

Aluochier Dispute Resolution

Arbitral Institution | Arbitration | Mediation

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Registration No: BN-BGCLBG7

10th April, 2024

Respondents & Interested Parties

Dear Respondents & Interested Parties

REQUEST FOR ARBITRATION

CASE NUMBER 002 OF 2024: LEMPAA VINCENT SUYIANKA v KENYA LEGISLATORS IN THE 2013-2017 AND 2017-2022 TERMS OF OFFICE

Aluochier Dispute Resolution (ADR) is an arbitral institution that administers arbitrations under the Aluochier Dispute Resolution Arbitration Rules, 2024 (ADR Arbitration Rules). Article 1(3)(c) of the Constitution of Kenya, 2010 provides that part of the sovereign power belonging to the people of Kenya, and that is to be exercised only in accordance with the said Constitution, is delegated to the Judiciary and independent tribunals, with the Judiciary and independent tribunals to perform their functions in accordance with the said Constitution. Article 159(1) reiterates that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the said Constitution. Article 159(2)(c) provides that in exercising judicial authority, the courts and tribunals shall be guided by principles including the mandatory promotion of alternative forms of dispute resolution including arbitration. Article 50(1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Consequently, independent and impartial arbitral tribunals, just as the courts, have the constitutional mandate derived from the people's sovereign power to exercise judicial authority on their behalf in the resolution of disputes capable of resolution by the application of law. 10 20

Section 2 of the Arbitration Act, 1995 provides that except as provided for in a particular case, the provisions of the said Act shall apply to domestic arbitration and international arbitration. The Arbitration Act is itself subject to the Constitution of Kenya, 2010, as Article 2(1) of the Constitution provides that the said Constitution is the supreme law of Kenya and binds all persons and all State organs. And section 7(1) of the Sixth Schedule of the Constitution provides that all law in force immediately before the effective date of the Constitution – 27th August, 2010 – continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the said Constitution. The Arbitration Act, an existing law at the time the Constitution became effective, is therefore to be construed to bring it into conformity with the Constitution, including allowing for, pursuant to Article 50(1) of the Constitution, the institution of arbitral proceedings, just as is the case with the institution of court proceedings, by any person without the consent or agreement of any other person, as it is the right of every person to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. 30

Consequently, in the exercise of his right under Article 50(1) of the Constitution, Lempaa Vincent Suyianka has instituted arbitral proceedings under the administration of ADR against Kenyan

Legislators who served in the 2013-2017 and 2017-2022 terms of office.

Pursuant to the ADR Arbitration Rules:

- 1 Rule 5.2.1 – **Claimant's Contact Details: Lempaa Vincent Suyianka, Vision Plaza, 1st Floor, Muthithi Road, Westlands, P O Box 5436-00100, Nairobi. Email address: wolvinso@yahoo.com.**
- 2 Rule 5.2.2 – **Respondents Contact Details: Service through a newspaper with national circulation.**
- 3 Rule 5.2.3 – The Claimant is relying on Article 50(1) of the Constitution of Kenya, 2010 that provides that every person has the right to have any dispute than can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The Claimant has therefore instituted these proceedings before an independent and impartial tribunal, being an arbitral tribunal administering arbitration under the ADR Arbitration Rules. 10
- 4 Rule 5.2.4 – Statement describing the nature and circumstances of the dispute giving rise to the claim, and the relief sought by the Claimant against the Respondents:
 - 4.1 Article 103(1)(e) of the Constitution, that provides that the office of a member of Parliament becomes vacant if, having been elected – (i) as a member of a political party, the member resigns from that party or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause (2); or (ii) as an independent candidate, the member joins a political party. The Respondents continued to occupy parliamentary office after changing their political party membership status – after their offices had automatically become vacant pursuant to this constitutional provision. 20
 - 4.2 Article 194(1)(e) of the Constitution, that provides that the office of a member of a county assembly becomes vacant if, having been elected to the assembly – (i) as a member of a political party, the member resigns from the party, or is deemed to have resigned from the party as determined in accordance with the legislation contemplated in clause (2); or (ii) as an independent candidate, the member joins a political party. The Respondents continued to occupy county legislative office after changing their political party membership status – after their offices had automatically become vacant pursuant to this constitutional provision. 30
 - 4.3 Article 74 of the Constitution, that provides that before assuming a State office, acting in a State office, or performing any functions of a State office, a person shall take and subscribe the oath or affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament. The Respondents performed the functions of legislative office, following the vacancies that arose in those offices upon their change of political party membership status, before first taking and subscribing the oath or affirmation of office. They therefore contravened Article 74 in assuming or performing the functions of a State office without first taking or subscribing the oath or affirmation of office. 40
 - 4.4 Article 99(1)(b) of the Constitution, that provides that unless disqualified under clause (2), a person is eligible for election as a member of Parliament if the person satisfies any educational, moral and ethical requirements prescribed by this Constitution or by an Act of Parliament. The Respondents, by contravening Article 103(1)(e), failed to satisfy the moral and ethical requirements prescribed by this Constitution.
 - 4.5 Article 193(1)(b) of the Constitution, that provides that unless disqualified under clause (2), a person is eligible for election as a member of a county assembly if the person satisfies any educational, moral and ethical requirements prescribed by this

