



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTION AND HUMAN RIGHTS DIVISION**

**PETITION NO. 275 OF 2019**

**IN THE MATTER OF INFRINGEMENT AND CONTRAVENTION OF FUNDAMENTAL  
AND FREEDOMS UNDER THE CONSTITUTION OF KENYA 2010**

**ARTICLES 22, 23, 24, 27(1) & (2), 47(1), 50(1) (2), 69 & 259**

**AND**

**IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI PURSUANT  
TO ARTICLES 23(3) (F) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF DECISION BY THE INSTITUTION OF KENYA (IEK)  
TO CANCEL THE APPLICANTS CORPORATE MEMBERSHIP CERTIFICATE**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF THE INSTITUTION  
OF THE ENGINEERS KENYA (AMENDED 2015)**

**AND**

**IN THE MATTER OF DEREGISTRATION OF THE PETITIONER AS A  
PROFESSIONAL ENGINEERBY THE ENGINEERS BOARD OF KENYA**

**BETWEEN**

**DANIEL MWENDA NTOITI.....PETITIONER**

**AND**

**THE INSTITUTE OF ENGINEERS OF KENYA.....1<sup>ST</sup> RESPONDENT**

**THE ENGINEERS BOARD OF KENYA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The Petitioner herein commenced these proceedings through Petition dated 12<sup>th</sup> July 2019 filed on even date together with a chamber summons application. The application was accordingly dispensed with so as to fast track the petition. The Petition seeks various reliefs thus:-

*a) A Declaration that the action by the 1<sup>st</sup> Respondent vide its letters dated 14<sup>th</sup> January 2019 cancelling the Petitioner's Certificate of Membership to the Institution of Engineers of Kenya was illegal and/or irregular.*

*b) An Order of Certiorari to quash the decision issued by the 1<sup>st</sup> Respondent vide its letter dated 14<sup>th</sup> January 2019 cancelling the Petitioner's Certificate of Membership to the Institution of Engineers of Kenya for being unconstitutional, illegal and/or irregular.*

*c) An Order of Mandamus directing the 2<sup>nd</sup> Respondent to reinstate the Petitioner as a Professional Member.*

*d) Costs of this Petition to be borne by the 1<sup>st</sup> Respondent.*

*e) Any other Relief that this Honourable Court deems fit.*

### **PETITIONER'S CASE**

2. The Petitioner's petition is allegedly occasioned by irregular and/or unlawful cancellation of the Petitioner's corporate Membership certificate M. 3511 issued by the 1<sup>st</sup> Respondent after the Petitioner had met all the procedural requirements laid out by the 1<sup>st</sup> Respondent.

3. The Petitioner contend that he was invited for a professional interview on 9<sup>th</sup> March 2018; interviewed by panel of three (3) Engineers, namely; Eng. Samuel Charagu (who was the substantive Honorary Secretary of the 1<sup>st</sup> Respondent and the Chair person of the Interview panel that conducted the professional interview); Eng. Richard Chepkwony and Eng. Christopher Ndungu (deceased).

4. That after successfully completing the interview process, the Petitioner was issued with corporate membership certificate M.3511 dated 11<sup>th</sup> April 2018 signed by three signatories:- Eng. Samuel Charagu (the then Honorary Secretary); Eng. Rosemary Kung'u (Chairperson of the Membership Committee) and Eng. Michael Okonji (the then President of IEK). That as is the procedure, the Petitioner, armed with the Corporate Certificate M.3511 applied for registration as a professional Engineer with the 2<sup>nd</sup> Respondent. That on 25<sup>th</sup> June 2018 vide letter referenced EBK/STG/11/28/Vol.II (5067) the Petitioner's application to be registered as a professional Engineer was accepted.

5. The Petitioner urge that during the period between 9<sup>th</sup> March 2018 and 12<sup>th</sup> April 2018 professional interviews were being carried out, the 1<sup>st</sup> Respondent was in the process of preparing for elections of new council members. That elections were conducted on 12<sup>th</sup> April 2018 and new council assumed office on 27<sup>th</sup> April 2018 following the AGM on that day. That among those voted in was Eng. Nathaniel Matalanga as the Honorary Secretary of the 1<sup>st</sup> Respondent and deponent of the 1<sup>st</sup> Respondent's Replying Affidavit.

6. The Petitioner assert that on 6<sup>th</sup> August 2018 the new Honorary Secretary of the Council Eng. Nathaniel Matalanga, made a telephone call to the Petitioner requesting the Petitioner to return his membership Certificate M..3511 ostensibly because his Membership Certificate had been shared with someone else. These were confirmed through conversations to the Petitioner dated 7<sup>th</sup> August 2018. The Petitioner instead suggested that before he could release his original certificate; that 1<sup>st</sup> Respondent make the so called "rectification" then the Petitioner would exchange his "erroneous" original certificate as he obtained the "rectified" one.

7. The Petitioner state that in a turn of events, on 19<sup>th</sup> October 2018, the 1<sup>st</sup> Respondent, vide letter referenced IEK/SEK/736/2018, referring once again to the previous telephone conversation, directed the Petitioner to return the Certificate M.3511 within fourteen (14) days of the date of the letter. That it was not until 14<sup>th</sup> January 2019, vide letter referenced IEK/HS/G.3511, that the Petitioner was informed that the Certificate M.3511 had been cancelled. The letter was copied to the 2<sup>nd</sup> Respondent and the Petitioner was subsequently deregistered as a professional Engineer on 29<sup>th</sup> January 2019 vide letter referenced EBK/STG/28/VOL.II (8828) and prohibited from practising as a Civil Engineer in Kenya.

8. The Petitioner contend that the action by the 1<sup>st</sup> Respondent provoked the 2<sup>nd</sup> Respondent to remove the Petitioner's name from the roll of professional Engineers in Kenya leading to the filing of this Petition seeking the prayers thereto.

9. The Petitioner in this Petition relies on his supporting affidavit sworn on 12<sup>th</sup> July 2019; his supplementary affidavit sworn on 13<sup>th</sup> January 2020 and affidavit sworn by Engineer Michael Okonji filed on 25<sup>th</sup> March 2020, the immediate former president of the 1<sup>st</sup> Respondent and who doubted up as a Board Member of 2<sup>nd</sup> Respondent, though the said affidavit was filed without leave of court, I will admit the same so as to have substantive justice done to all parties in this Petition.

### **THE 1<sup>ST</sup> RESPONDENT'S RESPONSE**

10. The 1<sup>st</sup> Respondent is opposed to the Petitioner's Petition and in doing so relies on Replying Affidavit by Engineer Nathaniel Wilson Omwolo Matalanga sworn on 16<sup>th</sup> December 2019. The 1<sup>st</sup> Respondent further rely on four (4) supplementary affidavits sworn by the following, one by Eng. Richard Kipng'etich Chepkwony filed on 19/2/2020; second one sworn by Eng. Nathaniel Wilson Omwolo Matalanga filed on the same day; a third by Eng. Samuel Njagi Nathaniel sworn on 18<sup>th</sup> February 2020 and the fourth by Eng. Daniel W. Njora sworn on 12<sup>th</sup> March 2020.

11. The 1<sup>st</sup> Respondent contend that during the period between 5<sup>th</sup> and 16<sup>th</sup> March 2018 it held professional interviews and invited 37 candidates to appear before the panellists; out of these candidates, 18 passed, 11 failed and 7 deferred the interview and were advised on what improvement they needed to make before re-submitting their documents.

12. The 1<sup>st</sup> Respondent admit that the Petitioner herein was interviewed by the 1<sup>st</sup> Respondent's professional Review Board chaired by Eng. Samuel Charagu (1<sup>st</sup> Respondent's former Honorary Secretary) and other two members Eng. C. M. Ndonga and Eng. Richard Chepkwony.

13. It is urged the Report from the panellists was presented to the 1<sup>st</sup> Respondent's membership committee meeting held on 5<sup>th</sup> April 2018, which report is asserted indicated that the Petitioner had failed the professional interview and therefore was not eligible to be admitted to the class of "Corporate Membership". It is alleged the Petitioner was advised to acquire more training in the design of civil engineers works. It is averred that the minutes of the meeting indicate that the membership committee scrutinized the results and concurred with the panellists recommendations. It is averred that the Petitioner's name was not among those approved for "Corporate Membership" class at the 442<sup>nd</sup> Council meeting held at 1<sup>st</sup> Respondent's Secretariat on 11<sup>th</sup> April 2018.

14. The 1<sup>st</sup> Respondent urge that on review of the Petitioner's Membership file revealed that there were some falsified receipts of the 1<sup>st</sup> Respondent's submissions fees, that on 19<sup>th</sup> October 2018 the 1<sup>st</sup> Respondent asked the Petitioner to return the corporate membership Certificate M 3511, which was alleged he had obtained irregularly from the 1<sup>st</sup> Respondent's, then Registration Officer, Christopher Munubi.

15. It is averred that the Petitioner refused to return the Corporate Membership Certificate forcing the 1<sup>st</sup> Respondent on 18<sup>th</sup> December 2018 to send a letter to the Petitioner explaining that he was not among the individuals approved for the "Corporate Membership" class during the 442<sup>nd</sup> Council Meeting held at 1<sup>st</sup> Respondent's Secretariat on the 11<sup>th</sup> April 2018 but the Petitioner refused to return the Corporate Membership Certificate M.3511.

16. The 1<sup>st</sup> Respondent on 14<sup>th</sup> January 2019 wrote to the Petitioner informing him of the cancellation of Corporate Certificate M.3511 and the 1<sup>st</sup> Respondent notified the 2<sup>nd</sup> Respondent (the Engineers Board of Kenya) of the cancellation as required.

17. The 1<sup>st</sup> Respondent contend upon scrutinizing the retained certificates, it was discovered that they all bore fake signature and matter was reported to the Department of Criminal Investigation Headquarters (DCI).

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

18. The Respondent is opposed to the Petition and relies on Replying Affidavit by Eng. Nicholas M. Musuri sworn on 27<sup>th</sup> January 2020.

19. The 2<sup>nd</sup> Respondent aver that it is a state corporation as stipulated under **Section 3 of the Engineers Act, 2010** whose mandate and functions are set out under Section 7 of the Act.

20. The 2<sup>nd</sup> Petitioner argue that the Petitioner having met the criteria set in the Engineers Act under **Section 16(a)**, which includes submitting a corporate membership certificate from the 1<sup>st</sup> Respondent, it proceeded and registered him as a professional Engineer in Civil Engineering on 25<sup>th</sup> June 2018.

21. The 2<sup>nd</sup> Respondent contend that on 14<sup>th</sup> January 2019 through a letter, the 1<sup>st</sup> Respondent informed it, that the Petitioner's application for corporate membership had not been approved during the 1<sup>st</sup> Respondent's Council meeting held on 11<sup>th</sup> April 2018. It was further informed the Petitioner had been informed the Corporate Membership Certificate which had been issued by the 1<sup>st</sup> Respondent to him had been irregularly issued and therefore it had been cancelled.

22. The 2<sup>nd</sup> Respondent aver its position is that the Petitioner's Membership in the 1<sup>st</sup> Respondent having been cancelled, it is clear he had not met the criteria set under **Section 16 of the Engineers Act 2011** and therefore the entire submissions of his registration of professional Engineer falls away.

23. The 2<sup>nd</sup> Respondent urge, that he cannot be required to act against clear provisions of a statute just to meet any expectations otherwise its decision would be out rightly illegal and a violation of the principle of legality, a key principle in rule of law.

24. The 2<sup>nd</sup> Respondent urge that this Petition is a non-starter as it is an ill-concerned Constitutional Petition as there is no nexus between the subject matter of the case and the 2<sup>nd</sup> Respondent and the Petition ought to be struck out in limine. It is further urged that there is no specific violation or threatened violation of any constitutional provision, that has been cited neither has the petitioner established a case of violation under the Bill of Rights nor Constitutional provisions by the 2<sup>nd</sup> Respondent.

25. The 2<sup>nd</sup> Respondent argue that the joinder of the 2<sup>nd</sup> Respondent to the instant suit is superfluous, vexatious, and devoid of merit as there is no nexus between the 2<sup>nd</sup> Respondent and the subject matter of the case to make it a party to the proceedings of this case.

## **ANALYSIS AND DETERMINATION**

26. In this matter this Court issued directions on 30<sup>th</sup> October 2019 with regard to parties filing their respective responses together with written submissions. The petitioner in compliance filed and served written submission on 23<sup>rd</sup> January 2020. That when the matter came up

for mention to confirm compliance on 5<sup>th</sup> February 2020, the 1<sup>st</sup> Respondent had not complied. On the material date they sought court's leave to file supplementary affidavit which court in the interest of substantive justice, granted 1<sup>st</sup> Respondent 14 days within which to file supplementary affidavit and submissions. The Petitioner sought leave to file supplementary affidavit which was granted and the petitioner filed supplementary affidavit dated 24<sup>th</sup> March 2020. On 10<sup>th</sup> June 2020 when the matter came up for mention the 1<sup>st</sup> Respondent did not appear and had not filed any submissions. The Court on being moved by counsel for Petitioner and 2<sup>nd</sup> Respondent, who had filed their submissions found that 1<sup>st</sup> Respondent has had sufficient time to file submissions but had failed to do so for no apparent good reason and set this matter down for judgment.

27. I have considered the pleadings herein, the submissions on record and from the aforesaid the issues arising for consideration in this petition in my view are as follows:

- a) Whether the decision by the 1<sup>st</sup> Respondent to cancel the Petitioner's Corporate Membership Certificate and subsequent action by the 2<sup>nd</sup> Respondent to de-register the Petitioner as a professional Engineer was justified?*
- b) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated and/or breached the Petitioner's legitimate expectation and his right to gainful employment?*
- c) Whether the action by the 1<sup>st</sup> Respondent is illegal and/or irregular, going against the fundamental rights and freedoms of the Petitioner and an affront to his right to fair administrative action as envisaged under Article 47 of the Constitution of Kenya and Article 7.03 and 8.03 of the 1<sup>st</sup> Respondent's Constitution (Amended in 2015)?*
- d) Whether the 1<sup>st</sup> Respondent cancelled the Petitioner's membership Certificate out of malice and/or in bad faith?*
- e) Whether the Petitioner is entitled to other reliefs in form of damages?*
- f) Who will bear the costs of the Petition?*

**A. WHETHER THE DECISION BY THE 1<sup>ST</sup> RESPONDENT TO CANCEL THE PETITIONER'S CORPORATE MEMBERSHIP CERTIFICATE AND SUBSEQUENT ACTION BY THE 2<sup>ND</sup> RESPONDENT TO DE-REGISTER THE PETITIONER AS A PROFESSIONAL ENGINEER WAS JUSTIFIED?**

28. The Petitioner contend that the very first step in any administrative action procedure that subscribes itself to the laws of natural justice would be supplying an accused person with a statement of the alleged offences and/or show cause letter and a charge of specific breaches made against him/her in a well documented instrument. It is from such action that, an accused person is expected to make a response; comment and/or prepare a defence. An omission of this first step would automatically prejudice an accused person as from the onset, as he/she would not know what "offence" or "charges" is laid against him/her so as to prepare his/her defence.

29. Right from the onset, and as per clear facts as set out in the Petitioner's affidavits, the petitioner has been taken round on a fishing expedition by the 1<sup>st</sup> Respondent, not being told exactly what accusation he is facing, and what exactly he was required to respond to. The 1<sup>st</sup> Respondent has been engaged in goal changing game and has treated Petitioner to a contest he cannot fairly compete. There is no doubt that in this matter, that the initial accusation has mutated from one accusation to another, leading to the Petitioner herein learning some flesh accusation brought to his attention for the very first time when the 1<sup>st</sup> Respondent filed his Replying Affidavit dated 16<sup>th</sup> December 2019.

30. It is noted that before the decision to have Petitioner's Membership Certificate cancelled and subsequently de-registered, the current Honorary Secretary of the 1<sup>st</sup> Respondent on 6<sup>th</sup> August 2018 by telephone conversation, and later confirmed by email exchanges dated 7<sup>th</sup> August 2018, was clear, that the Membership Certificate Number M.3511 had been erroneously shared between the Petitioner and another undisclosed person. That if such person existed and exists there was nothing barring the 1<sup>st</sup> Respondent from disclosing such a person but this has never been disclosed to date. I find that all along and in view of the above, the 1<sup>st</sup> Respondent maliciously and deliberately concealed material facts, by remaining silent of the details and supporting particulars of the second person whose membership number was allegedly shared. The burden of proof in such case, lies with the 1<sup>st</sup> Respondent as, whoever alleges must prove.

