



INTEGRITY IN LEADERSHIP?

An assessment of Kenya's performance in
enforcing constitutional values



AFRICA CENTRE FOR OPEN GOVERNANCE (AfricOG)

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Foreword

The struggle for integrity has formed a major part of Kenya's recent governance history. Over the decades, the Kenyan public has made its desire for a change in the quality and ethical standards of its leaders clear. Again and again they have cited corruption in leaders as a major national problem which must be addressed if Kenya is to progress. Chapter Six of the Constitution on Integrity and Leadership is regarded as a consolidation of the efforts that went into that struggle. The Constitution creates the category of states officers and makes special requirements of them to embody the spirit and values of the new Constitution and conduct themselves with integrity. It also creates an Ethics and Anti-Corruption Commission to enforce its provisions and mandates the passage of legislation on leadership and integrity. Accordingly, the implementation of this critical chapter in the Constitution is an important measure of the success that has been met in arriving at correct solutions to the country's governance problems.

This paper reviews interventions and responses by the responsible organs of the Kenyan state, the Executive, the National Assembly, and the Judiciary in the enforcement of the new integrity regime imposed by Chapter Six. A number of recommendations are provided, with practical suggestions on how challenges can be confronted and improvements can be made towards the goal of achieving the public integrity envisaged in the Constitution.

This paper traces the history of attempts to enforce the leadership and integrity standards of the Constitution and the significant setbacks encountered along the way. This is a history often marked by lack of seriousness, failure of courage and ill intent, particularly in those who bear the greatest responsibility for implementing the Constitution. However, these negative aspects are juxtaposed with the courage and commitment of those who continue to fight for transformation of the conduct and governance of Kenya's public life.

This report complements the contribution that AfriCOG seeks to make to public debate on key governance issues in Kenya, and is an important addition to the body of knowledge since it systematically assesses the country's experiences regarding the implementation of Chapter Six.

AfriCOG dedicates this report to those who struggle to achieve an end to the misrule and corruption that plague this country so that Kenya can finally achieve its true potential.

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Abbreviations and Acronyms

AFC	Agricultural Finance Cooperation
EACC	Ethics and Anti-Corruption Commission
CIC	Commission on the Implementation of the Constitution
ICC	International Criminal Court
IEBC	Independent Electoral and Boundaries Commission

Executive Summary

Chapter Six of the Constitution

This paper reviews the effectiveness of the steps taken to implement Chapter 6 of the Constitution, 2010, dealing with leadership and integrity. A key to the scheme provided under the Constitution is the notion of ‘state officer’, a category of senior public officials to whom the provisions in the chapter apply and who have the obligation to conduct themselves with integrity. The Constitution establishes the Ethics and Anti-Corruption Commission (EACC) and mandates the Leadership and Integrity Act for the administration of Chapter Six of the Constitution.

The establishment of the integrity institutions was beset with problems. The cabinet unilaterally changed the contents of the Leadership and Integrity Bill, removing proposed procedures to ensure that persons presenting themselves for election or selection as state officers possessed personal integrity, competence and suitability as contemplated by the Constitution. Cabinet also deleted a proposal requiring a declaration by candidates for public office, of assets and liabilities and, in contravention of the Constitution, introduced amendments allowing state officers to engage in other gainful employment while in office.

While the Commission on the Implementation of the Constitution (CIC) challenged Cabinet’s changes in the High Court, the challenge failed, as the High Court held that there was a general presumption that every Act is constitutional and that the burden of proof thus lies on any person who alleges otherwise.

The setting up of the EACC was also problematic. The High Court reversed the appointment of Mumo Matemu as the first chair of the Commission,

stating that he lacked the necessary integrity to hold the office. However, its decision was reversed on appeal, based on very technical legal reasoning. The manner in which the National Assembly had processed the Matemu appointment showed a lack of appreciation of the seriousness with which the fight against corruption should be approached. Also, a significant amount of time was lost as Matemu fought questions regarding his suitability for office.

Judicial approach to interpreting Chapter Six

The judicial approach to interpreting Chapter Six was defined by the case which sought to disqualify Uhuru Kenyatta and William Ruto from running for the presidency and vice presidency while facing a trial before the ICC, and which the High Court dismissed. The court held: that this was an issue within the exclusive jurisdiction of the Supreme Court over which the High Court lacked jurisdiction; that the mandate of the IEBC and other statutory bodies in dealing with the issues of eligibility and integrity was not exhausted by the petitioners before invoking its jurisdiction; and that despite the serious nature of the charges facing Kenyatta and Ruto at the ICC, they were presumed innocent until the contrary was proved.

Decided cases suggest that the courts are reluctant to entertain anticipatory claims as to the integrity of a person who seeks elective public office. A court will thus require the existence of a formal set of facts that suggest that the person in question is a candidate for a particular public office. The difficulty with this approach is that it allows candidates seeking elective office to mobilise beforehand to defeat a possible challenge on their candidature down the line, as the case against Kenyatta and Ruto demonstrates.

A recurrent issue in cases that have been presented before the courts is the argument that where there exist sufficient or adequate mechanisms to deal with a specific issue or dispute by other designated organs, the jurisdiction of the court cannot be invoked until such mechanisms have been exhausted. This is one of the grounds on which the Kenyatta/Ruto petition was decided and there are many others that have been decided on the same grounds. However, a departure by Justice Mumbi Ngugi from this line of reasoning is the case of *Benson Riitho v J. M. Wakhungu*. If the reasoning by Justice Ngugi was applied in the decision in the case challenging the qualification of Kenyatta and Ruto, it might have led to a completely different set of results.

The cases presented before court have also shown the challenges as to how the court deals with the factual allegations on the basis of which the lack of integrity is claimed. The decisions show that the courts view this as the responsibility of the constitutional or statutory body that was responsible for making the appointment. The courts argue that they lack the means to deal with questions about whether such allegations are correct or not. The decision of the Court of Appeal in the case of Mumo Matemu best demonstrates this approach.

The fact that parties bring cases in the High Court seeking to challenge the suitability of public appointments reflects weaknesses in the mechanisms for making complaints before bodies other than a court of law. The case brought before the High Court by the CIC discussed this issue.

Awarding costs

In the vast majority of cases that have sought to invoke Chapter Six, no costs were awarded against the losing parties. The exceptions, which show the difficulties in public interest litigation, were the suit challenging the suitability of Uhuru Kenyatta and

William Ruto to run for president and in the case of *Kituo Cha Sheria v John Ndirangu Kariuki & another [2013] eKLR* where the judge awarded costs of Ksh 250 000 against Kituo cha Sheria, which had lost the case challenging the eligibility of John Ndirangu to hold the office of Member of Parliament.

The enforcement of Chapter Six has since faced significant setbacks, including the enactment of weak legislation to implement its provisions, and the fact that the National Assembly treated very lightly the very significant issues that faced Mumo Matemu. Since the enactment of the new Constitution, a very large number of cases have been brought to court seeking to invoke Chapter Six in one way or another. However, all but two cases have been unsuccessful.

Recommendations

In view of the above, it is recommended that:

- The CIC should seek amendments to the Ethics and Integrity Act with a view to incorporating into the Act provisions that the National Assembly had unilaterally deleted and which sought to establish such a mechanism.
- A proposal requiring a publicly accessible declaration of income, assets and liabilities for all state officers by persons seeking state office, which was deleted by Cabinet, should be negotiated and enacted in an amendment of the Leadership and Integrity Act.
- Cabinet's unilateral insertion into the Leadership and Integrity Bill of the provisions that allow state officers to engage in other gainful employment while in office, is contrary to the Constitution and should be removed through amendment.

- Outside the litigation context, procedures for making complaints regarding integrity should be clarified and appropriate information (should be provided) to the public on a proactive basis.
- While it is understandable that courts will not act in anticipation of a situation, the court's argument is a blunt tool against political mobilisation that is calculated to defeat accountability based on integrity. A discussion with judges regarding this issue would bring out the practical difficulties involved and clarify possible judicial responses.
- While in some cases the High Court has upheld the argument that alternative remedies provided under the law ousted the jurisdiction of the court, there was a departure by Justice Mumbi Ngugi from this line of reasoning in the case of the *Benson Riitho v J. M. Wakhungu*. It is recommended that this line of reasoning be developed through litigation, as it affords a more responsible approach to the enforcement of Chapter Six.
- The tendency for courts to award costs against litigants in Chapter Six litigation is a threat to the enforcement of the integrity regime. Consideration should be given to amending the Civil Procedure Act to clarify when a court should not award costs.
- The judiciary must conduct an internal review of its position on Chapter Six and lawyers who present relevant cases before the courts should not only argue their individual cases, but should also find ways of providing a perspective about the unsatisfactory role that the courts have so far played in the enforcement of Chapter Six.
- A dialogue with the leadership of the National Assembly is required to clarify the responsibilities that the Assembly assumes when discharging its approving role in relation to public appointments.

