Okoiti v Kenya Institute of Supplies Management & 4 others (Petition E023 of 2021) [2023] KEHC 22331 (KLR) (Constitutional and Human Rights) (22 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22331 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E023 OF 2021

HI ONG'UDI, J

SEPTEMBER 22, 2023

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

KENYA INSTITUTE OF SUPPLIES MANAGEMENT ..... 1ST RESPONDENT

THE COUNCIL, KENYA INSTITUTE OF SUPPLIES MANAGEMENT .... 2ND RESPONDENT

JAMES KALOKI ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

CABINET SECRETARY, NATIONAL TREASURY AND PLANNING .... 5TH RESPONDENT

JUDGMENT

1. The petition dated 18th January 2021 was filed under Articles 3(1), 22 (1) & (2) (c), 23, 48, 50(1), 165(3), 258 (1) & (2) (c) of *the Constitution* for the alleged violation of Articles 1(1), 2(1) & (2), 3(1), 10(1) & (2),40, 46(1) (c), 47, 73(2)(a), 73(2)(c)(ii) & (d), 75(1), 232(1)(d) & (e) and 259(1) of *the Constitution*. The petition seeks the following reliefs:

    A. A Declaration that:

        i. The Continuous Professional Development (CPD) policy is unconstitutional, null and void.

        ii. There's a conflict of interest where the institute offers training services in competition with the entities it regulates.

iii. The appointment of Mr. James Kaloki as the Chief Executive Officer of the Kenya Institute of Supplies Management was unlawful and unconstitutional and, therefore, null and void.

iv. A declaration that the 1st and 2nd respondents should pay the costs of this suit.

B. An Order:

i. Prohibiting the 1st and 2nd respondents and their agents from offering training services in competition with the entities it regulates.

ii. Quashing the Continuous Professional Development (CPD) policy.

iii. Quashing the appointment of Mr. James Kaloki as the Chief Executive Officer of the Kenya Institute of Supplies Management.

iv. Compelling the 1st and 2nd respondents to pay to the petitioner the costs of this suit.

C. Any other appropriate relief the court may deem just to grant.

The Petitioner's case

2. This petition is based on the assertion that the 1st respondent which is established as a State Corporation under Section 3 of the *Supplies Practitioners Management Act* No. 17 of 2007 acted ultra vires its mandate as provided under Section 5 of the *Supplies Practitioners Management Act*.

3. The petition is supported by the petitioner's supporting affidavit of even date, a supplementary affidavit dated 18th November 2021, and an undated further affidavit in opposition and response to the 1st, 2nd and 3rd respondents' responses.

4. The *Supplies Practitioners Management Act*'s is the legal framework that makes provision for training and registration; licensing of supplies practitioners and regulation of the supplies practitioners. The 1st respondent is established as the regulator under Section 3 of the Act and its functions being to oversee registration, regulation, education, promotion of standards and discipline for procurement and supply of chain management professionals in addition to its core functions as spelt out under Section 5.

5. The petitioner deposes that the bone of contention herein is that the 1st respondent is acting contrary to its clear functions as espoused in the Act. This is because the 1st respondent in offering training services is in direct competition with the bodies it regulates. He adds that Section 5 provides that the 1st respondent is to only make provision for training of persons seeking registration under the Act and does not in any way empower it to engage in activities which puts it in competition with the training institutes which is deemed to be in conflict with its mandate. The petitioner avers that the 1st respondent cannot therefore be impartial as the regulator. He avers that the principles of natural justice and *the Constitution* under Article 73(2) prohibit conflict of interest in public affairs.

6. The petitioner as well depones that the 1st respondent's requirement that the registered professionals who are employed in procurement and supplies management within various organizations be licensed is inconsistent with its mandate under the Act. According to him the employed persons only require to be registered as members of the 1st respondent while those engaged in active business such as the consultants be licensed.

7. He further depones that not all members can afford the high costs of training offered by the 1st respondent as it demands a minimum of 48 Continuous Professional Development (CPD) points per year which is approximately Ksh.110,000 per person. Obviously failure to acquire the minimum

CPD points equates to loss of membership and the license to practice the following year. From the foregoing, the argument is with such a requirement, employees who generally earn low incomes and unemployed persons cannot afford to pay for the CPD to attain the required points per year. This in effect diminishes the employability of the qualified aspiring professionals.

8. The petitioner is further aggrieved that on 8th January 2021, the 1st respondent unlawfully issued a CPD policy without adhering to the principle of public participation and parliamentary approval as provided under Articles 10(2) and 232(1)(d) of *the Constitution* as well as Sections 2, 4, 5 and 5A of the *Statutory Instruments Act*, No.23 of 2013. Further he states that the respondents made known that the Policy would act retrospectively to 2020 and account for 50% of the required points per year. The petitioner believes that this is a tactic to compulsorily force its members to attend its exorbitant CPD trainings.

9. The petitioner further deposes that the 2nd respondent recruited the 3rd respondent a person who is not a public officer to be the 1st respondent's Chief Executive Officer. He states that this is in violation of Article 73(2)(a) of *the Constitution* and Sections 2 and 34 of the *Public Service Commission Act*, No.10 of 2017.

10. The petitioner as such brings this petition against the 1st and 2nd respondents for failing to uphold Article 3 of *the Constitution*. Furthermore, it's in breach of the rule of law and good governance in violation of Articles 10 and 47(1) of *the Constitution*. Equally, it's in violation of the rights of consumers to the protection of their economic interests under Articles 46(1)(c) of *the Constitution*.

11. In the supplementary affidavit, the petitioner makes known that on 9th November 2021, his friend who works in one of the media houses drew his attention to a discussion about the instant suit which took place on 3rd and 8th September 2021, on a WhatsApp Chat Group called 'WANUNUZI_ke!'

