



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 562 OF 2017**

**IN THE MATTER OF ARTICLES 1, 2, 3, 4(2), 10, 12(1)(A), 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 156, 159, 165, 232, 234, 258, AND 259 OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 2, 10, 27, 41(1), 47, 73, 232, 234, AND 259(1) OF THE CONSTITUTION; THE PUBLIC HEALTH OFFICERS (TRAINING, REGISTRATION AND LICENCING) ACT (NO.12 OF 2013); THE STATUTORY INSTRUMENTS ACT 2013.**

**IN THE MATTER OF THE ALLEGED MISMANAGEMENT OF THE AFFAIRS OF THE PUBLIC HEALTH OFFICERS AND TECHNICIANS COUNCIL (PHOTC) OF KENYA, INCLUDING THE IRREGULAR APPOINTMENT OF INDEPENDENT MEMBERS OF THE COUNCIL.**

**IN THE MATTER OF: THE ALELGED INVALIDITY LEGAL NOTICE NO. 61 OF 23<sup>RD</sup> MARCH, 2015 (THE PUBLIC HEALTH OFFICERS (FEES AND RATES) REGUALTIONS, 2015); AND THE ALELGED INVALIDITY OF THE KENYA GAZETTE NOTICE NOS 11295, 11296, AND 11297 OF 21<sup>ST</sup> SEPTEMBER 2017; AND THE ALELGED EXORBITANT AND DISCRIMINATORY PROFESSIONAL EXAMINATION AND LICENCING FEES CHARGED PUBLIC HEALTH GRADUATES FOR COMPETENCE ASSESSMENT.**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....PETITIONER**

**VERSUS**

**CABINET SECRETARY, MINISTRY OF HEALTH.....1<sup>ST</sup> RESPONDENT**

**PUBLIC HEALTH OFFICERS AND**

**TECHNICIANS COUNCIL.....2<sup>ND</sup> RESPONDENT**

**DR. KEPHA MOGERE OMBACHO.....3<sup>RD</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**AND**

**SIMON KIMANI.....1<sup>ST</sup> INTERESTED PARTY**

**WILLIAM KITAGWA.....2<sup>ND</sup> INTERESTED PARTY**

**VINCENT M. IDUR.....3<sup>RD</sup> INTERESTED PARTY**

**VITALIS LUKIRI.....4<sup>TH</sup> INTERESTED PARTY**

**REDEMPTA MUENDO.....5<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

**PETITION**

1. The Petitioner through an amended Petition filed on 15<sup>th</sup> December 2017 dated 14<sup>th</sup> December 2017 seek the following orders:-

**i) A DECLARATION THAT**

- a) **The 3<sup>rd</sup> Respondent's failure to submit the accounts of the 2<sup>nd</sup> Respondent to the Auditor General violated articles 201, 226(3) and 229(4)(b) of the Constitution.**
- b) **The 3<sup>rd</sup> Respondent acted unconstitutionally, illegally and *ultra vires* when he purported to appoint a Mr. Simon Kimani as the Acting Chairman of the 2<sup>nd</sup> Respondent and one of the mandatory signatories of the Council's bank accounts**
- c) **The 3<sup>rd</sup> Respondent irregularly awarded consultancy services without competitive bidding to M/s Lumumba Mogere & Co. Advocates.**
- d) **The 3<sup>rd</sup> Respondent acted unconstitutionally, illegally and *ultra vires* when he purported to appoint the persons listed in the 1<sup>st</sup> Respondent's letter to the 5<sup>th</sup> Respondent Ref: MOH/ADM/CONF/LEG/1 VOL 2, dated 31<sup>st</sup> August, 2017 titled "Gazettement of Board Members for the Public Health Officers and Technicians Council of Kenya".**
- e) **The 2<sup>nd</sup> Respondent should accredit Moi University.**
- f) **A declaration that the Legal Notice No. 61 of 23<sup>rd</sup> March, 2015 and The Kenya Gazette Notice Nos. 11295, 11296 and 11297 of 21<sup>st</sup> September 2017 are invalid, null and void.**
- g) **The 2<sup>nd</sup> Respondent should hold consultations with members of the public and other concerned stakeholders on the fees for Council examinations.**
- h) **The purported appointment by the 3<sup>rd</sup> Respondent of members of the Public Health Officers and Technicians Council (PHOTC) of Kenya is unconstitutional and, therefore, invalid, null and void *ab initio*.**

**ii) AN ORDER**

- a) **An order quashing The Kenya Gazette Notice Nos. 11295, 11296 and 11297 of 21<sup>st</sup> September 2017.**
- b) **Quashing Legal Notice No. 61 of 23<sup>rd</sup> March, 2015 (the Public Health Officers (Fees and Rates) Regulations, 2015).**
- c) **Quashing the 1<sup>st</sup> Respondent's letter to the 5<sup>th</sup> Respondent Ref: MOH/ADM/CONF/LEG/1 VOL 2, dated 31<sup>st</sup> August, 2017 titled "Gazettement of Board Members for the Public Health Officers and Technicians Council of Kenya".**
- d) **An order compelling the 2<sup>nd</sup> Respondent to hand over its books of accounts for the period 2013/2014 – 2016/2017 to the Auditor General with immediate effect.**
- e) **An order directing the 2<sup>nd</sup> Respondent to develop fees and rates regulations for public health officers in strict compliance with the law.**
- f) **An order that the costs of this suit be provided for.**
- g) **Any other relief the court may deem just to grant.**

**PETITIONER'S CASE**

2. The Petitioner's case is that in September 2016 the term of the last Public Health Officers and Technician Council expired but contrary to the law, the 3<sup>rd</sup> Respondent continued running the affairs of the Council singlehandedly with the chairman who was still in office.

3. In February 2017, the Chairman, Mr. Kioko Kiilu resigned to pursue competitive politics and the 3<sup>rd</sup> respondent, acting illegally and *ultra vires*; purported to appoint a Mr. Simon Kimani as the acting Chairman, and irregularly vested him with the power to be one of the mandatory signatories of the Council's Bank Accounts, yet he is not gazette as a member of the council.

4. It is Petitioner's case that the appointment of Mr. Kimani created a conflict of interest contrary to the express provisions of **Article 73(2)(b) and 75 (1) (a) of the Constitution** given that he is the Head of the Department of Environmental health at the Kenya Medical Training College which is regulated by the same council which he is purported to chair and regulate.

5. It is contended by the Petitioner vide a letter **Ref: MOH/ADM/CONF/LEG/1 VOL 2, dated 31<sup>st</sup> August, 2017** titled "**Gazettement of Board Members for the Public Health Officers and Technicians Council of Kenya**".

6. It is further averred the above-mentioned individuals were singlehandedly hand-picked by the 3<sup>rd</sup> Respondent.

7. The Petitioner further state that the 3<sup>rd</sup> Respondent's memo purporting to forward the list to the 1<sup>st</sup> Respondent is dated 1<sup>st</sup> September 2017; meaning it was written after the 1<sup>st</sup> respondent had forwarded the names to the 4<sup>th</sup> Respondent. The Petitioner as such asserts he became suspicious of the state of affairs that the impugned list of the nominees was arrived at through improper and illegal means to achieve undisclosed collateral purpose. The Petitioner further aver that he is apprehensive that the public interest in the sound management of the 2<sup>nd</sup> respondent was undermined when the handpicked individuals were gazetted vide the Kenya Gazette Notice No. 11295; 11290; and 11297 of 21<sup>st</sup> September 2017.

8. The Petitioner further assert that the list is irregular to the extent that it contains the name of the Chief Executive Officer of PHOTC for gazettement as a member of the Council ; which is against the parent Act which at Section 3 stipulates that he is an ex-officio member of the Council.

9. The Petitioner contend that he is aggrieved that whereas the 3<sup>rd</sup> Respondent has accredited nondescript institutions, he is, for undisclosed reasons, yet to grant accreditation to Moi University which is the first institution to offer a Bachelor of Science degree in Environmental Health.

10. In his view, the failure to accredit Moi University affects many students who are unable to sit the professional exams offered by the 2<sup>nd</sup> Respondent simply because the institution is not accredited. He strongly believes that there is also an element of bias in that students from the Kenya Medical Training College, which is also not accredited, are allowed to sit the exams while those from Moi University are not.

11. The Petitioner is further aggrieved that the accounts of the 2<sup>nd</sup> Respondent have never been submitted to the Auditor General for auditing since the year 2013, when the Council came into existence. He asserts that this is contrary to the requirement in law that all accounts should be submitted to the Auditor General at the close of each financial year, and that the Auditor General should release his report by the 31<sup>st</sup> of December of the year. The Petitioner avers that vide Legal Notice No. 61 of 23<sup>rd</sup> March, 2015, (the Public Health Officers (Fees and Rates) Regulations, 2015) the 2<sup>nd</sup> Respondent imposed professional registration examination and licensing fees for public health professionals which is exorbitant and discriminatory when compared to fees charged by similar government bodies. The Petitioner contends that the impugned exorbitant fees were unilaterally arrived at by the 2<sup>nd</sup> Respondent without public participation, including without consultations with the public health officers to be affected.

12. In addition to the above, the Petitioner opines that the legal instrument (Legal Notice No. 61 of 23<sup>rd</sup> March, 2015) imposing the impugned professional exam fees is itself void because it was not within seven (7) sitting days after its publication laid before Parliament as required by **Section 11(1) of the Statutory Instruments Act 2013**. Therefore in his view, by dint of **Section 11(4) of the Act**, the statutory instrument was voided at expiry of the seventh day when it was supposed to be laid before Parliament.

#### **THE 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENT'S RESPONSE**

13. The 2<sup>nd</sup> and the 3<sup>rd</sup> Respondents filed a Replying Affidavit sworn upon by the 3<sup>rd</sup> Respondent on 7<sup>th</sup> December 2017 and a notice of preliminary objection dated 12<sup>th</sup> November 2017.

14. In the Notice of Preliminary Objection the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have raised 4 grounds being as follows:-

**a) That this Honorable Court lacks the jurisdiction to hear and determine the Petition as follows:**

**i. The Petition offends the Provisions of Article 162(2) of the Constitution of Kenya, as read together with Section 12 of the Employment and Labour Relation Court Act Cap 234B Laws of Kenya**

**ii. The Petition offends the provisions of Section 9 of the Public Procurement and Disposal Act No. 3 of 2005.**

**b) That the Petition filed before this Honourable Court is scandalous, frivolous and vexatious, and an abuse of this Honourable Court's process.**

**c) That the Petition is fatally defective and seriously incurable.**

**d) That the documents relied upon in the Petition offend the Article 50(1) of the Constitution and Sections 79 – 81 of the Evidence Act CAP 80 of the Laws of Kenya and should be expunged from the Court records.**

15. In the Replying Affidavit of the 3<sup>rd</sup> Respondent, it is depend that he received a letter dated 25<sup>th</sup> September, 2017 notifying him that the 4<sup>th</sup> Respondent had approved his appointment on Local Agreement Terms for a period of **two (2) years**. He stated that prior to the receipt of

the aforementioned letter, he was scheduled to leave office on 29<sup>th</sup> November, 2017 upon attaining the mandatory retirement age of sixty (60) years. He further added that the decision by the 4<sup>th</sup> Respondent to issue him with a two (2) year contract was primarily because there were no officers who could serve in his position with the requisite competence and experience. He opined that his term in office was extended on a contractual basis to enable him mentor persons who can assume the office of Director Public Health once his two (2) year term comes to an end.

16. On the issue pertaining the alleged conflict of interest while awarding consultancy services without competitive bidding to M/s Lumumba Mogere & Co. Advocates, the 3<sup>rd</sup> Respondent stated that the Petitioner had not supplied any material showing the existence of such a law firm, the award of consultancy services and its association with the 3<sup>rd</sup> Respondent's son. He denied knowledge of the alleged consultancy report annexed to page 50-64 of the Petition and stated that it was not signed by anyone. He was of the view that the allegations pertaining to the alleged procurement of consultancy services of the aforesaid M/s Lumumba Mogere & Co. Advocates are part of the wider scheme by the Petitioner to discredit his person and block the extension of his contract of employment by the 1<sup>st</sup> & 4<sup>th</sup> Respondents.

17. As a response to the issue pertaining to the alleged irregularities in the appointment of Members to the Council of the 2<sup>nd</sup> Respondent, the Public Health Officers and Technicians Council, the 3<sup>rd</sup> Respondent contended that there was no conflict of interest in the appointment of Simon Kimani as Chairman of the Council. He added that the Petitioner had neither supplied any material before the Court to show that Simon Kimani was employed by one of the agencies regulated by the Council nor how that would result in a conflict of interest. He asserted that the appointment process was left to the discretion and mandate of the Cabinet Secretary for Health and that the Chairman and Members of the Council were gazetted by the Cabinet Secretary vide the Kenya Gazette Volume No. Vol. CXIX – No. 171 of 17<sup>th</sup> November, 2017.

18. Further on the issue concerning the 2<sup>nd</sup> Respondent's failure, refusal or neglect to accredit students of Moi University to undertake their exams, the 3<sup>rd</sup> Respondent stated that by the letter of 12<sup>th</sup> September, 2017, Moi University committed to pay Kshs. 587,500/- to facilitate accreditation, which they had not done to that date. He added that the Council had not refused or failed to accredit the Institution and that Moi University had not raised any complaint with the 2<sup>nd</sup> Respondent about the process. He further stated that contrary to the figures quoted by the Petitioner as fees payable by students, they annexed a special issue of the Kenya gazette supplement no. 26 stipulating the said figures (KMO-7). In conclusion, the 3<sup>rd</sup> Respondent asserted that at no time had the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed to submit accounts to the Auditor General, nor had they ever been required to do so. Consequently, he was of the view that the Petition lacked merit and should be dismissed with costs.

#### **ANALYSIS AND DETERMINATION**

19. I have very carefully considered the amended Petition and affidavit in support, the Respondents pleadings and submission and from the same the issues for consideration can be summed up as follows:-

***a) Whether the Court has jurisdiction to entertain the Petition?***

***b) Whether the Constitution was violated and whether Court should intervene?***

***c) Whether the 3<sup>rd</sup> Respondent's failure to submit the accounts of the 2<sup>nd</sup> Respondent to the Auditor General violated Articles 201, 226(3) and 229(4) (b) of the Constitution.***

***d) Whether the 3<sup>rd</sup> Respondent acted unconstitutionally, illegally and ultra vires by purporting to appoint; a Mr. Simon Kimani as the Acting Chairman of the 2<sup>nd</sup> Respondent and one of the mandatory signatories of the Council's Bank Accounts?***

***e) Whether the 3<sup>rd</sup> Respondent irregularly awarded consultancy services without competitive bidding to M/s Lumumba Mogere & Co. Advocates?***

***f) Whether the purported appointment by the 3<sup>rd</sup> Respondent of members of the public Health Officers and Technicians Council (PHOTC) of Kenya is unconstitutional and, therefore, invalid, null and void ab initio?***

***g) Whether the 2<sup>nd</sup> respondent should accredit Moi University?***

***h) Whether the Kenya Gazette Notice Nos. 11295, 11296 and 11297 of 21<sup>st</sup> September 2017 are invalid, null and void.***

***i) Whether legal Notice No. 61 of 23<sup>rd</sup> march, 2015, is invalid, null and void?***

***j) Whether the 2<sup>nd</sup> Respondent should hold consultation with members of the public and other concerned stakeholders on the fees for council examinations?***

#### **A. WHETHER THE COURT HAS JURISDICTION TO ENTERTAIN THE PETITION?**

20. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their Notice of Preliminary Objection dated 12<sup>th</sup> November 2017 contend that this Court lacks jurisdiction to hear and determine the Petition herein on two main grounds being:-

***a) The Petition offends the provisions of Article 162(2) of the Constitution of Kenya as read together with Section 12 of the***

**b) The Petition offends the provisions of Section 9 of the Public Procurement and Disposal Act No 3 of 2005.**

21. **Article 162(2) (a) and (b) of the Constitution** provides that the parliament shall establish courts with the status of the High Court to hear and determine (a) disputes relating to employment and labour relations and (b) the environment and the use and occupation of and title to land.

22. It is trite that the jurisdiction of a Court or Tribunal is derived from the Constitution, statute, or by principle laid out in Judicial precedent. In ***Re the matter of the Interim Independent Electoral Commission (2011) eKLR*** Constitutional Petition Application No. 2 of 2011 at paragraph 29 and 30 the Supreme Court held thus:-

***“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent...”***

23. Further in the case of ***Samuel Kamau Macharia v. Kenya Commercial Bank & 2 others (2012) eKLR*** at paragraph 68, the Supreme Court stated as follows:-

***“[68] A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”***

24. The Court is alive of the fact that whereas any dispute resolution procedure laid down in statute should be exhausted first, whenever the bar of this court’s jurisdiction is raised, the court is obligated to examine the nature of the case and reliefs sought, so as to determine whether or not the aggrieved party would get redress elsewhere.

25. In the instant Petition, the Petitioner prays for various reliefs and orders allegedly violated by the Respondents and sets out specific provisions of the Constitution of Kenya, 2010 and legislations concerning appointment of persons into offices in the public service. The issues raised concern to a great extent the violation of provisions of the Constitution as set out in the Petition. This Court has original and exclusive jurisdiction, arising from **Article 22(1) (2); 23 and 165 of the Constitution** to determine whether the issues complained about herein violated provision of the Constitution and legislation.

26. On the other hand, it should be noted and appreciated that the jurisdiction of any Tribunal under the law does not oust this Court’s jurisdiction to hear and determine matters respecting, violations of the constitution since the mandates of tribunal are limited.

27. It is further to be appreciated that tribunals do not have jurisdiction to determine disputes regarding interpretation and application of the constitution and / or to issue remedies for the violation of the constitution. I find if any tribunal were to purport to address the issues raised in this Petition, that would in itself be ultra vires its mandate and would be acting in excess of its jurisdiction and thereby, issue decisions which are unlawful, irregular and void.

28. Upon clear reading and perusal of the Petition herein, it is clear that bulk of the reliefs sought in the instant Petition requires the authoritative interpretation of the constitution which is not within the mandate of tribunals or subordinate courts. The Disputes inviting constitutional interpretation are for the High Court and Courts of equal status and not otherwise. In the case of ***Cohens v. Virginia 19 U.S. 264 (1821)*** the Court held that:-

***“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty.”*** (Emphasis added)

29. The jurisdiction to interpret the constitution is thus within this court’s mandate and further the court is enjoined to protect Petitioner’s rights under **Article 48 and 50(1) of the Constitution** by entertaining the Petition.

30. I note the Respondents did not file submission in support of the preliminary objection inspite of having been given sufficient time to do so. It is clearly noted that **Article 1(c), 4(2), 10, 22, 23, 50(1), 159, 165, 258 and 259 of the Constitution of Kenya**, as read with **Section 12 of the Employment and Labour Relations Court (No.20 of 2011)**, vest jurisdiction in the High Court, inter alia, to hear any question regarding the violation of rights and fundamental freedoms in the Bill of Rights determining if acts or omissions are constitutional; and the interpretation of constitution, including questions of contradiction between any law and the Constitution, and to protect the Constitution from any threats or violations.

31. I find from the above that both the Constitution and Statute clothe this court with original and exclusive jurisdiction to determine whether the respondents violated the constitution and other laws in the manner complained of herein. **Article 165 3 (b) of the Constitution** clearly states that this court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened and under **Article 165 (3) (d) of the Constitution** the Court has jurisdiction to hear any question regarding the interpretation of the constitution and as such these being some of the bulk issues for determination in this Petition, I find that this court has jurisdiction to hear and determine this Petition.

## **B. WHETHER THE CONSTITUTION WAS VIOLATED AND WHETHER COURT SHOULD INTERVENE?**

32. The Petitioner's position is that the Respondents violated the constitution through their actions, whereas the Respondents deny having breached any of the Petitioner's constitutional rights. **Article 2(1) of the Constitution** binds all persons and all state organs at both level of government including the respondents herein, **Article 2(4)** on the other hand clearly provides that any law;

**“(4)Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”**

33. The Petitioner in his amended Petition under paragraph 15 to 67 of the Petition has pleaded the acts and omissions on part of the respondents which he alleges contravenes the constitution and the law. The Respondents have not given any justification for the clear acts which are against the Constitution and the law as stated in the petition.

34. In case of **Republic v. Kenya national Examination Council, Miscellaneous Application No. 328 of 2015**, the Court intervened to ensure that respondents respect, uphold and respected the Constitution, as it held as follows:

**“That the Court can interfere where there is improper exercise of discretion is now trite. As was held by Warsame, J (as he then was) in Re: Kisumu Muslim Association Kisumu HC Misc. Application NO. 280 of 2003, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration...”**

35. It is my finding that the Respondents in carrying out their statutory duties they have an obligation to be transparent and accountable and in doing so are required to exercise the principles of good governance, including equity, social justice, inclusiveness, equality, human rights, integrity and substantiate development. They are bound to apply **Article 10 of the Constitution** to the letter. Any action by the respondents pertaining to an application of policy should be considered in right of **Article 47 of the Constitution** which provides as follows:-

**“47. Fair administrative action**

**(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

36. **Article 47 of the Constitution** is breached when the actions complained of are unreasonable as was held in the case of **Republic v. Kenya Power & Lighting Co. Ltd and Another (2013) eKLR** where the Court held that:-

**“I think the words of Lord Greene, M. R. at page 229 in the Wednesbury Corporation case (supra) will make good closing remarks in this case. He observed that:-**

**“It is true the discretion must be exercised reasonably. Now what does that mean” Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretion often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority... In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.” (Emphasis added)**

37. I find from the acts complained of and as set out in the Petitioner's pleadings the respondents acted irrationally and unreasonably and without consideration for the public interest in the manner as complained in the Petition, which was manifestly discriminatory and unfair to those directors who were dropped and in exercising their discretion, the Respondents acted in an arbitrary, unreasonable and irrational manner. I find the Respondents rendered their actions null and void when they deliberately ignored clear provisions of the constitution on legislation and considered instead extraneous matters contrary to the law.

38. It is clear that the respondents impugned actions and omissions are in violation of **Article 47(1) of the Constitution** which affirms the right of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. I find that the Respondents have not shown that there is any provision under the law, which confers the Respondents with jurisdiction to disregard the constitution and statutory law. The actions and/or conduct of the respondents constitutes unlawfulness, unreasonableness and is irrational. The Respondents impugned actions and omissions are in violation with express provisions of the Constitution and more specifically **Articles 10, 27, 47 and 259 of the Constitution**. They are also in breach of mandatory provisions of **Fair Administrative Action Act, 2015**, the **Leadership and Integrity Act 2012 and Public Service (Values and Principles) Act 2015**.

39. I find that the petitioner has demonstrated that the respondents acted ultra vires in the manner complained of in the Petitioner's Petition. The Respondents cannot be heard to say they can act contrary to what is authorized by law. What is not authorized is both ultra vires and unconstitutional and therefore, invalid, null and void and of no legal consequence. Under the doctrine of ultra vires, an act of public body or officers must not be beyond or exceed the powers delegated to the body or officers, or what the law allows; otherwise it will be ultra vires and accordingly invalid, null and void and of no legal consequences.

40. It is clear that the doctrine of ultra vires intention is to protect the public interest by ensuring that public bodies and officers act strictly within and in accordance with the law to prevent the abuse of power by putting check over the activities of public bodies and officials by setting the four corners of law within which they are authorized to act and must act thereto. I therefore find the ultra vires act complained of by the Petitioner in this petition are void ab initio as the public body or the officials had no capacity to make them in the first place.

41. In view of the above the Petitioner has clearly demonstrated that the Respondents violated various constitutional provisions as set out therein above and that the Court has jurisdiction to intervene and set aside the impugned act which are in violation of the Constitution and laws.

**C. WHETHER THE 3<sup>RD</sup> RESPONDENT'S FAILURE TO SUBMIT THE ACCOUNTS OF THE 2<sup>ND</sup> RESPONDENT TO THE AUDITOR GENERAL VIOLATED ARTICLES 201, 226(3) AND 229(4) (B) OF THE CONSTITUTION.**

42. The petitioner contention is that the 3<sup>rd</sup> Respondent failure to submit the accounts of the 2<sup>nd</sup> Respondent to the Auditor General violates **Article 201, 226(3) and 229(4) (b) of the Constitution.**

43. **Article 201(1) (b) and (e) of the Constitution** provides:-

**“201. Principles of public finance**

*The following principles shall guide all aspects of public finance in the Republic—*

*(a) there shall be openness and accountability, including public participation in financial matters;*

*(b) the public finance system shall promote an equitable society, and in particular—*

*(i) the burden of taxation shall be shared fairly;*

*(ii) revenue raised nationally shall be shared equitably among national and county governments; and*

*(iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;*

*(e) financial management shall be responsible, and fiscal reporting shall be clear.”*

44. **Article 226(3) of the Constitution** provides:-

**“226. Accounts and audit of public entities**

*(3) Subject to clause (4), the accounts of all governments and State organs shall be audited by the Auditor-General.”*

45. **Article 229(4) (b) of the Constitution** provides:-

**“229. Auditor-General**

*(4) Within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on—*

*(b) the accounts of all funds and authorities of the national and county governments.”*

46. On the issue of accounts and Audit **Section 19 of the Public Health Officers (Training Regulations and Licensing) Act; 2012** provides:-

**“(1) The Council shall cause to be kept all proper books and records of accounts of the income, expenditure, assets and liabilities of the Council.**

**(2) The accounts of the Council shall be audited by the Controller and Auditor – General or by an auditor appointed by the council with the written approval of the Controller and Auditor-General.**

**(3) The council shall, within three months from the end of the financial year to which the accounts relate, submit to the Controller and Auditor-General or an auditor appointed by the Council under sub section (2), the accounts of the council together with-**

**a) a statement of income and expenditure during the year;**

**b) a statement of the assets and liabilities of the Council on the last day of that year;**

c) a cash flow statement for the financial year; and

d) any other statements and accounts that may be necessary to fully disclose the financial position of the Council.

(4) The account of the Council shall be audited and reported upon in accordance with the Public Audit Act.

(5) The fees payable to an auditor appointed under subsection (2) shall be determined and paid by the Council.”

47. In the instant Petition it is not contested by the Respondents that the accounts of the 2<sup>nd</sup> Respondent have never been submitted to the Auditor General for auditing since the year 2013 when the Council came into existence. The failure goes against the requirements in law that all accounts be submitted to the Auditor General at the close of each financial year and the Auditor General should release his report by 31<sup>st</sup> December of the year.

48. It was the responsibility of the 3<sup>rd</sup> Respondent, in his capacity as the Registrar of the Council, pursuant to **Section 23 of the Public Health Officers (Training Registration and Licensing) Act 2012** to submit to the Controller and Auditor – General or an auditor appointed by the Council the accounts. The 3<sup>rd</sup> Respondent failure to submit the accounts as required of him violated **Articles 201, 226(3) and 229(4) (b) of the Constitution** and **Section 19 of the Public Health Officers (Training, Regulation and Licensing) Act 2012**.

**D. WHETHER THE 3<sup>RD</sup> RESPONDENT ACTED UNCONSTITUTIONALLY, ILLEGALLY AND ULTRA VIRES BY PURPORTING TO APPOINT; A MR. SIMON KIMANI AS THE ACTING CHAIRMAN OF THE 2<sup>ND</sup> RESPONDENT AND ONE OF THE MANDATORY SIGNATORIES OF THE COUNCIL’S BANK ACCOUNTS?**

49. In the instant Petition the Petitioner avers that in February 2017, the PHOTC Chairman, Mr. Kioko Kiilu, resigned to pursue competitive politics and the 3<sup>rd</sup> Respondent, acting illegally and ultra vires, purported to appoint a Mr. Simon Kimani as the Acting Chairman, and irregularly vested him with the power to be one of the mandatory signatories of the Council’s bank accounts, yet he is not gazetted as a Member of the Council.

50. It is further urged by the Petitioner that the appointment of Mr. Kimani created a conflict of interest contrary to the express provisions of **Articles 73(2)(b) and 75 (1) (a) of the Constitution** given that he was the Head of the Department of Environmental health at the Kenya medical Training College, which is regulated by the same Council, he was purported to chair and regulate.

51. Pursuant to **Section 3(3) (a) the Public Health Officers (Training, Registration and Licensing) Act, 2012**, the Public Health Officers and Technicians Council consist of a chairperson appointed by the Cabinet Secretary.

52. I find that the law is clear as to who is the appointing authority and that since the appointing authority is the Cabinet Secretary, the 3<sup>rd</sup> respondent acted beyond his powers; and acted illegally, and ultra vires when, the 3<sup>rd</sup> Respondent purported to appoint a Mr. Simon Kimani as the Acting Chairman of the 2<sup>nd</sup> Respondent and as one of the mandatory signatories of the Council’s bank accounts.

**E. WHETHER THE 3<sup>RD</sup> RESPONDENT IRREGULARLY AWARDED CONSULTANCY SERVICES WITHOUT COMPETITIVE BIDDING TO M/S LUMUMBA MOGERE & CO. ADVOCATES?**

53. The Petitioner contends that the 3<sup>rd</sup> Respondent irregularly awarded consultancy services without competitive bidding to M/s Lumumba Mogere & Co. Advocates. There is dispute that the 3<sup>rd</sup> Respondent awarded consultancy services as alluded to by the Petitioner in the Petition. It is clear that before awarding consultancy services as stated in the Petition herein, the 3<sup>rd</sup> Respondent was bound by the Constitution and the law as well as the best international practices and norms of procurement of legal services to act as provided by the law in force then.

54. Under **Section 3(g) of the Public Procurement and Asset Disposal Act, 2015** International practice and norms are overriding principles when procuring legal services. Examples of these practices include the **Chartered Institute of Purchasing and Supply (CIPS), UK and Ireland Department of Public Expenditure and Reform Circular 05/13**.

55. The Petitioner in support of the above proposition refers to according to “*How to bring Legal Services (supra)*” where it is stated that the Chartered Institute of Purchasing and Supply the purchasing process for legal services is broken down into an eight-phase process wherein each stage involves one or more sub-stages. The eight stages are: problem identification; problem analysis; establishment of a buying centre; sourcing; selecting; purchasing; monitoring and post-purchase evaluation.

56. The Petitioner further urge that according to Ireland Department of Public Expenditure and Reform Circular 05/13

**“The purpose of this Circular is to remind public bodies of their obligations to ensure that their procurement of legal services complies with the rules and guidelines on public procurement...”**

57. In view of the aforesaid there is no doubt that in awarding consultancy services to any firm of Advocates anyone sourcing for such services is clearly bound by the International Practice and Norms which bind him to secure legal Services in a participatory, transparent, competitive and costs effective process. The purpose is therefore to ensure one acts in accordance with the governing provisions as set out in selection, awarding and costing of legal services under **Section 86(1) (b) or (d) and Section 124 of the Public procurement and Assets Disposal Act, 2015** which provides for pre-determined and competitive provisions of legal services subject to the scale prescribed in the

Advocates Remuneration order.