Enforcing Chapter Six of The Constitution: An Assessment of the Country's Performance

Constitutional and legal provisions on integrity

Introduction

The passage of a new constitution in 2010 provided a one-stop opportunity for consolidating gains made in Kenya's governance struggles dating back almost two decades. An innovation of the new constitution was a chapter on leadership and integrity which introduced a set of standards addressing misrule in general, and corruption in particular, in relation to public office. The chapter titled 'Leadership and Integrity' (known commonly as Chapter Six) was a response to experiences in public administration over the last decade, which was characterised by these twin problems.

This report reviews the steps made towards the enforcement of the Constitution 2010 with special regard to the provisions relating to leadership and integrity. The report traces the origins of these provisions, setting forth the considerations that were taken in the constitution-making process, which resulted in the inclusion of a chapter on leadership and integrity. The paper then provides an overview of the constitutional provisions on leadership and integrity and of the laws passed to give effect to the constitutional provisions.

The last part of the report discusses experiences in the actual enforcement of the provisions on integrity and does so from the point of view of cases that have been taken to court seeking interpretation of the constitutional provisions on leadership and integrity.

History of the provisions on leadership and integrity

The first draft Constitution of Kenya that was issued by the Constitution of Kenya Review Commission in 2002 did not contain the leadership and integrity provisions that constitute Chapter Six of the current constitution. Neither did the report accompanying the draft constitution contain an elaborate discussion on integrity. The closest that it came was the identification of thirteen "main points from the people" that the report said went into framing the draft constitution. One of these was a message from the people that "they wanted an end to corruption".¹

Chapter Six was first included in the draft constitution, that became the subject of a referendum in 2005, and identical provisions were included in the rival 'Bomas Draft', the version that was supported by a faction of the National Constitutional Conference as the legitimate draft constitution.

The report of the National Constitutional Conference issued in 2005, after deliberations on the first draft constitution, was the first occasion on which leadership and integrity were discussed at length. The report noted that "leadership is the backbone of the success of any undertaking, be it at village level, community project, business, a local authority or even the country", adding that "leadership at its very best, determines the continued support of the people, national unity and the growth and development of a country."²

¹ Republic of Kenya, The Main Report of the Constitution of Kenya Review Commission, Nairobi: 18 September 2002, p. 56

² Republic of Kenya, The Final Report of the Constitution of Kenya Review Commission, Nairobi 2005, p. 217.

³ Ibid

The report continued: “Integrity, on the other hand, plays an important role in ensuring that leadership remains focused on the interest of the people and desired by the people”. It added that “Leaders are faced with moral and ethical dilemmas every day” and that “in this light, integrity, which basically involves leaders consistently behaving in an honest, ethical, and professional manner, promoting and advocating the highest standards of personal, professional and institutional behaviour, is of utmost importance in their tenure.”³

According to the report, leadership integrity involves: selfless service based solely on the public interest and not in any way motivated by personal interest; maintenance of public confidence in the integrity of the office; strict adherence to the law and oath of office; instilling discipline and commitment in the public service in order to facilitate national development; ensuring that nepotism or favouritism do not influence objectivity and impartiality in decision-making; accountability for decisions, action to the public and submission to scrutiny in the manner prescribed by law; maintenance of absolute honesty in the execution of public duties; and the declaration of any personal interests, that are likely to conflict with official duties.⁴

The report noted the absence of provisions on leadership and integrity in the Constitution then in force and pointed out that other countries, including Uganda and South Africa, had included provisions on leadership and integrity in their constitutions.

The report had sections titled, “What the people said”, under which it outlined some of the expectations of ordinary people regarding what should happen in the management of public affairs.

These expectations included that public institutions should be accountable for their reputations; people who accept bribes should be punished; assets acquired through corruption should be reclaimed by the state; public appointments should be done transparently and there should be a code of conduct.⁵

The report went on to make a number of specific recommendations, including that there should be an ethics and integrity code of conduct applying to all top leaders; that the code should require the specified officers to make periodic declarations of their incomes, assets and liabilities; that it should prohibit conduct likely to compromise the principles set out, or to lead to corruption in public affairs; that it should prescribe the penalties to be imposed for breach of the code, without prejudice to the application of the criminal law for the breaches in question; and that it should prescribe powers, procedures and practices for the effective enforcement of the code.⁶

The report also recommended the establishment of an Ethics and Integrity Commission, to receive declarations in accordance with the ‘Leadership and Integrity Code of Conduct’, retain custody of such declarations and make them available for inspection by citizens. It would also ensure compliance with the code of conduct and disqualify, on investigation, those found to be in breach of the code.⁷

The proposals on leadership and integrity were the subject of debate during the National Constitutional Conference. The Conference appreciated the direct provisions on leadership and integrity, and was in agreement that the relevant chapter and the Fifth Schedule of the Draft Bill of 2002 although clear, needed to be expanded and strengthened.

⁴ Ibid p.218

⁵ Ibid p.219

⁶ Ibid

⁷ Ibid

According to the report, “the Conference agreed that those provisions should be integrated into the mandate of the Ethics and Integrity Commission; be extended to the private sector; apply to official conduct at all levels of governance; and provide for more severe penalties for violations thereof.”

The provisions on leadership and integrity survived the subsequent changes made to the draft constitution and their substance forms part of the current constitution.

The Constitutional Provisions on Leadership and Integrity: an overview

As stated above, the Constitution of Kenya 2010, devotes an entire chapter to provisions on leadership and integrity. A key to the scheme provided under the Constitution is the notion of ‘state officer’, a category of senior public officials to whom the provisions in the chapter apply. The officials identified as state officers include those holding the offices of president and deputy president of Kenya, as well as cabinet secretaries, members of parliament, judges and magistrates, and members of the independent commissions established under the Constitution. The offices to which the leadership and integrity provisions apply are those that were recommended for such inclusion in the Constitution of Kenya Review Commission (CKRC) report.

Others are persons who hold office under Chapter Fifteen, members of county assemblies, governors and deputy governors, other members of the executive committee of a county government, the attorney-general, director of public prosecutions, secretary to the cabinet, principal secretary, chief of

the Kenya Defence Forces, commander of a service of the Kenya Defence Forces, the Director-General of the National Intelligence Service, the inspector-general, and the deputies of the National Police Service, or an office established and designated as a state office by national legislation.⁸

The Constitution declares that the authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with its purposes and objects, and that demonstrates respect for the people, brings honour to the nation and dignity to the office, and promotes public confidence in the integrity of the office⁹.

The Constitution stipulates principles that should guide the appointment of persons who provide leadership to the public as state officers. They are to be selected on the basis of personal integrity, competence and suitability, and where selection is based on elections, these should be free and fair elections.¹⁰ State officers are to be guided by objectivity and impartiality in decision-making, and in ensuring that decisions are not influenced by nepotism, favouritism and other improper motives or corrupt practices.¹¹

All state officers have certain special obligations, including the obligation to behave, whether in public or official life, in private life, or in association with other persons, in a manner that avoids conflict between personal interests and public or official duties and, particularly, compromising any public or official interest in favour of a personal interest. A state officer who contravenes its provisions is subject to the applicable disciplinary procedure for the relevant office; and may be dismissed or otherwise removed from office.¹²

⁸ Article 260

⁹ Article 73(1)

¹⁰ Article 73(2)

¹¹ Ibid

¹² Article 75

The Constitution obliges Parliament to enact legislation to establish an independent ethics and anti-corruption commission for purposes of ensuring compliance with, and the enforcement of, the provisions of Chapter Six and also to enact legislation establishing procedures and mechanisms for the effective administration of the chapter.¹³

The Leadership and Integrity Act

In 2012, Parliament enacted the Leadership and Integrity Act, “to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution”.¹⁴ It obliges a state officer to respect the values, principles and requirements of the Constitution.¹⁵

The governance of the Act was placed under the Ethics and Anti-Corruption Commission, (EACC), established under the Ethics and Anti-Corruption Commission Act. The responsibility of overseeing and enforcing the implementation of the Act was placed with the EACC, thus requiring all state organs to assist the Commission in ensuring compliance. The EACC is conferred with the power to compel any public entity to carry out such functions and exercise such powers as may be necessary under the Act. The EACC may apply to the High Court for appropriate orders requiring the public entity to comply.

The Act establishes a General Leadership and Integrity Code, which is a code of conduct applicable to all state officers. The contents of the code include a requirement for all state officers to respect the rule of law, a declaration that public

office is a public trust, and a requirement for the authority and responsibility vested in a state officer to be exercised in the best interests of the people of Kenya.¹⁶

The code requires honesty, efficiency, and professionalism in the discharge of public duties. It also requires the financial integrity of all public officials, prohibits the use of public office to unlawfully or wrongfully enrich oneself or others, and requires public officers to exert their best efforts to avoid being in a situation where personal interests conflict, or appear to conflict, with public duties.¹⁷

The code prohibits public officers from opening or operating bank accounts outside Kenya without the approval of the Commission and requires public officers to be politically neutral.