31. I find in view of the contents of the 1<sup>st</sup> Respondent's conversation of 6<sup>th</sup> and 7<sup>th</sup> August 2018 with the Petitioner; even had it been that the Petitioner shared a membership number with anyone else, then that would be the 1<sup>st</sup> Respondent's misdoing for which no one else can be blamed, as issuance of certificates and the numbers thereof are purely the sole mandate of the 1<sup>st</sup> Respondent. The Petitioner or third party for that matter, ought not be pushed for a wrong or mistakes committed by the 1<sup>st</sup> Respondent.

32. The Petitioner contend that, however there was no sharing of membership number as averred by the 1<sup>st</sup> Respondent in the first place, It is petitioners averment that, indeed, the nomenclature system of the 1<sup>st</sup> Respondent is rather simple – when a qualifying candidate gets registered in the class of "graduate number" the candidate gets a unique number with a prefix "G" for graduate, followed by numerical suffix number that becomes the member's unique identifier. It is urged that in Petitioner's case, he was allocated the number G.3511 that can be clearly seen in all the payment receipts for subscriptions made and also in the January 14<sup>th</sup> 2019 letter by the 1<sup>st</sup> Respondent, the letter reference reflected the Petitioner's unique identifier number G.3511, when he was still a graduate member.

33. It is further submitted by the Petitioner that when a candidate finally passes his professional interview and becomes a corporate member the prefix changes from "G" to "M". The affix number does not change in any way – only the prefix letter. It is therefore from this uncontroverted submission that the Petitioner submits that there was no error of sharing his number as alleged by the 1<sup>st</sup> Respondent without

substitution, and therefore I find this was not sufficient ground for cancellation of the Petitioner's certificate.

34. The former President of the 1<sup>st</sup> Respondent Eng. Michael Ezekiel Okonji, who doubled up as a Board Member of the 2<sup>nd</sup> Respondent sworn an affidavit filed on 2<sup>nd</sup> March 2020, affirming prior to swearing the affidavit, he examined the membership certificate M.3511 in his own capacity and affirmed that the membership certificate M.3511 was indeed valid.

35. Following the filing of this Petitioner by the Petitioner seeking the reliefs set out in the Petition, the 1<sup>st</sup> Respondent mutated its facts, and came up with fresh allegations, alleging that the Petitioner failed his interviews, conspicuously strange, the Replying Affidavit by the 1<sup>st</sup> Respondent, dated 16<sup>th</sup> December 2019, the deponent thereto, deliberately refused to attach the original signed and dated scores and minutes of the professional interview process. Instead the 1<sup>st</sup> Respondent attached unsigned and undated purported scores and minutes despite them having a provision for signing and dating.

36. Perusal of the 1<sup>st</sup> Respondent's Replying Affidavit dated 16/12/2019 the 1<sup>st</sup> Respondent filed a litery of annexure documents stretching as far back as the year 2009, annexing what the 1<sup>st</sup> Respondent termed as "summary of scores" in relation to Petitioner. It is noted the summary of scores" was neither signed nor dated.

37. The Petitioner in his supplementary affidavit, raised several weighty issues with regard to the so called "summary of scores". The Petitioner went on to submit and contend that the so called "summary of scores" had not been signed nor dated despite them having provisions for signing. This Court notes that it was only after the Petitioner had extensively and exhaustively submitted on that issue that the 1<sup>st</sup> Respondent in a choreographed malicious and trickery scheme now annexed "purportedly fresh evidence" of signed and dated summary scores and individual score sheets filed alongside the four (4) supplementary affidavits. The 1<sup>st</sup> Respondent in doing so wants this court to believe the same were signed on 9<sup>th</sup> March 2018. That if then the same were in existence as of 9<sup>th</sup> March 2018, there remains once question unanswered. Why were they not attached to the first Replying Affidavit and where did the unsigned and undated "summary of scores" come from?

38. There are unanswered questions which provokes the Petitioner to raise the following issues and inconsistencies with regard to the so called "score sheets" published by the 1<sup>st</sup> Respondent, that clearly point to forgery, fabrication and perjury. The petitioner contend that if indeed the said score sheets were genuine, then the 1<sup>st</sup> Respondent ought to have presented them in the first instance when it was filing the 1<sup>st</sup> Replying Affidavit.

39. Further if as per the 1<sup>st</sup> Respondent, the Petitioner had failed, then the 1<sup>st</sup> Respondent should have in the first conversation within the Petitioner on 6<sup>th</sup> and 7<sup>th</sup> August 2018, told the Petitioner so rather than that the Membership Certificate Number M3511 had been erroneously shared between the Petitioner and another undisclosed person. The 1<sup>st</sup> Respondent ideally produced three (3) individual scores sheets, in the Petitioner's membership file, awarded by the three (3) interview panellists who in this case were Eng. Richard Chepkwony, Eng. Samuel Charagu and Eng. Christopher Ndonga (deceased). In questing the 1<sup>st</sup> Respondent's character, this court notes the 1<sup>st</sup> Respondent only produced two (2) individual score sheets; that of Eng. Richard Chepkwony and Eng. Samuel Charagu. In this Petition it turns out clearly that the 1<sup>st</sup> Respondent could not produce individual score sheet for the third panellists Engineer Ndonga since they could not have him fabricate the score sheet, sign and backdate it as he is now unfortunately dead. I am not satisfied the score sheet produced by the 1<sup>st</sup> Respondent is genuine. I am of the view that if at all the scores were genuine, individual score sheet of Engineer Ndonga ought to be in the Petitioner's file in the custody of the 1<sup>st</sup> Respondent and the same could have been produced but was not produced because it is not favourable to the 1<sup>st</sup> Respondent's case.

40. Looking at the supplementary affidavit of Engineer Samuel Charagu, the deponent purports to annex summary of scores apparently now having been signed and dated. On the signing part, it is interesting to note that Engineer Charagu actually signed twice on the summary of score sheet for himself and for Engineer Daniel Njora. This amounts to perjury. I find that the affidavit and annexure therefore and the said score sheet cannot be relied upon and for that reason, I reject the same as not genuine document.

41. This court agrees with the Petitioner's submissions, that it is the standard procedure, that the scores/transcripts of the professional interview process are never issued to the candidates. I therefore find that it was not possible for the Petitioner to verify or validate whether or not he had passed his professional interview.

42. The 1<sup>st</sup> Respondent justify their cancellation of decision by urging that a regret letter was duly served upon the petitioner as is required and averring that due process was followed in the deregistration process in conformity to **Articles 7 and 8 of the 1<sup>st</sup> Respondent's own governing constitution**. The Petitioner however urge that the 1<sup>st</sup> Respondent has deviated from the facts relating to due process and resulted to attempting to justify their irrational, irregular, and illegal decision by annexing backdated documents in an attempt to prop their assertions.

43. It is clear in the affidavit by Eng. Samuel Charagu under paragraphs 10 – 19, it is averred that he never prepared a corporate certificate for the petitioner and that he was surprised how the petitioner obtained his membership certificates; however it is strange to note that he never explained why he never prepared a regret letter for dispatch to the Petitioner. Further the deponent herein has not explained how the Petitioner's certificate was sealed with the Institutions seal after the certificate had been signed. I find that normally the seal of such institutions are not avail to each and every worker in the institution but is kept under lock and key by the Honorary Secretary of the Council. Consequently the deponent does not also disown his own signature on the face of Certificate M.3511. From the above, I find clearly that there were no signed and dated score sheet in the first place. It's the 1<sup>st</sup> Respondent who first had the same score sheet fabricated, signed and backdated. I find the conduct of the 1<sup>st</sup> Respondent to have been suspect right from the outset and have been driven by malice. The true reason that led to the cancellation decision has been mutating and so has been the "evidence" produced each time by the 1<sup>st</sup> Respondent. This has been demonstrated by shifting of the evidence from the issue of shared membership number, to forgery of payment receipts; to bribery/collusion, to now the latest allegation of failed result. I find from the demeanour of the 1<sup>st</sup> Respondent each single allegation or

action is questionable and hell-bent or maliciously denying the Petitioner the Right to Practice as a Professional Engineer without justifiable reason. I find that the evidence of the 1<sup>st</sup> Respondent is untruth and unbelievable.

