Ochieng v Public Service Commission & another; Attorney General & another (Interested Parties) (Petition E291 of 2024) [2025] KEHC 12535 (KLR) (Constitutional and Human Rights) (10 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E291 OF 2024

AB MWAMUYE, J

SEPTEMBER 10, 2025

IN THE HIGH COURT OF KENYA AT NAIROBI CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. E291 OF 2024

IN THE MATTER OF ARTICLES 22(1) AND 258(2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2), 10, 23, 73, 75, 94, 95, 109, 165, 232, 234, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 5A(2) AND 5A(3) OF THE UNIVERSITIES ACT, 2012

AND

IN THE MATTER OF THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE CHIEF OF STAFF AND THE HEAD OF PUBLIC SERVICE EXECUTING THE MANDATE OF THE COMMISSION OF UNIVERSITY EDUCATION.

BETWEEN

TOM ODHIAMBO OCHIENG ..... PETITIONER

AND

THE PUBLIC SERVICE COMMISSION ..... 1ST RESPONDENT

THE CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE ... 2ND RESPONDENT

AND

THE HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY

COMMISSION FOR UNIVERSITY EDUCATION ..... INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner, in his Petition dated 12th June, 2024 challenges the constitutional and legal validity of a circular letter Ref. No. OP/CAB.9/60 dated 29th May 2024, issued by the 2nd Respondent, the Chief of Staff and Head of Public Service. The Petitioner contends that the circular, which directs the 2nd Interested Party, the Commission for University Education (CUE), to allow professional bodies to undertake student indexing and to collaborate on a singular accreditation protocol, constitutes an unconstitutional executive overreach. It is alleged to violate the sovereignty of Parliament, the exclusive statutory mandate of CUE, and the principles of public participation and rule of law.

2. The factual matrix of this case is largely uncontested. On 29th May 2024, Mr. Arthur Osiya, writing on behalf of the 2nd Respondent, issued the impugned circular. This circular was a follow-up to a consultative meeting held on 28th May 2024 between CUE and various professional bodies. The circular outlined several resolutions, including: (i) a directive for CUE to issue immediate communication to all universities confirming that designated professional bodies have express approval to undertake indexing of all students pursuing professional courses; and (ii) a directive for CUE to engage with professional bodies to define a singular protocol on accreditation, licensing, and inspection of university programmes that incorporates the mandatory participation of these bodies.

3. Aggrieved by this circular, the Petitioner filed the instant petition on 12th June 2024, seeking the following reliefs:

    i. That pending hearing and subsequent determination of the petition, a conservatory order be issued staying the implementation of the directive in the impugned letter dated 29th May 2024, ref OP/CAB.9/60 to the effect that CUE to issue immediate communication to all the Universities confirming that the designated professional bodies have the express approval to undertake the indexing of all students pursuing respective professional courses.

    ii. That a declaration be and is hereby issued that the 1st and 2nd Respondents are obliged by law and under *the Constitution* vide Articles 10, 132 and 232 whenever they make public policy decisions to observe the rule of law and constitutionalism.

    iii. That an order of certiorari to quash the directive contained in the letter dated 29th May 2024, ref OP/CAB.9/60 to the effect that CUE to issue immediate communication to all the universities confirming that the designate professional bodies have the express approval to undertake the indexing of all students pursuing respective professional courses.

    iv. That a declaration be and is hereby issued that the intended policy of allowing the professional bodies to accredit and index students, is discriminatory, will breach the right to education as enshrined in article 43(f) of *the Constitution* by making university education unnecessarily expensive and further threat to infringe the university students right to human dignity as enshrined in article 28 of *the Constitution*.

    v. That the Honourable Court does direct the 1st Respondent and the 1st interested party by a structural interdict, and the Cabinet Secretary for Education to immediately and without any delay and in consultation with the 1st interested party, the universities and key stakeholders

to develop a Bill for consideration by the National Assembly to regulate and control the roles of professional bodies and those of the 1st interested party in regulating the university programmes.

vi. Such other orders as this Honourable Court shall deem just.

vii. That there be no order as to costs.

The Petitioner's Case;

4. The Petitioner's case, as articulated in the Petition and the application is that the impugned circular is a blatant act of executive law making that violates *the Constitution* in multiple ways.

5. The Petitioner argues that the circular directly contravenes the exclusive mandate granted to CUE under Sections 5A (2) and 5A (3) of the *Universities Act*, 2012. He emphasizes that Section 5A (2) expressly states that the "recognition, licensing, student indexing, approval or accreditation of any academic programme... shall be the exclusive mandate of the Commission to be exercised... at the exclusion of any other person or body." The directive for CUE to confirm that professional bodies can undertake indexing is, therefore, an illegal attempt to delegate this exclusive power.

6. The Petitioner contends that this executive action amounts to a back-door amendment of the *Universities Act*, a function reserved solely for Parliament. By issuing a fiat that effectively re-writes the statutory scheme, the 1st and 2nd Respondents have arrogated to themselves powers they do not possess, thus violating the *Universities Act*, 2012 and *the Constitution*.

7. It is averred that the decision in the impugned letter is a violation of the principles of good governance, particularly public participation under Articles 10 and 232 of *the Constitution*. He asserts that the decision, which will have far reaching implications for university education and students, was made without any meaningful consultation with key stakeholders such as universities, student bodies, and the public.

8. It is contented that subjecting only students in Kenyan universities to indexing by more than 14 professional bodies, while their counterparts who opt to study abroad are exempted, creates unjustifiable differential treatment and will unnecessarily make university education very expensive.

9. It is the Petitioner's case that the directive by the Chief of Staff and the Head of Public Service is unconstitutional for breaching Articles 10 and 232 of *the Constitution* as it directed CUE to carry out an illegality, and thus urged this Court to grant the reliefs sought.

1St Repondent's Case

10. The 1st Respondent, in opposing the Petition, filed Grounds of Opposition dated 11th July 2024 and Preliminary Objection dated 4th July 2024 asserting that the Petition against it is vexatious, malicious and an abuse of the due process of Court. It is contended that it has been wrongly joined to the suit as it had no role in the development or issuance of the impugned circular. Additionally, it is argued that the Petitioner has failed to demonstrate how it was involved in the development or issuance of the impugned circular and neither has he shown how it violated the various Constitutional Articles and the *Universities Act*.

2Nd Respondent's And 1St Interested Party's Case

11. The 2nd Respondent and the 1st Interested Party, represented by the Honourable Attorney-General, opposed the Petition through Grounds of Opposition. It is averred that the entire Petition is not

maintainable in law as it is based on a document that was illegally and unlawfully obtained. They contend that impugned resolutions were interim in status and not final.

12. In response to the allegation of lack of public participation, it was argued that public participation does not automatically vitiate governance process as the allegations must be considered based on the circumstances of each and not in isolation of components of governance process.

13. In urging this court not to grant the orders sought in the Petition, it was argued that this court should prioritize encouraging alternative forms of dispute resolutions premised under Article 159 (2) (c) of *the Constitution*, and by granting the orders sought, it would hinder the parties from pursuing an alternative means of dispute resolution.

14. The Petition was canvassed by way of written submissions and in compliance, the Parties filed their respective written submissions.

Petitioner's Submissions

15. The Petitioner filed his written submissions contending the impugned circular was not illegally obtained. It was submitted that the circular was a public document since it is not denoted as confidential and private, it was copied to nineteen (19) public institutions and it was intended to be used as a public document.

16. It was also submitted that the mere assertion by the 2nd Respondent that the impugned circular was illegally obtained is unfounded since it has failed to discharge its burden of proof as the law of evidence requires. It was claimed that the 2nd Respondent has failed to prove that the circular will render the trial unfair or it would be detrimental to the administration of justice, or make it irrelevant and of little or no probative value. To buttress this position, counsel for the Petitioner relied on the decisions Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others and Stanley Muluvi Kiima (Interested Party) International Commission of Jurists Kenya Chapter (Amicus Curiae) (2019) eKLR.

17. On the merits of the Petition, counsel submitted that the instant Petition meets the threshold for Constitutional Petition as expressed in the case of Anarita Karimi Njeru v Republic [1979] eKLR having clearly set out the specific constitutional provisions alleged to have been violated, as well as the manner in which the said violations are claimed to have occurred.

18. It was further submitted that the issue of indexing and accreditation is solely the mandate of the CUE pursuant to Section 5A (2) and 5A (3) of the *Universities Act*, 2012 and that the executive seeks to override the mandate Parliament and Judiciary through arm twisting and issuance of unlawful orders and illegal fiats. Reliance was placed in the decision on Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General & 4 Others [2017] eKLR. The Petitioner thus urged this Honourable Court to grant the reliefs sought and each party to bear their own costs being a public interest litigation.

1St Respondent's Submissions

19. In its written submissions, the 1st Respondent submitted that no cause of action has been demonstrated against it. It was argued that the responsibility of ensuring that the pleadings establish a cause of action lies with the Petition as was observed in the case of Ndishu & another v Muriungi (Civil Appeal 3 of 2020) [2022] KEHC 2 (KLR).

20. It was contended that the Office of the Head of Public Service is established under the National Government Coordination Act, 2013 as amended in 2024, whereas the Public Service Commission is

established under Article 233 of *the Constitution* and its functions are prescribed in Article 234 thereby making the two institutions separate and that the actions of one cannot be attributed to the other.

21. It was further submitted that the 1st Respondent was wrongly joined to the suit because it was not a party to the drafting or issuance of the impugned circular. Moreover, it was argued that the Petitioner has not demonstrated any nexus between the impugned circular and the 1st Respondent and neither has he disclosed any cause of action against it.

22. On whether to grant the reliefs sought, it was submitted that the Petitioner has failed to demonstrate how the 1st Respondent violated the quoted constitutional provisions in discharging its mandate and thereby the reliefs sought should not be granted.

23. With regard to the request of directing the 1st Interested Party to develop a Bill for consideration to regulate the roles of professional bodies to regulating university programmes, it was argued that the claim is baseless and if there are gaps that the Petitioner has noticed he should forward it to Parliament which is vested with the Constitutional mandate to legislate on issues and thus urged this Honourable Court to dismiss the Petition.

1St Interested Party's Submissions

24. The first and foremost argument raised by the Attorney General is that the entire petition is incompetent and unsustainable in law because it is founded on a document, the circular Referenced No. OP/CAB.9/60, that was illegally and unlawfully obtained. It is submitted that the circular was an internal communication addressed to Dr. Beatrice Inyangala and copied to members of a Consultative Forum and it was not meant for public consumption at its deliberative stage.

25. The Attorney General submitted that the Petitioner has failed to demonstrate how he acquired the document and argues that it must have been illegally obtained. Further, it is argued that the Petitioner ought to have sought this information through the lawful means as stipulated under Article 35 of *the Constitution*. Placing reliance on the Supreme Court decision Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR), it was submitted that illegally obtained document cannot form the basis for originating an action in court and urged the court to strike it out and consequently dismiss the Petition.

26. It was further submitted while relying on the decision in Institute of Certified Public Accountants of Kenya (ICPAK) & 2 others (Interested Parties) [2021] KEHC 9748 (KLR), that matters relating to law reform fall within the domain of policy-making, which is a mandate constitutionally vested in the Executive and the Legislature, and not within the purview of the courts.

27. Further, it is submitted that there is need for coordination between independent commissions and other government organs. Reliance is placed on the Supreme Court advisory opinion in Re Interim Independent Electoral Commission [2011] eKLR, to emphasize that collaboration between various government organs does not imply a surrender of institutional independence.

28. In response to the allegation of lack of public participation, it was submitted that the impugned communication was issued at a preliminary, deliberative stage, and as such, it was premature to invoke the requirement for public participation. It was further contended that such participation would be undertaken upon the finalisation of a concrete policy proposal addressing the subject matter. In support of this position, reliance was placed on Section 6(1) of the *Access to Information Act* and the decision of the Supreme Court in Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others (supra).

29. Invoking the doctrine of ripeness, the Attorney General submitted that the Petition is premature, as no binding decision had emanated from the consultative meeting in question. Reliance was placed on the decision of the Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others, Petitions Nos. 14A, 14B & 14C of 2014 [2014] eKLR, wherein the Court emphasized that allegations must be evaluated within the specific context and circumstances of the case, taking into account the entire governance process rather than isolating individual components thereof. Accordingly, the Court was urged to dismiss the Petition with costs.

Analysis And Issues For Determination

30. After careful consideration of the Petition, grounds in support, responses and the submissions by the parties, the issues for determination are:

    i. Whether the 1st Respondent (Public Service Commission) was properly joined to these proceedings.

    ii. Whether the Petitioner's petition is based on an illegally obtained document and is therefore inadmissible.

Whether the 1st Respondent was properly joined to the Proceedings

31. The jurisprudence of this jurisdiction in this regard has been settled for a long time that a petitioner should be specific as to the right violated and give particulars of it. It is a rule of good sense that aids in the crystallization of issues before the court and, moreover, it gives opportunity to the other party to know the exact nature of the complaint leveled against him and therefore be in a position to give an appropriate answer. It provides structure, sense and symmetry to the litigation and prevents it from being an unruly free for all. The Anarita Karimi Njeru v Republic (supra) and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR are clear and authoritative expositors of that position.

32. Rule 5(d) of the Mutunga Rules provides as follows, regarding joined and striking out of parties:

> " The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
>
> i. order that the name of any party improperly joined, be struck out; and
>
> ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added."

33. The Court has the discretionary power to either strike out any party that is improperly joined or add any person who ought to have been joined or whose presence in the proceedings is necessary for adjudication and settlement of a matter before the Court. Joinder or striking out of a person or party may be done at any stage of the proceedings.

34. The 1st Respondent has persuasively argued that it was wrongly joined to this suit. The Petitioner's own case is centered on a circular issued from the Executive Office of the President by the Chief of Staff and Head of Public Service, the 2nd Respondent herein. The Public Service Commission, the 1st Respondent herein, is established under Article 233 of *the Constitution*, and has a distinct mandate focused on human resource management within the public service. There is no allegation or evidence

linking the 1st Respondent to the drafting, approval, or issuance of the impugned circular issued by the 2nd Respondent.

35. The Petitioner has failed to establish any cause of action against the Public Service Commission (PSC). In Ndishu & Another v Muriungi (supra) the court underscored that:

> " The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action. A pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made."

36. No such claim has been disclosed against the 1st Respondent. Therefore, the presence of the 1st Respondent in the proceedings herein is not necessary and the inevitable conclusion that this court makes, is that the 1st Respondent has been improperly joined herein.

Whether the Petition is based on an illegally obtained document

37. The most critical issue raised by the Respondents is that the petition is founded on an illegally obtained document and must be struck out. This court notes the provisions of article 50(4) of *the Constitution* which provides as follows;

> " Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

38. In addition, Black's Law Dictionary 10th Edition – Page 673 defines illegally obtained evidence as:

> " evidence obtained by violating a statute or a person's constitutional or other right especially - the guarantee against unreasonable search and seizure."

39. According to the provisions of section 64 of the *Evidence Act*, Cap 80 Laws of Kenya, the contents of documents may be proved either by primary or by secondary evidence. Under section 66, secondary evidence includes certified copies given under the provisions of the Act. Section 67 requires that documents must be proved by primary evidence, except in cases mentioned in section 68(1) when secondary evidence may be given of the existence, condition or contents of a document in the following cases, the relevant ones for our purposes being paragraphs (e) and (f):

> " (e) when the original is a public document within the meaning of section 79;
>
> (f) when the original is a document of which a certified copy is permitted by the *Evidence Act* or by any written law to be given in evidence."

40. Section 68(2) (c) provides that in cases mentioned in paragraphs (e) and (f) of section 68(1), a certified copy of a document, but no other kind of secondary evidence, is admissible.

41. The term "public document" is defined at section 79 of the *Evidence Act* as follows:

> "(1) The following documents are public documents-
>
> a. documents forming the acts or records of the acts-
>
> i. of the sovereign authority; or
>
> ii. of official bodies and tribunals; or
>
> iii. of public officers, legislative, judicial or executive, whether of Kenya or of any other country;
>
> b. public records kept in Kenya of private documents.
>
> (2). All documents other than public documents are private."

42. Section 80 of the *Evidence Act* provides for the manner in which public documents are to be certified. It states: -

> " 80. Certified copies of public documents
>
> (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.
>
> (2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section."

43. In the present case, the Respondents and the 1st Interested Party rely on the Supreme Court's decision in Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (supra), where the court expressed strong disapproval of the use of internal memos obtained without following the procedure under the *Access to Information Act*. The court stated that such a violation of procedure not only renders the evidence inadmissible but also impacts its probative value. In arriving at the conclusion, the court stated as follows:

> " Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under *the Constitution* and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.
>
> 24. The petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of

> the 2nd respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the petitioners' case against the 1st and 2nd respondents, and to an extent, the 3rd respondent. No serious answer has been given to that contention. The use of such information before the court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board (supra). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd respondent is guaranteed under *the Constitution* and section 27 of the IEBC Act. This is because the limitation imposed by both article 50(4) and section 27 aforesaid squarely apply to the matter before us."

44. The principle has been firmly established through a consistent line of authoritative judicial precedent. The legal position on the admissibility of evidence, particularly in relation to the manner of its procurement, is underpinned by both statutory provisions and judicial interpretation. Section 80 of the *Evidence Act* encapsulates the general rule that the method by which evidence is obtained is a relevant consideration in determining its admissibility. While the provision does not impose a strict exclusionary rule, it vests the Court with discretion to exclude such evidence where the circumstances surrounding its acquisition are such that its admission would offend the interests of justice.

45. The Supreme Court, in the case of Torino Enterprises Limited v Attorney General [2023] KESC 79 (KLR), delivered a definitive pronouncement on this issue. The Court was unequivocal in its stance, emphasizing that the constitutional right to access information under Article 35 is not absolute and must be exercised within the confines of the law. The Court expressly stated that where a party bypasses the statutory procedure for obtaining information held by the state, any evidence so obtained is tainted by illegality and is inadmissible. The Court further held that such illegality goes to the root of the petition, rendering it incompetent and unsustainable. This principle was established to protect the integrity of legal process and to prevent litigants from benefiting from their own violation of the law. The court stated as follows:

> "…. the impugned documents were public documents within the meaning of section 79 of the *Evidence Act* requiring certification in accordance with sections 68 (1)(e)(f), (2) (c) and 80 of the *Evidence Act*. Moreover, we are guided by this court's decision regarding evidence unlawfully procured, in Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others; Presidential Election Petition No 4 of 2017, [2017] eKLR, wherein we held as follows: "(22) …. We also recognize that information held by the State or state organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information. (23) Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. That duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under *the Constitution* and the constituting provisions of the law.

It was a two-way channel where the right had to be balanced with the obligation to follow due process."

46. Furthermore, the Court of Appeal in Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] KECA 589 (KLR) provided additional guidance which was affirmed by the Supreme Court. While acknowledging the importance of public interest litigation, the court maintained that even noble ends cannot justify unlawful means. The court cautioned that disregarding statutory procedures for obtaining information undermines the legal framework established by Parliament and erodes the very rule of law that petitioners often seek to uphold. The Court thus stated:

> "We reiterate that the appellants claimed to have been supplied with the contentious documents by "conscientious citizens" and "whistleblowers". Based on the foregoing, the appellants ought to have requested the concerned Government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of *the Constitution*. It was not necessary for the appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of *the Constitution* to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned "conscientious citizens" or "whistleblowers" might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question."

47. The Supreme Court, while agreeing with the Court of Appeal in the above decision in Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR) stated as follows;

> "We agree with and affirm the Court of Appeal decision. To admit the illegally obtained information is detrimental to the administration of justice and the provisions of article 50(4) of *the Constitution*. Allowing such documents is akin to sanitising illicit actions of the 1st, 2ndand 3rd respondents of irregularly obtaining evidence, in violation of article 31 of *the Constitution* on the right to privacy including privacy of communication. Further, we agree that such documents adduced by the 1st to 3rd respondents are of utmost confidentiality and relate to communication within government circles, between civil servants, relating to government engagement and operations. Even if the authenticity or contents of the documents was not questioned by the appellants, the production of such documents as evidence must be in accordance with the law. Not having obtained and adduced the documents in the manner set out under sections 80 and 81 of the *Evidence Act* or requested for information under article 35 of *the Constitution*, the documents are inadmissible, we so declare."

48. The consistent thread running through these authorities is an unwavering commitment to procedural propriety. The courts have drawn a clear line that the constitutional authoritative to expose wrongdoing does not grant an authorization to break the law in the process. To hold otherwise would be to create a dangerous precedent where the ends justify the means, thereby weakening the foundational pillars of our legal system.

49. Applying these principles to the present case, I find that the objection must succeed. The Petitioner's case stands or falls on the impugned circular. It is the sole piece of evidence upon which his entire constitutional edifice is constructed. The Petitioner, in his submissions, argued that the document is public in nature because it was not marked "confidential" and was copied to several state organs. With respect, this argument is misconceived and fails to engage with the substance of the objection. The test is not whether the document ought to be public, but whether the Petitioner lawfully made it so by following the prescribed legal procedures. The number of copies does not alter its character as information held by the state, access to which is regulated by statute.

50. The Petitioner has provided no account whatsoever of how he came into possession of this circular. He has not exhibited a request made under the *Access to Information Act*, nor has he demonstrated that it was officially released to him through any lawful means. In the face of a direct challenge to the legitimacy of his evidence, his silence is telling. The burden to prove the lawful acquisition of evidence, once the issue is raised, shifts to the party seeking to rely on it. The Petitioner has conspicuously failed to discharge this burden.

51. In Susan Wariara Kariuki v Diakonie Katastrophenhilfe [2016] eKLR the Court stated the following:

> " This Country now has a Constitution that enables parties to access documents necessary for their case through legal means and there is therefore no need to resort to street methods to do so and as held by Lenaola J (as he then was) in Okiya Omtatah Okoiti & 2 others v Attorney General [2014] eKLR a court of law will not rely on documents that are improperly obtained."

52. The circular, being the bedrock of the petition, is rendered inadmissible. Without it, the petition loses its factual foundation and collapses into a mere abstraction. There are no remaining factual premises upon which this Court can adjudicate the alleged constitutional violations. The petition is therefore not just weak; it is incompetent and incapable of sustaining a constitutional inquiry.

53. The Petitioner's reliance on the case of Philomena Mbete Mwilu vs. Director of Public Prosecutions & 3 Others; Stanley Muluvi Kiima (Interested Party); International Commission of Jurists Kenya Chapter (Amicus Curiae) (supra) is distinguishable. The holding in that case was made in the specific context of a criminal trial and the protection of an accused person's right to a fair trial. The broader public interest in constitutional litigation, while significant, does not override the specific and clear directives from the Supreme Court decisions cited above which directly address the admissibility of evidence in constitutional petitions. The Supreme Court's decision is the prevailing law on this point and is binding on this Court.

54. Having found that the sole piece of evidence propelling this petition is inadmissible, to proceed to determine the merits without lawful evidence would be an academic exercise and would offend the principle that courts only decide on live issues grounded on admissible evidence and therefore the Petition fails on this ground.

55. From the foregoing, the constitutional authoritative decision in Kenya Railways Corporation & 2 others v Okoiti & 3 others (supra), to uphold the rule of law demands that the court guards its own processes from being subverted by illegality. The Petitioner's cause, however public-spirited it may be, cannot be advanced through the use of evidence obtained in defiance of the very laws he seeks to uphold.

56. Consequently, the Petition is found to be premised on an illegally obtained document which is hereby declared inadmissible in evidence. Stripped of its foundational evidence, the Petition cannot stand and is hereby dismissed in its entirety.

57. The Respondents have successfully defended this Petition, the Court makes the following observations. The Petition has been dismissed on the primary ground that it was founded on an illegally obtained document, which rendered it incompetent ab initio. As regards the misjoinder of the 1st Respondent, the Court finds that while it was an error in legal strategy, there is no evidence to suggest it was done maliciously or frivolously. It appears to have been an error born of a misapprehension of the distinct mandates of state organs rather than an attempt to vexatiously multiply proceedings. Taking all the above into consideration and the nature of this matter as one involving public interest, my finding transcends beyond the parties before the court, and therefore I order that each party bear its own costs.

58. The matter be and is hereby dismisses, each party to bear its own costs.

Orders accordingly. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF SEPTEMBER 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioner –Mr. Kipkorir

Counsel for the 1st Respondent - No appearance

Counsel for the 2nd Respondent - No appearance

Counsel for the 1st Interested Party – Mr. Weche h/b Mr. Kaumba

Counsel for the 2nd Interested Party - No appearance

Court Assistant - Ms. Lwambia