58. In the case of *Maina & Maina and (Igeria & Ngugi Advocates v National Irrigation Board, PPARB Application No. 47 of 2011 the Public Procurement Administration Review Board* held at page 19 that:-

***“The Board finds that apart from the above statements contained in the Applicants’ Financial Proposal Submission Form and letter, the Applicants’ Financial Proposal did not list any costs and thus did not conform to the requirements of the Request for Proposal document with respect to submission Financial Proposals...”***

59. In view of lack of evidence in support of the Petitioner’s allegation that the 3<sup>rd</sup> Respondent irregularly or otherwise awarded consultancy services to the firm of M/s Lumumba Mogere & Co. Advocates; I find the petitioner has failed to demonstrate that there was violation of express provisions of the Constitution and Public Procurement and Disposal Act, 2015 on part of the 3<sup>rd</sup> Respondent. The Petitioner has not produced evidence to show that the firm ever existed; that the consultancy award ever existed and that the 3<sup>rd</sup> Respondents son is connected to the alleged firm of Advocates.

**F. WHETHER THE PURPORTED APPOINTMENT BY THE 3<sup>RD</sup> RESPONDENT OF MEMBERS OF THE PUBLIC HEALTH OFFICERS AND TECHNICIANS COUNCIL (PHOTC) OF KENYA IS UNCONSTITUTIONAL AND, THEREFORE, INVALID, NULL AND VOID AB INITIO?**

60. The Petitioner contend that the 1<sup>st</sup> Respondent wrote to the 4<sup>th</sup> Respondent to gazette the members of the Public Health Officers and Technical Council (PHOTC) of Kenya who it is urged had been handpicked by the 3<sup>rd</sup> Respondent through a letter Ref MOH/ADM/CONF/LEG/1 Vol 2, dated 31<sup>st</sup> August 2017, titled “Gazettement of Board Members for the Public Health Officers and Technicians Council, of Kenya.”

61. The Petitioner assert that the individuals on the list were singlehandedly handpicked by the 3<sup>rd</sup> respondent yet **Section 3(3) (e) to (l) of the Public Health Officers (Training, Registration and Licensing) Act, 2012**, provides for their nomination by various organizations.

62. Further it is noted the 3<sup>rd</sup> Respondent’s memo purporting to forward the list to the 1<sup>st</sup> respondent is dated 1<sup>st</sup> September 2017, meaning it was written after the 1<sup>st</sup> respondent had forwarded the names to the 4<sup>th</sup> respondent on 31<sup>st</sup> August 2017.

63. The Petitioner in addition to the above avers that the list is also irregular to the extent that it contains the name of the Chief Executive Officer of PHOTC for gazettement as a Member of the Council. That is against the parent Act which at Section 3 stipulates that he is an ex-officio member of the Council.

64. The Petitioner’s averments have not been controverted and as such the impugned list of the nominees were aimed at, achieving an improper and illegal list of purported nominated member notwithstanding nomination had not taken place in accordance with the **Public Health Officers (Training Registration and Licensing Act, 2012**. Secondly there is no demonstration of bona fide listing. I therefore find the 3<sup>rd</sup> Respondent acted unconstitutionally, illegally and ultra vires the relevant Act, when he purportedly singlehandedly appointed Board Members for the Public Health Officers and Technicians Council, of Kenya.

**G. WHETHER THE 2<sup>ND</sup> RESPONDENT SHOULD ACCREDIT MOI UNIVERSITY?**

65. It is not disputed that the 2<sup>nd</sup> Respondent has not granted accreditation to Moi University which is the first institute to offer a Bachelor of Science degree course in the Environmental Health. It is alleged the failure to accord Moi University accreditation affects students who are unable to sit the professional examinations offered by the 2<sup>nd</sup> Respondent simply because the institution is not accredited.

66. **Section 24(1) of the Public Health Officers (Training, Registration and Licensing) Act, 2012**, provides that “*all certificates, diplomas or degrees issued by a university or accredited under the Universities Act, 2012 shall be recognized by the Council.*”

67. The Respondent in response urges concerning the 2<sup>nd</sup> Respondent’s failure, refusal or neglect to accredit students of Moi University to undertake their exams, the 3<sup>rd</sup> Respondent urges that by the letter of 12<sup>th</sup> September, 2017, Moi University committed to pay Kshs. 587,500/- to facilitate accreditation, which they had not done to date. He added that the Council had not refused or failed to accredit the Institution and that Moi University had not raised any complaint with the 2<sup>nd</sup> Respondent about the process.

68. The Petitioner has not controverted the 2<sup>nd</sup> Respondents contention that failure of accreditation has been occasioned by the Moi University’s failure to pay amount required to facilitate accreditation. It therefore appears the failure to accredit the Moi University is due to failure of the University to pay Kshs.587,500 to facilitate accreditation and secondly there is no complain that had been raised by the University about the process.

69. In view of the above I find that the Petitioner has not shown that the 2<sup>nd</sup> Respondent should accredit Moi University without meeting the terms and conditions set out by the 2<sup>nd</sup> Respondent.

**H. WHETHER THE KENYA GAZETTE NOTICE NOS. 11295, 11296 AND 11297 OF 21<sup>ST</sup> SEPTEMBER 2017 ARE INVALID, NULL AND VOID.**

70. The Petitioner contend that the appointment of the interested Parties by the 1<sup>st</sup> respondent made vide the impugned gazette notice are invalid, null and void. The Petitioner further urge gone are the days when public servants served under the pleasure of the appointing authority and were appointed at the whims of the appointing authority, mainly the president and broader executive.

71. The **Black's law Dictionary, 10<sup>th</sup> Edition** gives the meaning of a 'pleasure appointment' as:-

***“The assignment of someone to employment that can be taken away at any time, with no requirement of cause, notice or hearing.”***

72. Since the promulgation of the New Constitution 2010 in Kenya, the pleasure doctrine was swept by new changes for good, hence the pleasure doctrine ceased to apply in Kenya anymore and now it is contrary to the Constitution of Kenya for anyone to proceed to appoint and/or dismiss the chairperson and other members of Board of Public entities as if they still serve at the President's leisure as was the case under the repealed constitution of Kenya.