12. He informs that in the discussion, Counsel for the 1st, 2nd and 3rd respondents, Mr. Mwaniki and Dr. Chama, Mr. Oyamo, and Mr. Gana deliberated on why the 1st respondent's decision to offer training services is wrong. They pointed out that this is the mandate of the National Treasury and that it had not delegated the same to the 1st respondent. He deponed that Mr. Mwaniki argued that the 1st respondent had usurped the National Treasury's function.

13. In view of this discussion, the petitioner depones that the pleadings placed on record in this suit by the 1st, 2nd and 3rd respondents are not merited.

The Respondents' case

The 1st Respondent

14. The 1st respondent through its acting Chief Executive Officer, James Kaloki filed a replying affidavit dated 12th February 2021 in answer to the petition. He disparages the petition as being filed in bad faith and an attempt to deter the 1st respondent from carrying out its mandate. He informs that Sections 16 and 20 of the *Supplies Practitioners Management Act* mandate the 1st respondent to register and license supplies practitioners which is constitutional and legal as per Article 36 of *the Constitution*.

15. He avers that the 1st respondent conducts continuous professional development through in person and virtual workshops in which it exposes its members to emerging developments in legislative, judicial and practice in the supplies practice in compliance with Section 16(3) of the Act. Furthermore, with reference to Section 16(10), it is mandatory for all supplies practitioners to comply with the CPD programmes as prescribed by the 2nd respondent. That it is plain that this sub Section does not provide

for prescription of the CPD by other persons and it is for this reason that the 2nd respondent issued the impugned CPD Policy.

16. He avers that contrary to the petitioner's allegation, the CPD Policy was subjected to public participation. That the said policy is administrative in nature and not a statutory instrument within the meaning of the *Statutory Instruments Act*. He further states that although the 1st respondent has exclusive power to prescribe and conduct the CPD programmes, it also recognizes those conducted by its members that satisfy and possess the requisite pedagogy and knowledge of the laws and best practices that govern supply chain management. As such its members who attend the said programmes are entitled to a maximum of 50% CPD points of the required minimum.

17. On the other hand he explains that the purpose of limiting the points to 50% is to ensure that members participate in the 1st respondent's CPD programmes which are affordable and ensure it attains financial independence. He informs even so that the 1st respondent also provides free CPD programmes for its members. He refutes the claim that the law requires the 1st respondent's CEO to be a public officer. He states that this Court by virtue of Article 162(2)(a) and 165 (5)(b) of *the Constitution* and the Employment and *Labour Relations Act*, 2011 lacks jurisdiction to entertain the question as to whether the employment of the acting CEO is constitutional or not.

18. He further depones that the petition is an abuse of public interest litigation as it was filed by Centre for Advanced Procurement Studies Limited (CAPS), International Supply Chain Solutions Limited (ISCS) and Global Procurement Academy Limited (GPA) through the petitioner with a view to harass and intimidate the respondents to abandon their statutory duty to prescribe the CPD programmes. Considering this, he states that the petition is frivolous, vexatious and an abuse of the court process and so should be dismissed.

The 2nd and 3rd Respondents' case

19. The 2nd and 3rd respondents' in response to petition filed their replying affidavits dated 12th February 2021. These affidavits reiterated the averments of the 1st respondent's replying affidavit verbatim.

The 4th and 5th Respondents' case

20. In response and opposition to the petition, these respondents' filed two sets of Grounds of Opposition dated 22nd July 2020 and 10th May 2022 respectively. The 2nd set is a reproduction of the 1st set. These respondents' case is anchored on the grounds that:

    i. The petitioner has not demonstrated how the 4th and 5th respondents have violated his constitutional rights as established in the case of Anarita Karimi Njeri vs R (1976-1980) KLR 1272.

    ii. According to Section 5 (a) of the *Supplies Practitioners Management Act*, one of the functions of the 1st respondent is 'to establish, monitor, improve and publish the standards of the supplies practitioners' profession and safeguard the interest of all supplies practitioners' and so the 1st respondent developed standards to guide the CPD and Accreditation of courses offered by other institutions for award of the CPD points.

    iii. Section 16(10) of the *Supplies Practitioners Management Act* requires all supplies practitioners to comply with the CPD programmes as prescribed by the 2nd respondent. Further that Section 2 of the *Public service (values and principles) Act*, 2015 provides that 'continuing professional development' means the means by which a professional maintains their knowledge and skills related to their professional lives.

iv. The Draft Continuous Professional Development (CPD) Policy and Draft Accreditation Policy were rigorously benchmarked with similar policies by other professional bodies in the country and the public was made aware of the said policy.

v. Under Section 31 of the *Supplies Practitioners Management Act*, other persons are allowed to offer training courses or examinations with authority from the Minister and so by offering the CPD training the 1st respondent does not drive away licensed trainers out of business.

vi. Section 9 of the *Supplies Practitioners Management Act* provides that there shall be a Chief Executive Officer of the Institute who shall be competitively appointed by the Council, whose terms and conditions of service shall be determined by the Council in the instrument of appointment and further that Section 34(1)(a) of the *Public Service Commission Act* 2017 provides that acting appointments shall be made by the lawful appointing authority which is the 2nd respondent and accordingly acted within its powers in appointing the 3rd respondent.

vii. The petitioner has failed to demonstrate how his legitimate expectation has been breached as the conduct of the respondents does not constitute any violation of the petitioner's rights.

viii. The petition is frivolous, vexatious, incompetent and improperly before court and an abuse of the court process.

Parties' submissions

The Petitioner's submissions

21. The petitioner filed two sets of written submissions and a list of authorities dated 18th May 2021 and 28th September 2021 respectively in support of the petition. In the first set he identified the issues for determination to be as follows:

    i. The petitioner's locus standi to institute these proceedings.

    ii. This Court's jurisdiction to hear and determine this case.

    iii. Whether the Continuous Professional Development (CPD) policy was subjected to Public Participation and enacted in violation of the *Statutory Instruments Act*.

    iv. Whether the appointment of 3rd respondent as the Acting Chief Executive Officer of the 1st respondent was invalid, null, and void.

    v. Whether there is a conflict of interest where the institute offers training services in competition with the entities it regulates.

    vi. Whether the respondents violated the petitioner's legitimate expectations.

22. The petitioner on the first issue relying on Articles 22 and 258 of *the Constitution* submitted that he has the requisite locus standi to institute this suit in public interest. To buttress this point reliance was placed on the case of Mumo Matemu vs. Trusted Society of Human Rights Alliance &and 5 others [2014] eKLR where it was held that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or *the Constitution* in general. He also relied on the cases of John Wekesa Khaoya V. Attorney General [2013] eKLR, Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR, Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others [2002]

eKLR and Trusted Society of Human Rights Alliance –Versus- Nakuru Water and Sanitation Services Company & Another [2013] eKLR.

23. Turning to the next issue, he submitted that this Court by virtue of Article 23 of *the Constitution* as read with Article 165 of *the Constitution* has the jurisdiction to hear and determine applications for redress of a denial, violation, infringement of, or threat to a right or fundamental freedom. In support reliance was placed on the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) KLR.

24. It was submitted on the third issue that the impugned CPD policy was issued in violation of Articles 10 and 232(1) (d) of *the Constitution* as it was not subjected to public participation. To buttress this point he cited the case of Kiambu County Government & 3 others v Robert N. Gakuru & others [2017] eKLR where it was held that the issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. That *the Constitution* under Article 10 binds all state organs, state officers, public officers and all persons in the discharge of public functions and highlights public participation as one of the ideals and aspirations of our democratic nation. Other cases referred to are Doctors for Life International v Speaker of the National Assembly & Others [2006] ZACC 11 and Kenya Human Rights Commission vs. Attorney General & another [2018] eKLR, among others.

25. The petitioner further argued that the CPD policy is a statutory instrument within the meaning of Section 2 of the *Statutory Instruments Act*, No. 23 of 2013 yet it was enacted in a manner that did not comply with Sections 2, 4, 5, 5A, 10, 11, 12, 13 and 14 of the Act. He referred to the case of British American Tobacco Limited vs Cabinet Secretary for the Ministry of Health & 5 others [2017] eKLR where it was held that public participation is a mandatory requirement in the process of making legislation including subsidiary legislation. The threshold of such participation is dependent on the particular legislation and the circumstances surrounding the legislation. Suffice to note that the concerned State Agency or officer should provide reasonable opportunity for public participation and any person concerned or affected by the intended legislation should be given an opportunity to be heard. Also referred are the cases of Keroche Breweries Limited & 6 Others v Attorney General & 10 others [2016] eKLR, and Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman Samuel Njuguna – Secretary, Joseph Kimiri –Treasurer) & 8 others v Cabinet Secretary For Transport & Infrastructure & 5 Others [2014] eKLR.

26. On the fourth issue he submitted that the 3rd respondent was irregularly and unlawfully appointed as the Acting Chief Executive Officer of the 1st respondent since he is not a public officer as provided under Section 2 of the *Public Service Commission Act*, No. 10 of 2017. He argued that this requirement is also reiterated under Paragraph 2 and 23 of the Public Service Commission Regulations 2020 and Section 34 of the *Public Service Commission Act*. The appointment was therefore deemed to be in violation of Articles 10(2)(a), 47(1) and 73(2)(a) of *the Constitution*.

27. In support reliance was placed on the case of Ferdinand Ndung'u Waititu v Benson Riitho Mureithi (suing on his behalf and on behalf of the general public) & 2 others [2018] eKLR where it was held that the application of Chapter six of *the Constitution* to public officers, places an obligation on the appointing authority to take into account the integrity of the persons being considered for appointment as a public officer. In particular, Article 73(2) of *the Constitution* provides the guiding principles of leadership and integrity. Further referred to is the case of David Kariuki Muigua v Attorney General & another [2012] eKLR.

28. He next submitted that the expression "make provision for training of persons seeking registration/ licensing under the Act" does not give the 1st respondent a mandate to be a trainer itself but rather gives

it the responsibility to regulate the trainers in the sector. Any provision of training by the 1st respondent causes conflict of interest. He contended that the 1st respondent could not be a neutral and objective regulator whilst competing for business with the entities it regulates. He relied on the case of Felix Kiprono Matagei v Attorney General & 3 others [2016] eKLR where it was held that *the Constitution* demands impartiality of public officers under Article 232(1)(c). Where there is a real possibility of conflict of interest or of the potential of conflict of interest, then the very principles enshrined under Articles 10, 73 and 232 of *the Constitution* are unlikely to be met. Therefore, public officers, whose duties invite the potential of conflict of interest, are unlikely to inspire public confidence in their offices or the services they offer.

29. On violation of the petitioner's legitimate expectations, it was submitted that the 1st and 2nd respondents violated this expectation by going against the national values and principles of governance enshrined in Article 10 and values and principles of public service enshrined under Article 232 of *the Constitution*. To buttress this point reliance was placed on the case of Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR where it was observed that the expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded. Also see the case of Communication Commission of Kenya & 5 others vs Royal Media Services Ltd & 5 others, (2014) e KLR.

30. In the second set of submissions, the petitioner submitted that the 4th and 5th respondents were properly enjoined in the suit since the 4th respondent is the legal advisor of the Government while the 5th respondent is the person in charge of the parent Ministry responsible for the 1st respondent. On whether the petition meets the threshold set out in the Anarita Karimi case, it was submitted that the threshold does not constitute an absolute bar to constitutional pleadings. To buttress this point he relied on the case of Kevin Turunga Ithagi –v- Hon. Justice Fred Ochieng & others [2015] eKLR, where the Court stated that the principles espoused and championed in the Anarita Karimi case must be applied with adequate caution to ensure deserving parties are not denied justice, or access to justice, without hearing their cases on merit. He further relied on the cases of Peter M. Kariuki v Attorney General [2014] eKLR, and John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others [2013] eKLR.

31. The petitioner as well challenged the assertion that the petition was an abuse of the Court process. He argued that his pleadings presented well-reasoned and founded arguments which particularize the violations of the law and sets out the issues to be determined in the petition. To buttress this point reliance was placed on the case of Kenya Power & Lighting Company Limited vs. American Life Insurance Company (K) Limited (2015) eKLR where it was held that a pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy.

32. He further referred the court to the cases of Charo Hassan Nyange vs. Mwashetani Hatibu & 3 others [2014] eKLR , Trusted Society of Human rights Alliance Vs A.G. & Others High Court Petition No.229 of 2012 among others. Accordingly the petitioner argued that the respondents had not demonstrated how the petition is bad in law, frivolous, vexatious and an abuse of the court process. He urged the court to allow the petition with costs.

The 1st, 2nd and 3rd Respondents' submissions

33. These respondents' through the firm of Mwaniki Gachuba Advocates filed written submissions dated 26th May 2021 where Counsel identified the issues for determination as:

i. Whether the petitioner has locus standi.

ii. Whether this Court has jurisdiction to entertain the petition.

iii. Whether the Continuous Professional Development (CPD) policy is unconstitutional.

iv. Whether the appointment of the 3rd respondent was unconstitutional.

34. Counsel while referring to Articles 22(1) and 258(1) of *the Constitution* as read with Rule 4(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 submitted that the petitioner in instigating this suit had not disclosed on whose behalf the petition had been brought. Accordingly it was not clear whether the petition was on behalf of members of the 1st respondent. By the same token it was not stated why these members could not act in their own name. Likewise the petitioner did not also show whether he was acting as a member of the 1st respondent; or in the public interest; or in the interest of one or more of an association to which he belongs with reference to the subject at hand.

35. To support this point Counsel relied on the case of John Mining Temoi & Another vs Governor of County of Bungoma & 17 Others (2014) eKLR where the Court discussing the scope of Article 22 and 258 of *the Constitution* observed that despite the wide scope of the provisions where one purports to enforce the rights of another, there must be a nexus between the parties. Comparable reliance was placed on the case of Mwanganza L.P.O Self-Help Group v Attorney General & 3 others [2020] eKLR and Okiya Omtatah Okoiti v Kenya Power & Lighting Company Ltd & another [2017] eKLR.

36. In view of the above, Counsel while referring to the annexure marked "JK 5" in the 1st respondent's replying affidavit argued that the petition was instituted on behalf of Centre for Advanced Procurement Studies Limited (CAPS), International Supply Chain Solutions Limited (ISCS) and Global Procurement Academy Limited (GPA) who are legal persons with capacity to sue and to be sued. He stressed that the petitioner had not demonstrated that he has the requisite locus standi to file this suit and so it was evident that the petition had been filed without bona fides.

37. On the second issue, Counsel answered in the affirmative. This he said is because the High Court by virtue of Article 23(1) of *the Constitution* and Section 5(a) of the *High Court (Organization and Administration) Act*, 2015 has the authority to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights. In support of this argument reliance was also placed on the cases of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & another [2012] eKLR and Kenya Hotel Properties Limited v Attorney General & 5 others [2018] eKLR.

38. On the third issue counsel submitted that a reading of Section 5(f) and 16(10) of the *Supplies Practitioners Management Act* informs that provision of continuous professional development services is a statutory monopoly bestowed upon the 1st and 2nd respondents. That principally, the 2nd respondent is exclusively mandated to prescribe CPD programmes while the 1st respondent is mandated to provide the continuous professional development services. He referred to the case of Eunice Nganga & another v Law Society of Kenya & another [2019] eKLR where the Court held that members of professional bodies such as those of the 1st respondent must keep themselves abreast with new developments in the law and practice and that provision of the service by the regulatory body cannot be deemed unconstitutional. Comparable reliance was placed on the cases of Martin Wanderi & 19 others v Engineers Registration Board of Kenya & 5 others [2014] eKLR, Okenyo Omwanza & another v Attorney General, Petition No. 126 of 2011 among others.

39. Counsel argued that the respondents' in drafting the impugned CPD policy were within their mandate. He further noted that the policy had been subjected to public participation. In the case of Elle Kenya Limited & others v Attorney General & others, Petition No. 320 of 2011 it was observed that this court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of *the Constitution*; and, having done that, its duty ends.

40. On the final issue, Counsel submitted that Section 9 of the *Supplies Practitioners Management Act* does not prescribe any key qualifications and competencies for the position CEO rather only states that the recruitment has to be done competitively. That as per the provision the power to determine the qualifications and competencies of the CEO is left at the discretion of the 2nd respondent and further does not bar appointment of an acting CEO.

41. Counsel as well pointed out that Section 34(1)(a) of the *Public Service Commission Act* provides that "acting appointments shall be made by the lawful appointing authority" which in this case is the 2nd respondent. He relied on the case of Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others [2012] eKLR where it was held that it had never been the intention of *the Constitution* to subject decision making to the tyranny of tabulated legalism. That there is a margin of discretion conferred by *the Constitution* and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the law.

42. To this end Counsel urged the Court to award the respondents costs owing to the fact that the petitioner has no locus standi and the petition was filed mala fides.

The 4th and 5th Respondents' submissions

43. The 4th and 5th respondents filed written submissions dated 11th August 2021 through State Litigation Counsel, Patricia A. Chibole, who identified the issues for determination as:

    i. Whether there was any constitutional right infringed or threatened to be breached by the conduct of the respondents.

    ii. Whether there was public participation before implementation of the CPD policy and the Accreditation Policy by the Institute.

    iii. Whether the requirements for legitimate expectation doctrine were established by the petitioner for him to rely on the doctrine.

    iv. Whether the petitioner is entitled to the orders as prayed.

44. Counsel relying on the case of Anarita Karimi Njeru (supra) as restated in the case of James Muchene Ngei vs. Republic [2008] eKLR, submitted that a person in seeking redress from the High Court should set out with reasonable degree of precision that which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed. According to her the petitioner had not demonstrated how the 4th and 5th respondents had violated his constitutional rights as set out in this principle. Further reference was made to the Mumo Matemu case (supra).

45. On public participation Counsel submitted that in keeping with this principle, the impugned CPD Policy and Draft accreditation Policy were rigorously benchmarked with similar policies by other professional bodies in the country and the public were equally made aware of the said policy. She contended that the failure to consider all views submitted at the public forum during public participation would not vitiate the process of participation. She referred to the case of Musimba v The

National Land Commission & others [2016] eKLR where it was held that the fact that the views given by the attendees at a public forum are all not taken into consideration does not vitiate the fact that there has been compliance with the requirement for public participation. Additional reliance was placed on the cases of National Association for the Financial Inclusion of the Informal Sector v Minister for finance and another (2012) eKLR and Consumer Federation of Kenya (COFEK) vs Attorney General & others -Nairobi Petition No. 11 of 2012.

46. On to the next issue, Counsel submitted that the petitioner had failed to establish that the petition satisfies the principles set out in the case of Communication Commission of Kenya & 5 others V Royal Media Services Ltd & 5 others (2014) eKLR that prove that his legitimate expectation was violated by the respondents. The principles are that there must be an express promise given by a public authority; that the expectation itself is reasonable; that the representation must be one that is competent and lawful for the decision-maker to make; and lastly that there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*. Counsel while considering this pointed out that applying the alleged legitimate expectation as pleaded by the petitioner would be contrary to the clear provisions of the *Supplies Practitioners Management Act*.

47. In conclusion Counsel submitted that the petitioner is not entitled to the prayers sought as he had failed to prove that his case has merit, and the same should be dismissed with costs.

Analysis and Determination

48. I have perused the pleadings and submissions of the parties herein and it is my considered view that the issues for determination are as follows:

    i. Whether the petitioner has the necessary locus standi to institute this suit.

    ii. Whether the 1st and 2nd respondent's provision of CPD training to its members is lawful in view of the *Supplies Practitioners Management Act* No. 17 of 2007.

    iii. Whether the Continuous Professional Development (CPD) policy was subjected to Public Participation.

    iv. Whether the appointment of 3rd respondent as the acting Chief Executive Officer was unlawful.

    v. Whether the respondents violated the petitioner's legitimate expectation and constitutional rights under Articles 10(1) & (2),40, 46(1) (c), 47, 73(2)(a), 73(2)(c)(ii) & (d), 75(1), 232(1) (d) & (e) and 259(1) of *the Constitution*.

    vi. Whether the petitioner is entitled to the reliefs sought.

Whether the petitioner has the necessary locus standi to institute this suit.

49. The locus standi of the petitioner was challenged by the 1st, 2nd and 3rd respondents who argued that there is no nexus between the cause of action herein and the petitioner. It was also asserted that the petitioner had failed to disclose on whose behalf the petition had been instigated and whether indeed these persons lacked the legal capacity to sue on their own behalf. It was further stressed that the petitioner had not shown whether the matter had been filed in public interest. The petitioner opposed these arguments stating that his ability to institute this suit was well covered under Articles 22 and 258 of *the Constitution*.

50. The meaning of the term locus standi was explained in the case of Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR as follows:

> "...In the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that ;-
>
> > "Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of Alfred Njau and others ..Vs.. City Council of Nairobi (1982) KAR 229, the Court also held that;-
> >
> > > "the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".
>
> It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means 'a place of standing'..."

51. The heart of the principle of locus standi was exhaustively elucidated by the Court of Appeal in the case of Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 others [2016] eKLR as follows:

> "While Article 48 of *the Constitution* recognizes the importance of access to justice as an essential instrument for the protection of human rights, it must, at the same time be borne in mind that "...the rights and fundamental freedoms in the Bill of Rights...belong to each individual and are not granted by the State". See Article 19 (3) (a).Taken together with Articles 22, and 258 these Articles are a stark departure from the narrow scope of Section 84 of the former Constitution in so far as the concept of locus standi is concerned. The former Constitution and the cases decided during its reign provided and held in no uncertain terms that only a party aggrieved and whose interests were directly affected could institute proceedings for protection, under the Bill of Rights. ...This conservative requirement had the effect of limiting access to justice as it treated litigants, other than those directly affected, as mere or meddlesome busy bodies, ignoring the fact that every judicial system has a built-in mechanism to protect its process from abuse by busy bodies, cranks and other mischief makers."

52. The Court went on to state that:

> "Articles 22 ,258 and 260 of *the Constitution* are cited to make the point that historical common law restrictions on the standing have been overhauled by *the Constitution* of Kenya, 2010....
>
> The three Articles give an enlarged view of locus standi to the effect that every "person" including persons acting in the public interest, can move a court of law contesting infringements of any provision in the Bill of Rights or *the Constitution*."
>
> Each of the first two Articles starts with the phrase "Every person has the right to institute court proceedings." They also provide that that person may either bring the proceedings as an individual in his/her own interest. He/she can, in addition bring proceedings in many other capacities, on behalf of persons who cannot act in their own name, or as a member of or in the interest of a group or class of persons, or, like in the above cited Supreme Court

case of Mumo Matemo (supra), acting in the public interest or, finally an association acting in the interest of one or more of its members can also institute court proceedings for the enforcement of the Bill of Rights."

53. I stand guided by the cited authorities and adopt the same in answering this question. It is appreciated that the 1st, 2nd and 3rd respondent's opposition is based on the lack of nexus between the claim and the petitioner. This is since the petitioner does not make known on whose behalf the suit is brought and his interest in the matter. The petitioner on the other hand asserted that the suit concerns the exercise of these respondents' authority as state corporations under the *Supplies Practitioners Management Act* No. 17 of 2007 which is argued to have violated a number of constitutional principles.

54. It is my considered view that the petitioner in this matter genuinely believes that there was a violation of the constitutional dictates and hence was entitled to approach the court for redress in public interest. I respectfully reject the respondents' argument that the petitioner lacks audience before this Court. This in my view is an old version notion that was done away with by the 2010 Constitution under Article 22 and 258.

Furthermore, it is this Court's duty to grant every person an opportunity to present their case and have the Court ventilate on their issues in accordance with the law and their right to access justice under Article 48 of *the Constitution*. For avoidance of doubt, it is my finding that the petitioner has the necessary locus standi to sustain this suit.

Whether the 1st and 2nd Respondent's provision of CPD training to its members is lawful in view of the *Supplies Practitioners Management Act* No. 17 of 2007

55. One of the key contentions in this matter is that the 1st and 2nd respondents are acting ultra vires their mandate in the *Supplies Practitioners Management Act*. In this regard the petitioner argued that the functions of these respondents do not include provision of training for Continuous Professional Development to its members. The petitioner argued that such action invokes a conflict of interest between the 1st respondent as the regulator and its members who offer similar training. Naturally this was opposed by the respondents who submitted that their training is well within its function as the regulatory body.

56. The *Supplies Practitioners Management Act* in its preamble makes known that it is 'an Act of Parliament to make provision for the training, registration and licensing of supplies practitioners; to regulate their practice and for connected purposes'. The 1st respondent which is established under Section 3 of the Act is required to perform the following functions under Section 5:

a. establish, monitor, improve and publish the standards of the supplies practitioners profession and safeguard the interest of all supplies practitioners;

b. make provision for the training and instruction of persons seeking registration under this Act;

c. recommend to the Minister for the time being responsible for education institutions to be approved for training of persons seeking registration under this Act;

d. advise the Examinations Board on matters relating to examination standards and policies;

e. have regard to the conduct of persons registered and licensed under this Act, and take such disciplinary measures as may be necessary to maintain a proper standard of conduct among such persons;

f. perform such other functions as may be necessary for the proper administration of this Act.

57. With reference to Continuous Professional Development, the Act under Section 16 (10) provides as follows:

> A member of the Institute shall be required to undergo such continuous professional development programmes as may be prescribed by the Council.

58. A reading of the cited provisions divulges that the 2nd respondent is mandated to advise on the provision of the CPD's. Reasonably the 1st and 2nd respondents in regulating its professionals must ensure the mandatory standards are maintained and provide guidelines over these programmes. A reading of the Act makes it clear that no specific body or institution is stated as required to provide the CPD programmes as alleged by the petitioner. This in my interpretation is left at the discretion of the 2nd respondent owing to Section 16(10) of the Act. It would seem that the petitioner's assertion was based on the argument that a regulatory body cannot regulate the services and at the same time conduct the training in view of the CPD programmes. In my view the petitioner's interpretation over the issue does not have any legal basis in the *Supplies Practitioners Management Act*.

59. Further, an examination of the law of comparable regulatory bodies such as the Law Society of Kenya under Section 4 of the *Law Society of Kenya Act*, 2014 and the Engineers Board of Kenya under Section 7 of *Engineers Act*, 2011 makes known that one of their key functions is to set, maintain and continuously improve the standards of learning and professional competence for the provision of their services in Kenya. These bodies correspondingly provide regular CPD programmes to its members as facilitated by them and the externally recognized bodies.

60. The essence of the CPD training by the regulatory bodies was captured in the case of Eunice Nganga & another (supra) where the Court observed as follows:

> " 51. ...Members of professional bodies such as those of the 1st respondent must keep themselves abreast with new developments in the law and practice. The only way they can do so is through regular training. Attending programmes initiated and developed by their society for their benefit cannot be deemed unconstitutional. This is because the programmes are meant to enhance members' knowledge and skills."

Whether the Continuous Professional Development (CPD) policy was subjected to Public Participation

61. The other contention in this petition is that the 1st and 2nd respondents' CPD policy was issued in violation of Articles 10 and 232(1) (d) of *the Constitution* as was not subjected to public participation. Additionally, it was argued that the policy being a statutory instrument failed to comply with Sections 2, 4, 5, 5A, 10, 11, 12, 13 and 14 of the *Statutory Instruments Act*. The respondents rebutted this allegation stating that the CPD Policy albeit an administrative instrument had been subjected to public participation as they had various consultative meetings with various stakeholders before enactment of the Policy.

62. One of the hallmarks of *the Constitution* is involvement of the public in its affairs so much so that it forms one of the national values and principles as envisaged in Article 10 of *the Constitution*. *The Constitution* obligates facilitation public participation and involvement in the legislative process at all levels. The essence of public participation has been captured in a plethora of cases such as those cited by the parties herein which I stand guided by.

63. To highlight briefly, the Court in the case of In Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR on this topic observed as follows:

> "75. As to the nature and form of public participation, the South African Constitutional Court in Doctors for Life International Case (supra) held that;
>
> [105] The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation...
>
> 76. How public participation is given effect will vary from case to case but it must be clear, upon examination of the legislative process, that a reasonable level of participation has been afforded to the public. In Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC) at para. 630, Sachs J., noted that;
>
> The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."

64. The Court went on to state that:

> "77. The issue as to whether there was public participation is not merely a matter of form but one of substance. The court must look at the process to determine whether it meets constitutional muster..."

65. Further the Court in the case of Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR held as follows:

> "75. In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation..."

66. In the same way, the principles of making a statutory instrument are highlighted in the *Statutory Instruments Act*, Act No. 23 of 2013. This Act defines a statutory instrument as follows:

> 'any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.'

67. Evidently, the CPD policy was enacted under the authority of the *Supplies Practitioners Management Act* and so qualifies as a statutory instrument. The Act as such requires under Section 5 that:

> Consultation before making statutory instruments
>
> 1. Before a regulation-making authority makes a statutory instrument, and in particular where the proposed statutory instrument is likely to—
>
> (a) have a direct, or a substantial indirect effect on business; or
>
> (b) restrict competition;
>
> the regulation-making authority shall make appropriate consultations with persons who are likely to be affected by the proposed instrument.
>
> (2) In determining whether any consultation that was undertaken is appropriate, the regulation making authority shall have regard to any relevant matter, including the extent to which the consultation—
>
> (a) drew on the knowledge of persons having expertise in fields relevant to the proposed statutory instrument; and
>
> (b) ensured that persons likely to be affected by the proposed statutory instrument had an adequate opportunity to comment on its proposed content.
>
> (3) Without limiting by implication the form that consultation referred to in subsection (1) might take, the consultation shall—
>
> (a) involve notification, either directly or by advertisement, of bodies that, or of organizations representative of persons who, are likely to be affected by the proposed instrument; or
>
> (b) invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

68. Further Section 5A provides as follows:

> Explanatory memorandum
>
> (1) Every statutory instrument shall be accompanied by an explanatory memorandum which shall contain—

a. a statement on the proof and demonstration that sufficient public consultation was conducted as required under Articles 10 and 118 of *the Constitution*;

(b) a brief statement of all the consultations undertaken before the statutory instrument was made;

(c) a brief statement of the way the consultation was carried consultation;

(d) an outline of the results of the consultation;

(e) a brief explanation of any changes made to the legislation as a result of the consultation.

(2) Where no such consultations are undertaken as contemplated in subsection (1), the regulation-making authority shall explain why no such consultation was undertaken.

(3) The explanatory memorandum shall contain such other information in the manner specified in the Schedule and may be accompanied by the regulatory impact statement prepared for the statutory instrument.

69. Manifestly the importance of involvement of the relevant stakeholders to share their views and comments before enactment of a Statute or even a policy cannot be over emphasized. A lack of compliance with this principle as discussed in a plethora of cases affects the legality of the said Act or statutory instrument.

70. That said, an examination of the evidence presented before this Court reveals a number of things. The 1st respondent vide a letter dated 13th January 2021 invited its members to a Sensitization Forum on the CPD Policy Guidelines. Prior to this in a letter dated 8th January 2021, the 1st respondent had introduced the CPD Policy Guidelines to its members stating as follows in part:

> 'During the meeting of 14th December 2020, and following several stakeholder consultative meetings, the KISM Council resolved that the CPD Policy Guidelines (Annex 1 attached herewith) for the Institute will be reviewed from time to time, in keeping with member needs, aspirations and new developments.'

71. The 1st respondent in this letter makes known that it had collected views from various stakeholders as follows:

> '...the attached CPD Policy guideline is a summary of the input consolidated from various stakeholder engagements.'

72. This pronouncement is not supported by any evidence that indeed there was a call to the relevant stakeholders to participate in the public participation exercise. Likewise, the indicated stakeholder engagements are not identified and particularized. That is the respondents do not show the various dates, venues and meetings that took place in this regard. As emphasized severally, public participation ought to be real and not illusory. This means that it must be clear that an invitation to the relevant stakeholders was made with details of the said policy. This invitation ought to be in form of a notice or advertisement either in a publication with wide national circulation and communication to the

relevant parties such as its members. The stakeholders must also be given an opportunity to issue their comments and views within a specified period before enactment of the policy.

73. Generally, this process is usually well documented in a trail of documentation which can easily be adduced in Court as evidence to ascertain the averment that indeed public participation was conducted. Once the petitioner alleged that the policy was enacted devoid of public participation it was incumbent on the 1st and 2nd respondents to prove that indeed they carried out the exercise before enactment of the CPD policy. Furthermore where this exercise was not conducted, reasons were to be stated as provided under Section 5A (2) of the *Statutory Instruments Act*.

74. What is clear from the adduced evidence is that the 1st respondent's call to the members was done after enactment of the CPD policy and was aimed at briefing the members on the Policy and what to expect from its enactment. The Supreme Court in the case of British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR issued the following guiding principles on public participation:

> "(i) As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
>
> (ii) The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
>
> (iii) The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
>
> (iv) Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
>
> (v) Public participation is not an abstract notion; it must be purposive and meaningful.
>
> (vi) Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
>
> (vii) Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
>
> (viii) Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
>
> (ix) Components of meaningful public participation include the following:
>
> a. clarity of the subject matter for the public to understand;

b. structures and processes (medium of engagement) of participation that are clear and simple;

c. opportunity for balanced influence from the public in general;

d. commitment to the process;

e. inclusive and effective representation;

f. integrity and transparency of the process;

g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter."

75. A perusal of the adduced evidence makes it apparent that the 1st and 2nd respondents did not in the slightest way seek to uphold these principles before enactment of the CPD Policy Guidelines. The effect of lack of compliance to the public participation principle manifestly renders the impugned Policy unlawful and unconstitutional. It is my humble finding therefore that the public participation principle as envisaged under Article 10 of *the Constitution* and the *Statutory Instruments Act* was not satisfied in the circumstances of this case.

Whether the appointment of 3rd Respondent as the acting Chief Executive Officer was unlawful.

76. One of the issues raised in the instant petition is the legality of the 3rd respondent's appointment as the 1st respondent's acting CEO. The petitioner argued that this was not in line with Section 2 and 34 of the *Public Service Commission Act* and in effect in violation of Articles 10 and 73(2)(a) of *the Constitution*.

77. The 1st and 2nd respondents while rejecting this assertion stated that they had made the appointment in line with the law. Nevertheless, they argued that this Court does not have jurisdiction to deal with this matter as the question invokes the Employment and Labour Relations Court's jurisdiction.

78. The Supreme Court in the case of Samuel Kamau Macharia (supra) makes known that:

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...."

79. The High Court's jurisdiction to entertain constitutional matters is found in Article 165(3)(d) of *the Constitution* which provides as follows:

(3) Subject to clause (5), the High Court shall have--

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191.

80. *The Constitution* additionally in Article 162 establishes two more Courts of equal status with the High Court who exercise jurisdiction over environment and land matters and employment and labour relations. This Article provides as follows:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to--

a. Employment and labour relations; and

b. The environment and the use and occupation of, and title to, land.

81. As a result of Article 162 of *the Constitution* the High Court is barred under Article 165(5)(b) of *the Constitution* from exercising jurisdiction conferred to the special courts. This Article provides as follows:

The High Court shall not have jurisdiction in respect of matters-

(a) .....

(b) falling within the jurisdiction of the courts contemplated in Article 162(2).

82. The Parliament as empowered by Article 162 of *the Constitution* enacted the Employment and Labour Relations Court (No. 20 of 2011) which deals exclusively with matters falling within its ambit. The Jurisdiction of the Court is defined in Section 12 of the Act as follows:

Jurisdiction of the Court

The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

a. disputes relating to or arising out of employment between an employer and an employee;

....

83. The Court in the case of Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR while expounding on the jurisdiction of the Employment and Labour Relations Court opined as follows:

"Similarly, pursuant to Article 23(3) of *the Constitution* as read with Section 12(3) of the *Employment and Labour Relations Court Act*, it is my view that the Employment and Labour Relations Court can grant reliefs in a constitutional petition. However, the jurisdiction to do so is confined to matters falling within Article 41 of *the Constitution* as read with section 12 of the *Employment and Labour Relations Court Act*. The Court cannot therefore purport entertain petitions outside the aforesaid matters as its jurisdiction is limited only in so far as employment matters and matters related thereto are concerned. In

my view the matters which fall within the ambit of Article 162(2) of *the Constitution* must be matters within the exclusive jurisdiction of the said specialized Courts..."

84. The dispute herein relates to the employment and appointment of the 3rd respondent by his employer as the acting CEO. Evidently, this matter invokes the jurisdiction of the Employment and Labour Relations Court which bars this Court from making a determination on the legality of his appointment by the 2nd respondent. With this in mind, this Court's determination over the issue would be an exercise in futility as any decision made without authority from *the Constitution* or the law is void ab initio. Bearing this in mind, this Court will not make a determination over this issue.

85. From the foregoing analysis, I find that the respondents in view of its failure to conduct public participation as required by *the Constitution* and the law, violated the petitioner's legitimate expectation and constitutional rights under Articles 10(1) & (2),40, 46(1) (c), 47, 73(2)(a), 73(2)(c)(ii) & (d), 75(1), 232(1)(d) & (e) and 259(1) of *the Constitution*. Accordingly the petitioner is entitled to the reliefs sought in that regard.

86. As to the award of costs, this being a public interest matter the Supreme Court addressing this question in the case of Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR guided as follows:

> " It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs. In Amoni Thomas Amfry and Another v. The Minister for Lands and Another, Nairobi High Court Petition No. 6 of 2013, Majanja, J concurred with the decision in Harun Mwau and Others v. Attorney-General and Others, Nairobi High Court Petition No. 65 of 2011, [2012] eKLR, in which it was held [para.180]:
>
> > "In matters concerning public-interest litigation, a litigant who has brought proceedings to advance a legitimate public interest and contributed to a proper understanding of the law in question without private gain should not be deterred from adopting a course that is beneficial to the public for fear of costs being imposed. Costs should therefore not be imposed on a party who has brought a case against the State but lost. Equally, there is no reason why the State should not be ordered to pay costs to a successful litigant.
> >
> > It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation."

87. I stand guided by the above. This being a matter advancing public interest as opposed to personal gain, and which sought to question the constitutionality of the 1st and 2nd respondents' CPD Policy

Guidelines and protection of fundamental rights and freedoms, I am of the view that each party ought to meet their own costs of the suit.

88. The upshot of the foregoing and for the reasons set out above, the petition dated 18th January 2021 has merit and succeeds partially. The following orders are made:

    i. The continuous Professional Development (CPD) policy is unconstitutional null& void.

    ii. There is no conflict of interest where the institute offers training alongside the entities it regulates.

    iii. Revocation of the 3rd respondent's appointment is declined.

    iv. Each party to bear its own costs.

89. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 22ND DAY OF SEPTEMBER 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT