



**Okoiti v Kenya Airways Plc (Kq & 3 others; Civil Aviation Authority (Kcaa
(Interested Party) (Constitutional Petition 57 of 2020) [2022] KEHC 13235 (KLR)
(Constitutional and Human Rights) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION 57 OF 2020**

**HI ONG'UDI, J
SEPTEMBER 30, 2022**

BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**KENYA AIRWAYS PLC (KQ 1ST RESPONDENT
HOUSING & URBAN DEVELOPMENT 2ND RESPONDENT
NATIONAL TREASURY 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

AND

KENYA CIVIL AVIATION AUTHORITY (KCAA INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition dated February 19, 2020 seeking the following reliefs: -
 - i. A declaration that:
 - a. KQ as a recipient of public funds falls within the ambit of and is governed by express provisions of the Constitution of Kenya, 2010 and the Public Procurement and Asset Disposal Act, 2015.
 - b. KQ as a recipient of public funds has breached the provisions of article 227 of the Constitution of Kenya, 2010 and the Public Procurement and Asset Disposal Act, 2015 by failing to conduct an open, fair, transparent, competitive and cost-effective



procurement process for pilot training services to which the public, stakeholders and interested parties could have participated in as mandated by the Constitution and by statute.

- c. KQ as a recipient of public funds, by sourcing its pilot training services from outside Kenya (South Africa), has violated the national values and principles of patriotism and equity enshrined in article 10 of the Constitution.
- ii. An order:
 - a. Prohibiting KQ as a recipient of public funds from training its pilots outside Kenya (in South Africa).
 - b. Compelling KQ as a recipient of public funds to procure its pilot training services and other goods and services strictly in compliance with the Constitution and the Public Procurement and Asset Disposal Act, 2015.
 - c. Compelling the respondents to bear the costs of this suit.
 - iii. Any other relief this honourable court may deem just to grant.

The Petitioner's Case

2. The petition is founded on articles 3(1), 10, 19, 20, 21, 22, 23, 24, 40, 47, 48, 50(1), 227, 201,232, 258 and 259(1) of the Constitution.
3. The petition as set out is supported by the petitioner's affidavit sworn on February 19, 2020, supplementary affidavit sworn on November 17, 2021 and affidavit by Joseph Martin Rirani sworn on November 17, 2021. The petitioner depones that, following an advert which closed on December 11, 2019, the 1st respondent invited applications for trainee pilot positions, and was in the process of shortlisting candidates for the training under its Ab Initio Pilot Trainee Programme (programme). The training entails training of persons who have no previous experience, to the level where they acquire commercial pilot's licenses. The trainees are sent to flight schools outside Kenya (in South Africa).
4. He avers that the 1st respondent has solicited and continues to receive public monies to keep the company afloat. By so doing, it has become a public entity subject to public law with regard to the necessary safeguards of the said public funds, including being bound by Kenya's public procurement laws. Further that by the express provisions of law, the expenditure of the said public funds is governed by the Constitution and the Public Procurement & Asset Disposal Act, 2015 (PPADA).
5. He depones that in a clear breach of the Anti-Corruption & Economic Crimes Act (ACECA), the 1st respondent failed to comply with both the Constitution and the PPADA by procuring the services of foreign (South African) based entities to train its pilots under its programme and without compliance with a system that is fair, equitable, transparent, competitive and cost-effective, as required of public entities under article 227(1) of the Constitution.
6. He avers that Kenya has Government Approved Training Organisations (ATOs) which train pilots even for other regions. The said locally trained pilots are as good as any other, and have been employed by major international carriers. To him the 1st respondent being a recipient of public funds ought to be patriotic and equitable in its operations by promoting local industry as set out in articles 4(2) & 10 of the Constitution.



7. It is his case that it is a violation of both values of patriotism and equity for KQ to export jobs and money outside Kenya for services that are already available locally. It has therefore failed in its obligations under article 3(1) of the Constitution to respect, uphold and defend the Constitution.
8. By reason of the aforesaid, articles 1, 2, 3(1), 4(2), 10, 19, 20(1), 27, 40, 47, 201, 227, 232 and 259 (1) & (3) of the Constitution have been violated, and the 4th respondent failed in its duties under article 156(4) (a) & (6) of the Constitution.
9. In his supplementary affidavit and in response to the replying affidavit by the 1st respondent, he averred that the 1st respondent's deponent did not annex any evidence to demonstrate the authority to swear the affidavit on its behalf adding that the deponent was a locally trained Kenyan pilot. He deposed that both the petition and application are merited as public interest litigation motions which should be allowed.
10. He deposed that the KQ is insolvent and is periodically bailed out by the exchequer as demonstrated in the Program Based Budget Supplementary, / Estimates for FY2020-2021. That it was a matter of public notoriety that plans were underway to nationalize KQ to save it from total collapse. He further deposed that the 1st respondent does not espouse the values of article 10 of the Constitution. It is said to have been undermining the local pilots training industry by sending its Ab Initio Pilots Training Programmes students out of the country since 1998. It has further admitted that the programme is funded by Co-operative Bank of Kenya hence used Kenya money to finance a Chinese Flying School AIFA in South Africa.
11. In response to the interested party's replying affidavit, he averred that the deponent did not annex any evidence to demonstrate the authority to swear the affidavit on behalf of the interested party. He averred that whereas the KCAA cannot determine where the airlines chose to train their pilots, provided the facilities meet its standards, KCAA does not seem to understand its noble and tax payer funded mandate to develop an economical and efficient civil aviation system by helping Kenyan ATOs build capacity.
12. In response to the 2nd - 4th respondents' grounds of opposition, he averred that they are properly enjoined to these proceedings because KQ is a public entity to the extent that it receives government funding and therefore the said respondents have an obligation to ensure that it complies with the law governing public entities.
13. In his affidavit Joseph Martin Rirani averred that Captain Paul Njoroge was deliberately skewing facts to mislead this court. To wit,
 - i. On the quality of facilities, the AIFA where KQ specializes in sending cadets, is a semi desert area north of George, Western Cape and is nowhere near Kenya's Wilson Airport and the already busy JKIA.
 - ii. On capacity of instructors, the Kenyan ATOs senior instructors have tens of thousands of flight instruction hours. Only one South African ATO has an ex-airline captain as the accountable manager.
 - iii. On period of training, the Kenyan period of training takes longer only in the case of parents and guardians who struggle to pay the high fees.
 - iv. On affordability, KQ has given comparable charges only in the UK, Netherlands, USA and South Africa. They did not point that Kenyan costs were 50% of those in South Africa,