Constitution or by an Act of Parliament. The Respondents, by contravening Article 194(1)(e), failed to satisfy the moral and ethical requirements prescribed by this Constitution.

- 4.6 Article 101(2) of the Constitution provides that whenever a vacancy occurs in the office of a member of the National Assembly under Article 97(1)(c), or of the Senate under Article 98(1)(b), (c) or (d), the respective Speaker shall, within twenty-one days of the occurrence of the vacancy, give notice in writing of the vacancy to – (a) the Independent Electoral and Boundaries Commission; and (b) the political party on whose party list the member was elected or nominated. Article 101(4)(a) provides that whenever a vacancy occurs in the office of a member of the National Assembly elected under Article 97(1)(a) or (b), or of the Senate elected under Article 98(1)(a) – (a) the respective Speaker shall, within twenty-one days after the occurrence of the vacancy, give notice in writing of the vacancy to the Independent Electoral and Boundaries Commission. The Speakers of Parliament did not issue the relevant written notices as required, pursuant to the parliamentary offices vacancies that arose pursuant to Article 103(1)(e). 10
- 4.7 Article 226(5) of the Constitution that provides that if the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not. The Speakers of legislative assemblies, by not giving relevant written notices of vacancies in legislative offices in their legislative Houses, allowed the use of public funds contrary to law, in that salaries and other remuneration that should not have been paid to persons not lawfully in occupation of legislative office were indeed so paid. 20
- 4.8 Section 12A of the Leadership and Integrity Act, 2012 (L&I Act) provides that any person intending to be appointed to a State office shall submit to the EACC a self-declaration in the form set out in the First Schedule.
- 4.9 Section 13(1) of the L&I Act provides that for purposes of Articles 99(1)(b) and 193(1)(b) of the Constitution, a person shall observe and maintain the listed moral and ethical requirements, including, among others – (a) demonstrate honesty in the conduct of public affairs subject to the Public Officer Ethics Act; ... (c) accurately and honestly represent information to the public; (d) not engage in wrongful conduct in furtherance of personal benefit ... Section 13(2) provides that a person who wishes to be elected to a State office shall, for the purposes of this section, submit to the IEBC a self-declaration in the form set out in the First Schedule. 30
- 4.10 The Respondents did not comply with the moral and ethical requirements in section 13(1)(a), (c) and (d) of the L&I Act, which are also included in the self declaration in the form set out in the First Schedule.
- 4.11 Section 19(3) of the Elections Act provides that whenever a vacancy occurs in a county assembly, the speaker of the county assembly shall within twenty one days after the occurrence of the vacancy issue a notice to the Commission in the prescribed form. The speakers of the various county assemblies did not issue the relevant notices as required, pursuant to the county assembly offices vacancies that arose pursuant to Article 194(1)(e). 40
- 4.12 The nature of the injury caused to the Claimant or to the public:
- 4.12.1 Theft (misappropriation) of public funds by way of salaries and other remuneration when not lawfully entitled to the same.
- 4.12.2 Unlawful and wrongful occupation of legislative office that would have been occupied by Kenyans of integrity as provided for in the Constitution.

