

IN THE MATTER OF THE OATHS & STATUTORY DECLARATIONS ACT

CAP 15 LAWS OF Kenya

AFFIDAVIT

I, **Sheila Masinde** of National Identity card number [REDACTED] and resident of **Nairobi, Kenya** in the Republic of Kenya do make oath and state as follows: -

1. **THAT** I am a Kenyan adult of sound mind and understating and competent to swear this affidavit.
2. **THAT I** am the Executive Director of Transparency International Kenya, hereinafter referred to as TI-Kenya, and swear this Affidavit on the behalf of Transparency International Kenya for which I am competent to.
3. **THAT** TI-Kenya is a not-for-profit organisation established with the aim of developing a transparent and corruption-free society through good governance and social justice initiatives.
4. **THAT** TI-Kenya swears and submits this affidavit in response to a call for Public Participation/Submission of Memoranda to the National Assembly in the Matter of Approval by the National Assembly of the persons nominated to be appointed as Cabinet Secretaries, Secretary to the Cabinet & Attorney General.
5. **THAT** we submit this affidavit in two parts, the principles of Chapter 6 that should guide the National Assembly in the vetting process and, submissions on specific nominated individuals.

Principles of Chapter Six of the Constitution of Kenya

6. **THAT** Article 2(1) of the Constitution provides that, the Constitution is the supreme law and binds all persons and all organs on both levels of government. Any law or practice which is inconsistent with it is invalid.
7. **THAT** Article 3(1) of the Constitution provides that every person has an obligation to respect, uphold and defend the Constitution.
8. **THAT** Article 10 of the Constitution provides for the national values and principles of governance which 'bind all state organs, state officers, public officers and any other person whenever they apply or interpret the Constitution; enact, apply or interpret any law; or make or implement public policy decisions'. The national values and principles of governance as provided under Article 10 of the Constitution include the rule of law, good governance, integrity, transparency and accountability and sustainable development.
9. **THAT** Article 73(2) of the Constitution requires State Officers to be guided in their day-to-day conduct by principles of leadership and integrity which, among other requirements,

include;

- a) Selection based on **personal integrity**, competence and suitability or election in free and fair elections;
 - b) **objectivity** and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;
 - c) **selfless service** based solely on the public interest, demonstrated by;
 - i. honesty in the execution of public duties; and
 - ii. the declaration of any personal interest that may conflict with public duties;
 - d) accountability to the public for decisions and actions; and being accountable to the public for decisions and actions;
 - e) **discipline** and commitment in service to the people.
10. **THAT** Chapter 6 of the Constitution, specifically Article 73(1) provides that authority assigned to a state officer is
- a) A **public trust** to be exercised in a manner that:
 - i. is consistent with the purposes and objects of this Constitution;
 - ii. **demonstrates respect for the people;**
 - iii. **brings honour to the nation and dignity to the office; and**
 - iv. **promotes public confidence in the integrity of the office; and**
 - b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.
11. **THAT** Article 75 (1) of the constitution states that “A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—
- a) any conflict between personal interests and public or official duties
 - b) compromising any public or official interest in favor of a personal interest; or
 - c) **demeaning the office of the officer holds.**
12. **THAT** Section 3(2) of the Leadership and Integrity Act requires State Officers to respect the values, principles and the requirements of the Constitution including (a) the national values and principles provided for under Article 10 of the Constitution.
13. **THAT** Section 13 of the Leadership and Integrity Act require public officials to observe moral and ethical requirements in the Act and other legislation.
14. **THAT** going by the aforementioned legislative and constitutional provisions, there are certain mandatory ethical and moral standards required of any public or state officer which are inherently different from criminal or civil standards. One of the criteria for

qualification of elective and appointive office is the satisfaction of the provisions of Chapter Six of the constitution on leadership and integrity.

