis upon which the grounds for the petition were anchored was the appellant’s lack of integrity as demonstrated by his conduct in a land dispute between him and the 1st respondent where the appellant is alleged to have dishonestly and fraudulently transferred part of the land to himself, and misconducted himself in contravening court orders restraining any development on the disputed land. The 1st respondent also adverted to the publicized arrest and arraignment in court of the appellant over incitement to violence and hate speech charges.

[44] It is on the above factors that were alleged to have taken place before the appellant’s appointment that the 1st respondent contended that the appellant was not a person of integrity, and sought to impugn the appellant’s appointment on grounds stated in paragraph 14 - 19 of the petition as follows:

14. The said move by the 1st respondent of appointing Ferdinand Waititu as the Chairman of Athi Water Services Board, cannot be deemed proper, the same is unlawful and in violation of the provisions of the Constitution and the relevant law;

15. The petitioner avers that in making the said appointment, the 1st respondent did not have regard to the candidate’s character and integrity;

16. The petitioner avers that the said act of the respondents, are in breach of the Constitution and amount to an abuse of the powers conferred upon the respondents by law;

17. The said appointment is in breach of the legitimate expectation to a fair, transparent, reasonable and constitutional selection of leadership in the country;

18. That this Honourable court has immense powers through the orders sought herein to avert the said appointment, which is in breach of the provisions of the Constitution;

19. That the said appointment offends the fundamental tenets of the Constitution and the very law that governs the powers, mandate and discretion of the respondents.

[45] In light of the background given in the petition, our understanding of the grounds upon which the petition is anchored is that the 1st respondent was aggrieved firstly, that the appellant was not a man of integrity; secondly, that though the appellant was not a person of integrity, the Cabinet Secretary had appointed him to a public office; and thirdly, that the appointment was in contravention of the constitutional requirements.

[46] In our view, the issue of the appellant's integrity was raised in the petition and the court was urged to come to a conclusion that the appellant's appointment was in contravention of the Constitution as the appellant was not a man of integrity. The petition did not simply allege failure to follow the process for appointment but also attacked the merit of the Cabinet Secretary's decision. Thus, the appointment was faulted first because the appellant was not a person of integrity, and secondly because no inquiry was made concerning the appellant's integrity.

[47] The application of Chapter six of the Constitution to public officers, places an obligation on the appointing authority to take into account the integrity of the persons being considered for appointment as a public officer. In particular, Article 73(2) of the Constitution, provides the guiding principles of leadership and integrity, which includes:

“(2). The guiding principles of leadership and integrity 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 decision and action; and

(e) Discipline and commitment in service to the people.”

48. The above constitutional provision places an obligation on any appointing authority in regard to the appointment of a State officer to inquire into the personal integrity, competence and suitability of the appointee. The requirement of accountability to the public places the spotlight on the process and provides for public participation. Therefore the issue of consideration of integrity and competence of the appellant was a crucial process in his appointment as Chairman of the Athi Water Services Board, and a matter of public interest.

49. In his prayers in the petition the 1st respondent sought the following:

The Petitioner humbly prays for the following writs, declaration and orders:

1. That a declaration be issued under Article 73 of the Constitution as read with the Fifth and Sixth Schedule of the Constitution, the 1st respondent is under a duty to have regard to personal integrity, character, competence and suitability when making the appointment of the Chairman of the Athi Water Services Board;

2. That a declaration be issued that the 1st respondent has failed to have regard to personal integrity, character, competence and suitability when making the appointment of the Chairman of the Athi Water Services Board;

3. That a declaration be issued that the 1st respondent's failure and omission to have regard to personal integrity, character, competence and suitability when making the appointment of the Chairman of the Athi Water Services Board is illegal and unconstitutional;

4. That a declaration be issued to the 1st respondent to ensure that regard is had to personal

integrity, character, competence and suitability when making the appointment of the chairman of the Athi Water Services Board. The appointment of Ferdinand Waititu is therefore null and void ab initio and ought to be struck down so as to pave way for the genuine and constitutional appointment of a candidate;

5. That an order do issue directing the 1st respondent and 2nd respondent to take steps to ensure that regard to personal integrity, character, competence and suitability when making the appointment of the chairman of the Athi Water Services Board;

6. That the costs of, and incidental to, this petition be awarded to the Petitioner against the respondents;

7. That this Honourable Court be pleased to grant such further order or orders as may be just and appropriate.”

[50] Regardless of the fact that the prayers could have been worded in a better manner, the prayers in the petition reveal that the 1st respondent focused in the submissions on the impropriety of the process of appointment undertaken by the Cabinet Secretary, which in his view rendered the appellant’s appointment unconstitutional. This was a shift from the primary issues raised in the affidavit and background facts which were focused on the complaint that the appellant was not a person of integrity and therefore unfit to hold office, to whether the appointment process was flawed because the issue of integrity and competence of the candidate was not inquired into during the selection process. Indeed, the petition specifically questioned the integrity of the appellant and ineligibility for appointment.

[51] This shift is evident at paragraph 66 and 67 of the judgment of the trial court that states as follows:

66. As I understand it, the petitioner’s case in this matter is not that the Court should find the Interested Party unsuitable to serve as the Chairman of the Athi Water Services Board. Rather, his claim is directed at the 1st respondent: that in exercise of powers under the Water Act 2002, the Cabinet Secretary failed to consider the provisions of the Constitution and therefore appointed a person who fell short of the constitutional criteria, and the appointment should therefore be declared null and void.

67. In considering this issue it must be borne in mind that the Court is not making any judgment one way or another in regard to the character, integrity or suitability of the interested party. What the Court is concerns with is whether the 1st respondent in appointing him chairman took into consideration what she was required to take into account by the Constitution

[52] The prayer for an order that the appointment was null and void, and for a proper process to be undertaken would be a logical consequence if the petition were anchored on the appointment process. However, these prayers were not consistent with the grounds upon which the petition was anchored. Although the relief sought was clear, the pleadings did not sufficiently demonstrate with particularity the constitutional issues that were being posed. In finding that the 1st respondent’s claim was against the Cabinet Secretary, and the propriety of the appellant’s appointment, the learned judge ignored the facts set out in the 1st respondent’s affidavit and in the petition as the background, and the initial complaint, which was against the appellant. We find that contrary to the Anarita Karimi Decision, the 1st respondent’s petition did not set out in a consistent and precise manner his complaints and the alleged manner of infringement, with the result that the claim that was dealt with by the court was not the original complaint.

[53] Concerning the appellant’s appointment and whether the Cabinet Secretary had complied with Article 73 of the Constitution, Article 73 required the Cabinet Secretary to consider the appellant’s personal integrity, competence and suitability for appointment as Chairman of Athi Water Services Board, as an integral part of the appointment process. The issue is who has the jurisdiction to inquire into compliance or non-compliance with Article 73 of the Constitution by an appointing authority?

[54] Article 73 falls within Chapter six of the Constitution that deals with leadership and integrity and it is instructive to note that Article 79 empowers Parliament to establish an independent Ethics and Anti-Corruption Commission for purposes of ensuring compliance with the enforcement of provisions of Chapter six. Article 80 also empowers Parliament to establish procedures and mechanisms for the effective administration of Chapter six and for the application of Chapter six with necessary modifications to public officers. It is on the foundation of Article 79 and 80 that Parliament has enacted the Ethics and Anti-corruption Commission Act No. 2011, and the Leadership and Integrity Act No. 2012.

[55] It was contended that the 1st respondent's petition ought to have failed as it was not consistent with section 4(3) of the Leadership and Integrity Act, under which it is only the Ethics and Anti-corruption commission that can make an application for appropriate orders before a High Court judge where there has been non-compliance with or enforcement of Chapter 6 of the Constitution. This is not a novel argument. A similar argument was canvassed in this Court in the *Mumo Matemu Decision* (*supra*), in which a five (5) judge bench of this Court considered the jurisdiction of the High Court under Article 165(3)(d) and (5) *vis a vis* section 4(3) of the Leadership and Integrity Act. We reiterate the ruling made by the five (5) judge bench that the High Court has the jurisdiction to conduct a review of an appointment to a state or public office to ascertain the procedural soundness as well as to examine the appointment decision itself to determine if the constitutional threshold has been met.

[56] Likewise, the trial judge had jurisdiction to determine whether the constitutional threshold in the appointment of the appellant had been met. In considering the constitutional threshold, the issue before the trial judge was not a determination of the appellant's personal integrity and competence, but whether the Cabinet Secretary addressed the issue of competence, integrity and suitability of the appellant before the appointment was made.

[57] In this regard there is a clear distinction between the role of the Ethics and Anti-Corruption Authority to enforce Chapter six of the Constitution, and the role of the court to ensure compliance with the constitutional provisions in the enforcement of Chapter 6 of the Constitution. Section 4(5) of the Leadership and Integrity Act permits EACC to seek help from the court for orders to ensure that public entities comply with the enforcement directions given by EACC. This is not a mandatory provision nor can it limit the constitutional mandate of the High Court to act only in instances that they are moved by EACC.

