



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO 450 OF 2013**

**WYCLIFE GISEBE NYAKINA.....1<sup>ST</sup> PETITIONER**

**HUMAN RESOURCE PRACTITIONERS OF KENYA t/a ASSOCIATION OF  
HUMAN RESOURCE PRACTITIONERS OF KENYA (AHRPK).....2<sup>ND</sup> PETITIONER**

**VERSUS**

**INSTITUTE OF HUMAN RESOURCE MANAGEMENT.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. In the Amended Petition dated 12<sup>th</sup> February 2014, the petitioners challenge the capacity of the 1<sup>st</sup> respondent to be deemed the “former institute” contemplated under section 45(1) and (2) of the **Human Resource Management Professionals Act 2012** (hereafter ‘**the Act**’). They contend that the 1<sup>st</sup> respondent is a business name and therefore lacks the capacity to meet the requirements of the Act. The petitioners asserts that on the contrary, the 2<sup>nd</sup> petitioner is the “former institute” contemplated under the Act as it has the legal and legitimate capacity under section 45 (1) and (2) of the Act to register members, convene an annual general meeting, form a Governing Council, hold elections and elect a Chairman. The 2<sup>nd</sup> petitioner is described as a registered association under the Societies Act, holding Certificate No 31400, and comprising 920 members.

2. The Amended Petition is opposed. The 1<sup>st</sup> respondent contends that it is the institute defined under section 45(7) of the Act, and that it was entitled to hold the elections for the governing council of the institute established under section 7 of the Act.

**The Petitioners’ Case**

3. The petitioner’s case is contained in the Amended Petition dated 12<sup>th</sup> February 2014, the affidavit in

support sworn by Mr. **Wycliffe Gisebe Nyakina**, the 1<sup>st</sup> petitioner who is also the Secretary General of the 2<sup>nd</sup> petitioner, and written submissions dated 18<sup>th</sup> February 2014.

4. In his affidavit in support of the Amended Petition, Mr. Nyakina deposes that the 2<sup>nd</sup> petitioner is fully registered under the Societies Act and had 920 members as at 20<sup>th</sup> April 2013; that it was founded as a voluntary members' organization with the objective of, among other things, promoting and developing the science and practice of human resource management in Kenya. He deposes further that the 2<sup>nd</sup> petitioner has the legal capacity to lay claim to being the entity anticipated in Section 45(1) and (2) of the Act, attributes which he contends that the 1<sup>st</sup> respondent lacks.

5. The 1<sup>st</sup> petitioner further avers that the 1<sup>st</sup> respondent and one of its founders, Mr. Gilbert Adrian Muteshi, lack the integrity to operationalize the Act. Mr. Nyakina avers that he learnt through the Standard Newspaper of Monday January 6, 2014 that the Director of Public Prosecutions (DPP) had ordered the Director of Criminal Investigations Department (CID) to investigate the 1<sup>st</sup> respondent, its directors and its purported council on alleged fraud; that he obtained a copy of the letter from the DPP to CID and contacted the complainant, one Mr. Mohamed Ahmed Mohamed who supplied him with a copy of his letter of complaint. He also makes reference to a newspaper advertisement carried in the Standard of Friday January 17, 2014 in which the 1<sup>st</sup> respondent acknowledged that the said Adrian Gilbert Muteshi served as a director of the 1<sup>st</sup> respondent.

6. The 1<sup>st</sup> petitioner avers that the 1<sup>st</sup> respondent has issued illegal membership certificates and renewal cards to *'its victims of the fraud'*; that it has illegally advertised itself in national newspapers as the professional body of human resource practitioners in Kenya; has issued detailed guideline on the procedure of gazetting council members, rules and regulations, and without regard to the 2<sup>nd</sup> respondent's directives and the law, sneaked a list of purported members of its council and rules and regulations to the Government Printer. Mr. Nyakina avers that the 1<sup>st</sup> respondent was in total disregard of a Presidential Executive order on arrangements of government functions and departments as gazetted in 2013 where the Head of State had assigned the responsibilities of human resource development to the Ministry of Devolution and Planning.

7. With regard to the position of the 2<sup>nd</sup> petitioner, the 1<sup>st</sup> petitioner avers that the 2<sup>nd</sup> petitioners' charter is in line with the objects of the institute formed under section 3 of the Act; that in line with section 45 of the Act; it held an AGM and conducted elections of its chairman and six council members in readiness to form the institute under section 3 of the Act; and that the names of its elected chairperson and council members were presented to the Ministry of Devolution and Planning for gazettment on 10<sup>th</sup> December 2013 in readiness to operationalize the Act on 4<sup>th</sup> January 2014 as anticipated in Section 45(5) of the Act. He states that while awaiting for the gazettment of the 2<sup>nd</sup> petitioners' elected officials, he learnt that an agent of the 1<sup>st</sup> respondent had, through Gazette Notice No 277 of January 2014, gazetted the purported Council.

8. Mr. Nyakina avers that it is the 2<sup>nd</sup> petitioner which should transit to the institute formed under section 3 of the Act; that sections 45(1), (2) and (7) are all in reference to the 2<sup>nd</sup> petitioner; that section 7(3) requires the Cabinet Secretary for Devolution and Planning to gazette the elected chairperson and Council members of the institute formed under section 3 of the Act in accordance with Executive Order No 2 of 2013 titled **Organization of the Government of the Republic of Kenya** as section 7(1) (b) and (c) of the Act require the Principal Secretaries of the Ministries of Labour and in charge of Public Service to sit in the Council.

9. Mr. Nyakina further contends that it will be impractical for the 1<sup>st</sup> respondent to expect the Attorney General and senior officers from various government institutions to sit in the institute's Examination Board established under section 16(1) of the Act having ignored the government in the gazettment process; or to expect senior members of the government to sit in a council in whose gazettment it was not involved.

10. In his submissions on behalf of the petitioners, Learned Counsel, Mr. Okenyo Omwanza, argued that section 45(7) of the Act defines the term '*former institute*' as the institute of Human Resource Management existing before the enactment of the Act. He contends on behalf of the petitioners that the term has, however, been interpreted wrongly by the 1<sup>st</sup> respondents to refer to itself.

11. Mr. Omwanza submitted that the 1<sup>st</sup> respondent does not meet the definition of "*former institute*" in the Act; that anyone has a right to freedom of association under Article 36(1); that if the 1<sup>st</sup> respondent is the only institute referred to under the Act, then the law is unconstitutional as it is suffocating the rights of the members of the 2<sup>nd</sup> petitioner from participating in the activities of human resource practitioners in Kenya. It is their contention also that to assert that the 1<sup>st</sup> respondent is the institute contemplated under the Act violates the provisions of Article 27 which guarantee to every one equal protection before the law.

12. According to the petitioners, the term '*former institute*' meant a legitimately existing institute; that the 2<sup>nd</sup> petitioner was registered as a society on 27<sup>th</sup> January 2010 while the 1<sup>st</sup> respondent was registered as a business name, in the name "*Institute of Human Resource Management*", with six proprietors, on 26<sup>th</sup> September 2005. It is therefore the petitioners' case that section 45 of the Act refers to the 2<sup>nd</sup> petitioner.

13. The petitioners contend that by the 1<sup>st</sup> respondent laying claim to being the institute under section 45 of the Act, it is locking out the legal and legitimate members of the 2<sup>nd</sup> petitioner from seeking and imparting information from members of the human resources profession. It therefore contends that section 45 of the Act discriminates against its members and is therefore unconstitutional.

14. It was the petitioners' further contention that section 45 in its strict terms is discriminatory as it favoured one group or the other. They conceded, however, that section 45 donates transitional powers to the 1<sup>st</sup> respondent and, according to Mr. Omwanza, the fact that section 45 donates transitional powers to the 1<sup>st</sup> respondent is discriminatory over any other existing human resource management professional body.

15. Mr. Omwanza submitted that the 1<sup>st</sup> respondent has not proved that it exists as a company limited by guarantee and has not provided a certificate of incorporation; that the 2<sup>nd</sup> petitioner has a governing council and that section 45 of the Human Resource Practitioners Act is unconstitutional but that the 2<sup>nd</sup> petitioner should be deemed as the only legitimate association under the Act.

16. In their Amended Petition, the petitioners seek a raft of orders and declarations which are best paraphrased as they cannot conveniently be reproduced. Certain of these orders are directed at the 1<sup>st</sup> respondent, while others are directed at the Cabinet Secretary, Ministry of Devolution and Planning. The petitioners also seek various orders declarative of the status of the 2<sup>nd</sup> petitioner under the Act.

17. With regard to the 1<sup>st</sup> respondent, the petitioners seek declarations that the 1<sup>st</sup> respondent, a registered business name under the Business Names Act holding Certificate No 426094, does not meet the legislative threshold of the institute anticipated in section 45(1) and (2) of the Act; that it does not have capacity to register members; convene an Annual General Meeting (AGM); form a Governing Council or elect a Chairman as anticipated in section 45 of the Act.