15. **THAT** by the above, it is possible for an individual to be ethically and morally unfit without necessarily having a criminal record or charge. There is indeed a clear and objective threshold that can be used for vetting on the basis of Chapter 6 of the constitution. Such basis appreciated ethical and moral standards have a different and in fact stricter threshold than criminal standards.
16. **THAT** examples of ethical and moral standards in the Constitution include the following;
 - i. Action that **demonstrates respect for the people**
 - ii. Action that **brings honor to the nation and dignity to the office**
 - iii. Action that **promotes public confidence in the integrity of the office**
 - iv. Action/behavior which whether in public or private life, **does not demean the office the officer holds**
 - v. Action/behavior that does not amount to **gross misconduct**
17. **THAT** the above is supported by several judicial and quasi-judicial pronouncements which have either barred or proposed barring of individuals from occupying public office on the basis that they do not meet the threshold of chapter six. They include;
 - i. Report on Vetting of the Nominee for Appointment as Chairperson NACADA by the Departmental Committee on Administration and National Security, 2013
The report observed that the nominee was accused of falsely presenting documents that led to a company associated with him irregularly benefiting Kshs. 41.3 million from Kenyatta National Hospital. The vetting committee found the nominee unfit and concluded that although he was best suited for the job, the criminal allegations touching on his personal integrity were likely to compromise public confidence in the integrity of the office. Even though the report was amended after plenary, the paramountcy of integrity in public office was well captured.
 - ii. Report on Removal of the Chairperson of the Ethics and Anti-Corruption Commission by the Departmental Committee on Justice and Legal Affairs, 2016
Following a petition to the National Assembly questioning the suitability of Phillip Kinisu to hold the office of Chairperson of the Ethics and Anti-Corruption Commission, the Departmental Committee on Justice and Legal Affairs tabled a report recommending the removal of Philip Kinisu as Chairperson of the EACC for failing to disclose material information during his

vetting exercise. The information involved his close ties to a company that had dealings with the National Youth Service and government ministries contrary to the law. By failing to disclose the information, the vetting committee was not in a position to detect possible conflict of interest. The non-disclosure amounted to violations of provisions of Chapter 6 and other ethical values in the constitution.

iii. Report on Vetting of Nominee for Appointment as Chairperson of the Salaries and Remuneration Commission by the Departmental Committee on Finance and National Planning, 2018

On 22nd June 2018, President Kenyatta nominated Dr. Ben Chumo for the position of Chairperson of the SRC. The vetting committee reported that the nominee had integrity issues arising out of the fact that he had been accused of economic crimes and therefore did not satisfy the requirements of Chapter Six of the Constitution on leadership and integrity. The nominee had also not stepped aside as the Chair of Council of Egerton University despite the fact that he had an ongoing case

iv. Report and Recommendation into the Conduct of the Hon. Lady Justice Nancy Makokha Baraza, 2012

In 2012, a tribunal was set up to investigate the conduct of former Deputy Chief Justice Nancy Baraza who, on 31st December 2011 at a shopping complex, refused to be searched by a security officer, assaulted her and threatened her with a pistol. The report concluded that the DCJ's conduct amounted to gross misconduct and misbehavior, a breach of values of leadership and integrity, and recommended for her removal from the office.

v. Suspension of ministers and other senior ranking officials over graft allegations

In March of 2015, former President Uhuru Kenyatta suspended four Cabinet Secretaries Kazungu Kambi (Labour), Michael Kamau (Transport), Davis Chirchir (Energy) and Felix Koskei (Agriculture) and 12 other high-ranking officials after they were implicated in corrupt deals based on a report from the Ethics and Anti-Corruption Commission. The then president in his statement emphasized on the need for public and state officers to uphold the highest standards of personal integrity in the discharge of their official functions.