[58] As was stated by this Court in the *Mumo Matemu* decision, although the High Court should defer to the powers of other branches of Government, it should not hesitate to be searching where the circumstances of the case demand a heightened scrutiny provided that the High Court did not purport to sit on appeal over the decision of the other branches of Government. This is because the High Court's constitutional mandate is a general oversight mandate to protect the Constitution, and this power can be invoked in public interest at the request of any party to ensure that all actions taken under the Constitution are in compliance with the Constitution.

[59] Our view that the jurisdiction lies in the High Court is also reinforced by the fact that the 1st respondent's complaint did not relate to the conduct of the appellant after his appointment (so that the inquiry would be about his removal), but related to his conduct before appointment. Neither the Constitution nor the Leadership and Integrity Act gives jurisdiction to the Anti-Corruption & Ethics Commission to oversee compliance in regard to the constitutional threshold for appointment relating to conduct before appointment. That is to say that had the 1st respondent's petition been properly pleaded, the High Court had jurisdiction to consider whether there was compliance with the constitutional threshold.

[60] Coming to the issue of *locus standi*, Article 22 and 258 of the Constitution are explicit that any person has the right to institute proceedings where there is contravention or threatened contravention of the Constitution, and that such a person can bring the proceedings in his own interest or in public interest.

[61] The following extract from the *Mumo Matemu* Decision is relevant on the application of *locus*

standi in constitutional proceedings:

(27) Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition.....

(31) However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold...”

[62] The question that we must address is whether in bringing his petition the 1st respondent who purported to bring the petition in public interest was acting in good faith. In other words whether the threshold set out in the Mumo Matemu Decision was met. In addressing the issue of locus the trial judge having referred to Article 258 of the Constitution concluded as follows:

(60) The petitioner contends that the Constitution has been contravened by the 1st respondent through the appointment of the Interested Party who does not meet the leadership and integrity criteria set out in Chapter 6 of the Constitution. He thus has the right to challenge the constitutionality of the appointment of the Interested Party, both as a citizen in the public interest, but also as one who alleges to have been personally affected by the acts of the Interested Party whom he alleges lacks integrity. (emphasis added)

[63] With due respect, the trial judge did not pay much attention to the aspect of good faith. In the 1st respondent's affidavit sworn in support of the petition, the 1st respondent swore that the appellant had dishonestly and fraudulently secured the transfer of part of the disputed land to himself, and that the appellant had also contravened court orders relating to the land. It is true that these issues affected the 1st respondent directly, but it cannot be ignored that they were subject of a pending litigation. Although it was argued that the reference to the land case was not *sub judice* as the court was not being invited in the constitutional matter to address matters that were substantially in issue in the land case that was precisely what the Cabinet Secretary was being asked to do in order to determine the appellant's integrity.

[64] It is evident that the 1st respondent was motivated by his personal dispute with the appellant. His main concern was not the appointment of the Chairman of Athi Water Service Board, or the protection of the Constitution, but the appellants alleged actions, which as the trial judge observes affected him. In this regard the 1st respondent was trying to gain an unfair advantage in his pending litigation, by urging the court to give substance to his allegations on the appellant's want of integrity, while the matters were still pending before another court.

[65] We find that had the learned Judge properly interrogated the circumstances and background to the 1st respondent's petition as reflected in the supporting affidavit, he would have found that the petition was not one where the 1st respondent was motivated by a wish to vindicate justice or protect the Constitution, but an oblique attempt to gain mileage in the pending dispute between him and the appellant. As the 1st respondent purported to bring his petition in public interest, and it being apparent that his action was not brought in a bona fide attempt to protect public interest he lacked *locus standi* and therefore the learned Judge ought to have rejected the petition on this ground.

[66] In light of our above findings we do not find it necessary to consider the other grounds. We come to

the conclusion that although the High Court had jurisdiction to deal with the 1st respondent's petition, the petition was not properly pleaded with the result that the character of the petition changed, and this led to the learned judge considering the process of the appellant's appointment which was not the original complaint. In addition, the 1st respondent lacked *locus standi* to institute the proceedings in public interest because he was motivated by an ulterior personal motive.

[67] Accordingly, we allow this appeal, set aside the orders issued by the trial judge, and substitute thereto an order dismissing the 1st respondent's petition. On the issue of costs the order that commends itself to us, is that each party shall bear their own costs.

Those shall be the orders of this Court.

Dated and Delivered at Nairobi this 22nd day of June, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR