



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. E055 OF 2020**

**IN THE MATTER OF ARTICLES 19, 20, 22, 23, 27, 33, 36, 38, 47, 77, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF SECTION 12 OF THE POLITICAL PARTIES ACT**

**AND**

**IN THE MATTER OF SECTION 23 OF THE LEADERSHIP AND INTEGRITY ACT**

**AND**

**IN THE MATTER SECTION 7 OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

**AND**

**IN THE MATTER OF SECTION 29 OF THE UNIVERSITIES ACT**

**BETWEEN**

**PROFESSOR BEN MURUMBI SIHANYA.....1<sup>ST</sup> PETITIONER**

**ORANGE DEMOCRATIC MOVEMENT.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT**

**THE REGISTRAR OF POLITICAL PARTIES.....1<sup>ST</sup> INTERESTED PARTY**

**THE UNIVERSITY OF NAIROBI.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. The Petitioners **Professor Ben Murumbi Sihanya** and **Orange Democratic Movement** (herein after) ODM filed the petition on 28<sup>th</sup> September, 2020 praying for the following orders:-

(i) A declaration be and is hereby issued that whereas Article 77(2) of the Constitution was intended as an absolute bar against state officers holding office in political parties or participating in political activities, Section 12 of the Political Parties Act and Section 23 of the Leadership and Integrity Act were not similarly intended for public officers.

(ii) A declaration be and is hereby issued that holistically and purposively construed, Section 12 of the Political Parties Act and Section 23 of the Leadership and Integrity Act were intended to prevent overt, blatant and/or flagrant manifestations of political bias by public officers and that interfere with the rights and fundamental freedoms of other persons.

(iii) A declaration be and is hereby issued that the functions of the 1<sup>st</sup> Petitioner as a chairperson and/member of the disciplinary tribunal of the Orange Democratic Movement Party are not incompatible with his duties as a Professor at the University of Nairobi's

School of Law or at all and/or do not compromise the political neutrality of the 1<sup>st</sup> petitioner as alleged or at all.

(iv) A declaration be and is hereby issued that the Respondent's findings, determination and/or decision contained in its letters dated 18<sup>th</sup> August, 2020 and 15<sup>th</sup> September, 2020 purporting to declare that; **by holding office as the Chairperson of the Disciplinary Committee of the ODM Party, the 2<sup>nd</sup> Petitioner while serving as a public officer, to wit; a lecturer at the university of Nairobi, the petitioner is in violation of Article 77(2) of the Constitution, Section 23 of the Leadership and Integrity Act, 2012 and Section 12 of the Political Parties Act**

(v) An order of Certiorari do and hereby issues removing into the Court and quashing the Respondent's findings, determination and/or decision contained in its letters dated 18<sup>th</sup> August, 2020 and 15<sup>th</sup> September, 2020 addressed to the 1<sup>st</sup> petitioner.

(vi) A permanent injunction be and is hereby issued barring/ prohibiting the interested parties, their agents and/or any other person whatsoever from acting in any manner to remove and/or interfere with the 1<sup>st</sup> petitioner's position as the chairperson and/or member of the disciplinary committee of the Orange Democratic Movement Party and/or as a Professor at the University of Nairobi for the reasons stated in the Respondent's letters dated 18<sup>th</sup> August, 2020 and 15<sup>th</sup> September, 2020 addressed to the 1<sup>st</sup> petitioner.

(vii) A permanent injunction be and is hereby issued barring/ prohibiting the interested parties, their agents and/or any other person whatsoever from acting in any manner to remove and/or member of the disciplinary committee of the Orange Democratic Movement Party and/or as a Professor at the University of Nairobi without evidence of actual overt, blatant and/or flagrant political bias that has interfered with the rights and fundamental freedoms of other persons.

(viii) Any other orders and/or relief the Honourable Court may deem just and fit to grant and/or as may be necessary to meet the ends of justice at any state of the proceedings.

(ix) Costs of the petition.

