



REPUBLIC OF KENYA

IN THE MATTER OF THE SECOND SCHEDULE, ELECTIONS ACT, 2011.

IN THE MATTER OF BREACH OF THE ELECTORAL CODE OF CONDUCT BY HON.  
MOSES KIARIE KURIA, MEMBER OF THE NATIONAL ASSEMBLY GATUNDU SOUTH  
CONSTITUENCY

RULING ON THE RESPONDENT'S PRELIMINARY OBJECTION OF 30<sup>TH</sup> MARCH 2022

1. The Respondent Hon. Moses Kiarie Kuria through Counsel has raised a Preliminary Objection contending in the main, that the Electoral Code of Conduct Enforcement Committee does not have jurisdiction to hear the matter before it.
2. The Counsel has submitted that the Commission does not have jurisdiction under Article 88(4) of the Constitution and Section 110 of the Elections Act to hear a matter such as the present one. He has submitted that this matter falls under the jurisdiction of the National Cohesion and Integration Commission (NCIC) and cited sections 24, 25, 26 and 27 of the National Cohesion and Integration Act to buttress his contention.
3. Counsel has also cited the subsisting Electoral Code of Conduct case against Hon Sabina Chege arguing that the High Court sitting in Nairobi in Constitution Petition Number E073 of 2022 gave orders restraining the Commission from hearing any case on breach of the Electoral Code of Conduct. He has contended that before the High Court Matter is determined, this Committee should down its tools in so far as the Enforcement of the Electoral Code of Conduct is concerned.
4. Counsel has further submitted that the Commission cannot be a Complainant, Investigator, Prosecutor and a Judge in its own cause.
5. This Committee has heard the submission of learned Counsel for the Respondent on the question of jurisdiction and wishes to state as follows.
6. That Article 88(4) (j) of the Constitution mandates the Independent Electoral and Boundaries Commission (IEBC) to develop a code of conduct for candidates and parties contesting elections. Article 84 of the Constitution places an obligation on

all candidates and all political parties to comply with the code of conduct prescribed by IEBC.

7. Section 110 of the Elections Act requires every political party and every person who participates in an election under the Constitution to observe the Electoral Code of Conduct.
8. The Electoral Code of Conduct found in the second schedule of the Elections Act binds all candidates, all political parties, leaders, office bearers, agents, members of political parties and any persons who support a political party. It also binds the government.
9. The Electoral Code of Conduct Enforcement Committee is established under the provisions of paragraph 15 of the second schedule of the Elections Act. This is a statutory Committee with the power to hear and determine cases of breach of the Electoral Code of Conduct. This Committee has had an opportunity to appraise the provisions of the National Cohesion and Integration Act and found that it is an Act of Parliament intended to encourage National cohesion and Integration by outlawing discrimination on ethnic grounds. This mandate is distinguishable from the mandate conferred upon this Committee by the Constitution and indeed the Elections Act to enforce the Electoral Code of Conduct.
10. In the premises, the straight and narrow of the case before this Committee falls under the Electoral Code of Conduct framework. In particular breach of paragraph 6(a) and 6(l) of the Electoral Code of Conduct.
11. On the submission by the Respondent that the Commission is acting as a Complainant, Investigator, Prosecutor and Judge in one fold, this Committee wishes to state that the Legislature in its wisdom enacted the Elections Act and therein conferred upon the Committee the power to enforce the Electoral Code of Conduct. Indeed this power enjoys substantive constitutional anchor. As a matter of fact, the Counsel for the Respondent has failed to appreciate the distinction between the Commission and the Committee.
12. In terms of the provisions of Article 252 of the Constitution, the Commission may undertake investigations on its own motion. In the matter before the Committee, the Commission's attention was drawn to the media report and material bearing utterances made by Hon. Moses Kiarie Kuria and on its own motion was seized of this matter.
13. This Committee is alive to the Constitutional Petition No. E073 of 2022 in which Hon. Sabina Chege challenged the jurisdiction and proceedings of this Committee. She obtained interim conservatory orders against the Committee. In issuing the orders, the Hon. Justice Mrima was clear in his mind that the orders applied solely

to the case filed by Hon. Sabina Chege. They were orders *in personum* and not *in rem*. This Committee is therefore not restrained from presiding over the present case respecting alleged breach of the Electoral Code of Conduct by Hon. Moses Kiarie Kuria.

14. Indeed, the question as to whether the Commission has the jurisdiction to hear a matter such as the one before it has been the subject of litigation in the High Court. In **Nairobi High Court Judicial Review Misc. Application No. 592 of 2017 Republic versus the Independent Electoral and Boundaries Commission, the Honorable Attorney General and Hon. Jessica Mbalu** *ex parte* Prof. Phillip Kaloki, the Court while hearing a judicial review application filed by Prof Phillip Kaloki challenging the jurisdiction of the Electoral Code of Conduct Enforcement Committee on grounds similar to the current objections, reiterated the provisions of Section 110 of the Elections Act on the observance and enforcement of the Electoral Code of Conduct. It outlined the powers of the Committee and concluded that the Committee was right in executing its mandate. Further, that it is not bound by the provisions of the Criminal Procedure Code and the Evidence Act.

The Court upon examination found that the procedure followed by the Committee and the decision rendered was within its power and thus upheld the same. The Court declined to issue the orders sought by the Applicant and dismissed the petition.

15. Against the above background, the Electoral Code of Conduct Enforcement Committee thus has jurisdiction and is legally seized of the matter before it for hearing and determination.

The Committee therefore orders as follows;

1. The preliminary objection raised by the Counsel for the Respondent on 30<sup>th</sup> March 2022 is hereby dismissed.
2. Matter to proceed to full hearing.

Dated and Signed at Nairobi this 30<sup>th</sup> day of March, 2022

Wafula W. Chebukati ..... 

Chairperson

Ms. Irene Masit..... 

Member

Mr. Justus Nyang'aya .....



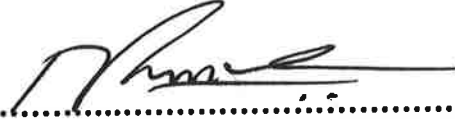
Member

Ms. Juliana Cherera.....



Member

Mr. Francis Wanderi.....



Member