In addition to the General Code of Conduct, the Act requires each public entity to prescribe a specific leadership and integrity code for the state officers that work in that public entity. All the specific codes must be approved by the Commission before they take effect.¹⁸

A breach of the code amounts to misconduct, for which the state officer may be subjected to disciplinary proceedings. A person alleging that a state officer has committed a breach of the code may lodge a complaint with the relevant public entity. Where a complaint is lodged, the public entity must register and inquire into the complaint. The public entity, or an authorised officer, may take disciplinary action against a state officer serving in the public entity, or may refer the matter to the attorney general or the director of public prosecutions for civil or criminal investigation, if the facts so warrant.

¹³ Article 80

¹⁴ See the long title to the Act

¹⁵ Section 3

¹⁶ Section 6

¹⁷ Sections 7 to 36

¹⁸ Section 37

The Ethics and Anti-Corruption Act

In addition to the Leadership and Integrity Act, Parliament amended the Anti-Corruption and Economic Crimes Act, first enacted in 2003, renaming it, the Ethics and Anti-Corruption Act and creating the EACC in place of the Kenya Anti-Corruption Commission (created under the Anti-Corruption and Economic Crimes Act). The new commission retained the basic features of the previous commission. Under the Act the Commission consists of a chairperson and two other members.

In addition to the functions of the EACC under the Constitution, the Act requires the Commission to develop and promote standards and best practice in integrity and anti-corruption; work with other state and public offices in the development and promotion of standards and best practice in integrity and anti-corruption; investigate and recommend to the director of public prosecutions the prosecution of any acts of corruption, or violation of codes of ethics, or other matter prescribed under the Act; oversee the enforcement of codes of ethics prescribed for public officers; and institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption, or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

Controversy surrounding the management of the leadership and integrity bill

While deliberating on the Leadership and Integrity Bill, which had been prepared by the Commission on the Implementation of the Constitution (CIC), Cabinet unilaterally introduced its own amendments to the Bill, some of which were problematic.

The CIC had proposed a mechanism that would result in the issuance of a ‘Certificate of Compliance with Chapter Six’ to all persons seeking election or selection as state officers. As originally drafted, the Bill required the Ethics and Anti-Corruption Commission (EACC) to issue a certificate of compliance to a person deemed to be compliant with Chapter Six for purposes of election or selection to a state office.

With a view to issuing certificates of compliance, the EACC would publish the names of all persons seeking election to state offices and request information on their past records from relevant public bodies, such as the security intelligence service and the tax authorities, as well as from members of the public.

The EACC would be required to evaluate any information received, with a view to determining whether a certificate of compliance could be issued.

When considering the Bill, Cabinet dropped this mechanism, which meant that while the constitutional requirement as to integrity remained intact, there would be no legislative device to give

effect to the requirement. The actions of Cabinet were questionable because the Constitution requires Parliament to establish mechanisms to facilitate the election or selection of leaders based on suitability, personal integrity and competence. The relevant provision states that the guiding principles of leadership and integrity include “selection on the basis of personal integrity, competence and suitability, or election in free and fair elections”.

The Cabinet intervention on the Bill deleted the procedure that the CIC had proposed, which would have ensured that persons presenting themselves for election or selection as state officers possessed the level of personal integrity, competence and suitability contemplated by the Constitution.

In the form in which it was enacted, the Bill fulfilled a prevalent political view that so long as one was popular enough to be elected to public office, nothing else mattered and once elected, one fell outside the orbit of moral accountability.

Cabinet also deleted the requirement for a declaration of income, assets and liabilities for all state officers, again proposed by the CIC. The Bill had proposed that persons seeking state office should declare their income, assets and liabilities to the EACC before taking office. While the amendment by Cabinet retained a form, which, if completed, would constitute a declaration of assets and liabilities, there was no legal requirement to fill out this form, thus making it redundant.

The decision to shield state officers from wealth declarations was criticised because the Constitution, and also contemporary practices, already provided for wealth declarations. As a state party to the UN Convention Against Corruption, Kenya (the first country to ratify it) is required to establish measures and systems requiring public officials to make declarations regarding their outside employment, investments, assets and substantial gifts or benefits

from which a conflict of interest may result. Globally, since the United Kingdom (1974) and the United States (1978) adopted wealth declaration laws, the movement has become strong and even small countries around the globe now embrace it. It is unacceptable that Cabinet is pulling Kenya in the opposite direction.

A third major problem with the Bill was that, contrary to the Constitution, Cabinet introduced amendments that allowed state officers to engage in other gainful employment while in office. The Constitution stipulates that a full-time state officer shall not participate in other gainful employment. Cabinet introduced an amendment that qualified what was, and was not to be considered as gainful employment: employment as a director in a private company was not to be considered as gainful employment, nor was any investment in a business undertaking or corporate body which did not require active participation of the state officer in the operations of the business undertaking or corporate body. In addition, any work that was not covered by the Employment Act was also excluded for consideration as gainful employment.

A state officer seeking to get round the constitutional bar against other gainful employment would only need to set up a company through which to carry out such other employment. The proposal by Cabinet left intact the mischief that the constitutional provision was meant to cure, which was ensuring that state officers did not engage in conflicts of interests.

In comparison, the CIC Bill had defined gainful employment to include, “work a person can pursue and perform for money or other form of compensation or remuneration, whether on full time or part-time basis, which is inherently incompatible with the responsibilities of the State office or as a result of participating in such employment leads to the State officer suffering an impairment of judgment or a conflict of interest.”

Other problems with the Cabinet amendments included the removal of provisions on whistleblower protection and the failure to define a disciplinary procedure for breaches of Chapter 6.

Constitutional challenge against the Leadership and Integrity Act

After the passage of the Leadership and Integrity Act, the CIC brought a petition in the High Court seeking to invalidate the Act. The fact that the CIC had chosen this method of demonstrating its dissatisfaction with the Act was significant because it is the constitutional organ officially mandated to oversee the implementation of the Constitution.

The petition sought a declaration that Parliament was under a duty to enact legislation to provide for mechanisms and procedures for ensuring the effective administration of Chapter 6 of the Constitution, within the deadline stipulated in the Fifth Schedule to the Constitution; that Parliament had failed to enact such legislation within the stipulated deadline; that such failure was illegal and unconstitutional; that the Leadership and Integrity Act, Number 19 of 2012, as enacted, was not the legislation contemplated under Article 80 of the Constitution and was, therefore, null and void and ought to be struck down so as to pave the way for the genuine and authentic legislation to be enacted and that the court should order Parliament to take steps to ensure that legislation to provide for mechanisms and procedures for ensuring the effective administration of Chapter 6 of the Constitution was enacted.

The reasons why the petitioners considered the Act illegal were that:

- (a) The Act failed to establish procedures and mechanisms which would enable the EACC to enforce compliance with Chapter Six as envisaged under the Constitution;
- (b) Parliament disregarded public views forwarded to it by Kenyans, including civil society groups, in deliberations leading to the enactment of the Act, among them, suggestions as to disciplinary mechanisms and penalties as required by the Constitution; and a mechanism that would allow the EACC to prosecute cases of breach of Chapter Six where, without good cause, the Director of Public Prosecutions refused to prosecute. The CIC attached various written memoranda to the founding affidavit from civil society groups and other state organs: Way(s) for the comprehensive administering of the Chapter Six as required by Article 80(a).
- (c) There was a failure to allow public participation in the process of passing the Act.

The High Court held that there was a general presumption that every Act is constitutional and the burden of proof thus lies on any person who alleges otherwise.

According to the High Court, the power of courts to declare a statute unconstitutional was subject to two guiding principles of decision that ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon the judiciary's own exercise of power is its sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.”

In the view of the court, although the Act was condemned on the basis of lack of public participation, the parties who impugned the Act on that basis did not demonstrate to the court how the National Assembly had failed to achieve public participation within the constitutional parameters, taking into account the process from the time the Bill was initiated by the CIC up to its enactment. The court found that the parties did not address the standard to apply in order to assess the level of public participation in the legislative process. The court was, therefore, unable to find and hold that the Act was unconstitutional for want of public participation.

A comment on the institutional arrangements governing integrity

The substance of the institutional mechanisms to guarantee the enforcement of the leadership and integrity provisions under the new constitution remains the same as it was before the new constitution was enacted. The institutional make-up of the EACC is substantially the same as that of the Anti-Corruption and Economic Crimes Commission, which replaced it.

A significant new intervention was the attempt by the CIC to provide a procedure by which certificates of integrity could be issued to persons seeking election or appointment to public office. However, as indicated above, this proposal was removed by Cabinet when the bill was presented for its approval. The effect was that the Leadership and Integrity Bill was robbed of the provision that would have provided for its enforcement.

Although it was unsuccessful, the extraordinary decision by the CIC to challenge the procedure used in enacting the legislation, as well as the inadequacy of its contents, represents frustration at the astounding interference by Cabinet with the legislative scheme that would have been responsible for the enforcement of the integrity chapter. As a result, and as the CIC asserted in court, the legal basis for the enforcement of the integrity provisions was mortally compromised at the point of conception.