- 4.12.3 Disregard of the sovereign authority of the people of Kenya by contravening Article 74 of the Constitution, by assuming legislative office and performing the functions of legislative office, following vacancy in the said office, before first taking or subscribing to the oath or affirmation of office.
- 4.13 The reliefs sought by the Claimant, by way of declaration or mandatory action or both, are:
- 4.13.1 That the offices in the appropriate legislative assemblies that the Respondents were elected to automatically became vacant upon their change of political party membership status, pursuant to Articles 103(1)(e) and 194(1)(e) of the Constitution. 10
- 4.13.2 That the Respondents unlawfully remained in occupation of office following such automatic vacancy.
- 4.13.3 That the Respondents unlawfully received salaries and other remuneration during their periods of unlawful occupation of office.
- 4.13.4 That the Respondents, following vacancies that arose in office on account of their change in political party membership status, contravened Article 74 of the Constitution by assuming the vacant offices and performing the functions of office without having first taken or subscribed to the oath or affirmation of office.
- 4.13.5 That the Respondents failed to satisfy, during their periods of unlawful occupation of office, moral and ethical requirements prescribed by the Constitution or an Act of Parliament, pursuant to Articles 99(1)(b) and 193(1)(b) of the Constitution, and subsequently contravened sections 12A and 13 of the Leadership and Integrity Act, 2012. 20
- 4.13.6 That the Respondents are found to have misused a legislative State office during their periods of unlawful occupation of office, pursuant to Articles 99(2)(h) and 193(2)(g) of the Constitution.
- 4.13.7 That the Respondents fully compensate the public for all salaries and other remuneration unlawfully received during their periods of unlawful occupation of office, the compensation to include interest payable at the rate of 12% per annum, calculated from when the unlawful payments were received by them.
- 4.13.8 That a recommendation be made that criminal proceedings be instituted against the Respondents, pursuant to the Anti-Corruption and Economic Crimes Act, 2003, on account of their unlawful occupation of public office and commensurate unlawful receipt of salaries and other remuneration. 30
- 4.13.9 That the Speakers of the various legislative assemblies who failed to give written notices to the Independent Electoral and Boundaries Commission within twenty-one days of legislative office vacancies occurring share jointly and severally with the Respondents in compensating the public for the unlawful salaries and other remuneration received by the Respondents.
- 4.13.10 That the Respondents pay the costs and expenses of the arbitration, being the legal and other expenses of the Claimant and necessary interested parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration. 40
- 4.13.11 Any other appropriate order.
- 5 Rule 5.2.5 – the Claimant proposes that the language of the arbitration be English.
- 6 Rule 5.2.6 – not applicable.
- 7 Rule 5.2.7 – the Claimant intends to serve the Respondent by way of an advertisement in a newspaper with national circulation, with a notification of these proceedings, including the manner of accessing his Statement of Claim.
- 8 Rule 5.2.8 – the Claimant on 10th April, 2024 paid a filing fee of Ksh 1,000/- by Mpesa via Paybill Account number 5811529, with Mpesa reference number SDA4QXD41M.

9 Rule 5.3 – **the arbitration is deemed to have commenced on 10th April, 2024**, upon payment of the filing fees and receipt of the Claimant's documents in support of his claim in arbitration.

10 Rule 6.1 – The Respondents should send, electronically, by email or WhatsApp, their responses to this request for arbitration within 30 days of service of this request for arbitration or the Statement of Claim. The responses should contain the information as provided for in ADR Arbitration Rule 6. The ADR Arbitration Rules can be downloaded at <https://www.aluochier.co.ke/ADR-Arbitration-Rules-20240129.pdf>.

Please go through the ADR Arbitration Rules to familiarise yourselves with the arbitration process as administered by ADR, taking special note of dates by which any actions on your part are required. We look forward to receiving your responses to facilitate progression of the arbitration proceedings in a manner in harmony with Article 50(1) of the Constitution.

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Yours faithfully
For and on behalf of
Aluochier Dispute Resolution



Isaac Aluochier
Chief Executive

cc **Respondents and Interested Parties**