18. **THAT** in vetting suitability of candidates on the basis of Chapter 6, we advise Parliament to bar the following persons;

- i. Persons adversely mentioned by reports of competent public fact finding institutions to possibly have or to have violated the law, abused their office or acted in a manner that causes indignity to themselves or another person.
 - ii. Persons who have been recommended for criminal charges by fact finding or investigative bodies or for investigation or prosecution.
 - iii. Persons who have been charged in court on corruption charges, abuse of office charges felonies or other serious offences.
 - iv. Persons who have been found to have engaged in offences by court of first instance.
 - v. Persons who have been removed from office through an impeachment process or any other administrative process.
19. **THAT** debarment of persons who do not meet the threshold under Chapter 6 of the Constitution is neither unconstitutional nor alien. The law by its very nature is restrictive and certain rights may be suspended in the interest of justice.
20. **THAT** in summation of the above, we submit and call upon the National Assembly to apply mandatory and objective criteria on the suitability of Chapter 6 during vetting of the candidates.

Submission on specific nominees on the basis of Chapter 6 of the Constitution

21. **THAT** following the above principles, we submit the following information on the below individuals sourced from verifiable public sources

Nominee	Reason for disqualification
Prof Njuguna Ndung'u	Facing abuse of office charges involving irregular award of a Kshs. 1.2 billion security tender while serving as Central Bank Governor in 2014. Adversely mentioned to have been involved in the irregular sale of the Grand Regency Hotel in 2008 according to the Report of the Commission of Inquiry into the Sale of the Grand Regency Hotel
Hon. Alice Muthoni Wahome	Captured on video assaulting an IEBC official on October 27 th 2017
Hon. Aisha Jumwa	Charged with the murder of Gumbao Jola during campaigns for the Ganda Ward by-election in 2019 in Malindi County; case currently ongoing. Criminal case no. E011 of 2020

	Charged with fraudulent misappropriation of Ksh. 57 million from NGCDF Malindi Constituency.
Hon. Moses Kuria	<p>Under investigations of embezzlement of the NGCDF funds in Gatundu South Constituency. His brother was a beneficiary of a tender awarded by the CDF board & it is alleged that Kuria was a beneficiary of Ksh. 3 million</p> <ul style="list-style-type: none"> • EACC/FI/ INQ/42/2019 <p>Made a public confession to have received a bribe of Ksh 100,000 in 2020 to vote for Amos Kimunya as leader of majority in the National Assembly.</p>
Hon. Ababu Namwamba	Adversely mentioned in a bribery scandal involving the Parliamentary Accounts Committee in 2014 while serving as its chair. He was removed from the position after recommendations by a report of the Departmental Committee on Powers and Privileges dated 31 st March 2015 was adopted by the National Assembly.
Hon. Davis Chirchir	Adversely mentioned in the “ChickenGate” scandal that saw officials of the then Interim Independent Electoral Commission receive kickbacks from Smith & Ouzman, a UK- based company specializing in printing security documents, between 2008 and 2010. The UK counterparts in the scandal were eventually charged and found guilty but no charges were preferred against Hon Chirchir and some other officials.
Hon. Mithika Linturi	Accused and charged with the offence of attempted rape on 30 th January 2021. The matter was eventually dropped but the charge raised serious issues on his integrity

22. **THAT** it is our position that the aforementioned individuals do not meet the standards of Chapter 6 and their nomination to the aforementioned positions of Cabinet Secretary should NOT be approved.

Representation of Special Interest Groups

- 23. **THAT** Article 54 (2) of the Constitution requires the state to ensure the progressive implementation that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.
- 24. **THAT** Article 27(8) of the Constitution requires the state to ensure that not more than two-thirds of the members of elective or appointive bodies are of the same gender.
- 25. **THAT** the shortlisted nominees do not meet either of the above criteria and the vetting committees should reject the names until such criteria is met.
- 26. **THAT** what is deponed herein is true to the best of my knowledge save wherein I have received information or stated my belief and the sources of such information and the grounds of such belief are provided.

SWORN at Nairobi by the said)

SHEILA MASINDE)

Sheila Masinde

This14thday of October 2022

BEFORE ME;)

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 ADVOCATE
 & COMMISSIONER FOR OATHS
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 NAIROBI

COMMISSIONER FOR OATHS

DRAWN BY:

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c/o

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