Experiences in the Implementation of Chapter Six

Background

The setting up of the Ethics and Anti-Corruption Commission (EACC) was the first major step towards the enforcement of Chapter Six of the Constitution. This section discusses peculiar experiences in relation to the process of appointing the commissioners of the EACC.

The Ethics and Anti-Corruption Commission Act, 2011 establishes the procedure for the appointment of the chairperson and members of the EACC.¹⁹ The procedure commences with the appointment of a selection panel, comprising representatives of government departments including the Office of the President, the Ministry of Justice, and the Judicial Service Commission. Other members of the selection panel are to be drawn from independent organisations, such as the National Gender and Equality Commission, the Kenya National Commission on Human Rights, the Media Council of Kenya, a forum of religious organisations and the professional societies.

The Matemu Saga

In September 2011, the president, in accordance with the Act, constituted a selection panel to invite and consider applications from qualified persons for nomination and appointment to the position of chairperson and member of the commission. Following interviews by the panel, which had also invited public views on the suitability of candidates expressing interest in joining the commission, the panel recommended to the president three persons, including a Nairobi lawyer, Mumo Matemu, alongside four other persons for appointment as chairperson and commission members.

In November, the president then nominated Matemu for appointment as chair, alongside Jane Onsongo and Irene Keino as members of the commission, subject to the approval of the National Assembly.

The departmental Committee on Justice and Legal Affairs was designated to deal with these nominations on behalf of the National Assembly. In accordance with its procedures, the committee invited representations from the public on the suitability of these nominees for appointment. Having interviewed the nominees, including Matemu, the committee presented its report, rejecting the nomination of Matemu and the two other commissioners, stating that they “lacked the passion, initiative and the drive to lead the fight against corruption”. However, the report made no recommendations relating to the unfitness or unsuitability of the appellant or the other nominees, who then assumed office.

The report of the committee was tabled in plenary on 14 December, 2011. There followed extensive debate on the suitability of the nominees to serve on the EACC. Eventually, the Assembly rejected the recommendations of the Committee’s report and approved the nomination of Matemu and the other proposed members of the commission.

In May 2012, after a delay of five months, the president appointed Matemu as chairperson of the EACC, a development that triggered a legal challenge against the appointment.

A voluntary organisation, Trusted Society of Human Rights Alliance, filed a petition in the High Court,²⁰ seeking a declaration that the process

¹⁹ See section 6

²⁰ *Trusted Society of Human Rights Alliance v. Attorney General* [2012] EKLK, accessed at http://kenyalaw.org/caselaw/cases/advanced_search/

and manner in which Matemu was appointed was “unconstitutional, illegal, embarrassing to Kenyans and a constitutional coup, hence null and void”.

The organisation argued that Matemu did not meet the constitutional threshold required for appointment to the office of chairperson of the EACC, because acts and omissions on his part, while holding office at the Agricultural Finance Corporation (AFC), a public corporation, left him unsuitable for the position. The petitioner alleged that Matemu had approved loans to be issued by the AFC without ensuring that they were properly secured, thus occasioning loss to the corporation, and further that he had been involved in the fraudulent payment of loans to unknown bank accounts; had sworn an affidavit containing false information in a case before the High Court and had failed to prevent loss of public funds entrusted to the corporation. The petitioner further claimed that some of these allegations were the subject of criminal investigations by the police, but the investigations had never been completed. The petitioner pointed out to the court that the criminal investigation file was still open with a recommendation that Matemu be interviewed. The petitioner added that during his tenure as a senior official at the AFC, the company’s governance record was characterised by mismanagement, dubious writing off of debts and the loss of billions of shillings of taxpayers’ money.

The evidence before the High Court in the petition comprised copies of documents and reports relating to questions on Matemu’s integrity and the process of his appointment as chairperson of the EACC. These included a complaint letter from a private company, to the petitioner in the case, on claims of fraudulent dealings with the corporation by the company’s co-director. Another document was a letter from the petitioner to the director

of public prosecutions, in response to the above complaint, allegedly implicating the appellant as having “overlooked the fraud” at the public corporation. Annexed to the letter were copies of loan agreements between the corporation and the private company, copies of cheques drawn by the public corporation and copies of purchase agreements of assets claimed to have been used to secure loans. Another set of evidence comprised copies of official reports and media extracts in relation to the process of appointment of the appellant.

In its judgment²¹ the court noted that according to the available evidence the petitioner knew that although the existing allegations against Matemu were raised in Parliament during the confirmation hearings they were not resolved. In the view of the court the petitioner had a right to expect that these allegations would be investigated and resolved before the appointment was made. The court noted that the petitioner’s specific argument was that, contrary to reasonable expectations, no attempt was made to resolve the allegations against Matemu, either during the confirmation process or during the interview for the position to which he was eventually appointed. Hence, the petition was the earliest point in the process when the petitioner could bring a challenge over the failure to resolve the allegations against Matemu.

The court noted that the Constitution has vested in the National Assembly the task of vetting persons for appointment to the EACC and that there were two aspects of the vetting process. The first was ensuring that procedural aspects of the appointment were followed, and the second was to ascertain that selected candidates possessed the requisite qualifications. Courts are entitled to review the process of appointments to state or public offices for procedural infirmities as

²¹ Ibid

well as for legality. A proper review to ensure the procedural soundness of the appointment process includes an examination of the process, to determine if the appointing authority conducted a proper inquiry to ensure that the person appointed meets the constitutional requirement. The absence of any evidence that such an inquiry was conducted, or, in fact, not conducted, would lead to the conclusion that the procedural aspects of this constitutional test had not been satisfied.

The court held that it had jurisdiction to hear the petition and the doctrine of separation of powers did not prevent the court from entertaining the controversy surrounding the Matemu appointment. The allegations levelled against Matemu were serious enough and sufficiently plausible to warrant any reasonable person charged with the constitutional responsibility of assessing his integrity or suitability for appointment to a state or public office, especially one as sensitive as the chair of the EACC, to conduct a proper inquiry before such an appointment. The court noted that by the time his name was officially presented to the National Assembly as a nomination by the president, no evidence was furnished to the court to show that any investigations regarding the allegations against him had been done, or had informed the assessment of his suitability for the position of chair of the Commission. Neither was there adequate explanation why the allegations against Matemu were brushed aside. In the view of the court, procedural propriety during appointment to a state or public office includes weighing the qualifications and attributes of nominees or candidates against the constitutional test as laid out in Chapter Six and, specifically, article 73 of the Constitution. Consequently, it was not possible

to return a verdict that due procedure in an appointment or nomination of Matemu to office had been followed, when there was absolutely no evidence to support such a conclusion.

From the record presented to the court, it was evident that the appointing authorities gave lip service, or no consideration at all, to the question of Matemu's integrity or suitability to hold the office. They failed to ascertain for themselves whether he met the integrity or suitability threshold. They did not give due attention to all information that was available, and which touched on his integrity or suitability. The failure to honour the duty to diligently inquire, coupled with the failure to adequately apply the constitutional test, rendered the procedure used to appoint Matemu to chair the EACC to be fatally defective and to violate the spirit and letter of the Constitution. It was, therefore, constitutionally untenable, null and void. The court concluded that on the strength of available evidence, the appointment of the interested party to head the commission would not pass constitutional muster under the substantive "rationality" test:²² though the evidence the petition relied on was yet to be tested in judicial proceedings and could not be taken as the truth of the matter, the allegations were substantial enough that it was not possible for any appointing authority to rationally make a determination without the aid of proper inquiry to determine if the interested party had passed the integrity test demanded by Kenya's Constitution.

Matemu wins on Appeal

An appeal was made to the Court of Appeal, challenging the decision of the High Court, which had invalidated the appointment of Matemu as chairperson of the Commission.²³ On 26 July

²² A "rationality test" is a standard applied by a court of law when called upon to examine whether the legislature had a reasonable basis for enacting a particular statute. A reasonable basis is the opposite of arbitrariness. The rationality test is one of various standards that courts of law have fashioned in assessing whether legislative acts violate constitutionally protected interests. The U.S. Supreme Court has articulated the rational basis test for those cases where a plaintiff alleges that the legislature has made an arbitrary or irrational decision. When a court employs the rational basis test, it usually upholds the constitutionality of the law, because the test gives great deference to the legislative branch.

²³ *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR

2013, the Court of Appeal reversed the decision of the High Court, and paved the way for Matemu to a finding that “the general evidentiary standard applicable in judicial review of the procedural propriety of appointments process is that there must be a showing by the claimant that there were substantive defects in that procedure, fundamental omissions, or a consideration of extraneous considerations as to render the cumulative process unconstitutional.”²⁴

According to the Court of Appeal, the record before the High Court did not provide details of the manner in which the appointing authorities performed their inquiries to warrant a finding of impropriety. The court further ruled that the appointment process was cumulative, with various stages and appointing organs – the Selection Panel, the National Assembly and the Executive – and that a finding of procedural impropriety must be substantive enough to impeach the entire process. On the question of the serious allegations of fraud against Matemu while he was an employee of the AFC, the Court of Appeal held that there was no evidence linking him with the alleged improprieties. The court also stated that its proceedings were not the forum for determining whether the allegations were true or not.²⁵

The aftermath of the Matemu challenge

Whereas the courts ultimately cleared Matemu to assume the office of chair of the EACC, this was based on very technical legal reasoning, finding in effect, that it was the National Assembly’s responsibility, and not the courts’, to investigate the substance of the various claims of financial misconduct that had been levelled against him in the appointment process. Even though the court ordered that he could assume office as chair of the EACC, it made no findings on the substance of these claims, which have therefore remained unresolved. At the same time, there is no available forum where these allegations can be resolved. As long as they remain unresolved, they affect public perceptions about Matemu’s suitability for the office he holds, as well as the credibility of the EACC as an entity.

The manner in which the National Assembly processed the Matemu appointment showed a lack of appreciation on the part of the legislature, of the seriousness with which the fight against corruption should be approached.

The process of appointing the EACC had commenced in September 2011. Delays ensured that the appointments of Keino and Onsongo were completed on 27 September 2012, when the two were sworn in as commissioners of the EACC. It was not until July 2013, almost a year later, that Matemu assumed office, when he was cleared to do so by the Court of Appeal. A significant amount of time was lost as Matemu fought questions regarding his suitability for office²⁶.

²⁴ Ibid

²⁵ Ibid

²⁶ Mr. Matemu resigned from the Commission in May 2015 weeks after he and another commissioner had been suspended by the President, who formed a tribunal to investigate their conduct, following weeks of political controversy. www.nation.co.ke/news/Mumo-Matemu-EACC.Resignation/-/1056/2714532/ym69j5/-/index.html

Judicial Interpretation of Chapter Six

The judicial approach to the interpretation and enforcement of Chapter Six of the Constitution was defined by the involvement of Kenya with the International Criminal Court (ICC), following violence after the elections held in 2007. The ICC eventually took jurisdiction for crimes that occurred during the crisis, and charged several persons considered as bearing the greatest responsibility for the violence, with crimes against humanity. Two of the persons charged were Uhuru Kenyatta and William Ruto, now the president and deputy president of Kenya.

When the two announced that they intended to seek election to the offices that they currently hold, there was opposition to their candidature based on the fact of charges against them before the ICC. It was argued that to run for president while facing ICC charges, contravened Chapter Six of the Constitution. This argument was finally tested in court in a case filed by a coalition of civil society organisations.²⁷

The petition contended that the pre-trial chamber had confirmed charges against Kenyatta and Ruto committing them to full trial, and that it was satisfied as to existence of “substantial grounds to believe” that they were either contributors to or indirect co-perpetrators of crimes against humanity committed in Kenya between December 2007 and January 2008.

The petition also pointed out that the two had publicly indicated their desire to run for the two presidential offices in the 4 March 2013 elections.

The petition asserted that a person committed to trial at the ICC would not be able to properly discharge his or her duties as a public or state officer since he would be required to attend the hearings at the ICC on a full-time basis, and that the honour, integrity and confidence bestowed on public office under Chapter Six of the Constitution and by Kenyans, would be seriously eroded if a person standing such a trial was also elected president of the country.

The petition asserted that Chapter Six of the Constitution on leadership and integrity addressed the situation in which a leader was not only required to be selected in a transparent process, but also to bring dignity, legitimacy and trust of the people to the office.

In a unanimous decision, however, the High Court dismissed the petition. The court found that, the question of whether Kenyatta and Ruto were qualified to offer their candidature for the offices of president and deputy president, was an issue within the exclusive jurisdiction of the Supreme Court. In the circumstances, the court lacked jurisdiction to deal with a question relating to the election of a president or deputy president.

The court held that its jurisdiction in the unique circumstances of the case was limited to interpreting the provisions of the Constitution in relation to Chapter Six on leadership and integrity. Where there existed adequate mechanisms to deal with a specific issue or dispute relating to leadership and integrity, by other designated constitutional organs, the jurisdiction of the court could not be invoked until such mechanisms had been exhausted.

²⁷ International Centre for Policy & Conflict & 5 others v Attorney General & 4 others [2013] eKLR

In the case against Kenyatta and Ruto, the court found that the mandate of the Independent Electoral Boundaries Commission (IEBC) and other statutory bodies in dealing with the issues of eligibility and integrity was not exhausted by the petitioners before invoking its jurisdiction.

The court also found that despite the serious nature of the charges facing Kenyatta and Ruto at the ICC, under Article 50 of the Constitution they were presumed innocent until the contrary was proved. This right falls under the category of fundamental freedoms and rights that cannot be limited.

The judgment also found that Article 1 of the Constitution of Kenya places all sovereign power on the people of Kenya to be exercised only in accordance with the Constitution. Limiting the political rights of the parties sponsoring Kenyatta and Ruto would be inimical to the exercise of the democratic rights and freedoms of their members.

Cases decided by the courts regarding integrity raise the following general issues:

- **Timing: courts discourage anticipatory suits**

Decided cases suggest that the courts are reluctant to entertain anticipatory claims as to the integrity of a person who seeks elective public office. Courts will therefore not grant an application for the declaration that a person is not fit to run for public office, if the foundation of the suit is a rumour, or a general expectation that a person will seek to be elected for the seat in question. A court will thus require the existence of a formal set of facts that suggest that the person in question is a candidate for a particular public office.

The case of *Michael Nderitu v. Mary Wambui*,²⁸ filed by registered voters for Othaya, a parliamentary constituency, was based on a general expectation, gleaned from pre-election campaigns, that Wambui, whose integrity they questioned, would be a candidate for the parliamentary seat. The High Court, however, held that the petition was premature because, the fact that Wambui had expressed her intention to contest a parliamentary seat did not of itself give the petitioners the right to move the court to determine questions relating to her conduct or qualification. According to Justice Majanja:

“This case is predicated on the fact that Mary Wambui may on some date in the future present herself for nomination as a candidate for elective office. She has not presented herself and this court can go no further than state that this case is premature. Even if she presents herself to the nominating authority, that authority will be required to address itself to the constitutional requirements of the position and it is not for this Court to substitute itself at this stage as the body required to satisfy itself that the 1st respondent is qualified in all respects to be nominated as a candidate to vie for a parliamentary seat.”²⁹

This reasoning was affirmed by the High Court in the high profile petition that sought to block Uhuru Kenyatta and William Ruto as candidates for the offices of president and deputy president, respectively, to which they were eventually elected - a challenge that was based on the fact that the two faced charges before the ICC.³⁰

²⁸ Michael Wachira Nderitu & 3 Others vs Mary Wambui Munene Aka Mary Wambui & 4 Others [2013] eKLR

²⁹ Ibid

³⁰ International Centre for Policy & Conflict & 5 others v Attorney General & 4 others [2013] eKLR

The court noted that petitions against their candidature were presented to court long before the IEBC had accepted the nomination of Kenyatta and Ruto and commented that, at that point, the court was being invited to deal with hypothetical questions that fell outside its province. Furthermore, at that point in time there was no real dispute. The court found that as at the time of hearing the petitions, however, the IEBC had accepted the nomination of Kenyatta and Ruto and that the petition was properly before it.

In the view of the court:

“We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy. In this case the dispute before the court falls squarely within the province of Article 258 of the Constitution.”³¹

Furthermore, the fact that there were public allegations adverse to Wambui did not create an opportunity for any party to move the court to deal with the “questions” raised by these swirling allegations. In the view of the court, the “questions” referred to in article 165 were real questions, controversies or disputes placed before the Court for determination.

The authorities suggest that courts will not act on a mere allegation that a person seeks an elective public office and would instead want some official confirmation that the person is seeking election to such office.

The difficulty with this approach is that it allows candidates seeking elective office to mobilise beforehand in order to defeat a possible challenge on their candidature down the line. The case against Kenyatta and Ruto demonstrates this point. At a time when there was much uncertainty about whether Kenyatta could run for president in view of the charges he faced before the ICC, Kenyatta was involved in a well-publicised launch of The National Alliance, the political party on whose ticket he eventually ran for president. As a high profile political event, the launch of the party constituted a clear statement that Kenyatta intended to run for office, notwithstanding the charges against him.

According to decided cases, the launch of his political party would not constitute sufficient evidence to support a case challenging Kenyatta’s integrity. In retrospect, it can be argued that having sensed the indecisiveness in the country about confronting the question of their candidature for office, Kenyatta and Ruto relied on political mobilisation to increase the cost of a decision against allowing them to run for president while facing charges before the ICC. Given the amount of money spent in launching his political programme, and the fact that he had built a popular support base that would be unlikely to accept a decision against his candidature, Kenyatta had thus increased the difficulty in making a decision against his candidature. Thus, the main difficulty that the state of the law raises is that it allows space for mobilisation aimed at defeating possible future integrity challenges.

³¹ Ibid

- **Alternative procedures for addressing integrity disputes ousts the jurisdiction of the court**

A recurrent issue in cases that have been presented before the courts is the argument that where there exist sufficient or adequate mechanisms to deal with a specific issue or dispute by other designated organs, the jurisdiction of the court cannot be invoked until such mechanisms have been exhausted.

In the Wambui case Justice Majanja upheld this argument finding that, even if it were assumed that the complaint that she was not qualified for office was factually correct, the court would still not deal with the matter, which could only be addressed by the IEBC in terms of the Elections Act. The judge said:

“If there is any issue of qualification as to whether the Mary Wambui is qualified to be a person to contest or vie for a parliamentary seat, it is not a matter for determination by the High Court in terms of Article 88(4) (e). It is a matter to be determined according to the procedures and mechanisms provided by law applicable to the electoral process under the provisions of the IEBC Act, 2010, the Elections Act, 2011 and where applicable the Political Parties Act, 2011.”³²

This argument also featured in the Kenyatta case, where it was argued that the nomination of candidates for election to the office of president being the responsibility of the IEBC, this commission had a duty to confirm that candidates presenting themselves for nomination had met integrity requirements, and that persons with complaints about the suitability of candidates on integrity reasons should have first made such complaints to the IEBC.

In the view of the court, the requirement for the IEBC to receive the self-declaration forms was part of its mandate to check compliance with the Elections Act and the Elections (General) Regulations, 2012, which set out a vetting mechanism for all political parties regarding the nomination of candidates vying for positions. The court held that it had the power to review decisions made by the IEBC pursuant to these laws, except in cases relating to the election of a president or deputy president.

While in these two cases the High Court upheld the argument that alternative remedies that were provided under the law ousted the jurisdiction of the court, there was a departure from this line of reasoning in the case of *Benson Riitho v J. M. Wakhungu*.³³

This was a case in which the cabinet secretary nominated Ferdinand Waititu, a well-known politician who had unsuccessfully run for governor in Nairobi, for appointment to chair the Athi Water Board, a public corporation. Objection was raised before the High Court that Waititu’s well-publicised incendiary messages against a section of the population rendered him unsuitable for appointment to chair the board. On his behalf the defence was taken that since the Leadership and Integrity Act had provided a procedure for dealing with complaints about integrity, this ousted the jurisdiction of the court to deal with the same matter.

However, Justice Mumbi Ngugi dismissed this argument, finding that, “there is nothing in the said provisions that contains a mechanism or procedure for dealing with issues of integrity as contemplated under Chapter 6 of the Constitution with regard to the question whether a person slated for appointment as a public officer meets the constitutional threshold set by Chapter 6 of the Constitution.”³⁴

³² Michael Wachira Nderitu & 3 Others v Mary Wambui Munene Aka Mary Wambui & 4 Others [2013] eKLR

³³ Benson Riitho Mureithi v J. W. Wakhungu & 2 others [2014] eKLR

³⁴ Ibid

In her view, the provisions in question amounted to, “a system for ensuring observance of the Code of Ethics for public and state officers who are in office; with its reach extending to investigation of state officers after they leave office.” According to Justice Ngugi, “the two statutes do not, however, provide a procedure or mechanism under which a person who has concerns about the suitability of a person proposed for appointment to public office can be examined.”³⁵

In the view of the judge the case before her was different from those decided in relation to candidates seeking elective positions, a matter that she said would fall under the powers of the IEBC to examine the suitability of candidates. In the present case, no mechanism was provided in law for dealing with situations where there was an objection on integrity grounds against the proposed appointment of persons to public office.³⁶

Judge Ngugi found that the appointing cabinet secretary had a duty to take into account concerns about integrity when considering the suitability of the person for appointment, but had failed to do so. The reason for overturning the appointment was the failure of the cabinet secretary to give consideration to integrity provisions. The judge made it clear that she was not making a finding as to the suitability of Waititu for appointment to the office for which he had been proposed. Such a decision was for the cabinet secretary to make. She noted that “...there are serious unresolved questions with regard to the integrity of Waititu which do not appear to have been considered” and further that “no opportunity was provided for any person with an objection to his appointment to make such a case and that no evidence was presented that the

cabinet secretary had addressed the possibility that Waititu may have integrity issues”.³⁷ The judge then concluded:

“It seems to me therefore that the primary responsibility lay on the 1st respondent, and indeed on any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of members of boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as the Constitution now demands.”³⁸

The court directed the cabinet secretary to commence the appointment of the chair of the board in accordance with the provisions of the Water Act and taking into account the provisions of the Constitution regarding integrity.

While it is reasonable for the courts to take the view that other authorities must first engage with questions as to the suitability of persons for appointment or election to public office, before the courts are asked to pronounce on any disputes that may arise, many of these other authorities are unaware of their duty to determine the suitability of candidates for appointment or election to office. Also, the procedure for doing this, even where the authorities seek to comply with the expectation that they should vet for suitability on grounds of integrity, are undeveloped. To develop a consistent approach to addressing questions of integrity by authorities on the part of candidates for public office, it may be desirable to make additional legislation on the matter.

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

³⁸ Ibid

If the reasoning by Justice Ngugi were applied in the decision in the case challenging the integrity of Kenyatta and Ruto, it might have led to a completely different set of results. The approach employed by the IEBC in processing the Kenyatta/Ruto nominations was not different from that used in processing the Waititu nomination. In the case of Uhuru/Ruto, although the public was expected to know, and must have known about the nomination process for presidential candidates, (a fact that would have allowed a possible challenge of the Kenyatta/Ruto nomination by members of the public), there was a difference in the processing of the Waititu nomination and there was no reasonable opportunity for the public to participate by opposing the nomination.

However, neither the IEBC in the Kenyatta/Ruto case, nor the cabinet secretary, in the Waititu case, proactively invited public participation or provided an opportunity for a possible objection to the nomination of the persons concerned. Therefore, it was open for the judges in the Kenyatta/Ruto case to decide that the failure to actively encourage, or allow public participation that may have seen the emergence of objection to the Kenyatta/Ruto candidature, was fatal to their nomination.

A different way of understanding the decision in the Waititu case is that it ultimately turned on a lack of public participation, when considering Waititu's suitability to serve, rather than that it was based on integrity concerns, which the court expressly said it would not address.

- **Courts are reluctant to pass judgment on the evidence as to lack of integrity**

The cases presented before court have also shown the challenges relating to how the court deals with the factual allegations on the basis of which the lack of integrity is claimed.

In the Wambui case, the petitioners cited the fact that Wambui had been the subject of adverse mention in several public reports, including a report by the Kenya National Commission on Human Rights titled, *On the Brink of the Precipice: A Human Rights Account of Kenya Post -2007 Election Violence*. Also, Wambui had been adversely mentioned in the *Report of the Commission of Inquiry into the 2007 Post Election Violence*, (the Waki Report); the report titled *Report of Investigation into the Conduct of the Artur Brothers and their Associates* prepared by the National Assembly Departmental Committees on Administration, National Security and Local Authorities and Administration of Justice and Legal Affairs and the 2006 Shadrack Kiruki led Commission of Inquiry, *Report on the Commission of Inquiry into the activities of the Artur Brothers*.

However, the court did not have to deal with the question as to whether the allegations in these reports were true because it made a finding that even if the factual allegations were true, the court lacked the jurisdiction to do anything about the matter because the petition was prematurely in court. Secondly, the court also decided that the IEBC should first have been asked to make a decision on the matter before the jurisdiction of a court of law could be invoked.

In the Waititu case, the court refrained from addressing the factual allegations because it took the view that its proceedings were not the proper place for doing so.

These decisions show that the courts are reluctant to make their own findings on the truth about allegations of lack of integrity and view this as the responsibility of the constitutional or statutory body that was responsible for making the appointment. The courts argue that they lack the means to deal with questions as to whether such allegations are correct. The decision of the Court of Appeal in the case of Mumo Matemu case best demonstrates this approach.

The dispute before the High Court was that while serving as secretary to a public corporation, Matemu had approved loans without ensuring that the borrowers provided sufficient security, thus leading to massive losses by the corporation. To prove this point, an affidavit had been sworn in the High Court proceedings containing the specific incidents when Matemu allegedly irregularly approved the advancement of credit, including a loan of Ksh. 24 million, and two further loans of Ksh. 18 million and Ksh. 19 million, without ensuring their security. It seems that the petitioners against Matemu's appointment, brought this evidence before court hoping that it would be the basis for invalidating the approval of Matemu to the EACC position. While the High Court had decided that no evidence was provided that either the legislature or the selection panel had carried out an investigation into the allegations against Matemu, the court nevertheless held that its proceedings were not the forum for conducting such an inquiry, which would have to await a proper forum which the judgment did not specify.

On its part, the Court of Appeal said it had reviewed copies of loan agreements between the corporation and the entity alleged to have been awarded loans irregularly, copies of cheques drawn by the corporation to the entity, and copies of purchase agreements of the assets claimed to have been used to secure the loans. The court noted it was not provided with any evidence on the parties involved in initiating and processing the loans and concluded that, on their own, the documents submitted were insufficient to prove their claim. According to the court:

“Quite apart from the absence of proof on the claim of irregular award of loans, we have not been able to link the appellant to the alleged complaint. The nakedness of the documents is such that they can support any circumstantial claim, but only if there is more to substantiate the allegations. That is where the evidence requirement sets in. Moreover, the records before us do not show that any of the documents alleged to emanate from the AFC were done under the appellant's hand or authority. The alleged failure by the AFC to secure loans properly has neither been proved, nor was there proof of the involvement of the appellant in such practice. Nothing was advanced before us in argument or evidence to demonstrate that the appellant had any authority to grant loans.”³⁹

It seems therefore that courts will not engage with the merits of claims as to the lack of integrity on the part of a candidate. Even the decision in *Benson Riitho v J. M. Wakbungu*, one of the few where the courts have upheld a claim that a person was unsuitable for appointment on account of integrity, the court made it clear that it was not a trial court

³⁹ Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR

as to the veracity of the claims against Waititu but, rather, that the failure by the minister to consider these claims when making the appointment was the basis for invalidating it.

- **The lack of procedural guidance on raising integrity issues**

The fact that parties bring cases in the High Court seeking to challenge the suitability of public appointments is a reflection of the weaknesses in the mechanisms for making complaints before other bodies, apart from a court of law.

The case brought before the High Court by the CIC discussed this issue. The CIC petition sought several declarations, among them:

- That Parliament, which was a respondent in the petition, had a duty to enact legislation to provide mechanisms and procedures for ensuring the effective administration of Chapter Six of the Constitution.
- That Parliament had failed to enact such legislation within the timelines stipulated in a schedule for the enactment of implementing legislation on the Constitution, which formed part of the Constitution itself.
- That the Leadership and Integrity Act, as enacted, was not the legislation contemplated under the Constitution and was therefore null and void and ought to be struck down, so as to pave the way for genuine and authentic legislation to be enacted.
- That Parliament should be compelled to take steps to ensure that legislation to provide for mechanisms and procedures for ensuring the effective administration of Chapter 6 of the Constitution was enacted within a period of 30 days, and to report the progress to the Chief Justice.

The main argument by the CIC was that the Constitution envisaged that one way of ensuring compliance with Chapter Six was to ensure that leaders who did not comply with its provisions were either barred from holding public office, or if already in office, were removed from such office. As enacted, the Act failed to recognise such enforcement mechanisms. According to the CIC, the failure to establish procedures and mechanisms that would enable the Ethics and Anti-Corruption Commission to enforce compliance with Chapter Six as envisaged under Article 79, meant that the Act failed to comply with the Constitution.

The second contention by the CIC was that Parliament had disregarded public views on the proposed content of the Act. In support of this point the CIC attached copies of written representations from a number of civil society groups that had been made to other state organs and which never made it into the Act.

While holding that “the centrality and importance of legislation on leadership and integrity in Kenya’s governance cannot be underestimated given the history of our country”, the High Court reviewed the content of the Act and concluded that, “the outline of the provisions of the Act I have set out show that there are in place procedures for the administration of Chapter Six,” thus disagreeing with the contention by the CIC.

The court had created the test that these provisions should meet, which was that there needed to be a demonstration that they were “effective”. On whether or not the provisions were effective, the court concluded that, “it is not a matter in which the Court should delve into unless the Constitution is contravened”. The court relied on a previous decision of the High Court, *Mount Kenya Bottlers Limited & 3 others v Attorney General and Others, Nairobi Petition No. 72 of 2011 [2012] eKLR*, that

“the Courts cannot act as ‘regents’ over what is done in Parliament because such an authority does not exist.

- **Courts can award costs notwithstanding the public interest in litigation on integrity**

‘Costs’ is a monetary award granted by a court of law to a party in a civil suit before the court, which is recoverable from the party against whom the orders of costs is made, as compensation for expenses incurred in instituting or defending an action before the court.

The general rule is that the award of costs is at the absolute discretion of the judge. However, the tenet, “costs follow the event”, summarises the general expectation that, ordinarily, a court will award the costs of a suit to the party that wins the suit, and against the losing party. This rule is codified in the Civil Procedure Act⁴⁰ in the following terms:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”⁴¹

The function of costs is to reimburse the expenses incurred by the winning party in having to institute or defend the suit. The understanding that costs are at the discretion of the court is reflected in the judgments of the courts of record. For example, in *Joseph Oduor Anode v. Kenya Red Cross Society*,⁴² where the judge remarked that even though costs were at the discretion of the court, the discretion must, as usual, be exercised judiciously. According to the judge:

“The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as enumerated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion.”⁴³

One exception that Kenyan courts have fashioned out to the general rule is that, irrespective of the outcome of the litigation, costs will not be awarded against a public-spirited person that came to court to protect the public interest. Thus the courts have made the rule that in cases involving the public interest, costs will normally not be awarded against a losing party that came to court to protect the public interest.

‘Public interest litigation’ refers to legal proceedings brought to assist the poor or marginalised people, or to effect change in social policies in the public interest. Classically, the doctrine of *parens patriae*

⁴⁰ Cap 21, Laws of Kenya.

⁴¹ Section 27(1)

⁴² *Joseph Oduor Anode v. Kenya Red Cross Society*, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR.

⁴³ *Ibid*

was invoked by the state, as an exception to the rule about *locus standi*, to allow the state jurisdiction to intervene in the public interest to protect vulnerable children or adults who, because of mental disability, were in need of protection. As the defender of the public interest, the attorney general, or an equivalent official, is normally expected to bring litigation on behalf of the public interest. Where this does not happen and a public-spirited individual, or group(s) brings actions on behalf of the general public for the purpose of protecting what is deemed to be in the general interest of society, one way of construing the action is that they are acting where the attorney general might have acted. This is the rationale for the reluctance to award costs against such individuals. In most cases, the individual or individuals do not have any special or peculiar interests in the subject matter over and above other members of the society. They only seek to protect what is a common public interest or right.

For example, in *Jasbir Singh Rai v Tarlochan Singh Rai*,⁴⁴ in refusing to award costs against the losing party the Supreme Court observed that, while rule 3(5) of the Supreme Court Rules and section 27(1) of the Civil Procedure Act state that the court, like other superior courts, had an open-ended application of discretion to ensure the ends of justice, the basic principle on attribution of costs, that costs follow events was well-recognised but could not be used to penalise the losing party. Rather, it was for compensating the successful party for trouble taken in prosecuting or defending the suit. In the view of the court, the vital factors in settling the preference was the discretion of the court accommodating the special circumstances of the case and being guided by ends of justice. Claims of public interest, motivations and conduct of parties during litigation process were also relevant factors.

The vast majority of the cases that have sought to invoke Chapter Six were classified as public interest cases and, even though most of them were unsuccessful, no costs were awarded against the losing parties until the suit challenging the suitability of Uhuru Kenyatta and William Ruto to run for president and vice president. In making its order on costs, the court noted that despite the fact that the petition was of public interest, Kenyatta and Ruto had had to defend several petitions, and it was only fair that they be awarded costs.

The second departure from established practice occurred in the case of *Kituo Cha Sheria v John Ndirangu Kariuki & another* [2013] eKLR⁴⁵ where Justice Kimondo awarded costs of Ksh. 250,000 against Kituo cha Sheria, which had lost the case that challenged the eligibility of John Ndirangu to hold the office of member of parliament to which he had been elected. Kituo cha Sheria argued that a past conviction against him for fraud, rendered Ndirangu unsuitable for the office. The court, however, dismissed the case on the technical ground that 'Kituo cha Sheria' was not the formal registered name of the organisation and a suit filed in that name was therefore legally incompetent. Justice Kimondo then awarded costs in the following terms:

"If the Court does not do so, then the Registrar of the Court is required by Rule 37 to tax such costs. The 1st and 2nd respondents are entitled to costs. Those costs shall be paid by the petitioner. Parties have in the past abused the taxation process to exaggerate their costs at the expense of the losing party and the taxpayer. This petition has terminated early and before the hearing of any witnesses. Accordingly, and as per Rule 36 (1), I order that the petitioner shall pay costs assessed at Kshs 150,000 to the 1st petitioner who brought this

⁴⁴ *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] Eklr, SCK Petition No. 4 of 2012.

⁴⁵ *Kituo Cha Sheria v John Ndirangu Kariuki & another* [2013] eKLR

motion and Kshs 100,000 to 2nd Respondent who joined in the motion. The total costs are thus Kshs 250,000 only. It is a reasonable and fair sum noting the nature of the matter and complexity of the issues. Both respondents have instructed counsel in the matter. They have filed responses to the petition. They have filed other depositions and written submissions relating to the motion for striking out. Their lawyers have appeared in court to contest the petition. They must look up to the petitioner for redress. Under Rule 37 (3), I direct that the whole of those costs shall be met from the money deposited by the petitioner as security in Court. The balance of that deposit shall be refunded to the petitioner.”⁴⁶

The fact that these two cases exist represents a new difficulty in public interest litigation. Justice Kimondo who awarded costs in the *Kituo cha Sheria* case had been one of the five judges that sat in the Kenyatta/Ruto case where the first award of costs had been made.

Costs or punishment?

The petition in the Kenyatta/Ruto case having been dismissed with costs, the respondents, who include the Independent Electoral and Boundaries Commission, Uhuru Kenyatta and William Ruto, filed bills of costs whose cumulative total is Ksh. 178 million (US\$2 million), which are pending taxation before the Deputy Registrar of the High Court.

Concerns were, first, that the award of costs will discourage civic vigilance in the protection of the Constitution through public interest litigation, and, second, the amount of money claimed by the respondents in costs far exceeded the financial capacities of the petitioners. In all likelihood, the petitioners would have to close down their operations if required to meet such a large amount of debt in costs.

On an application by the Court of Appeal petitioners, the Court of Appeal stopped the assessment of costs until an appeal that the petitioners intend to file against the order of costs is heard and finalised.

⁴⁶ Ibid

Conclusion

While the enactment of Chapter Six of the Constitution provided hope that struggles to realise integrity in the management of public affairs had finally achieved consolidation, the enforcement of this Chapter has since faced significant setbacks that have contributed to decisively undermining the hope that had been vested in the new constitutional provisions.

To begin with, the enactment of legislation to implement the provisions of Chapter Six provided the first occasion for undermining those provisions. The unilateral decision by Cabinet to delete key provisions from the initial draft bill that had been approved by the CIC, left the bill without an implementing mechanism and thus significantly reduced the chances of its successful execution. Further, this action sent the signal that there was no commitment within the highest level of government to supporting the struggle for the enforcement of the integrity provisions.

While, to its credit, the CIC expressed its disaffection strongly and even resorted to the unusual act of bringing an action against the National Assembly that had just approved the legislation, the arguments made by the CIC about the inadequacy of the legislation did not meet the approval of the court, which dismissed the suit.

If the Legislature showed culpability in approving and enacting defective legislation meant to enforce Chapter Six, this same culpability was soon extended to the process for the enforcement of that legislation: the National Assembly treated very lightly the significant issues that faced Mumo Matemu - the candidate that the president had nominated for appointment as the first chair of the Ethics and Anti-Corruption Commission.

The circumstances surrounding the Matemu appointment could only have removed any remaining doubt as to the government's commitment to the fight against corruption and the enforcement of Chapter Six. The controversies surrounding Matemu led to delays in his appointment and when appointed, he has remained distracted by the unfinished legal processes questioning his qualification to serve in that office.

As discussed above, the courts have been a popular arena for addressing issues regarding the enforcement of Chapter Six. Since the enactment of the new Constitution, a very large number of cases have been brought to court that seek to invoke Chapter Six one way or the other. However, all these cases, bar two, have been unsuccessful.

One reason for the failure of the cases is the argument, fashioned by the courts through their judgments, that they will not address grievances regarding Chapter Six unless other mechanisms for addressing such grievances have been invoked exhaustively. The practical dilemmas raised by this line of argument have been discussed above. Further, this argument only makes more urgent the need to revisit the implementing mechanism that was contained in the first draft Leadership and Integrity Bill, which had been removed by Cabinet.

The most prominent case presented to court on Chapter Six related to the qualification of Uhuru Kenyatta and William Ruto to run for the presidency while facing charges before the ICC. The case attracted much publicity as its outcome had significant implications for the country's politics. In dismissing the case, the court took what was almost a hostile tone and ended up awarding costs against the organisations that had brought the case. In retrospect, it seems that the case served to exert

unwelcome pressure on the court, which could not have relished the responsibility of making such a crucial decision. It is not easy to understand that, while finding that it had no jurisdiction on the matter and that the matter raised serious public interest questions, the court nevertheless awarded costs against the losing parties, as if to punish them for putting the court in a position where it had to make a decision on such a difficult case.

Based on the record of the High Court so far, there is little hope that it is anything but very difficult for the courts to uphold Chapter Six through litigation. The prevailing circumstances tempt the conclusion that there exists a level of judicial cynicism against Chapter Six.

In retrospect, the Kenyatta/Ruto case may have come too soon in the life of the new Constitution, subjecting the Judiciary to what was a stern test in requiring it to apply Chapter Six to such a politically significant case, at a time when there was only a small body of judicial decisions on the matter. It may be argued that the tactic of using the courts to address the Kenyatta/Ruto candidature was probably too

ambitious and may have contributed to the antipathy that exists towards the provisions of this Chapter within the government and the judiciary. However, inertia on the part of other public institutions, principally the Independent Electoral and Boundaries Commission, made this outcome inevitable.

In the end, Kenyatta and Ruto assumed offices as president and deputy president, notwithstanding the attempts to block them from running for office because of the charges against them before the ICC. This is hardly a conducive political context for enforcing Chapter Six. While the two have not directly attacked the integrity provisions, their administration is noteworthy for its lack of championship of the new Constitution, which therefore drifts on its own, without notable political support.

Viewed in context, Chapter Six is important in that it has provided a previously missing standard for judging the quality of public leadership. However, there remains much to do to fully realise the provisions of this chapter. Unfortunately this may not be possible in the existing political environment.

Recommendations

- It is clear that the lack of a mechanism to enforce the integrity provisions under the Constitution has been a major hindrance to the implementation of Chapter Six. The CIC should seek amendments to the Ethics and Integrity Act with a view to incorporating into the Act provisions that the National Assembly had unilaterally deleted and which sought to establish such a mechanism.
- A proposal requiring a publicly accessible declaration of income, assets and liabilities for all state officers by persons seeking state office, which was deleted by Cabinet, should be negotiated and enacted in an amendment of the Leadership and Integrity Act.
- It is noted that Cabinet's unilateral insertion into the Leadership and Integrity Bill of provisions that allow state officers to engage in other gainful employment while in office, are contrary to the Constitution. These should be removed through amendment.
- The fact that parties bring cases in the High Court seeking to challenge the suitability of public appointments is a reflection of the weaknesses in the complaints-receiving mechanisms of mandated bodies, other than a court of law. Outside of the litigation context, procedures for making complaints regarding integrity should be clarified and appropriate information to the public should be provided on a proactive basis.
- The existing body of decisions suggests that courts will not act on a mere allegation that a person seeks to vie for an elective public office and would instead want some official confirmation that the person is seeking election to such office. Thus, the launch of a political party would not constitute sufficient evidence for a case challenging that person's integrity. The main difficulty that the state of the law raises is that it allows space for mobilisation aimed at defeating potential integrity challenges. While it is understandable that courts will not act in anticipation of a situation, the court's argument is a blunt tool against political mobilisation that is calculated to defeat accountability based on integrity. A discussion with judges regarding this issue would bring out the practical difficulties involved and clarify possible judicial responses.
- While in some cases the High Court has upheld the argument that alternative remedies provided under the law ousted the jurisdiction of the court, there was a departure by Justice Mumbi Ngugi from this line of reasoning in the case of the *Benson Riitho v J. M. Wakhungu*, where she held that "there is no statutory procedure or mechanism under which a person who has concerns about the suitability of a person proposed for appointment to public office can be examined." It is recommended that this line of reasoning be developed through litigation, as it affords a more responsible approach to the enforcement of Chapter Six.

- The tendency for courts to award costs against litigants in Chapter Six litigation is a threat to the enforcement of the integrity regime. Consideration should be given to amending the Civil Procedure Act to clarify that a court should not award costs unless it satisfies itself of the existence of at least one of the following three conditions:
 - (a) That the case did not involve the public interest
 - (b) That the case was frivolous or vexatious
 - (c) That the litigant acted unreasonably in the manner in which he/she prosecuted the case in court, and put other parties to financial hardship as a result of such conduct.

- In the Uhuru Kenyatta/William Ruto case, it is baffling that while the High Court found that it had no jurisdiction to hear the case against, it still went ahead and made substantive orders and also an order as to costs. The behaviour of the court has led to accusations

that it was not acting in an unbiased manner in the circumstances of the case. Looked at in totality, the decisions of the High Court in the cases on integrity provide little confidence about a judicial commitment to uphold the integrity provisions of the Constitution. The judiciary must conduct an internal review of its position on Chapter Six and lawyers who present relevant cases before the courts should not only argue their individual cases but should also find ways of providing a perspective about the unsatisfactory role that the courts have so far played in the enforcement of Chapter Six.

- The Mumo Matemu situation indicates that parliamentary procedures are weak for the enforcement of integrity requirements through the power of approving persons proposed for public appointments. A dialogue with the leadership of the National Assembly is required to clarify the responsibilities that the Assembly assumes when discharging its approving role in relation to public appointments.

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