73. The Court of Appeal in the case of **Narok County Grounds & another v. Richard Bwogo Birir & another [2015] eKLR**, observed that:-

***“54. ...It is not in dispute that he was neither informed of any allegations against him nor given an opportunity to defend himself, and no reason whatsoever was given for the dismissal. In sum, as earlier stated, there was no procedural fairness. The Supreme Court of Canada in the Dunsmuir case (supra) observed:-***

***“79. Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however easy to apply. As has been noted many time, ‘the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.’”***

55. The Petitioner contend that there was no adherence to the due process of the law in this case and referred to the case of **Selvarajan vs. Race Relations Board [1976] 1 ALL ER 12 Lord Denng** where the Court held thus:-

***“...in all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigations and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution nor proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answer it. The investigating body is however the mater of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only.”***

***56. It is clear to us therefore, and we uphold the trial court on this, that the action of the Governor violated Birir's rights to fair administrative action under Article 47 and fair labour practices under Article 41. The Governor also violated various provisions of the Constitution as set out hereinabove.”***

74. In view of the clear provision in the new constitution, the powers of the president and Cabinet Secretaries purporting to have power to hire and fire members of the Boards at whim are untenable and unconstitutional under the **Constitution of Kenya 2010**.

75. **Article 159(2)(e) of the Constitution of Kenya** clearly requires the Courts in exercising Judicial authority to be guided by the principles that ensures ***“the purpose and principles of the Constitution shall be protected and promoted.”***

76. It can easily be noted the purpose why Kenyans wanted Public Service Commission to be responsible for the recruitment of public officers and that the process be transparent, merit based, and competitive is well articulated in the Final Report of the **Constitution of Kenya Review Commission (CKRC)**. The report highlights that Kenyans told the Commission the following regarding Public Service (page 213):

**(a) As regard appointments, that**

- a. Civil servants should be appointed and promoted on merit after regular interviewing procedures;**
- b. All public service employees should be appointed by the Public Service Commission;**
- c. The positons of permanent secretaries should be advertised;**
- d. The President should appoint Public Service Commission members**

**(b) As regards independence, that**

- i. The Public Service Commission should be an independent body;**
- ii. There be no political appointments so as to strength the Commission's management and discipline roles;**

77. In view of the above, I find that the Petitioner has demonstrated that the 1<sup>st</sup> Respondent acted unconstitutionally, illegally and ultra vires when he purported to appoint the Board members for the Public Health Officers and Technicians Council, of Kenya through a process that is not provided in law, and when it is clear that the people appointed were just handpicked individually by the 3<sup>rd</sup> Respondent. Accordingly the Kenya Gazette Nos.11295, 11296, and 11297 of 21<sup>st</sup> September 2017 are invalid, null and void.

#### **I. WHETHER LEGAL NOTICE NO. 61 OF 23<sup>RD</sup> MARCH, 2015, IS INVALID, NULL AND VOID?**

78. The Petitioner contend that the Legal Notice No. 61 of 23<sup>rd</sup> March 2015 is invalid, null and void and of no legal consequences since it was enacted in complete disregard of **Articles 10, 47, 129, 153 (4) (a); 201(a) and 232(1) (d) of the Constitution** violating **Sections 4, 5, 6, 7 and 8 of the Statutory Instruments Act** and **Sections 3, 4, and 5 of the Fair Administrative Action Act**.

79. In the instant Petition it is contested that there was no public participation. It is clear that the 2<sup>nd</sup> Respondent enacted all the three impugned statutory instruments through a process that did not provide for public participation which needs to meet the threshold set in law. In fact, there is not an iota of evidence produced before this Court that any public consultations were held prior to the enactment of the statutory instruments. It is clear that **Section 5 of the Statutory Instruments Act** requires in mandatory terms that persons likely to be affected are consulted, and the section also lays out the process and the minimum thresholds to be met.

80. Further it is clear that Regulatory impact instruments were not prepared. It is not disputed that all the impugned statutory instruments were enacted with the contemptuous disregard for **Section 6 of the Statutory Instruments Act** which provides that, **“the regulation making authority shall, prior to making the statutory instrument, prepare a regulatory impact statement about the instrument.”**

81. I find that the current disputes surrounding the system would have been avoided had Regulatory impact statements been prepared complying with the contents of **Section 7 of the Act** and in accordance with **Section 8 of the Statutory Instruments Act**.

82. Further it has been demonstrated that there was no parliamentary scrutiny of the statutory instruments. I find that the legal instruments were voided pursuant to **Section 11(4) of the Statutory Instruments Act** for failure of being presented to Parliament for scrutiny and approval. In view of such non-compliance. I find that they are nullities ab initio. The impugned legal instruments are void due to the fact that they were enacted in complete disregard of express provisions of the law including **Articles 10(2)(a); 47, 129, 153(4)(a); 201(a) and 232 (2) of the Constitution of Kenya; sections 4(a), 5, 6, 8, 9, 10, and 11(2) of the Statutory Instruments Act**, and the corresponding provisions of the **Fair Administrative Action Act**.

#### **J. WHETHER THE 2<sup>ND</sup> RESPONDENT SHOULD HOLD CONSULTATION WITH MEMBERS OF THE PUBLIC AND OTHER CONCERNED STAKEHOLDERS ON THE FEES FOR COUNCIL EXAMINATIONS?**

83. The Petitioner aver that it is unacceptable that the fees for Council examinations are set and fixed by the 2<sup>nd</sup> Respondent without holding consultations with members of the Public and other concerned stakeholders. It is Petitioner’s contention that the process of generating consensus is entrenched in the constitution and in statute under the principle of public participation.

84. The Petitioner urges that **Article 10 of the Constitution** contains the national values and principles of governance which include the rule of law, democracy and participation of the people; hence public participation as a national value is an expression of the sovereignty of the people of Kenya.

85. The Petitioner further urges that **Article 73 of the Constitution** underscores the obligation on State Officers and other public officials to involve the public in administrative actions that affect them. In particular, **Article 72(1)(b)** provides that Authority assigned to a State officer – (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

86. The Petitioner further relies on **Article 201 (a) of the Constitution**, on the principles of public finance in the Republic, provides that, **“there shall be openness and accountability, including public participation in financial matters.”**

87. Pursuant to **Article 232 (1)(d), the Constitution** provides that the values and principles of public service include the involvement of the people in the process of policy making.

88. In October 2014, the Public Service Commission issued Guidelines for Public Participation in Policy Formulation, wherein it is clearly stated that:-

**“Public participation is the deliberative process by which citizens, civil society organizations, and government actors are involved in policymaking and implementation before decisions are made. It recognizes the pluralism of aims and values, and enables collaborative problem-solving designed to achieve more legitimate policies.**

**The objective of public participation is:**

- a) To provide the public with balanced and objective information to assist them in understanding the problem, alternatives and opportunities and/or solutions**
- b) To obtain public feedback on analysis, alternatives and/or decisions**
- c) To work directly with the public throughout the process to ensure that the public concerns and aspirations are**

***d) To partner with the public in each aspect of the decision including development of alternative and the identification of the preferred solution.”***

89. The Petitioner further urges that long before the Constitution of Kenya 2010 was promulgated on 27<sup>th</sup> August 2010, the Court has embraced the principle of public participation. In ***Republic vs. Ministry of Finance and Another Ex part Nyong'o Nairobi HCMCA No. 1078 of 2007 (HCK) (2007) KLR 299***, the Court held:

***“Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People’s participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests....”***

90. The Petitioner further contend that though the respondents have a broad measure of discretion in how it achieves the object of public participation, it must comply with the provisions of ***Section 4, 5, and 6 of the Fair Administrative Action Act 2015***. It must be clear that a reasonable level of participation has been afforded to the public. An Kenyan Courts have endorsed what Sachs J., observed in ***Ministry of Health and Another No v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)*** at para 630, that;

***“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.”***

91. In determining whether public participation was undertaken, the courts have always looked at a number of factors and more specifically the nature of legislation that is in question and the nature of the institution in question. In the instant Petition the 2<sup>nd</sup> Respondent is a Public Health Officer and Technical Council, which is mandated to carry out particular functions and the members thereto represent public interest. The members of the Council represent Public Participation as a national value is recognized under ***Article 10 of the Constitution***. Public participation requires a proper consideration of the public interest.

92. The 2<sup>nd</sup> Respondent in discharge of its mandate is guided by regulations and fees guidelines. It has not at all been demonstrated that the 2<sup>nd</sup> respondent has acted contrary to the regulations and fees guidelines and that it has not complied with the law nor has it been demonstrated the council is not properly representative of the public nor has it been shown the 2<sup>nd</sup> Respondent has not been consulting with members of public and other stakeholders on the fees for council examination. The Petitioner has failed to show the 2<sup>nd</sup> Respondent has not been holding consultation with members of public and other stakeholders on the fees for council examinations. I note it is trite that he who alleges has to discharge the burden of proof to succeed. In regard to this prayer I find that no evidence in support of the Petitioner’s claim under the aforesaid issue has been produced.

93. ***The upshot is that I find that the Petitioner’s Petition is meritorious and is allowed in the following terms:***

***a) The Preliminary Objection by 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is without merits and is dismissed. The Court has jurisdiction to hear and determine this Petition.***

***b) A declaration be and is HEREBY issued that the 3<sup>rd</sup> Respondent’s failure to submit the accounts of the 2<sup>nd</sup> Respondent to the Auditor General violated articles 201, 226(3) and 229(4)(b) of the Constitution.***

***c) A declaration be and is HEREBY issued that the 3<sup>rd</sup> Respondent acted unconstitutionally, illegally and ultra vires when he purported to appoint a Mr. Simon Kimani as the Acting Chairman of the 2<sup>nd</sup> Respondent and one of the mandatory signatories of the Council’s bank accounts.***

***d) A declaration that the 3<sup>rd</sup> Respondent irregularly awarded consultancy services without competitive bidding to M/s Lumumba Mogere & Co. Advocates is not proved and is declined.***

***e) A declaration be and is HEREBY issued that the 3<sup>rd</sup> Respondent acted unconstitutionally, illegally and ultra vires when he purported to appoint the persons listed in the 1<sup>st</sup> Respondent’s letter to the 5<sup>th</sup> Respondent Ref: MOH/ADM/CONF/LEG/1 VOL 2, dated 31<sup>st</sup> August, 2017 titled “Gazettement of Board Members for the Public Health Officers and Technicians Council of Kenya”.***

***f) A declaration that 2<sup>nd</sup> Respondent should accredit Moi University is not proved and is declined.***

***g) A declaration be and is HEREBY issued that Legal Notice No. 61 of 23<sup>rd</sup> March, 2015 and The Kenya Gazette Notice Nos. 11295, 11296 and 11297 of 21<sup>st</sup> September 2017 are invalid, null and void.***

***h) A declaration that the 2<sup>nd</sup> Respondent should hold consultations with members of public and other concerned stakeholders on fees for council examinations not proved and is declined.***

***i) A declaration be and is hereby issued that the purported appointment by the 3<sup>rd</sup> Respondent of members of the Public Health Officers and Technicians Council (PHOTC) of Kenya is unconstitutional and, therefore, invalid, null and void ab***

*initio.*

**II. Orders:**

- a) An order be and is **HEREBY** issued quashing The Kenya Gazette Notice Nos. 11295, 11296 and 11297 of 21<sup>st</sup> September 2017.
  
- b) An order be and is **HEREBY** issued Quashing Legal Notice No. 61 of 23<sup>rd</sup> March, 2015 (the Public Health Officers (Fees and Rates) Regulations, 2015).
  
- c) An order be and is **HEREBY** issued Quashing the 1<sup>st</sup> Respondent's letter to the 5<sup>th</sup> Respondent Ref: MOH/ADM/CONF/LEG/1 VOL 2, dated 31<sup>st</sup> August, 2017 titled "Gazettement of Board Members for the Public Health Officers and Technicians Council of Kenya".
  
- d) An order be and is **HEREBY** issued compelling the 2<sup>nd</sup> Respondent to hand over its books of accounts for the period 2013/2014 – 2016/2017 to the Auditor General with immediate effect.
  
- e) An order directing the 2<sup>nd</sup> Respondent to develop fees and rates regulations for public health officers in not proved and is declined.
  
- f) Costs to the Petitioner.

Dated, Signed and Delivered at Nairobi on this 22<sup>nd</sup> day of October, 2020.

.....

J. A. MAKAU

JUDGE