- v. On external students, Kenyan ATOs train on regular basis external students from DRC, Uganda, Tanzania, Sudan, Nigeria and far off countries like Equatorial Guinea, contrary to the KQs assertion the said countries have national carriers who fly jets. KQ is not supporting the development of local industry.
 - vi. On simulator training, the same is not relevant to Ab Initio Training. According to him, the petition was not objecting to KQ taking their pilots (not recruits) outside Kenya for advance training appropriate to their fleets where capacity lacks in Kenya.
 - vii. On quality of students, KQ was supposed to abide by the Aeronautical Information Circular Number 14/13 (white 130) issued with effect from October 17, 2013. Contrary to the AIC that specified that all aspirants for issue of CPL and ATPL pilot licenses must have a minimum academic qualifications of a mean grade C+ of the KCSE or equivalent KQ site provides minimum requirements for Direct Pilot as C or equivalent among others. The same applies to general requirements for captain.
14. Hence from the foregoing, he avers that KQ is not patriotic and has done nothing to help Kenyan ATOs, and has no justification for supporting South African ATOs instead.

The 1st respondent's case

15. The 1st respondent filed a replying affidavit and further replying affidavit by Captain Paul Njoroge sworn on May 28, 2020 and November 24, 2020 respectively. In the replying affidavit, he deposed that the 1st respondent is a limited liability company incorporated under the Companies Act, chapter 486 Laws of Kenya. Further that the petition and application are both laced with misrepresentations.
16. He averred that there are no constitutional rights and/ or freedoms that have been infringed and or threatened by the 1st respondent as alleged or at all. Further that the petition and application are defective both having been founded on an erroneous understanding of the provisions of the Constitution and the PPADA. He denied all allegations on, imminent insolvency; use of public funds to procure its Ab Initio Pilot Training Programme; and lack of patriotism by KQ's.
17. He deposed that KQ does not deny receiving loans from the government of Kenya a shareholder with KQ. Further that any loan to KQ by the government or any other shareholder is tied to specific purposes. He further deposed that KQ is not a public entity within the meaning of article 227 of the Constitution and / or the PPADA and / or the Public Finance Management Act (PFMA). He avers that KQ does not receive direction from the government. It is governed by its own constitutive documents and internal processes with regard to procurement and administration. He denied allegations that KQ uses public monies to fund the Ab Intio program or any other program. Loans are obtained from Co-operative Bank of Kenya to individual pilot trainees (cadets) for the said program.
18. On the issue of patriotism he averred that over the last 6 years KQ has been recruiting from Kenyan Approved Training Organisations (ATOs), with the last Ab Initio class having completed training in 2014. It was willing to continue recruiting from the local market if they were able to continue supplying the airline with high caliber pilots to meet its needs. Due to the shortage experienced KQ restarted the Ab Initio program. The said program was not unique to KQ and that it was being employed by other international carriers. Hence, if it were to stop the programme then it would be unable to maintain its operations, or keep up with its regional and international competitors.
19. He deposed further that KQ's selection of South African facilities as the base for its Ab Initio Training Programme is informed by, quality of facilities and capacity of instructors (they are of the highest quality); South African airspace is far busier than that in Kenya, thereby giving the cadets a more



engaging and challenging learning environment; and affordability. Further the reasons for choosing South Africa are due to its location and proximity to KQ headquarters in Kenya. The South African ATOs allow them the opportunity to conduct regular visits to monitor the cadets' progress over the course of their training. It also significantly reduces cost of travel and the climate is suitable for the cadets.

20. He further deposed that despite continued local recruitment drives as well as the supplemental Ab Initio Training Programme, KQ has continued to suffer significant shortages in enlisting pilots. Hence the programme is not only necessary but vital to continue the operations of KQ. He deposed that KQ was not aware of the safety standard of the other countries that could be training their cadets in Kenya nor their demand for pilots.
21. According to him, the petitioner's prayers were to completely impede all of KQs foreign based pilot training programmes not just limited to the Ab Initio Programme. This would have devastating effects not only on KQ, but on the country's transport sector and economy at large whose ripple effect would be unimaginable.
22. He deposed that, a very important aspect of commercial pilot training is instrument flight training. Wilson Airport which is where majority of the Kenyan ATO's are located has no ground-based navigation aids. This means that the trainee pilots must try and get a slot in the already busy JKIA airport with these systems, making it difficult for the students to get adequate practice on this navigation aids. On the contrary, South Africa has many of the Navigation aids in less busy airports all-round the country giving the pilots a chance to practice landing approaches with reference to an ILS system; proficiency in conducting this kind of piloting skills is key to KQ as all their flights operate in instrument flight rules (IFR) only.
23. He further deposed that to warrant promotion from the rank of First Officer to Captain within the KQ fleet, additional training was required and such training would be stopped by the far reaching orders sought by the petitioner. Further that in ensuring their pilots undergo continuous recurrent training programmes, KQ is not only safeguarding the safety of its customers and staff, but also ensuring compliance with the mandatory legal provisions in the *Civil Aviation Act, 1977* and the *Civil Aviation (Operation of Aircraft- Commercial Air Transport) Regulations* which require air carriers to take their pilots through regular recurrent training.
24. In the further replying affidavit, he brought to the court's attention the indefinite suspension of the Ab Initio Training Programme vide a letter dated June 29, 2020 issued by the 1st respondent due to the effects of Covid-19 pandemic. Thus, the petition and application are overtaken by events.

The 2nd, 3rd and 4th Respondents' Case

25. The 2nd, 3rd and 4th respondents filed a replying affidavit by Solomon Kitungu sworn on February 8, 2021 and grounds of opposition dated January 18, 2021. The grounds of opposition can be summarized as hereunder:
 - a. That the petitioner has not demonstrated how the 2nd -4th respondents violated their constitutional rights and how the respondents violated the provisions of article 227 of the *Constitution*.
 - b. There is no evidence adduced by the petitioner demonstrating how the alleged process of training pilots in South Africa was marred by corruption. It has not been shown indeed the 1st respondent ignored local flying schools in Kenya because none of the alleged local institutions have complained.



- c. It has not been established that the respondents acted in excess of jurisdiction when they settled on the decision to train pilots in South Africa. It has not been shown that the respondents, were not authorized to so do by the empowering provisions; acted in excess of jurisdiction or power conferred under any written law; acted pursuant to delegated power in contravention of any law prohibiting such delegation; were biased or may reasonably be suspected of bias.
 - d. Kenya Airways is not a public entity within the meaning of article 227 of the Constitution and the PPADA.
 - e. It has not been sufficiently proved and/ or established how Kenya Airways has contravened the provisions of articles 3, 10, 40, 47, 201, 232, and 227 of the Constitution.
 - f. Kenya Airways is not a State Corporation. It is a private liability company incorporated under the Companies Act and listed on the Nairobi Stock Exchange
 - g. The petitioner did not plead with reasonable precision how the Constitution has been violated and the manner in which the alleged violations were committed and to what extent.
 - h. The Procurement and Asset Disposals Act applies to all State organs and public entities but not private entities like Kenya Airways.
 - i. That under article 156 of the Constitution, Attorney General has no legal responsibility of advising private entities.
 - j. There is no evidence that the Attorney General has not advised Kenya Airways.
 - k. It is the responsibility of Parliament to decide how public money is utilized and not any other person.
26. In the replying affidavit, and reiterating the contents of the grounds of opposition, the deponent averred that:
- a. The 2nd respondent has the mandate to develop and formulate polices and regulations which govern operation the aviation industry *inter alia* for the 1st respondent.
 - b. The government of Kenya owns 48.7% shares of the 1st respondent ownership, 51.3% shareholding is held by private parties making it a privately-owned company. Further, pursuant to section 2(b) of the State Corporations Act, cap 443 Laws of Kenya the 1st respondent is not considered a state corporation hence not bound to the provisions of the PPADA. It is a private liability company incorporated under the Companies Act and listed on the Nairobi Stock Exchange.
 - c. The 2nd - 4th respondents are aware that the operations of the 1st respondent is a national interest and they follow the dictates of the Constitution to the latter as far as its rights and obligations extend in the operations of the 1st respondent.
 - d. That the 2nd respondent develops and formulates aviation policies only and is not involved in the day to day operations of the 1st respondent at all. The 2nd -4th respondents cannot influence the decision of the shareholders in making its decision to train the 1st respondent's pilots in Kenya under the Ab Initio Trainee programme as it is not a state corporation under the provisions of the law.



The Interested Party's Case

27. The interested party filed a replying affidavit by Denis Kang'ethe Kimani sworn on January 25, 2021. He deposed that Kenya is a contracting state to the International Civil Aviation Organization (ICAO) established by the States in 1944 to manage the administration and governance of the Convention on International Civil Aviation (Chicago Convention).
28. He averred that ICAO works with the Convention's 193 member states and industry groups to reach consensus on international civil aviation standards and recommended practices (SARPs) and policies in support of a safe, efficient, secure, economically sustainable and environmentally responsible civil aviation sector. These SARPs and policies are used by ICAO member states to ensure that their local civil aviation operations and regulations conform to global norms.
29. He further averred that the training of pilots and certification of institutions that offer the training, the subject matter of this petition, are matters within the regulatory competence of the Authority. That in that regard, the authority has domesticated and set approval and continuous training standards for Student Pilot Licenses (SPL), Private Pilot Licenses (PPL), Commercial Pilot Licenses (CPL) and Airline Transport Pilot Licenses (ATPL). The same is done vide regulatory prescriptions which ascribe to international standards and recommended practices that are Civil Aviation (Personnel Licensing) Regulations, 2018.
30. He deposed that the ATOs are certified upon meeting the minimum requirements and demonstrating capacity to train in accordance with the Civil Aviation (ATOs) Regulations 2018. That for purposes of ensuing high level of competence within the Kenyan aviation industry, the Authority publishes a list of approved training institutions organizations twice every year.
31. He further deposed that the local training institutions operating in Kenya must be certified by the Authority. Further operationally the training of pilots is capped on the instruments these institutions have. Furthermore, prior to the approval or renewal of an ATO for pilots training, a certification checklist is filled in by the Authority's inspectors. He adds that if an approved institution lacks the requisite instruments for training, nothing bars KQ from going outside the approved list. The Authority cannot limit the choice made by an operator to train the Ab-Initio pilot recruits in an effort to equip them with the necessary knowledge and technical skills in the continent. This causes them to boost the aviation's sector which will in turn boost the Kenyan economy.
32. He averred that KQ is at liberty to use approved training organizations that have been certified in line with ICAOs standard and recommended practices. Each and every pilot that undertakes training outside Kenya must either convert or validate the foreign license by meeting the minimum requirements before issuance of a Kenyan pilot license.
33. He further deposed that the aviation sector is highly specialized and standardized, and the interested party domesticates international standards and recommended practices for use by aviation operators. Each operator including the 1st respondent is mandated to comply with its regulations and ensure that its personnel are trained accordingly.
34. He deposed that the interested party does not determine where an operator chooses to have its personnel trained provided that they comply with the International standards and recommended practices that are domesticated by the Civil Aviation (Personnel Licensing) Regulations 2018. These in turn have their personnel trained by institutions certified as per the Civil Aviation (ATOs) Regulations 2018 and hence the petition lacks merit.



