



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E280 OF 2020

MICHAEL OUMA ODERO.....PETITIONER

VERSUS

KENYA NUTRINIONISTS & DIETICIANS INSTITUTE.....RESPONDENT

JUDGMENT

Introduction:

1. *Michael Ouma Odero*, the Petitioner herein, was until 20th August, 2020 a Member of and duly registered by the Kenya Nutritionists & Dieticians Institute, the Respondent herein, as a Clinical Nutritionist. The Petitioner is a graduate in Bachelor of Science in Nutrition and Dietetics and is currently pursuing a Master's Degree in Clinical Nutrition. He was licensed under Professional License Reference No. G/2298/17 and by extension Private Licence No. KND/REG/PP13/20 for Middle Health Solution (BN/9PCQVKZ).

2. The Petitioner was found guilty of gross misconduct by the Respondent and subsequently deregistered. His name removed from the Respondent's Register. As a consequence, the Petitioner is not allowed to practise as a Nutritionist and Dietician in Kenya and was ordered to surrender his original Registration Certificate and the Private Practice Licence.

3. Opposed to the decision, the Petitioner filed the Petition subject of this judgment.

4. The Respondent, a body corporate with perpetual succession and legal capacity is established under and its functions set out in The Nutritionists and Dieticians Act, No. 18 of 2007 (hereinafter referred to as '**the Nutritionists Act**').

The Petition:

5. The Petition is dated 16/09/2020. It is supported by twin Affidavits of the Petitioner. They are a Supporting Affidavit and a Supplementary Affidavit sworn on 16/09/2020 and 06/10/2020 respectively.

6. The Petitioner accuses the Respondent of fundamentally breaching his right to a fair hearing as protected under Articles 25, 27 and 50 of the Constitution.

7. The Petition was heard by way of reliance to Affidavit evidence and submissions. The Petitioner wholly relied on his submissions dated 08/10/2020.

The Response:

8. The Petition is opposed. The Respondent filed a Replying Affidavit through its Chief Executive Officer one *Dr. David Okeyo*. The Affidavit was sworn on 02/10/2020.

9. The Respondent contends that the Petitioner was accorded a fair hearing within the constitutional and statutory parameters. It also filed and relied on the submissions dated 13/10/2020.

Issue for Determination:

10. I have carefully considered the Petition, the response thereto, the parties' submissions and the decisions referred to. There is only one issue for consideration in this matter. It is whether the Petitioner was accorded a fair hearing within the meaning of the Constitution and the law.

Analysis and Determination:

11. The Petitioner hotly contests his deregistration from the membership of the Respondent. The facts in this matter are fairly straightforward. The Petitioner avers that on 3rd August, 2020 he received, through his electronic mail address, a letter from the Respondent's Disciplinary Committee. The letter was a Notice to Show Cause why disciplinary action should not be taken against him as a result of some allegations contained therein. I will hereinafter refer to the letter as '**the Notice**'. The Notice required the Petitioner to attend the disciplinary proceedings on 17th August, 2020. However, due to the Covid-19 pandemic ravaging the world, the disciplinary proceedings were to be conducted virtually. The Respondent undertook in the Notice to send a link through the Petitioner's official electronic mail well before the date scheduled for the hearing of the Notice.

12. The Petitioner promptly responded to the Notice. He stated as follows: -

Michael Ouma Odera confirms reception of your purported disciplinary letter and confirms to you the following: -

1) I, Michael Ouma Odera, WILL NOT appear before an illegitimate council formed by forgery of signatures and subsequently stealing of elections for chair.

2) I, Michael Ouma Odera, WILL NOT appear before illegitimate body which has stolen money from Nutritionists cases including Mlolotngo Building and Weetabix Saga.

3) I, Michael Ouma Odera, WILL NOT AND CANNOT appear before those who stole 8 million from Nutritionists in financial year 2017/18.

Kindly, find it easy to proceed with this matter, am very ready to meet you in court.

Yours faithfully,

Ouma Odera Michael."

13. As a result of the foregoing, the Respondent did not send the link to the Petitioner as it had indicated in the Notice. Come the 17th August, 2020 the disciplinary proceedings proceeded in the absence of the Petitioner. The Respondent's Disciplinary Committee (hereinafter referred to as '**the Committee**') discussed the matter under MIN/023/2020 as follows: -

A letter inviting Mr. Odera to the disciplinary meeting had been sent and he had responded that he would not appear before an "illegal" group and suggested we meet in court.

Members Noted that the Professional: -

i) Has no regard for authority

ii) Has displayed high levels of arrogance

iii) Feels that he is above the law and KNDI can do nothing to him.

iv) Is injurious and has resulted into additional criminalization with other government agencies i.e. KENAS.

The review of the matter at hand was guided by Section 26 of the ACT from which disciplinary committee draws its powers. It, was therefore unanimously agreed;

i. That the professional Mr. Michael Ouma Odera ceases to be recognized as a Clinical Nutritionist and therefore deregistered.

ii. The chair of the disciplinary committee to write a letter notifying him of the same and the same to be copied to the CEO KNDI and KNDI's legal advisor.

iii. The public be informed accordingly using KNDI Website and by writing to the relevant interested government authorities.

14. The Committee then resolved to deregister the Petitioner from the Respondent's membership. Other sanctions were attached to the deregistration. The Respondent then allegedly formally wrote a letter dated 20th August, 2020 to the Petitioner informing him of the decision of the Respondent.

15. The Petitioner denies receiving the Respondent's letter dated 20th August, 2020. On 25th August, 2020 the Petitioner was called by a colleague and informed that the Respondent had published in its official website a general notice to the public indicating that the Petitioner is

no longer a registered member of the Respondent with effect from 17th August, 2020. The Petitioner confirmed the publication. He learnt through the publication that he had been found guilty of gross misconduct and as a result he was deregistered from the membership of the Respondent. Further, he was no longer authorized to practice as a Clinical Nutritionist since his Practice Licenses were revoked.

16. The Petitioner instituted these proceedings. He contends that the Respondent's actions grossly violated his rights under Articles 25, 27(1), (2), 28, 47 and 50 of the Constitution as well as under the Fair Administrative Actions Act.

17. Relying on *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2019] eKLR, *Republic v Board of Governors, Our Lady of Victory Girls School Kapnyeberai & another Ex-parte Korir Kipyego Joseph & another* [2015] eKLR, *Nyongesa & 4 others v Egerton University College* [1990] eKLR, **Council of Civil Servants Union –Vs- Minister for the Civil Service (1985) AC 2 and Kevin K Mwitii & others v Kenya School of Law & others** [2015] eKLR, the Petitioner submitted that he had fully demonstrated that his rights were violated and is entitled to the reliefs sought in the Petition.

18. The Respondent is of the contrary position. It contends that the Petitioner's response to the Notice amounted to waiver of the right to be heard. The Respondent argued that as a result of the Petitioner's response, it was not under any further obligation to send the link as it had earlier undertaken. The disciplinary proceedings were therefore lawful as they were carried out under the Nutritionists Act.

19. According to the Respondent, the proceedings before its Committee on 20th August, 2020 are valid as none of the Petitioner's rights was infringed either as alleged or at all.

20. As the matter rests on whether the Constitution and the law was upheld during the disciplinary hearing, the starting point is the Constitution itself. **Article 2** *inter alia* declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency. Further, any act or omission in contravention of the Constitution is invalid. **Article 3** places an obligation upon every person to respect, uphold and defend the Constitution.

21. **Article 10** provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions.

22. The Constitution also provided for alignment of the laws then in force at its promulgation. Section 7(1) of the Sixth Schedule states as follows: -

Any law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

23. Speaking on the Constitution, Ringera, J in *Njoya and Others vs. Attorney General* {2004} 1 KLR 232, {2008} 2 KLR (EP) 624 (HCK) stated thus: -

... the Constitution is the supreme law of the land; it's is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles.

24. In *Joseph Kimani Gathungu vs. Attorney General & 5 Others Constitutional Reference No. 12 of 2010* the Supreme Court of Kenya (Ojwang, JSC) stated as follows: -

A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by "social orientation", and as its main theme, "rights, welfare, empowerment", and the Constitution offers these values as the reference-point in governance functions.

Given the supremacy of the Constitution, the manner in which the Constitution is interpreted and applied takes the centre-stage. **Article 259** of the Constitution deals with the interpretation of the Constitution. It obligates anyone interpreting the Constitution to do so in a manner that '*promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance*'.

25. **Article 20(3)** obligates any Court applying a provision of the Bill of Rights to develop the law to the extent that it gives effect to a right or fundamental freedom, to adopt the interpretation that most favours the enforcement of a right or fundamental freedom, to promote the values that underlie an open and democratic society based on human dignity, equality, equity, freedom and the spirit, purport and objects of the Bill of Rights.

26. **Article 19** provides that the Bill of Rights, which comprises of the human rights and fundamental freedoms, is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The human rights and fundamental freedoms are inherent in that they belong to each individual and are not granted by the State. They are also only subject to the limitations contemplated in the Constitution.

27. The Supreme Court has severally laid down guidance on the interpretation of the 2010 Constitution. In *In Re the Speaker of the Senate & Another v Attorney General & 4 Others; Supreme Court Advisory Opinion No. 2 of 2013; [2013] eKLR* where retired Chief Justice

Mutunga in his concurring opinion expressed himself as follows: -

[156] *The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitution borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.* (emphasis mine).

28. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR the Supreme Court further stated as follows: -

[356] *We revisit once again the critical theory of constitutional-interpretation and relate it to the emerging human rights jurisprudence based on Chapter Four – The Bill of Rights – of our Constitution. The fundamental right in question in this case is the freedom and the independence of the media. We have taken this opportunity to illustrate how historical, economic, social, cultural, and political content is fundamentally critical in discerning the various provisions of the Constitution that pronounce on its theory of interpretation. A brief narrative of the historical, economic, social, cultural, and political background to Articles 4(2), 33, 34, and 35 of our Constitution has been given above in paragraphs 145-163.*

[357] *We begin with the concurring opinion of the CJ and President in Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014 left off (see paragraphs 227-232). In paragraphs 232 and 233 he stated thus:*

[232] *...References to Black's Law Dictionary will not, therefore, always be enough, and references to foreign cases will have to take into account these peculiar Kenyan needs and contexts. [Emphasis supplied]*

[233] *It is possible to set out the ingredients of the theory of the interpretation of the Constitution: the theory is derived from the Constitution through conceptions that my dissenting and concurring opinions have signalled, as examples of interpretative coordinates; it is also derived from the provisions of Section 3 of the Supreme Court Act, that introduce non-legal phenomena into the interpretation of the Constitution, so as to enrich the jurisprudence evolved while interpreting all its provisions; and the strands emerging from the various chapters also crystallize this theory. Ultimately, therefore, this Court as the custodian of the norm of the Constitution has to oversee the coherence, certainty, harmony, predictability, uniformity, and stability of various interpretative frameworks dully authorized. The overall objective of the interpretative theory, in the terms of the Supreme Court Act, is to "facilitate the social, economic and political growth" of Kenya.*

29. In *In the Matter of the Kenya National Commission on Human Rights; Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR* the Supreme Court dealt with the holistic interpretation of the Constitution at paragraph 26, thus: -

But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances.

30. In the words of the retired Chief Justice of Israel Aharon Barak in *The Judge in a Democracy* (Princeton: Princeton University Press, 2006) 308 observed, that "...one who interprets a single clause of the constitution interprets the entire constitution...".

31. In a majority decision in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Supreme Court Advisory Opinion Application No. 2 of 2012* at para 54, the Supreme Court further stated as follows on the interpretation of the Constitution: -

Certain provisions of the Constitution of Kenya have to be perceived in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.

32. In interpreting the Constitution, a Court must always remain alive to the truism that a Constitution has a structural posture. It has the main framework and pillars forming its 'core and an unalienable soul.' That is the **basic structure of the Constitution**. Such a structure is so sacred that it cannot even be undermined by a constitutional amendment. This is the doctrine variously referred to as the "**basic structure doctrine**" or *the doctrine and theory of unamendability of "eternity clauses"* or *the doctrine and theory of "constitutional entrenchment*

clauses” or *the doctrine and theory of “unamendable constitutional provisions”* or *the doctrine and theory of “unconstitutional constitutional” clauses*. (See: The Supreme Court of India in *Kesavananda Bharati v State of Kerala & Anor* (1973) 4 SCC 225, *Golak Nath vs State of Punjab* and *Sajjan Singh* 1965 AIR 845 and *Minerva Mills v. Union of India* AIR 1980 SC 1789; The Constitutional Court of South Africa in *Re Certification of the Constitution of the Republic of South-Africa* 1996(4) SALR 744 (CC); *Executive Council of the Western Cape Legislature v. President of the Republic* 1995 10 BCLR 1289 (CC) and the High Court in Tanzania in *Christopher Mtikila v. Attorney General of Tanzania* (10 of 2005) [2006] TZHC 5; among others).

33. A Court, also, ought to be guided by the language used in the Constitution. A Court should not unduly strain to impose a meaning that the text is not reasonably capable of bearing. It should also avoid what was described as ‘*excessive peering at the language to be interpreted*’. (See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others vs. Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24 and *Johannesburg Municipality vs. Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted *Jaga v Dönges, N.O. and Another; Bhana v Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 664G-H).

34. Courts have variously interpreted the Constitution. Expounding on Article 10, the Court of Appeal in ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal No. 224 of 2017; [2017] eKLR*** held that:

In our view, analysis of the jurisprudence from the Supreme Court leads us to the clear conclusion that Article 10 (2) of the Constitution is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in Article 10 (2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles. Kenyans did not promulgate the 2010 Constitution in order to have devolution, good governance, democracy, rule of law and participation of the people to be realized in a progressive manner in some time in the future; it could never have been the intention of Kenyans to have good governance, transparency and accountability to be realized and enforced gradually. Likewise, the values of human dignity, equity, social justice, inclusiveness and non-discrimination cannot be aspirational and incremental, but are justiciable and immediately enforceable. Our view on this matter is reinforced by Article 259(1) (a) which enjoins all persons to interpret the Constitution in a manner that promotes its values and principles.

Consequently, in this appeal, we make a firm determination that Article 10 (2) of the Constitution is justiciable and enforceable and violation of the Article can found a cause of action either on its own or in conjunction with other Constitutional Articles or Statutes as appropriate.

35. As the anchor provision in this matter is **Article 50(1)** of the Constitution, I will reproduce it as under: -

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

36. The above provision is part of the Bill of Rights.

37. In light of the events which took place between the parties herein, the pertinent issue is for this Court to determine if the Petitioner’s position as contained in his response dated 3rd August, 2020 in stating that he will not appear before the Committee amounted to waiver of the right under Article 50(1) of the Constitution to the extent that the Respondent was discharged of the duty to send the link as it had undertaken in its letter dated 3rd August, 2020.

38. **Article 24** of the Constitution is on limitation of human rights and fundamental freedoms in the Bill of Rights. It enumerates the specific instances where any limitation is permissible. It states as follows: -

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the

right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clauses (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(a) Article 31—Privacy;

(b) Article 36—Freedom of association;

(c) Article 37—Assembly, demonstration, picketing and petition;

(d) Article 41—Labour relations;

(e) Article 43—Economic and social rights; and

(f) Article 49—Rights of arrested persons.

39. **Article 25** provides for the specific rights and fundamental freedoms which **cannot** be limited. It is tailored as follows: -

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) *freedom from torture and cruel, inhuman or degrading treatment or punishment;*

(b) *freedom from slavery or servitude;*

(c) ***the right to a fair trial; and***

(d) *the right to an order of habeas corpus.*

40. The right to a fair trial is among the rights and fundamental freedoms which cannot be limited in anyway whatsoever. It is therefore one of the rights forming the basic structure of the Constitution. As such, the question which now calls for an answer is whether the doctrine of waiver is applicable in the circumstances of this case. In other words, is the Petitioner, by his conduct, estopped from claiming infringement of his right to a fair trial?

41. Courts have dealt with this question. The Court of Appeal in Eldoret in ***Civil Appeal 51 & 58 (Consolidated) Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR*** had occasion to consider whether human rights and fundamental freedoms can be waived or acquiesced to by a person. The appeal related to an alleged acquisition, seizure and subsequent sub-division of land without following due process of law.

42. The parties contested the protection of private property as enshrined in **Section 75** of the retired Constitution and **Article 40** of the 2010 Constitution. The Respondents contended that they were the registered proprietors of the land in question and that the Government of Kenya had fraudulently, unlawfully and without following the laid down procedure for compulsory acquisition of land acquired and subdivided portions of the suit land.

43. The Respondents prayed among many other orders, declaration that the seizure of the land was without consent or compensation and thus unconstitutional, a declaration that there was violation of the Respondents proprietary rights under Section 75 of the retired constitution and Article 40 of the 2010 Constitution.

44. The Appellants refuted any unlawful conduct and alleged that the cause of action if any, by the Respondents was extinguished by the doctrine of laches.

45. It was the Appellants' case that the cause of action arose over thirty years ago way back in the 1980s; that the Respondents ought to have filed the Petition within a reasonable time from when the cause of action arose; that there had been no reasonable explanation for the delay in filing the Petition; that the Respondents slept on their rights and are guilty of laches and indolence; that their rights, if any, are stale and unenforceable; that the Appellants have been prejudiced by the late filing of the Petition as most of their witnesses are either dead or have retired from public office.

46. In making a determination on whether the Respondents rights had been defeated by laches the Court observed as hereunder: -

We have considered submissions by both parties on the issue of delay, acquiescence and the doctrine of laches. Our decision on this matter is premised on appreciation that what was before the trial court was a Petition alleging violation of the right to property as one of the fundamental rights in the Constitution. Both the Petition and amended Petition are grounded and entitled “In the Matter of Deprivation of Property Contrary to Section 75 of the old Constitution and Article 40 of the 2010 Constitution.” The Petition is essentially a petition to enforce the constitutional right to property.

47. The Court further made reference to the decisions in *Metal Box Co Ltd vs. Currys Ltd, (1988) 1 All ER 341* and *Kariuki Kiboi vs. Attorney General [2017] eKLR, Nairobi Civil Appeal No. 90 of 2015*, where the Court of Appeal heard and determined a claim which arose in the mid-1980s and a Petition was filed in 2010. The Court then made the following findings on whether one can acquiesce to an infringement of their human rights and fundamental freedoms: -

61. Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.

48. With respect to the doctrines of **acquiescence** and **estoppel** the Court rendered itself as follows: -

64. We have considered submissions by counsel on estoppel and acquiescence. In our view, there can be no estoppel against the Constitution which is the paramount law of the land. Subject to the express provisions of Article 24 of the 2010 Constitution, no individual can barter away fundamental rights and freedoms enshrined in the Constitution. One can neither acquiesce nor waive the fundamental rights and freedoms protected in the Constitution. Fundamental rights were not kept in the Constitution simply for individual benefits - these rights were put up as a matter of public policy and therefore the doctrine of inordinate delay, estoppel, acquiescence or waiver cannot unequivocally be applied as a bar to enforcement of fundamental rights. We are cognizant that the doctrine of laches is a principle of general application that may apply in constitutional petitions for breach of fundamental rights. However, delay in enforcing a claim for violation of fundamental rights may be permitted or denied depending on the circumstances of each case.

65. In line with Article 20 of the Constitution, respect for fundamental rights is a mandatory obligation on the State and all State Organs and the Bill of Rights applies to all and bind all citizens. No citizen can by his act or conduct relieve the State, a State Organ or any person of the solemn obligation to respect the Bill of Rights. It is in this context that no individual can acquiesce to violation or infringement of fundamental rights. Subject to express constitutional provisions, such as the limitations in Article 24 of the Constitution, neither the state nor an individual can arrogate to itself/himself a right or justification to commit a breach of fundamental rights of any citizen and resort to the doctrine of waiver, acquiescence, inordinate delay, estoppel or other similar principle as absolute defence or excuse.

49. The Court further stated that: -

67. On our part, based on the sacrosanct and inviolable nature of the Bill of Rights, convinced that respect for and enforcement of the Bill of Rights is the cornerstone of political stability in Kenya; persuaded that property and land rights is the foundation of socio-economic relationship in Kenya and further persuaded by merits of comparative jurisprudence cited above and convinced that no individual can barter away and acquiesce to violation of fundamental rights, we find that the trial court did not err in failing to apply the doctrine of laches, estoppel and acquiesce in this matter.

50. The Court of Appel sufficiently spoke. Therefore, regardless of the Petitioner’s email response dated 3rd August, 2020, the Respondent was still constitutionally required to fully comply with the Constitution and the law. In essence, the Respondent was obligated to send the link to the Petitioner as it had undertaken in its letter dated 3rd August, 2020.

51. I now find and hold that the failure by the Respondent to send the link to the Petitioner as it had undertaken denied the Petitioner the right to take part in the disciplinary proceedings. The Petitioner’s right under Article 50(1) of the Constitution was hence violated.

52. Having so found, I must now subject the decision not to send the link aforesaid to the provisions of **Article 47** of the Constitution. The Respondent’s decision in not sending the link to the Petitioner is, also, for the same reasons, a violation of Article 47 of the Constitution. By the Respondent’s own admission, no efforts whatsoever were taken to ensure compliance with Article 47 of the Constitution and the Fair Administrative Actions Act.

53. Article 47 of the Constitution. Sub-articles (1), (2) and (3) states that: -

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

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration

54. The legislation that was contemplated under Article 47(3) is the Fair Administrative Act. No. 4 of 2015. Section 4 thereof provides that: -

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

55. Section 2 of the Fair Administrative Act defines an 'administrative action' and an 'administrator' as follows: -

'administrative action' includes -

- (i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
- (ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

'administrator' means 'a person who takes an administrative action or who makes an administrative decision'.

56. In **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** Court of Appeal addressed itself on the above. The Court held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

57. The South African Constitutional Court in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1** ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

58. The right was further discussed in **Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR**. The Court had the following to say:

25. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano* [39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

a. Illegality - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.

b. Fairness - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. Irrationality and proportionality - The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation**: -

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

59. Emerging from the above, there is no doubt the Respondent's decision in not sending the link to the Petitioner was an administrative action. In sum, it was an administrative action because it affected the legal rights and interests of the Petitioner. As such the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

60. The impugned decision did not conform to the requirements of Article 47 of the Constitution and Fair Administrative Actions Act. At a minimum, to meet the constitutional and statutory threshold, the Respondent had to: -

- (i) Ensure that the Notice to show cause was, in addition to its contents, accompanied with all the necessary information, materials and evidence to be relied upon in making the decision or taking the administrative action;
- (ii) Inform the Petitioner the procedure to be used during the proceedings;
- (iii) Inform the Petitioner of his right to attend the proceedings, in person or in the company of an expert of his choice;
- (iv) Inform the Petitioner of his right to be heard and to make representations in that regard;
- (v) Inform the Petitioner of the right to cross-examine the witnesses;
- (vi) Inform the Petitioner of his right to legal representation;
- (vii) Inform the Petitioner of his right to where necessary to request for an adjournment of the proceedings;
- (viii) Include in the notice the Petitioner's right to a review or internal appeal against an administrative decision;
- (ix) Send the link to the Petitioner notwithstanding the Petitioner's response to the Notice to show cause;
- (x) Send to the Petitioner a statement of reasons pursuant to Section 6 of the Fair Administrative Action Act;
- (xi) Notify the Petitioner of its decision.

61. The Respondent's impugned decision, therefore, infringed Articles 47 and 50(1) of the Constitution as well as the Fair Administrative Actions Act. The impugned decision is hence constitutionally infirm.

Remedies:

62. The Petition has succeeded. The Petitioner is entitled to the declaration and the Order of *Certiorari* sought. On the prayer for compensation for violation of the Petitioner's rights, I will, reproduce the guidance by the Court of Appeal in ***Gitabu Imanyara & 2 Others v Attorney General [2016] eKLR***.

63. Although the extract is rather lengthy, it nevertheless expounds a comprehensive comparative analysis on how other jurisdictions have dealt with the issue. The decision has good jurisprudential content. The Learned Judges expressed themselves as follows: -

The challenge, in our view is not whether we should interfere with a discretionary award of damages by a trial judge but what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual, by a State. It is important to state from the outset that damages arising out of Constitutional violations also known as Constitutional Tort Actions are within public law remedies and different from the common law damages for tort under private law.

It is convenient to consider first, the comparative jurisprudence and general principles applicable to awards and assessment of damages for the violation of the Constitutional rights of an individual by a State. We will do so very briefly and broadly because it is not in doubt under common law principles, that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is at issue. However, in this case and as we posited earlier, we would want to consider what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual by a State under public law.

*The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of ***Siewchand Ramanoop v The AG of T&T***, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.*

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. (e m p h a s i s o u r s .) All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award. (Emphasis ours)

*In the ***Tamara Merson v Drexel Cartwright and Ag (Bahamas) Privy Council Appeal No. 61 of 2003*** the Privy Council held that in some cases, a suitable declaration may suffice to vindicate the right which has been breached. The Court quoted the postulation by Lord Scott of Foscote in ***Merson*** (supra) in which, after citing a passage from ***Ramanoop*** (supra) including the paragraphs set out above, stated thus:*

"[[18]. These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary."

*Taking que from the above decisions, the Privy Council in ***Alphie Subiah v The Attorney General of Trinidad and Tobago*** Privy Council Appeal No. 39 of 2007 pronounced itself on the same point stating that: -*

"The Board's decisions in Ramanoop, paras 17-20, and Merson, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in Merson's case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the

constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of Ramanoop, and Merson, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 516 D-E) for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasised in *Merson*, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression."

*The position of the Privy Council is in no way altered by the South African Case of **Dendy v University of Witwatersrand, Johannesburg & Others** - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:*

"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

"...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

*In **Peters v. Marksman & Another** [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in **Fuller v A-G of Jamaica (Civil Appeal 91/1995, unreported)**, where the Court held that:*

It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable... Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.

*The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in **Doucet-Boudreau v. Nova Scotia (Minister of Education)**, 2003 SCC 62 to include, a remedy that will:*

- (1) meaningfully vindicate the rights and freedoms of the claimants;
- (2) employ means that are legitimate within the framework of our constitutional democracy;
- (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and
- (4) be fair to the party against whom the order is made.

*Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "**appropriate and just**" "according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.*

64. In this case the Petitioner's rights are certainly vindicated *vide* an appropriate declaration and other orders. Although the Respondent violated the rights aforesaid, the Petitioner cannot be wholly absolved since the Respondent's subsequent actions were prompted by the Petitioner's response which was in any way not kind and respectful to the Respondent. The Petitioner in such realization alleged that harsh response was a reaction at the heat of the moment. Be that as it may, the Petitioner did not follow up his communication with another one in a bid to put the record straight once the heat had subsided. The mood of the response was well captured by the Respondent in the disciplinary proceedings. Further, the dispute between the parties is still ongoing.

65. In consideration of the circumstances of this matter I am well convinced that the grant of other remedies rather than damages will serve as adequate, just and appropriate remedies.

Disposition:

66. Flowing from these findings and conclusions, the disposition of the Petition dated 16th September, 2020 is as follows:

(a) A declaration, be and is hereby issued, that the Respondents administrative actions illustrated by the *ex-parte* disciplinary proceedings, the Respondent's letter dated 20th August, 2020, the subsequent public notice communicating deregistration of the Petitioner from the membership of the Respondent and the revocation of the Petitioners Professional License reference No. G/2298/17 and by extension Private License No. KND/REG/PP13/20 for Middle Health Solution (BN/9PCQVKZ) are contrary to the Constitution and the Fair Administrative Actions Act hence unconstitutional, unlawful, un-procedurally fair, null and void.

(b) An Order of Certiorari, be and is hereby issued, calling, removing, delivering up to this Honourable Court and quashing or revoking the Respondent's Disciplinary Committee proceedings of 17th August, 2020, the Respondent's Letter KNDI/DISCIPLINARY/FL/00001(2) dated 20th August, 2020 to the Petitioner and the Respondents public notice published on the Respondent's website communicating deregistration of the Petitioner from the membership of the Respondent as well as revoking the Petitioners Professional License reference No. G/2298/17 by the Respondent and by extension Private License No. KND/REG/PP13/20 for Middle Health Solution (BN/9PCQVKZ).

(c) The Respondent is at liberty to re-hear the complaints against the Petitioner.

(d) Costs to the Petitioner.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 23rd day of November 2020

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Litoro, Counsel instructed by Messrs. Litoro & Omwebu Advocates for the Petitioner.

Prof. Kiama, Counsel instructed by Messrs. Prof. Kiama Wangai & Co. Advocates for the Respondent.

Dominic Waweru – Court Assistant