44. Further it is noted that the 1<sup>st</sup> Respondent does not address a fundamental anomaly in which the minutes of the “membership committee” are still not signed and nor dated, yet it is the same minutes annexed as the minutes the 1<sup>st</sup> Respondent relied on to cancel the membership certificate. This raises another challenge in that could it be that the 1<sup>st</sup> Respondent was unable to convince the concerned former council members, to perjure themselves by endorsing the minutes of membership committee whose credibility was questionable? I find that in absence of the original signed and dated minutes of the membership committee to validate to the summary of scores, the 1<sup>st</sup> Respondent cannot reasonably purport that the Petitioner did not pass his professional interview.

45. The Petitioner contend the 1<sup>st</sup> Respondent, in an attempt to conceal material facts, has deliberately failed to annex, minutes of the full council meeting to prove whether or not the Petitioner elected in the class of corporate member. The Petitioner aver that after certificates are issued by the 1<sup>st</sup> Respondent, there is a Board Meeting held by the 2<sup>nd</sup> Respondent whose purpose is to inter alia; independently review all certificates and confirm the same before registering the candidates as professional Engineers. The President of the 1<sup>st</sup> Respondent is by default a Board member of the 2<sup>nd</sup> Respondent and the purpose of the President in the board of the 2<sup>nd</sup> Respondent is to party, to confirm the certificates to the 2<sup>nd</sup> Respondent. In the instant Petition, the then President Eng. Michael Ezekiel Okonji has sworn and filed an affidavit affirming that fact; which I take into account. It is further noted that he affirmed, that during his tenure, all documents were properly signed and filed, including proceedings of all council meetings he chaired. The minutes and such documents have not been availed, it therefore follows, the 1<sup>st</sup> Respondent has deliberately concealed, that fact by omitting to produce those council minutes.

46. In the supplementary affidavit sworn by Eng. Matalanga alleges, that there is a complaint recorded with the DCI with reference to CID/GE4/COMP/6/11/2019/420 dated 3<sup>rd</sup> April 2019. It is Petitioners’ contention that on 26<sup>th</sup> February 2020, at Mazingira Complex (DCI Headquarters) through his advocates carried search on the aforesaid complaint and found no reference whatsoever in anyway on the Petitioners membership certificate M.3511 nor any other membership certificate as alleged by the 1<sup>st</sup> Respondent. The contents he found relate to one Christopher Munubi who was a member of the Secretarial of the 1<sup>st</sup> Respondent. From the complaint lodged by current Honorary Secretary Eng. Matalanga, it is clear the referred investigations, under that reference relate only to Christopher Munubi and there are no membership certificates under investigations including that of the Petitioner. I find that there is no basis on the averment under oath under paragraph 10 of the affidavit of Eng. Matalanga, where he alleges that the Petitioner has declined requests from the DCI to hand in his certificate for forensic analysis. This allegation is founded on malice. That had the incident occurred as alleged by Eng. Matalanga, the Petitioner would have breached **Section 22 of the Police Act (Cap 84)**, where it is clear that it is an offence not to honour summons by a Police Officer. That if that ever arose; then the police would have resulted to arresting such a defaulter. In this Petition, I find that the 1<sup>st</sup> respondent has not demonstrated through adducing evidence to that effect that the Petitioner has been summoned but failed to honour the summons. The burden of proof is with whoever alleges and in this case the 1<sup>st</sup> Respondent failed to discharge the burden of proof.

47. It is further noted that the former President of the 1<sup>st</sup> Respondent Eng. Michael Ezekiel Okonji, who doubled up as a Board member of the 2<sup>nd</sup> Respondent swore an Affidavit detailing the entire process of election/transfer of class of a member. He has deponed that at no point was any decision made based on unsigned and undated documents during his tenure, essentially implying that the Petitioner’s membership file should be having all records and details, properly signed and dated. In the instant petition, it is interesting to note, the 1<sup>st</sup> Respondent, the custodian of the Petitioner’s records, opted to make use of unsigned and undated documents. It is clear that something is not correct here as regards this matter. The former President has stated that prior to swearing his affidavit, he did, examine the membership certificate M.3511 in his own capacity and affirmed that the membership certificate M.3511 was indeed valid. This is evidence from a witness from the 1<sup>st</sup> Respondent and this court finds the 1<sup>st</sup> Respondent is bound by its own witness evidence.

48. The Petitioner in urging that the documents relied upon by the 1<sup>st</sup> Respondent were in admissible relies on the case of **Rose Shikeyi Obiero v Chairman – KNUT Busia & 2 others (all on behalf of Busia KNUT Education Scheme) (2015) eKLR**.

49. The Petitioner on weight to be attached to unsigned and undated document sought to rely on the case of **Rose Shikeyi Obiero v Chairman – KNUT Busia & 2 others (all on behalf of Busia KNUT Education Scheme) (2015) eKLR** where Honourable Justice F. Tuiyott while sitting on an appeal arising out of the Judgment of **E. O. Obaga SRM, in Busia PMCC No.311 of 2008** particularly on the issue of documents having not been signed and their authenticity held that:

**“There is however no evidence to show that the document came from accounts section as it is not signed. It cannot therefore be used as a basis of the plaintiff claim. Besides the anomalies in the documents, the amount shown therein is not supported by the evidence of the plaintiff and other documents produced by the Plaintiff”.**

50. It is clear from the 1<sup>st</sup> Respondents affidavit that all other minutes filed by the 1<sup>st</sup> Respondent in relation to this case are indeed signed on every single page and at the foot of the minutes but when it turns to minutes in relation to the Petitioner and the results the same are not signed. It is noted that there is no application for why such failure has been advanced and even if any is advanced it would be irrational and unreasonable. The court can only read a deliberate intention to mislead the court in an attempt to justify illegal and unlawful action.

51. The Petitioner aver that procedurally, after candidates have interviews conducted by 1<sup>st</sup> Respondent, the results /transcripts are not handed to them and are never issued to the candidates directly, instead, where a candidate has passed his professional interviews, the candidate is issued with a membership certificate duly signed by the President, as Chairperson of the Membership Committee and the Honorary Secretary to the 1<sup>st</sup> Respondent. On the other hand, if a candidate does not pass the interviews, then a regret letter is immediately issued to such candidate.

52. In the instant Petition it is clear that the 1<sup>st</sup> Respondent has not managed to even provide a file copy of any regret letter signed by the

former Honorary Secretary; (who personally was involved in the interviewing the Petitioner) purportedly informing the Petitioner that he had failed his examination.

53. What this Court notes to be even more bizarre is that despite the current Honorary Secretary of 1<sup>st</sup> Respondent assuming office officially on 27<sup>th</sup> April 2018, more than eight (8) months after Petitioner had already been issued with his membership certificate and subsequently used to secure full registration as a Professional Engineer with the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent purported to have issued the Petitioner with a regret letter. It is worth noting, in this Petition, that the Petitioner only came to learn of the purported regret letter in these proceedings. I find the 1<sup>st</sup> Respondent did not take this matter serious or there was something that the 1<sup>st</sup> Respondent is not disclosing in these proceedings. I find the allegation are an afterthought, vague and maliciously presented to this court in an attempt by the 1<sup>st</sup> Respondent to justify its unlawful actions.

54. The Petitioner point out that further to the irregularities, the regret letter issued by Eng. Nathaniel Matalanga is addressed to a “P. O. Box No. 7375 Nairobi” which is not the Petitioner’s address, as all the other documents addressed to the Petitioner are addressed to P. O. Box Office No. 1639-60200 Meru, which is the Petitioner’s correct address. Eng. Nathaniel Matalanga was voted into office on 12<sup>th</sup> April 2018 and assumed office on 27<sup>th</sup> April 2018. It is evidently clear therefore Eng. Nathaniel Matalanga was not in office all the while when the Petitioner conducted his interviews and as at when his certificate was issued.

55. This Court notes the mutating allegations by the 1<sup>st</sup> Respondent through these proceedings continued coming in, which the Petitioner knew nothing about prior to filing of the Petition. The Petitioner was further accused of falsifying payment receipts in cahoots with one Christopher Munubi and secondly, that the certificate has been obtained irregularly, and that the matter was referred to Directorate of Criminal investigations (DCI). With regard to first allegation of falsified payment receipts, the 1<sup>st</sup> Respondent never provided the court any material evidence to prove those allegations despite having the onus to prove. Instead, the Petitioner, in his rejoinder Affidavit; produced annexed certified copies of M-pesa Statements and bank deposit slips duly certified by the bank indicating that all payments were paid directly to the 1<sup>st</sup> Respondent and never any individual. I find that the allegations that Petitioner’s payments were falsified, can only be viewed, in my view, as malicious aimed at tainting the good image and character of the Petitioner and as an attempt to justify the 1<sup>st</sup> Respondent’s is wrongful, illegal and irregular action.

56. The 1<sup>st</sup> Respondent, IEK Constitution 2018, Amendments (see from page 37 of the Petition) under **Section 7 and 8 of IEK Constitution**, it is clearly provided as follows:-

**“Article 7.03 provides-**

***The Council by resolution may refuse to continue to receive the subscription of any member who shall have wilfully acted in contravention of the By-Laws of the Institution or who in the opinion of the Council, shall have been guilty of such conduct as shall render him unfit to continue to belong to the Institution, and may erase his name from the Register and he shall thereupon cease to be a member of the Institution.***

**Provided that before taking such action the Council shall afford the member the opportunity of appearing before them or of making representations to them in writing.” (Emphasis mine)**

On the other hand, Article 8.01, 8.02, 8.03 provides:-

**“8.01. A member of any class is required so to order his conduct as to uphold the reputation of the Institution.”**

**“8.02. Every Corporate Member is required so to order his conduct as to uphold the dignity of his profession and to act, in whatever capacity he may be engaged. In a strictly fiduciary manner towards his clients and employers and towards others with whom his work is connected and towards other members, in a matter consistent with the best interest of the Institution.”**

**“8.03. Any alleged breach of By-Laws 8.01 and 8.02 which may be brought before the Council properly vouched for and supported by sufficient evidence, shall be dealt with by the Council, either by expulsion of the offender from the Institution under the procedure of By-Laws 7.03, as far as it applies, or in such manner as the Council may think fit.” (Emphasis added)**

57. The Petitioner argue that the 1<sup>st</sup> Respondent in reaching its decision blatantly failed to comply with the laid-down procedure as is enshrined under **Article 47 of the Constitution of Kenya** and **Article 7 and 8 of the IEK Constitution** and as is required by the Fair Administration of Justice, consequently the Petitioner has suffered prejudice. It is urged had the 1<sup>st</sup> Respondent acted as required, it would not have been in violation of any statutory public law. In this Petition the 1<sup>st</sup> Respondent did not act as per its Constitution as clearly spelled out under **Article 7 of IEK Constitution** and **under Article 47 of the Constitution of Kenya**. The 1<sup>st</sup> Respondent acted hastily and failed to exercise self-restraint and prematurely communicated the cancellation decision to the 2<sup>nd</sup> Respondent, which triggered the sequence of events leading to Petitioner’s deregistration as a professional Engineer.

58. In the instant Petition the 1<sup>st</sup> Respondent has not justified its arbitrary decision to cancel the Petitioner’s Certificate. The Petitioner was not served with a charge or allegation leading to cancellation of his certificate nor was he given an opportunity to defend himself. He was condemned unheard and against the rules of natural justice. He was therefore wrongfully deregistered, and was effectually denied his constitutional rights of ab initio being accorded an opportunity to be heard before being condemned and as otherwise guaranteed under **Article 47 of the Constitution of Kenya**; which provides every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. That as a result thereof he has been denied his Constitutional right of working and earning a living

as an engineer since January 2019. The situation herein has drawn great resemblance and parallelism to a case of wrongful dismissal. The Petitioner urges court to exercise its discretion under **Article 23** and **Article 165(3)(b) of the Constitution of Kenya** and award damages for violation of rights and irreparable financial and reputational damage caused to the Petitioner.

59. The Petitioner in this Petition seeks a determination on whether due process was followed as per the **Constitution of Kenya** and **Statutory Provisions** enshrined in **IEK Constitution (amended 2015)**.

60. The 2<sup>nd</sup> Respondent urge the Petition is incompetent and fatally defective on grounds that the Petitioner has failed to cite with precision or the relevant provisions of the Constitution alleged to have been violated and the manner in which the 2<sup>nd</sup> Respondent have violated the same to warrant intervention of this Honourable Court.

61. The 2<sup>nd</sup> Respondent relies on the case of **East African Breweries Limited v. Attorney General & 2 Others (2013) eKLR** where Justice Lenaola, (as he then was) observed thus:-

***“It is now well established that a party alleging violation of a constitutional right must demonstrate, with a reasonable degree of precision, what provisions of the Constitution have been violated, as well as the manner in which they have been violated.”***

62. The Petition herein is brought pursuant to **Articles 22, 23, 24, 27, 47, 69 and 259 of the Constitution of Kenya**. I have perused the Petition as drawn and filed and it is evidently clear that the Petitioner has cited with precision the relevant provisions of the Constitution allegedly violated and the manner in which the 1<sup>st</sup> Respondent has violated the same; though there are no allegation in what manner the 2<sup>nd</sup> Respondent violated the Petitioner’s constitutional rights as it is clearly pleaded under paragraph 22 of the Petition as follows:-

***“Following cancellation of the Petitioner Membership Certificate Number M-3511 by the 1<sup>st</sup> Respondent, it followed that the 2<sup>nd</sup> Respondent had no alternative but to cancel the Petitioner’s registration as Professional Engineer (PE).”***

63. **Article 50 of the Constitution of Kenya** provides that every accused person has the right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it; to have adequate time and facilities to prepare a defence. In view of **Article 50 of the Constitution of Kenya**, the 1<sup>st</sup> Respondent was under an obligation to formally notify the Petitioner of his alleged breaches, properly vouched with supporting evidence, to enable the Petitioner within a reasonable time, defend himself. It is also noted from the 1<sup>st</sup> Respondent’s Constitution, that such quasi-judicial proceedings, shall be before the full council, which was never the case herein. I find the constitution has clearly spoken and being a Supreme law, its words and messages are supposed to be complied with. I find that by denying the Petitioner the Constitutional rights enshrined both in the Constitution of Kenya and 1<sup>st</sup> Respondents constitution, **Article 47, and 50 of the Constitution** as well as provision under **Section 4(3) of the Fair Administrative Action Act** were breached. The 1<sup>st</sup> Respondent also breached its own **Article 7 and 8 of the IEK Constitution**.

64. The Petitioner in support of the aforesaid proposition sought reliance in the case of **R v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR** where the Court considered this question and observed as follows:

***“71. As can be seen, the entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy. Parties, who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Court decisions should show stands of the recognition of the Constitution as the basis of judicial review. 72. Our courts need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front. Our courts must develop judicial review jurisprudence alongside the main stream “theory of a holistic interpretation of the Constitution.” Judicial review is no longer a common law prerogative directed purely at public bodies to enforce the will of Parliament, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The judicial review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution. In any event, the basic idea that courts must police the boundaries of administrative power is firmly based on the constitutional principle of the rule of law. The function thus ascribed to the judiciary vis a vis the limitation of executive actions is crucial to promote the virtues of legality, fairness, and reasonableness which this principle has traditionally embodied... The judge is required to examine the legal framework within which the challenged decision was undertaken. This enhances the role of the courts as the guardians of the law and protectors of individual right. (Emphasis mine)***

65. From **Article 50 of the Constitution of Kenya** on fair hearing, it is provided that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another Independent and impartial tribunal or body.

66. I find that it is on the basis of the above, that the 1<sup>st</sup> Respondent established its own Constitution to govern such matters as deregistration of members. **Article 7 and 8 of IEK Constitution** conforms to **Article 50 of the Constitution** which requires that:-

***“(2) Every accused person has the right to a fair trial, which includes the right –***

***a) To be presumed innocent until the contrary is proved;***

***b) To be informed of the charge, with sufficient detail to answer it;***

- c) *To have adequate time and facilities to prepare a defence;*
- d) *To a public trial before a court established under this Constitution;*
- e) *To have the trial begin and conclude without unreasonable delay;*
- f) *To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*
- g) *To choose, and be represented by, an advocate, and to be informed of this right promptly;*
- h) *To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
- i) *To remain silent, and not to testify during the proceedings;*
- j) *to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*
- k) *to adduce and challenge evidence;*
- l) *to refuse to give self-incriminating evidence;*” (all emphasis mine)

67. I find and hold that the words “**accused**” as provided under **Article 50 of the Constitution** as herein above, can be substituted *matatis Mutandis*, with the Petitioner, as Petitioner has in this case been accused by the 1<sup>st</sup> Respondent of obtaining his membership certificate irregularly. It is further clear this court has found the 1<sup>st</sup> Respondent is in violation of all the emphasized strict constitutional requirements above. This court further notes that the framers of the constitution under **Article 25 of the Constitution of Kenya** categorically provided that the **fundamental right and freedom to fair trial shall not be limited**.

68. In view of the contents of the Petitioner’s pleadings and considering the submission as well as the 1<sup>st</sup> Respondents pleadings, I find that indeed, the Petitioner’s constitutional rights to fair trial were violated by the 1<sup>st</sup> Respondent. I find the decision by the 1<sup>st</sup> Respondent to cancel the Petitioner’s Corporate Membership Certificate and subsequent action by the 2<sup>nd</sup> Respondent on advise and instruction by 1<sup>st</sup> Respondent to de-register the Petitioner as a Professional Engineer was, irrational, illegal, unreasonable, unconstitutional, null and void and was not justified.

**B. WHETHER THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS VIOLATED AND/OR BREACHED THE PETITIONERS LEGITIMATE EXPECTATION AND HIS RIGHT TO GAINFUL EMPLOYMENT?**

69. It is urged by the Petitioner that his legitimate expectation was, that after he was duly issued with a membership certificate, that he had passed his interviews. That using the 1<sup>st</sup> Respondent’s membership certificate, he would be granted automatic registration as a professional engineer. The petitioner avers from this he expected that after fulfilling the requisite requirements and being granted registration status, he would be allowed to practice as a Professional Engineer unhindered, although within the by-laws and code of conduct governing his practice. The Petitioner urges as a result, the actions of the 1<sup>st</sup> Respondent to de-register the petitioner was wrong, illegal, irregular and a breach of his legitimate expectation and going against the very provisions of the governing **IEK Constitution (amended 2015) and provisions contained in the Constitution of Kenya (2010)**.

70. The 2<sup>nd</sup> Respondent in response submit that the action of 2<sup>nd</sup> Respondent in cancelling the Registration of the Petitioner as a Professional Engineer was guided by **Section 16(a) of the Engineers Act 2011** which provides that in order for one to register as a professional Engineer he/she must have met the following conditions:-

- “(i) *is registered as a graduate engineer and has obtained practical experience as prescribed under this Act;*
- (ii) *has passed professional assessment examination conducted by the Board;*
- (iii) *is a corporate member of the Institution of Engineers of Kenya.”*

71. That the cancellation was caused by the 1<sup>st</sup> Respondent’s who advised the 2<sup>nd</sup> Respondent on the status of compliance as regards to registration as a corporate member of the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent further urges, that statutory words overrule an expectation however founded. That the 2<sup>nd</sup> Respondent cannot be expected to act against clear provisions of a Statute just to meet ones expectations otherwise its decision would be out rightly illegal and a violation of the principle of legality, a key principle in rule of law.

72. The 2<sup>nd</sup> Respondent further assert that legitimate expectation to be successfully invoked, the expectation must itself be legitimate in the sense that it must itself be lawful. That where a statutory body is exercising statutory powers, its actions cannot be termed as contrary to legitimate expectation as long as they are acting in accordance with the statute and the statute has not been impugned. The 2<sup>nd</sup> Respondent in support of the above preposition place reliance in the case of **Royal Media Services Limited & 2 others V. Attorney General & 8 others (20134) eKLR** that :-

**“...legitimate expectation, however strong it may be, cannot prevail against express provision of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise.”**

73. The 2<sup>nd</sup> Respondent therefore urges the decision by the 2<sup>nd</sup> Respondent to cancel the registration of the Petitioner as a professional engineer cannot be successfully impeached as a by doing so would amount to unduly interfering with the discretion statutorily given to the 2<sup>nd</sup> Respondent to set standard to ensure that the highest professional standards are maintained in the profession and that is not for the court to be concerned with the efficaciousness of the decision made pursuant to the Act.

74. The 2<sup>nd</sup> Respondent further aver that it is vested with powers to make the decision in question and that no abuse of such powers has been alleged or proved and that it has not been shown the power was not exercised as provided for under the Engineer Act 2015. It is further conceded by the 2<sup>nd</sup> Respondent such a decision can only be challenged on grounds of illegality, irrationally and procedurally impropriety.

75. In *Nairobi H.C. Judicial Review No. 294 of 2010, Republic v Commissioner of Domestic Taxes and another, ex-parte Kenton College Trust, Justice W. Korir* summarized the ingredients of legitimate expectation as follows:-

**“After reviewing various decisions and books, I have come to the conclusion that for one to successfully rely on the principle of legitimate expectation it must be demonstrated that:-**

**a) The representation underlying the expectation is clear, unambiguous and devoid of relevant qualification;**

**b) The expectation is reasonable;**

**c) The representation was made by the decision-maker; and**

**d) The decision-maker had the competence and legal backing for making such representation.”**

76. The 1<sup>st</sup> Respondent action of issuing the Petitioner with Membership Certificate is in line with ingredients of legitimate expectation principle clearly translated to mean, that the Petitioner had satisfied all the requirements for issuance of the same including having passed his interviews. I still find this one question uncontroverted by the 1<sup>st</sup> Respondent; thus in any event, how did the 1<sup>st</sup> Respondent issue the Petitioner with a certificate, if at all, he did not pay for his interviews? I find the only reasonable conclusion that can be drawn, is that the said certificate was issued by the 1<sup>st</sup> Respondent having been signed by the 1<sup>st</sup> Respondents' three (3) signatories. I find that in line with the ingredients of legitimate expectation, no allegation whatsoever has been made and proved by the Respondents to the extent that the competence of the said three (3) signatories or that the action by the three to sign and issue the Petitioner with a membership certificate was illegal.

77. In support of the above preposition the Petitioner refers to the case of *Republic v Pharmacy and Poisons Board & 2 others Ex-parte Juliet Lihemo Agufa [2015] eKLR* where Honourable Justice Korir J, while addressing the issue of legitimate expectation found that:-

**“There is no allegation by the Board that the decision to exempt the ex-parte Applicant went against the law. The promise given to the ex-parte Applicant was therefore lawful and legitimate.”**

78. Further to the above in the case of *Council of Civil Service Unions case*, (supra) the learned judge in his wisdom observed that:-

**“the Board could not withdraw the right which had been granted to the ex-parte Applicant without giving her a chance to make her observations. The letter dated 19<sup>th</sup> May, 2014 therefore breached one of the ingredients of the doctrine of legitimate expectation namely that a promise made by a public authority cannot be withdrawn without giving the person to be affected a chance to comment on the decision.”** (Emphasis added).

79. In the instant Petition it is undisputed that the Petitioner was never afforded an opportunity to “comment” on the decision by the 1<sup>st</sup> Respondent to cancel his membership. Its upto now not clear to the Petitioner what led to cancellation of his membership as has been noted by the Court, facts have mutated from sharing membership number, to irregular payments and to failing the interview. The Petitioner urge the 1<sup>st</sup> Respondent acted maliciously in cancelling his membership. The Petition rely on decision of *Lord Diplock in the Council of Civil Service Union (supra)* where the Judge in his wisdom observed:-

**“the Board could not withdraw the right which had been granted to the ex-parte Applicant without giving her a chance to make her observations. The letter dated 19<sup>th</sup> May, 2014 therefore breached one of the ingredients of the doctrine of legitimate expectation namely that a promise made by a public authority cannot be withdrawn without giving the person to be affected a chance to comment on the decision.”** (Emphasis added).

80. I find in the instant Petition, in concealing the Petitioner's membership without laying down the charges against him, affording him an opportunity to defend himself, the cancellation breached one of the ingredients of the doctrine of legitimate expectation in the Constitution of *IEK Constitution and Article 50 of the Constitution of Kenya*; A promise made by 1<sup>st</sup> Respondent, cannot be withdrawn without giving the person to be affected by its action a chance to comment on the decision. This was a clear abuse of powers under the *IEK Constitution* as the power was not exercised as provided under the *Engineers Act 2011*. The cancellation decision reached by the 1<sup>st</sup> Respondent was therefore

illegal, irrational and not procedurally fair.

**C. WHETHER THE SECTION BY THE 1<sup>ST</sup> RESPONDENT IS ILLEGAL AND/OR IRREGULAR, GOING AGAINST THE FUNDAMENTAL RIGHTS AND FREEDOMS OF THE PETITIONER AND AN AFFRONT TO HIS RIGHT TO FAIR ADMINISTRATIVE ACTION AS ENVISAGED UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA AND ARTICLE 7.03 AND 8.03 OF THE 1<sup>ST</sup> RESPONDENT'S CONSTITUTIONAL (AMENDED IN 2015)?**

81. *Article 47 of the Constitution of Kenya 2010* provides:-

***“47. Fair administrative action-***

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

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

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

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

***(b) promote efficient administration.”***

82. It is Petitioner's contention that he was never at any particular time informed of the particular "offence" he had committed to warrant cancellation of his membership as a Professional Engineer. He further urges, even if, there was no offence, then the Respondents were obliged to accord him an opportunity to be heard before taking the, irrational, wrongful, irregular and/or illegal decision to cancel his membership and deregister him as a professional engineer.

83. Our Constitution has clearly expressed itself on the issue of fair administrative action. It is a requisite of a fair administrative action, as guaranteed under **Article 47 of the Constitution**, clear that the Respondents in this matter were constitutionally and statutorily obliged to hear the Applicant before making any adverse findings against the Applicant. In support of this proposition the Petitioner relies on **Halsbury's laws of England Judicial Review (Volume 61 (2015) 5<sup>th</sup> Edition) Para. 639** where it is stated as follows with respect to the right to notice and opportunity to be heard:-

***“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice in itself to attract a duty to comply with this rule.”***

84. In the instant petition the 1<sup>st</sup> Respondent actions to cancel the Petitioner's membership certificate and subsequently by the 2<sup>nd</sup> Respondent to de-register the Petitioner went against one of Petitioner's right to economic and social rights as enshrined under **Article 43 of the Constitution**; his right to information as enshrined under **Article 35**; his freedom of expression and right to education as enshrined under **Article 33 of the Constitution**; to freedom to conscience and opinion as stated under **Article 32 of the Constitution**, his right to human dignity under **Article 28 of the Constitution**. This is due to the fact that the 1<sup>st</sup> Respondent has never communicated to the Petitioner the particular reasons as to why the rational/arbitrary decision was made.

85. The Institution of Engineers of Kenya a professional Society of Engineers was founded in 1972 and at the heart of its legal frame work and governance structure is the **IEK Constitution** guiding its affairs, including the **2015 Amendments** that were proposed and adopted to align with the government affairs and to conform to the constitutional requirements. **Article 7.03** of the said institution of **Engineers Constitution** on resignation; re-admission and expulsion of members provides that:-

***“7.03. subscription of any member who shall have wilfully acted in contravention of the By-laws of the Institution or who in the opinion of the Council, shall have been guilty of such conduct as shall render him unfit to continue to belong to the Institution, and may erase his name form the Register and he shall thereupon cease to be a member of the Institution.***

***Provided that before taking such action the Council shall afford the member the opportunity of appearing before them or of making representations to them in writing.*** (Emphasis mine)

86. **Article 7.03** clearly provides for a party to be afforded an opportunity of appearing before a full council or making a representation to them in writing. The Petitioner in this matter, was never afforded an opportunity before the Council or afforded an opportunity whatsoever to present his representation in writing. The Council in proceeding without complying with its own constitution clearly violated its constitution and to great extent violated Petitioner's Constitutional right to be heard before being condemned.

87. I further find and hold, that even if, the process for administrative action is not governed by statute or otherwise, then the same must conform to the constitutional requirement of fair administrative action. In the case of **Russel vs. Duke of Norfolk [1949] 1 All ER at 118**, where the Court expressed itself as hereunder:-

***“There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case.”*** (Emphasis added).

88. Further in the case of *Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR* while the Honourable Justice G. V Odunga was upholding the decision in *Russel vs. Duke of Norfolk (supra)* he held that;

***“What the above cases hold is that whatever form of proceedings adopted by the authority, it must meet the minimum irreducible elements of fairness. In this case, it is clear that after the Applicant filed his application for review, he was not invited to argue his case. Whereas he need not have appeared before the Tribunal in person, the law expected that the applicant would be heard on his case before a determination either way was made.”*** (Emphasis mine)

89. **Article 8 of the IEK Constitution** prescribe the code of conduct for professional and penalty for any breach, clarifying three things:- first is what exactly continues a valid breach of professional conduct; secondly, who exactly is mandated to deal with such matters and lastly the administrative action procedure before any penalty is imposed. **Sub-Article 8.03** provides:-

***“Any alleged breach of By-Laws 8.01 and 8.02 which may be brought before the council properly vouched for and supported by sufficient evidence, shall be dealt with by the council, either by expulsion of the offender from the institution under the procedure of By-Laws 7.03 as far as it applies, or in such manner as the council may think fit”.*** (Emphasis mine)

90. The important and key thing here is, that any alleged breach must be properly vouched for, and proven by sufficient evidence in order for the breach to be punishable under the provisions therein. It is clear that all membership related cases can only be dealt with by the full council and not by an individual council member; following a clearly laid-down or prescribed procedure that requires that an accused to be accorded the opportunity to appear before the council and making presentations in his defence before any administrative penalty can be imposed.

91. Turning to the Petitioner’s case herein the following, observations are evident:

***a) There has not been any specific breach/accusation levelled against him to date.***

***b) The claims alleged by the 1<sup>st</sup> Respondent have not been properly vouched/evidenced to enable the Petitioner to respond to them.***

***c) The Petitioner was condemned unheard by mere unsubstantiated allegations which were processed by an individual (the current Honorary Secretary) and not by full council as prescribed.***

***d) The Petitioner was not invited at any one point to make presentation to the Council in his defence before being condemned.***

92. From the findings herein above, it has clearly been demonstrated by the Petitioner in his pleadings, that the action by 1<sup>st</sup> Respondent is illegal and/or irregular, and is against the fundamental rights and freedoms of the Petitioner and an affront to Petitioner’s right to fair administrative action as envisaged under **Article 47 of the Constitution of Kenya** and **Article 7.03 of the 1<sup>st</sup> Respondent’s Constitution (Amended in 2015)**. I find from the above the 1<sup>st</sup> Respondents action was, irrational, wrongful, irregular and/or illegal in cancelling the Petitioner’s membership and de-registering him as a professional engineer.

#### **D. WHETHER THE 1<sup>ST</sup> RESPONDENT CANCELLED THE PETITIONER’S MEMBERSHIP CERTIFICATE OUT OF MALICE AND/OR IN BAD FAITH?**

93. The Petitioner contend that the 1<sup>st</sup> Respondent maliciously committed the irrational, illegal and/or wrongful act of cancelling his membership certificate deliberately and wilfully to injure the Petitioner’s reputation and in support of this allegations the Petitioner illustrates as follows:-

***a) The 1<sup>st</sup> Respondent does not have a firm ground as to why it cancelled the Petitioner’s membership certificate. Instead, the 1<sup>st</sup> Respondent is on a fishing expedition to try and justify its actions. That the issues have been mutating with times and circumstances from sharing membership number to failing of the professional Interview, to falsified payment to having obtained the certificate irregularly. This can only be interpreted as maliciously choreographed and pre-meditated unlawfully and/or illegally cancel of the certificate at all costs.***

***b) The 1<sup>st</sup> Respondent had all the resources at its disposal and under its custody pertaining to the Petitioner, including the records of his Professional Interview process to the class of Corporate Member and also subscription records. However, the 1<sup>st</sup> Respondent maliciously disregarded those records and opted to deliberately cancel the Petitioner’s certificate.***

***c) The 1<sup>st</sup> Respondent maliciously and with no justifiable reason went ahead to allege that the Petitioner had engaged in inappropriate financial dealings with one Christopher Munubi, including sending money to the said individual with no material evidence. This was aimed at maliciously presenting the Petitioner as a person of loose morals and character, corruptible, crooked and one who gets his way through dubious means.***

d) The 1<sup>st</sup> Respondent has maliciously deliberately declined to produce the signed scores and membership committee minutes duly signed by the appropriate persons confirming that the Petitioner indeed passed his Professional Interview. Instead the 1<sup>st</sup> Respondent opted to annex in Court unsigned and undated scores and minutes. The 1<sup>st</sup> Respondent, knowing all too well that transcripts of Processional Interviews results are procedurally never released to candidates after the Interview process, deliberated and maliciously withheld the authenticated scores and minutes, thereby denying the Petitioner a chance to exonerate himself.

e) The 1<sup>st</sup> Respondent deliberated breached the governing constitution of the 1<sup>st</sup> Respondent (amended 2015) by denying the Petitioner the chance to defend himself before the full Council before the penalties of expulsion from the Corporate member was imposed on the Petitioner. The 1<sup>st</sup> Respondent abused powers he did not have to arbitrarily cancel the Petitioner's certificate in total disregard to a clearly laid out administrative action procedure laid out under articles 7.03 and 8.03 of the IEK constitution (amended 2015).

f) The 1<sup>st</sup> Respondent caused the cancelation decision to get "published to the general public" when it copied the contents of the January 19, 2019 letter, to the 2<sup>nd</sup> Respondent, knowing all too well that any written instrument addressed to a government entity is freely available for public scrutiny unless otherwise marked as 'Confidential', 'Secret' or 'Top Secret'. It is from this communication that the Petitioner's former Employer, peers and former colleagues learnt that the Petitioner had been deregistered as a Professional Engineer on account of irregularly obtaining his membership certificate with the 1<sup>st</sup> Respondent. This inevitably injured the reputation of the Petitioner by branding him as a fraud, a quack and lacking in financial integrity.

94. I have considered the Petitioner's allegations of malice allegedly committed by the 1<sup>st</sup> Respondent, where particulars have clearly been pleaded by the Petitioner and which have not been contravened by the 1<sup>st</sup> Respondent. I find from the same it is clear, that the 1<sup>st</sup> Respondent whether it deliberately acted maliciously or not, it acted, irrationally, illegally and/or wrongfully, in having the Petitioner's membership certificate cancelled without following the laid down procedure as regards giving the Petitioner an opportunity to be heard. The 1<sup>st</sup> Respondent's actions were contrary to the **Constitution of Kenya** and the **IEK Constitution** and not justifiable in anyway and was out of malice.

#### **E. WHETHER THE PETITIONER IS ENTITLED TO OTHER RELIEFS IN FORM OF DAMAGES?**

95. **Article 22 and 23 of the Constitution of Kenya 2010** gives the High Court wide discretionary powers to hear and determine applications for redress of denial, violation or infringement of or threat to, a right and fundamental freedoms in the Bill of Rights and specifically list the various categories of reliefs under **Article 23(3) of the Constitution** thus:-

**"23 (3) in any proceedings brought under Article 22 a court may grant appropriate relief, including—**

**a) a declaration of rights;.....**

**b) an injunction;**

**c) a conservatory order;**

**d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**

**e) an order for compensation; and**

**f) an order of judicial review."**

96. The Petitioner in support of an order for monetary compensation for constitutional violations referred to the case of **Siewchand Ramanoop v The AG of T&T, PC Appeal No.13 of 2004**, Lord Nicholls in his ruling on monetary compensations for constitutional violations, noted the following under paragraphs 18 and 19;

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

**An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasis the importance of the constitutional right and the gravity of the breach, and deter further breaches."**  
(Emphasis added).

97. The Petitioner argue that the unjustified and unconstitutional cancellation of the Petitioner's corporate membership certificate, and the consequent de-registration of the Petitioner as a professional Engineer, was driven by malice on the part of the 1<sup>st</sup> Respondent, and that has

not only injured the Petitioner's professional reputation, and his personal character but also is a violation of the Petitioner's fundamental rights and freedom to economic and social rights as enshrined under **Article 43 of the Constitution**, his right to information as enshrined under **Article 35**, his freedom of expression and right to education as enshrined under **Article 33 of the Constitution**, his freedom to conscience and opinion as enshrined under **Article 32 of the Constitution**, and his right to human dignity under **Article 28 of the Constitution**.

98. In the Petitioner's affidavits he attached three sample payslip from his salary as evidenced, that prior to his de-registration he was a Senior Government officer at job Group "P" (Assistant Director Level), in the rank of Chief Superintending Engineer, Structural, with total earning in November 2018 Kshs.114,200, in December Kshs.169,310 and January 2019 Kshs.159,310.

99. By virtue of his position, the petitioner was a public figure, widely known throughout Meru County. The news of the certificate cancellation was communicated on 14<sup>th</sup> January, 2019 by the 1<sup>st</sup> Respondent and subsequently de-registered by the 2<sup>nd</sup> Respondent on 25<sup>th</sup> January 2019, the Petitioner was formally prohibited from practicing as a Civil Engineer. This did not only bring disrespect to the Petitioner in his professional capacity, but also to the esteemed office he held as a public officer and the Petitioner definitely has been denied a chance to practice as an Engineer for over eighteen (18) months now, and still counting.

100. There is no doubt that the Petitioner's professional reputation and his personal character have been irreversibly injured and will always carry on indelible blemish as "the Engineer who was deregistered at one point for fraudulently obtaining his membership certificate". "in the eyes of the average member of public, I find the Petitioner's prospects of getting professionally restituted to the standing he once enjoyed, prior to the cancellation actions, may never get fully realized even though this Honourable Court, were to graciously exonerate the Petitioner of any wrong doing.

101. I have no doubt in finding that, essentially, the Petitioner has had all the professional gains made reversed to the point where rebuilding his professional reputation, trust and good-will, a new would take a lifetime. It is well known that professional services are not like any other businesses where customers, will always trade without caring who the seller is. Professionals become known through referrals and through their exemplary services since media advertising is not allowed. In the same way that good referrals can build a professional's reputation, bad referrals also spread even faster and wide and completely ruin the professional reputation of someone. I therefore find from the facts of this matter that the action of the 1<sup>st</sup> Respondent was malicious, going to the root of the petitioner's fundamental rights and freedoms. I find from the same, it would be proper and fit to award the Petitioner exemplary reliefs, that are commensurate with the grave reputation occasioned by the malicious conduct of the 1<sup>st</sup> Respondent and as an opportunity for the Court to signal its disapproval, condemnation and to denounce the impunity behind the 1<sup>st</sup> Respondent's conduct of abusing its powers to victimise and to wilfully contravene the Petitioner's Constitutional rights.

#### **F. WHO WILL BEAR THE COSTS OF THE PETITION?**

102. **Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides that the award of costs is at the discretion of the Court. It is also trite law that costs follows the event as provided under **Section 27 of the Civil Procedure Act**.

103. The upshot is that the Petitioner herein has proved his case to the required standard of proof. I find the Petitioner's petition meritorious and proceed to make the following orders in favour of the Petitioner:-

**a) A Declaration be and is HEREBY issued that the action by the 1<sup>st</sup> Respondent vide its letter dated 14<sup>th</sup> January 2019 cancelling the Petitioner's Certificates of Membership to the Institution of Engineers of Kenya is illegal and/or irregular.**

**b) An Order of Certiorari be and is HEREBY issued quashing the decision issued by the 1<sup>st</sup> Respondent vide its letter dated 14<sup>th</sup> January 2019 cancelling the Petitioner's Certificate of Membership to the Institution of Engineers of Kenya for being unconstitutional, illegal and/or irregular.**

**c) An Order of Mandamus be and is HEREBY issued directing the 2<sup>nd</sup> Respondent to reinstate the Petitioner as a Professional Member.**

**d) General damages of Kshs.5 million awarded to the Petitioner against the 1<sup>st</sup> Respondent.**

**e) Kshs.1.5 million on exemplary damages against the 1<sup>st</sup> Respondent**

**f) Costs to the Petitioner to be borne by the 1<sup>st</sup> Respondent.**

**Dated, Signed and Delivered at Nairobi on this 1<sup>st</sup> day of October, 2020.**

.....

**J. A. MAKAU**

**JUDGE**