The Petitioner's submissions

35. The petitioner filed submissions dated November 17, 2021. On whether the petition and application are merited and properly before this court, he submits that they are since at paragraphs 76 to 82 he clearly sets out the violations of the Constitution in issue. He relied on Anarita Karimi Njeru v Attorney General (No 1) (1979) eKLR 154, on this.
36. According to him, the standards set in the Anarita case have been overtaken by developments in jurisprudence. To wit, Kevin Turunga Ithagi v Hon Justice Fred Ochieng & 4 others [2015] eKLR; Peter M Kariuki v Attorney General [2014] eKLR; and John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others [2013] eKLR. Consequently, he argues that the court is bound to inquire and determine matters on their merit, and where the matter in issue could be deciphered from the pleadings, then the court was bound to determine such matter even when the particulars of breach have not been specifically pleaded.
37. On whether KQ is subject to the Laws governing public procurement in Kenya, and while relying on article 227(1) of the Constitution; the preamble of PPADA, sections 4(1) & 2(p) PPADA, section 3(d) of the Interpretation and General Provisions Act and the cases of Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 others [2016] eKLR and Association of Retirement Benefits Schemes v Attorney General & 3 others [2017] eKLR, he submitted that KQ is a public body that receives and survives on public funds and bailouts. As such it falls within the ambit of and is governed by the express provisions of the Constitution and PPADA. Further and as a result of receiving state funding and pursuant to article 201 (a) and (d) of the Constitution, it is supposed to cooperate closely with State authorities and to be under State supervision.
38. As to whether KQ violated articles 201 and 227 of the Constitution, he argued that it breached article 227 and the PPADA by failing to conduct an open, fair, transparent, competitive and cost-effective procurement process for its Ab Initio Scheme, to which public, stakeholders and interested parties could have participated in as mandated by the Constitution and statute. Further pursuant to article 201(a) and (d) and having received public funds in various bailouts to date, it was under a constitutional obligation to subject its procurement processes to article 227 of the Constitution and the PPADA.
39. Regarding the violation of article 10 of the Constitution by KQ, he argued that having established that KQ as a recipient of public funds is a public entity, it failed to, promote the national values and principles under section 3(a) PPADA and article 10 of the Constitution; promote the principles of public finance under article 201 of the Constitution and section 3(e) of the PPADA; promote local industry, sustainable development and promotion of citizen contracts.
40. He argued that the public at large had the legitimate expectation that KQ would strictly adhere to the law in execution of its Ab Initio Scheme. There was breach when it failed to competitively seek service providers for the scheme, and for not considering local industry in the provision of services. He relied on; Canada (Attorney General) v Mavi, (2011) 2 SCR 504; Kuria Greens Limited vs Registrar of Titles & another (2014) eKLR; Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO (2019) eKLR, in support of his argument.
41. He submitted that KQ acted irrationally, illogically and unreasonably and its actions were illegal to the extent that they violated express provisions of the Constitution and the statute. He therefore argued that he had made a case to warrant the grant of the orders sought.
42. Relying on Kenya National Examinations Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & others Civil Appeal No 266 of 1996 eKLR, he submitted that the 1st respondent should be prohibited



from training its pilots under the Ab Initio Scheme outside Kenya because local ATOs are competent enough to offer the same. He submitted that an order of mandamus should issue as prayed in view of his above arguments.

43. On costs, he relied on *Kenya Human Rights Commission v Communications Authority of Kenya and 4 others* (2018) eKLR arguing that he should be awarded costs if he succeeds and if unsuccessful each party should bear their own costs. Referring to *Erick Okeyo v County Government of Kisumu & 2 others* (2004) eKLR and *Trustees for the Time Binge of Biowatch Trust v Registrar, Genetic Resources and others* Case CCT 80/08[2009] ZACC 14, he submitted that should the suit fail, he should not pay costs as the matter was filed in public interest under articles 22 and 258 of the *Constitution*.

The 1st Respondent's Submissions

44. The 1st respondent filed submissions dated March 23, 2022 through the firm of Anjarwalla & Khanna Advocates. Counsel notes that the Ab Initio Programme (programme) was indefinitely discontinued by the 1st respondent on June 29, 2020 owing to the adverse effects of Covid-19 pandemic on the aviation industry. The petition therefore is a mere academic exercise and a total waste of judicial time.
45. Counsel reiterates the contents of the replying affidavit as to receiving a loan from the government of Kenya and raises the following issues for determination:
- i. Whether the petition is moot
 - ii. Whether the petition is properly before court
 - iii. Whether the 1st respondent is a public body and is therefore subject to the provision of article 227 of the *Constitution* and the PPADA
 - iv. Whether the petitioner is deserving of the prayers sought
46. On the first issue, and while relying on *Wanjiru Gikonyo & 2 others vs National Assembly of Kenya & 4 others* [2016] eKLR, counsel submitted that the issue is moot being that the programme was discontinued on June 29, 2020.
47. On the second issue, he submitted that from the petition and the supporting affidavit the petitioner has not demonstrated how the 1st respondent violated the alleged constitutional provisions. On this he relied on the Supreme Court case of *Communications of Kenya & 5 others vs Royal Media Services Limited & 5 others* [2014] eKLR.
48. For the third issue, and while placing reliance on the Githunguri case (supra), he submitted that the 1st respondent does not fall within the category of public entities outlined in section 2 of the PPADA.
49. He maintained that the respondents set out how the programme was 100% funded by loans from a bank and subsequent insurance from CIC, a fact not converted by the petitioner. That no evidence was adduced by the petitioner to show that the 1st respondent received public funding to run the programme which would result in the government of Kenya controlling the affairs, operations and management decisions of the 1st respondent for it to be properly construed as a public body for purposes of articles 227 and the PPADA.
50. According to counsel, the issue of the 1st respondent's status was determined by the Industrial Court in *Aviation and Allied Workers Union v Kenya Airways Limited & 3 others* [2012] eKLR and in the Court of Appeal in *Kenya Airways Limited v Allied Workers Union Kenya & 3 others* [2014] eKLR. That decision has not been appealed against and pursuant to the Supreme Court case of *Evans Odhiambo*



Kidero & 4 others v Ferdinand Ndung'u Waititu & 4 others [2014] eKLR, this court is bound, by the said decision.

51. Counsel added that the 1st respondent was registered as a private limited company duly incorporated under the Companies Act, chapter 486 Laws of Kenya (repealed). That although the shareholding for the Government of Kenya has increased to 48.7% since the Court of Appeal case, it still does not have a controlling interest in the 1st respondent.
52. He argued that section 2 of the PFMA does not support the petitioner's averments that the 1st respondent is a public body to be bound by article 227 of the Constitution. Counsel submitted that contrary to the petitioner's assertions the 1st respondent neither survives on public funding nor bailouts. It is also not a public body within the meaning of article 227 of the Constitution and the PPADA and / or the PFMA. It neither relies exclusively on funds from the government nor does it receive direction from the government in terms of management and control. It is a private enterprise governed by its own constitutive documents and internal processes concerning procurement and administration.
 - i. On the fourth issue, and while relying on Republic vs Kenya Revenue Authority Exparte Shake Distributors Limited [2012] eKLR counsel argued that KQ has neither promised nor undertaken to depart from its practice of sending its Ab Initio Training Programme students out of the country. Further being a private entity, it has a duty to discharge its mandate and operations subject to a board- approval plan. He submitted that though not pleaded the issue of legitimate expectation was raised in the submissions, and should be struck out. For this proposition he relied on the following cases;
 - i. Habel Muchemi Nkoroi v Stephen Muchina [2020] eKLR;
 - ii. Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR; Mohamud Ali v Independent Electoral and Boundaries Commission [2019] eKLR;
 - iii. Republic v Principle Secretary, Ministry of Transport, Housing, and Urban Development Exparte Soweto Residents Forum CBO (2019) eKLR.
53. On the fifth issue and on prohibition, and while relying on the case of Kenya National Examination Council (supra) he submitted that the same does not lie in the circumstances of this case. There is no positive futuristic action that is capable of being cured by a prohibition order and that the same is spent.
54. On the order of Mandamus, counsel argued that the petitioner must demonstrate that the 1st respondent failed to perform a constitutional or a statutory duty. Relying on Jotham Mulati Welamondi v the Electoral Commission of Kenya [2002] 1KLR 486, he submitted that the order cannot be issued to compel the exercise of discretionary powers let alone the exercise of duties by a private entity such as the 1st respondent. Further relying on Kenya National Examination Council (supra) he argued that the order does not apply if the complaint is that the duty has been wrongly performed.
55. Regarding costs, and basing its argument on rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 and the case of Feisal Hassan & 2 others v Public Service Board of Marsabit County & another [2016] eKLR counsel prayed for costs.



The 2nd to 4th Respondents' Submissions

56. The 2nd to 4th respondents filed submissions dated March 1, 2022 through the office of the Attorney General, reiterating the contents of their grounds of opposition and replying affidavit. They raised the following issues:
- i. Whether the respondents have violated the petitioner's constitutional rights
 - ii. Whether Kenya Airways PLC is a state corporation and therefore subject to the PPADA.
57. Regarding the first issue, counsel submitted that the petitioner has not adduced any evidence demonstrating how the respondents violated his rights; he did not plead his case with precision; and there was also no mention of any harm suffered.
58. Relying on *Dr Rev Timothy Njoya v Hon Attorney General and Keya Review Authority* High Court Constitutional and Human Rights Division Petition No 479 of 2013, counsel submitted that the petitioner failed to demonstrate how article 227 of the *Constitution* was violated by the respondents; no evidence adduced to demonstrate how the alleged process of training pilots in South Africa was marred by corruption; it was not established by evidence how the 1st respondent contravened articles 3, 10, 40, 47, 201, 227 and 232 of the *Constitution*. Hence he failed to meet the constitutional threshold.
59. On the second issue, it was submitted that KQ is not a state corporation hence not subject to PPADA. Reliance was placed on *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* (supra) for that argument. Further that pursuant to the preamble of the PPADA, the same only applies to public entities and not private companies like the 1st respondent. Lastly, that the 2nd – 4th respondents have no influence on the decision by the 1st respondent to train pilots in Kenya.

The Interested Party's Submissions

60. The interested party filed submissions dated November 5, 2021 through the firm of Peter Wanyama & Associates LLP raising the following issues:
- i. Whether the petition meets the constitutional threshold
 - ii. Whether the 1st respondent violated the provisions of the *Constitution*
 - iii. The petitioner has not satisfied the threshold for grant of prohibitory orders
 - iv. The petitioner has not satisfied the threshold for grant of orders of mandamus
 - v. Who bears the costs of the application
61. On the first issue, counsel submitted that the petition does not meet the constitutional threshold because the petitioner has failed to plead specifically the constitutional rights alleged to have been violated and / or infringed by the 1st respondent. Counsel relied on *Godfrey Paul Okutayi (suing on his own behalf and on behalf of all past and present customers of banking institutions in Kenya) versus Habil Olaka- Executive Director (Secretary) of the Kenya Bankers' Association (being sued on behalf of Kenya Bankers Association) & another* (2018) eKLR; *Annarita Karimi Njeru vs Republic (No 1)* - (1979) KLR 154 and Appeal in *Judicial Service Commission versus Gladys Boss Shollei & another* (2014) eKLR.
62. Counsel submitted that the petitioner is not entitled to the orders sought because he is aiming at defeating the role bestowed on the 1st respondent which undermines article 2(5) and (6) of the *Constitution*.



63. On the second issue, counsel maintained that the petitioner has failed to present concrete evidence to demonstrate how his constitutional rights have been violated. On the contrary, the respondents acted within their mandates and province of roles.
64. Concerning grant of prohibitory orders, and while relying on *Kenya National Examination Council Case* (supra), counsel submitted that the petitioner has not met the set threshold. He contends that the 1st respondent acted within the confines of the law in an effort to plan, develop, manage, regulate, and operate a safe, economical and efficient civil aviation system in Kenya.
65. On the order of mandamus, he submitted that the petitioner has not satisfied the conditions for grant of an order of mandamus as set out in *Apotex Inc vs Canada (Attorney General)* which was reiterated in *Republic versus Principle Secretary, Ministry of Internal Security & another Ex-parte Schon Noorani & another* [2018] eKLR. Further, the advertisement to procure pilot training services from South Africa was in line with the ICAO Standard And Recommended Practices (SARPs) and policies to which Kenya is a contracting state to.

Analysis and determination

66. Having carefully considered the parties' pleadings, submissions, cited authorities and the law I find the following issues to be arising for determination: -
 - i. Whether the petition has met the threshold for a constitutional petition
 - ii. Whether the 1st respondent is a public body and therefore subject to the provisions of article 227 of the *Constitution* and PPADA
 - iii. Whether the petition is moot
 - iv. Whether the legitimate expectations of the petitioner and other Kenyans were violated
 - v. Whether the petitioner is entitled to the reliefs sought

Issue No (i) Whether The Petition Has Met The Threshold For A Constitutional Petition

67. The respondents and the interested party argued that the petition has not met the threshold for a constitutional petition. That although citing a number of constitutional provisions, the petitioner did not demonstrate how the same were violated or any harm suffered if any.
68. The petitioner argued that paragraphs 76 to 82 of the petition clearly set out the violations of the *Constitution* in issue. According to him, the standards set in the Anarita case (supra) have been overtaken by developments in jurisprudence and this court is bound to inquire and determine matters on their merit. Where the matter in issue could be deciphered from pleadings, the court is bound to determine such matter even if the particulars of breach have not been specifically pleaded.
69. In a constitutional petition, a party that alleges violation of rights must plead his or her case with reasonable precision on the way the rights have been violated. This principle was set out in the case of *Anarita Karimi Njeru vs The Republic* (1976-1980) KLR 1272 which was upheld by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR which observed as follows:

“...The principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this



principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch D 637 at 639 holds true today:

“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to articles 1, 2, 3, 4, 10, 19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.”

70. Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) provides for the form a petition should take.

In Timothy Njoya v Attorney General & another [2014] eKLR Lenaola J held: -

“I agree with the above reasoning, and with respect, the petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the Court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated, by whom and even state the article of the Constitution that has been violated and the manner in which it has been violated”

71. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR held that:

“Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Annarita Karimi Njeru v Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

Also see Humphrey Mutegi Burini & 9 others v Chief of the Kenya Defence Forces & another [2017] eKLR, by Mativo J,(as he then was)

72. It is evident that for a constitutional petition to be sustainable the petitioner must cite constitutional provisions, and precisely identify the provisions that are alleged to have been violated or threatened with violation. He/she must also demonstrate the manner in which the said provisions have been violated or are threatened with violation from the facts and evidence of the case. Looking at the petition, I agree with the respondents and the interested party that the petitioner has only stated the



- constitutional provisions violated but has failed to demonstrate how they have been violated and the harm suffered if any.
73. The petitioner has however cited a number of cases and submitted that there have been developments since the Anarita case. Although he cites *John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others* [2013] eKLR, I have looked up the case and the issue that was being handled therein was whether the petitioners had the locus standi to institute the suits.
74. I however also note that in the said case, the learned judge cited with approval the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgment), where the judges stated: -
45. We must point out that Anarita Karimi Njeru was decided under the old Constitution. The decision in that case must now be reconciled and be brought into consonance with the new Constitution. In our view, the present position with regard to the admissibility of petitions seeking to enforce the *Constitution* must begin with the provisions of article 159 on the exercise of judicial authority. Among other things, this article stipulates that:
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.
46. We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against respondents in a constitutional petition are fashioned in a way that gives proper notice to the respondents about the nature of the claims being made so that they can adequately prepare their case.
47. Indeed, both the respondents and the interested party have proceeded from this understanding. They have sought to explain at length the contours of article 73 and chapter six of the *Constitution* in response to the petitioner's allegations. If one needed evidence that these parties understood the claim facing them, it is to be found in their various papers filed in court and the oral submissions made in court. This being a constitutional issue of immense public importance and interest, we refuse to worship at the altar of formal fetishism on this issue and hold that the controversy at issue has been defined with reasonable precision to warrant a proper judicial determination on merits.”
75. In view of the above cited case law, it is clear that a respondent has to be given proper notice about the nature of the claims being made so that he/she can adequately prepare their case. The court therein while noting that the said case was not an epitome of precise, comprehensive, or elegant drafting, it nonetheless found that the complaints raised by the petitioner were concrete enough for the court to consider. It also noted that the respondents understood the claim and that was the reason why they substantively responded to the claim.
76. While agreeing with the said decision and the petitioner herein, it is evident that the petitioner has raised substantive issues concerning the 1st respondent and which the respondents and the interested



party have responded to in detail confirming they have understood the nature of the claim. Therefore, although I note that the petition is not pleaded with precision and the manner of violation and harm not mentioned, the court is bound to consider this petition as it can be deciphered from the petition what the issues in the matter are.

Issue No. (ii). Whether The 1st Respondent Is A Public Body And Therefore Subject To The Provisions Of Article 227 Of The Constitution And PPADA.

77. The petitioner submitted that since the 1st respondent is a recipient of public funds it falls within the ambit of and is governed by the express provisions of the Constitution and the PPADA.
78. The 1st respondent submitted that it does not fall within the category of public entities. There was also no evidence that it received public funds for the programme and that the issue of its status had been determined and the decision has never been appealed. It added that it is a registered limited company duly incorporated under the Companies Act (repealed) and that although the shareholding for the government of Kenya has increased to 48.7% since the Court of Appeal case, it still does not have a controlling interest in the 1st respondent. Also, section 2 of the PFMA does not support the petitioner's assertion that it is a public entity.
79. The 2nd to 4th respondents submitted that the 1st respondent is not a state corporation hence not subject to PPADA and they have no influence on the decision by the 1st respondent to train its pilots. They argued that the 1st respondent is a private liability company and as such the Attorney General cannot advise them. They also reiterated the issue concerning the government of Kenya shareholding in the 1st respondent.
80. The interested party, argued that nothing limits the 1st respondent from using ATOs that have been certified by ICAOs standards and recommended practice. Further that if an approved institution lacks the requisite instruments from training, nothing bars it from going outside the approved list.
81. Article 227 (1) of the Constitution provides;

When a State organ or any other public entity contracts for goods or service, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

The PPADA was enacted pursuant to article 227(2) of the Constitution. The preamble provides that it is an Act of Parliament to give effect to article 227 of the Constitution; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.

82. Section 2 of the PPADA defines public entity to include-
- a. (e)
 - f. a state corporation within the meaning of the State Corporations Act (Cap. 446);
 - g. (j)
 - k. a company owned by a public entity;
 - l. (o)
 - p. a body that uses public assets in any form of contractual undertaking including public private partnership;
 - q. (s)



- t. any other entity or a prescribed class of public entities or particular public entities that uses public money for purposes of procurement or any other entity as declared under sections 4 and 5 of the *Public Finance Management Act*, 2012 (No 18 of 2012).
83. Section 2 of the *State Corporations Act*, cap 446 of the Laws of Kenya defines a state corporation to mean-
- (a) (b) (iv).....
- (v) a company incorporated under the *Companies Act* (Cap. 486) which is not wholly owned or controlled by the Government or by a state corporation;
- (b) (vi) – (d)
84. Section 2 of the *Public Finance Management Act*, 2012 (PFMA) defines public money as hereunder: -
- “public money” includes—
- (a) all money that comes into possession of, or is distributed by, a national government entity and money raised by a private body where it is doing so under statutory authority; and
- (b) money held by national government entities in trust for third parties and any money that can generate liability for the Government;
85. What is evident from section 2 of the PPADA, section 2 of the *State Corporation Act* is that the 1st respondent does not fall under the definitions of a public entity. In fact, section 2 of the *State Corporations Act*, excludes a company incorporated under the *Companies Act* (cap 486) which is not wholly owned or controlled by the government or by a state corporation. To put this into perspective, the government of Kenya has 48.7 % shares in the 1st respondent, and there are other shareholders. There is also no evidence adduced to demonstrate that the government of Kenya runs the show at KQ.
86. The Court of Appeal in the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR held:
- “25. Kenya Airways is not a State Corporation. It is a private liability company incorporated under the *Companies Act* and listed on the Nairobi Stock Exchange as well as those of Uganda and Tanzania. Although the Government of Kenya is its shareholder, it holds only 29.8% of shares in it. KLM holds 26.73%, the International Finance Corporation, a private sector arm of the World Bank, holds 9.56%, and the rest of the shares are held by the private investors. Kenya Airways is therefore not wholly owned or controlled by the Government of Kenya in terms of the definition of a parastatal in section 2 of the *State Corporations Act*.⁶ The fact that it flies the Kenyan flag does not give the Kenyan Government any right to control its operations to ensure that the conduct of its business meets the country’s “economic, strategic as well as social responsibilities as the learned Judge held.”
87. In *Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 others* [2016] eKLR the court held:
- “ Arguments have been advanced that the Petitioner is regulated by the State hence making it a public entity. I find no favour in those arguments in the circumstances of this case. I would agree with Dr. Kuria when, citing the case of Thalappalam Ser Coop Bank Ltd & Others -



v- State of Kerala & Others SCI Civil Appeal No 9017 of 2013, he submitted that on the criterion of regulation there was need to be shown to the court that the State's regulation of any entity had to be such functional and pervasive control as to leave no doubt that the entity was a public entity.

There is no doubt that the State expends a considerable amount of resources in regulating social and economic affairs. Even the banking sector is regulated. However, the fact of regulation does not necessarily render such entities or bodies part of the State. The regulation, unless otherwise shown, does not give the State any direct or indirect control over the affairs of the various organs registered as private entities. The same is applicable to the instant situation. The State exercises no functional control over co-operative societies except for those where the State is also a majority shareholder.”

88. The 1st respondent is incorporated under cap 486 Laws of Kenya (now repealed). What can be drawn from the Githuburi case (supra) is that for one to prove regulation, it must be shown that the state's regulation of any entity is such a functional and pervasive control as to leave no doubt that the entity is a public entity. The petitioner herein has not demonstrated that, at all.
89. On the contrary, it has been shown that the 1st respondent is not in the ultimate control of the state. It has further explained how the programme is funded, and the same has not been rebutted by the petitioner. It has not denied receiving financial aid, it has however added that it receives the loan from the government of Kenya as a shareholder within the 1st respondent and in proportion to its investments. Further, its done pursuant to the terms of necessary shareholder loan agreement, the government is then issued with the equivalent of the loan in share capital like any other shareholder. The loan is also tied to a specific purpose. No evidence has been adduced by the petitioner prove the contrary.
90. on the allegation that the money used in the programme is public money, the 1st respondent submitted that the programme is funded 100% through loans issued by Co-operative Bank of Kenya to individual pilot trainees. Looking at the definition of public money under section 2 of the PFMA it is evident that, that is not public money. The money is also not given to the 1st respondent but to the trainees individually as loans. The petitioner has also not adduced any evidence to demonstrate that the monies given to the 1st respondent by the government of Kenya are specifically for the said programme. In my view, this is not a public entity subject to the provisions of article 227 of the Constitution and the PPADA, and no grants are given to it by the government of Kenya.

Issue No (iii) Whether the petition is moot

91. The 1st respondent submitted that the petition is moot being that the programme was discontinued on June 29, 2020. The 2nd -4th respondents supported the said position while the petitioner argued that it was not moot as it was only discontinued due to the Covid pandemic.
92. In the case of Daniel Kaminja & 3 others (suing as Westland Environmental Caretaker Group) v County Government of Nairobi [2019] eKLR the court stated: -.

“26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or



dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.[17]

27. The legal doctrine known as 'mootness' is well developed in constitutional law jurisprudence. Accordingly, a case is a moot one if it.[18] "...seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical effect upon a then existing controversy."
 28. Furthermore, a case will be moot-[19] "...if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision."
93. The petitioner has sought declarations and judicial review orders. To wit, a declaration that the 1st respondent falls within the ambit of and is governed by the express provisions of the Constitution and the PPADA; that it has breached articles 227 of the Constitution and the PPADA; and that it has violated the national values and principles of patriotism and equity enshrined in article 10 of the Constitution. On the judicial review orders, he has sought a prohibition order and compelling orders.
 94. All the said orders sought are founded on the Ab Initio Training Programme. The 1st respondent indicated that the programme was suspended indefinitely.
 95. The Black's Law Dictionary, 4th Edition defines the term indefinite to mean, without fixed boundaries or distinguishing characteristics; not definite, determinate or precise.
 96. The term indefinite is defined by the Supreme Court of Florida in the case of Twisdale v Womack, 148 So 2d 21 (1962) to mean:

"We think that the commission was correct in holding that this evidence is not competent substantial evidence to support a finding that the claimant's blindness is permanent. Rather the evidence seems to clearly show that the condition, while of indefinite duration, is not permanent. Indefinite is more synonymous with "temporary" than with "permanent" for it contemplates that the condition will end at an unpredictable time, whereas "permanent" does not contemplate that the condition will cease to exist."
 97. A look at the definition of indefinite simply means that it is vague and not sure when something will happen. Although it is not equivalent to being permanent, it may or may not happen. Being that the petition is solely based on the Ab Initio Programme which has been suspended indefinitely, it therefore means that this programme may or may not be revived. The question then would be, suppose this court grants the orders sought, can they be enforced. The answer is a resounding no, as the orders are pegged on whether the programme will be revived or not. In my humble view I agree that the petition is moot and/ or overtaken by events.

Issue No (iv) Whether The Legitimate Expectations Of The Petitioner And Other Kenyans Were Violated

98. The petitioner submitted that they had the legitimate expectation that KQ would adhere to the law in execution of its Ab Initio Scheme. That there was breach when it failed to competitively seek service



providers for the scheme including local industries. The 1st respondent submitted that this issue was not pleaded in the petition by the petitioner and should therefore be struck out.

99. The Supreme Court of Kenya in the case of *Raila Amolo Odinga & another vs IEBC & 2 others* (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

100. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR the court held:

11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002* .”

101. As confirmed from the record this issue was not raised in the pleadings and should be disregarded. Nonetheless, the principles of legitimate expectation have been elaborated in *Royal Media Services Ltd and 5 others* (Petition No 14 of 2014); there must be an express, clear and unambiguous promise given by a public authority; the expectation itself must be reasonable; the representation must be one which was competent and lawful for the decision maker to make; and there cannot be a legitimate expectation against clear provisions of the law or the *Constitution*.

102. This principle of legitimate expectation was also stated by the Supreme Court of Canada in *Canada (Attorney General) v Mavi*, [2011] 2 SCR 504, thus;

“(68) Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a requisite...”

103. The petitioner has not proved the conditions for legitimate expectation. There was no promise from the 1st respondent, which is not a public body. The principle of legitimate expectation is therefore not applicable to this case.



Issue No (v) Whether The Petitioner Is Entitled To The Reliefs Sought

104. Having determined that the 1st respondent is not a public entity and therefore not governed by articles 227 of the Constitution and the PPADA, prayer (i) in the petition fails.

105. Prayer (ii) is on the prohibitory orders and mandamus orders. In the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court held the following with regards to prohibition and mandamus orders:

“...that now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the Council in this case. What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition, Vol 1 at pg 37 paragraph 128.

..... What do these principles mean” They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

106. These explanations were reiterated by the Court of Appeal in the case of Joram Mwenda Guantai vs The Chief Magistrate, Nairobi [2007] eKLR, meaning of a prohibition order. In Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR Mativo J, (as he then was) expounded on the meaning of an order of mandamus.

107. Having determined that the petition is moot, the programme having been suspended indefinitely, the prohibition order sought cannot be issued. The court cannot also issue a compelling order as the 1st respondent is not a public entity and hence owes no legal obligation to the public. The petitioner has not therefore satisfied the conditions for grant of an order of mandamus and/or compelling order.

108. On the issue of costs, rule 26 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that the award of costs is at the discretion of the court. Sub rule (2) provides that in exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms. This indeed was a public interest case.

109. The upshot is that the petition lacks merit and is dismissed. Parties shall bear their own costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. Ong’udi