2. The petition is founded on facts set out in part (c) of the petition paragraphs 9 - 20 thereof and buttressed in the supporting affidavit of the 1<sup>st</sup> petitioner and all attachments thereto. The gravamen of the petition may be summarized that the 1<sup>st</sup> petitioner is an advocate of the High Court of Kenya presently employed by the University of Nairobi, Law School, as a Professor in Intellectual Property and Constitutional matters. It is not in dispute that University of Nairobi the 2<sup>nd</sup> interested party, is a body corporate established under Universities Act and the University of Nairobi Charter to provide university Education in Kenya and in the region and that it is a public university.

3. The 1<sup>st</sup> Petitioner was appointed by the 2<sup>nd</sup> Petitioner, the ODM party, as Chairperson of its disciplinary committee and was sworn in on 13<sup>th</sup> August, 2020 in that capacity.

4. On 18<sup>th</sup> August, 2020, the Respondent (hereinafter) Ethics & Anti-Corruption Commission (EACC) wrote to the 1<sup>st</sup> petitioner informing the 1<sup>st</sup> petitioner that his appointment as the chairperson of ODM's Disciplinary Committee, whilst he held the position of Professor at a public University was in violation of Sections 12(1) (b) (c) (d) and 13 of Political Parties Act, 2011 and Section 23(2) and (3) of the Leadership and Integrity Act, 2012 which by virtue of Section 52(1) is applicable to all public officers as if they were state officers and Ethics and Anti-Corruption Commission requested the 1<sup>st</sup> petitioner to make representations on the matter.

5. The 1<sup>st</sup> petitioner responded to the letter by EACC by a letter dated 29<sup>th</sup> August, 2020 in which the 1<sup>st</sup> petitioner stated that there was no conflict whatsoever between his holding the position of a professor at the University of Nairobi, which was a parastatal and his appointment to a non political position in the Orange Democratic Movement since the position of Chair of the disciplinary Committee of Orange Democratic Movement was not elective and was one of an independent arbiter of disputes arising between political contestants who were members of Orange Democratic Movement.

6. That the Constitution of Kenya under Articles 20, 27, 33, 36, 38 and 77 guaranteed the 1<sup>st</sup> petitioner equality before the law and the right to equal protection and benefits of the law which equally includes full and equal enjoyment of all rights and fundamental freedoms enshrined in the Constitution including the right to freedom of expression, association and to make political choices which include the right to participate in activities of a political party.

7. That the 1<sup>st</sup> petitioner was not a state officer and therefore is not prohibited under Article 77(2) of the Constitution to hold office in a political party. That he was also not a public officer since he worked not for an independent parastatal and therefore Section 12(1) of the Political Parties Act did not apply to him.

8. That Ethics and Anti-corruption Commission responded to the 1<sup>st</sup> petitioner by a letter dated 15<sup>th</sup> September, 2020 and informed him that it had considered the representations by the 1<sup>st</sup> petitioner and the law applicable and was of the considered finding that, the 1<sup>st</sup> petitioner was in violation of Article 77(2) of the Constitution, Section 23 of the Leadership and Integrity Act, 2012 and Section 12 of the Political Parties Act, 2011 by holding office in a political party, namely the Chairperson of the Disciplinary Committee of Orange Democratic Movement party whilst he remained a professor at the University of Nairobi, Law School.

9. Ethics and Anti-corruption Commission held that it did not regard the conduct by the 1<sup>st</sup> petitioner, a deliberate act of violation and gave the 1<sup>st</sup> petitioner the option of voluntarily remedying the situation by immediately resigning from the position of Chairperson of the disciplinary committee of Orange Democratic Movement. The 1<sup>st</sup> petitioner was given 14 days within which to comply failing which University of Nairobi to take necessary steps to remedy the situation.

10. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners aggrieved by the aforesaid determination by Ethics and Anti-corruption Commission brought this petition.

11. The legal foundation upon which the petition is premised are stated to be Articles 22, 23, and 162(2) of the Constitution read with Section 12 of the Employment and Labour Relations Court Act, 2014. Under paragraphs 21 to 28 in the petition, the petitioner exonerates himself from the ambit of Article 77(2) of the Constitution; Section 23 of the Leadership and Integrity Act; and Section 12 of the Political Parties Act.

12. The petitioner asserts his rights and freedoms protected under the provisions of the Constitution being Articles 27, 33, 36, and 38 thereof which the petitioners allege have been violated by the respondent and prays to be granted the reliefs sought.

### **Response by the Respondent**

13. The respondent filed a replying affidavit sworn to by **Emily Ibeere** an Ethics Compliance Officer working for Ethics and Anti-Corruption Commission.

14. The deponent captures the history of the dispute well outlined herein before. The deponent outlines the legal foundation of the mandate of Ethics and Anti-Corruption Commission in this matter and the justification for the decision taken by Ethics and Anti-Corruption Commission that the appointment of the 1<sup>st</sup> petitioner as the chairperson of the Disciplinary Committee of Orange Democratic Movement whilst he held the position of Lecturer in a public university violates Article 77(1) and (2) of the Constitution read with Article 80(c) and Section 52(1) of the Leadership and Integrity Act.

15. The deponent further states that Section 12 of Political Parties Act, 2011 debars a public officer from holding office in a political party and or engaging in political activity that may compromise or be seen to compromise the political neutrality of that person's office.

16. The deponent refers to the case of **Rogers Mugusu –vs- Onyango Oloo TNA and URP [2015 eKLR]** in which the Court interpreted and re-affirmed Article 260 of the Constitution regarding the meaning of Public and state officers. The deponent states that this case is applicable to the facts of this case.

17. The deponent states that the 1<sup>st</sup> petitioner is entitled to payment of allowances as chairperson of the Disciplinary Committee while he receives a salary from the university.

18. The deponent states that the edict given to the 1<sup>st</sup> petitioner does not threaten and or violate any of the stated provisions of the Constitution which guarantee his rights and freedoms.

19. The respondent prays that the petition be dismissed with costs.

### **1<sup>st</sup> Interested Party**

20. The Registrar of Political Parties, the 1<sup>st</sup> interested party, stated in its response that, the office of the Registrar of Political parties is established under the Political Parties Act, 2011. That its mandate include *interlia* to supervise political parties established under the Political Parties Act, 2011.

21. The deponent states that the oversight of political parties is strictly the domain of the Registrar of Political Parties, and that the Political Parties Act, 2011, remains the primary Act, under which the regulation, monitoring and supervision of political parties and its membership is done. That Political Parties Act is not subservient to the Leadership and Integrity Act in the management of parties. That Section 77(2) only bars state officers from holding office in a political party whilst Section 12 of the Political Parties Act 2011 depoliticises Public Service by prohibiting and restricting public officers from being eligible to hold office in a political party. The 1<sup>st</sup> interested party prays that its views be considered in determining the dispute.

22. The 2<sup>nd</sup> Interested party did not enter appearance in the matter nor did it file a replying affidavit.

23. The petitioner, the Respondent 1<sup>st</sup> and 1<sup>st</sup> Interested party filed written submissions which the Court has carefully considered together with the depositions aforesaid.

### **Determination**

24. The issues for determination are as follows:-

***(i) Whether the appointment of the 1<sup>st</sup> petitioner to the position of Chairperson Disciplinary Committee, Orange Democratic Movement violated Article 77(2) of the Constitution, Section 23(2) of the Leadership and Integrity Act, 2012 and Sections 12 and 13 of the Political Parties Act, 2011.***

***(ii) Whether the respondent violated the 1<sup>st</sup> Petitioner's rights and freedoms under Articles 27, 33, 36 and 38 of the Constitution of Kenya, 2010.***

***(iii) What remedies, if any are available to the petitioner.***

25. In answer to issues (i) and (ii) above, Article 77 of the Constitution provides:-

**“2 (1) A full-time state officer shall not participate in any other gainful employment.**

**(2) Any appointed state officer shall not hold office in a political party.”**

26. It is common cause that the petitioner is not a state officer and the Court is guided by a three judge bench decision of the High Court in **Katiba Institute and Another –vs- Attorney General and Another [2020] eKLR** (per J.W. Lesiit; C. Muita and L.M. Njuguna JJ) as follows:-

**“... state corporations and parastatals are not offices in public service, state organs or body established under the Constitution. We have also found that remuneration and benefits of chairpersons and members of board of those bodies are not drawn from the consolidated fund. However, they are funded by public money from the Treasury through line ministries. That funding notwithstanding, and not being state organs, or bodies established under the Constitution, they do not qualify as offices in the public service.”**

27. Section 12 of the Political Parties Act, 2011 on the other hand provides:-

**“(1) a Public Officer shall not-**

**(a) Be eligible to be a founding member of a political party.**

**(b) Be eligible to hold office in a political party.**

**(c) Engage in political activity that may compromise or be seen to compromise the political neutrality of that person’s office; or**

**(d) Publicly indicate support for or opposition to any political party or candidate in an election.”(emphasis mine)**

28. The question that arises therefore is whether the 1<sup>st</sup> petitioner is a public officer within the meaning of Section 12 of the Political Parties Act and therefore the impugned appointment violates Section 23 of the Leadership and Integrity Act which provides:-

**“(2) An appointed state officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.**

**(3) Without prejudice to the generality of subsection (2) a public officer shall not-**

**(a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;**

**(b) Publicly indicate support for or opposition against any political party or candidate participating in an election.”(emphasis mine)**

29. It is pertinent to consider the meaning given, to the term “Public Officer” and “Public Office.” Under Article 260 of the Constitution of Kenya, 2010 to bring light to this dispute.

30. Article 260 of the Constitution provides thus:-

**“Public Officer” means**

**(a) any state officer; or**

**(b) any person other than a state officer who holds a ‘public office.’**

31. The Constitution goes further to define “public office” as follows:-

**“Public office” means an office in the national government, a County government or Public service. If the remuneration and benefits of the officer are payable directly from the consolidated fund or directly out of money provided by parliament.” (emphasis mine)**

32. It is beyond per adventure that a lecturer at a Public University, such as University of Nairobi, is primarily remunerated and paid benefits out of money provided by Parliament.

33. This fact, which is common cause in this suit brings the 1<sup>st</sup> petitioner within the realm of a person whose remuneration and benefits are

paid out of money provided by Parliament. Therefore, the 1<sup>st</sup> petitioner is a person who holds a ‘**public office**’ and therefore falls within the meaning given to a ‘**Public Officer**,’ under Article 260 of the Constitution of Kenya, 2010.

34. It follows therefore, the 1<sup>st</sup> petitioner is prohibited under Section 12 of the Political Parties Act, and Section 23 of the Leadership and Integrity Act to hold office in a political party.

35. Furthermore, the University of Nairobi being a statutory body governed by an Act of Parliament and a charter is governed by Article 232 (2) (b) of the Constitution of Kenya, 2010 which provides:-

“(232 (2) - *The values and principles of public service apply to public service in-*

(a) .....

(b) All state corporations.

**(3) Parliament shall enact legislation to give full effect to this effect.”(emphasis mine)**

36. It is pursuant to Article 232(3) that the Leadership and Integrity Act, was enacted by Parliament to guide the code of ethics of all public officers including those in state corporations such as the 1<sup>st</sup> petitioner.

37. Whereas a lecturer at an institution of higher learning enjoys academic freedom and is not barred from expressing his or her political opinion, such an officer is bound to relinquish his position if he is appointed or elected to an office in a political party. Holding the office of lecturer at a public university and at the same time holding an appointed office of Chairperson of a disciplinary committee in a dominant political party amounts to performing daily and/or continuous political activities that may be seen to compromise the political neutrality of the office of lecturer in a public university within the meaning of Section 23 (2) of the Leadership and Integrity Act as read with Section 12(1) (c) of the Political Parties Act.

38. Following the above exegesis, and in answer to issues (i) and (ii) above the Court finds that the action by the respondent in giving the 1<sup>st</sup> petitioner opportunity to elect to remain a lecturer at the University of Nairobi or opt to become the Chairperson of the Disciplinary Committee of Orange Democratic Movement was lawful, fair, just and in accordance with the Leadership and Integrity Act and did not violate any of the rights and or freedoms of the petitioner set out in this petition or at all.

39. Accordingly, and in answer to issues (i), (ii) and (iii) above, the petition lacks merit and is dismissed with no order as to costs.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF DECEMBER, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**APPEARANCES**

**AWELE JACKSON ADVOCATES, LLP FOR THE PETITIONER**

**M/S LAI FOR RESPONDENT**

**MR. MARK OLEWEL FOR 1ST INTERESTED PARTY.**