18. They also seek a declaration that the line Ministry, the Ministry of Devolution and Planning is responsible for gazetting the elected chairman, council members and the rules and regulations governing the profession in line with section 7(3) and 44 of the Act and the Executive Order No 1 of 20<sup>th</sup> May 2013; and that the gazettelement of elected council members of the 1<sup>st</sup> respondent purporting to be those of the institute formed under section 3 of the Act vide Gazette Notice No. 277 dated January 17<sup>th</sup> 2014 is a nullity. They also seek a declaration that the gazettelement of procedures and regulations of the Institute vide Gazette Notice No 278 and 279 of 17<sup>th</sup> January 2014 by the Executive Director of the 1<sup>st</sup> respondent is also a nullity; and for orders directed at the Ministry of Devolution and Planning to annul

Gazette Notice No. 277 Of 2014 and gazette the council of the 2<sup>nd</sup> petitioner as the true council of the institute.

19. With regard to the 2<sup>nd</sup> petitioner, the petitioners ask the Court to issue a mandatory order that the 2<sup>nd</sup> petitioner fully meets the legislative threshold of the institute; has the capacity to conduct election of its chairman and six members of the council in line with section 45 of the Act as happened on 9<sup>th</sup> December 2013; as well as the capacity to register members, hold an Annual General Meeting, and form a governing council, all acts contemplated under section 45(1) and (2) of the Act.

20. They also seek a mandatory order that the 2<sup>nd</sup> petitioner is the one referred to in Section 45(7) of the Act and that it meets the threshold set out in the transitional provisions contained in Section 45 of the Human Resource Management Professionals Act 2012.

### **The 1<sup>st</sup> Respondent's Case**

21. Mr. Kaka for the 1<sup>st</sup> respondent relied on the Replying Affidavit sworn on 19<sup>th</sup> February 2014 by **Mr Samson K. Osero**, the Executive Director of the 1<sup>st</sup> respondent, and written submissions dated 19<sup>th</sup> February 2014.

22. In the said affidavit, Mr. Osero avers that prior to incorporation, the 1<sup>st</sup> respondent was known as the Institute of Personnel Management (IPM); that thereafter the members felt that it was necessary to change the name to Institute of Human Resource Management (IHRM); that in order to ensure that the name was reserved at the Companies Registry, a business name in the said name was registered on 26<sup>th</sup> September 2005.

23. He deposes that thereafter, the 1<sup>st</sup> respondent was incorporated on 26<sup>th</sup> February 2008 under the Companies Act Chapter 486 Laws of Kenya as a company limited by guarantee and not having a share capital. A copy of the Memorandum and Articles of Association dated 26<sup>th</sup> February 2008 is annexed. Mr. Osero avers that the 1<sup>st</sup> respondent operates as an autonomous non-profit making professional body with its membership drawn from both individual and corporate organizations in the public and private sectors.

24. Mr. Osero avers further with regard to the initial directors of the 1<sup>st</sup> respondent that Mr. Adrian Gilbert Muteshi and Mr Lawrence Ndombi retired in 2008; Mr. Alban Mwenda and Mr Christopher Huka in 2005; Mr. Hussein Alwy in 2002, while Mr. William Gitobu is deceased.

25. According to Mr. Osero, the 1<sup>st</sup> respondent began the process of developing legislation for the human resource profession in Kenya after it was felt that there was no law governing the profession; that it hired a legal consultant to undertake the drafting of the Bill, which was completed in 2009; and that a work plan for the realization of its goal was developed. Mr. Osero avers that due to Parliament's legislative workload, it was not until January 2012 when it approached the then Member of Parliament for Kimilili Constituency, Hon David Eseli Simiyu, to present the Bill as a Private Members Motion, and the Act was thereafter enacted. The 1<sup>st</sup> respondent contends that it involved all the sectors of the economy in order to have a law to regulate the human resources management profession and has annexed various documents in support.

26. Mr. Osero avers that the position now taken by the petitioners with regard to the constitutionality of the Act is perplexing as they had initially declared that the enactment of the Act was successful; that they had sent a letter to the 1<sup>st</sup> respondent dated 24<sup>th</sup> May 2013 with regard to the operationalization of the Act but never pointed out anything unconstitutional about the Act. He also terms as perplexing the assertion by the petitioners that as long as Section 45 of the Act refers to them then the said Act meets the threshold required by the Constitution.

27. Mr. Kaka reiterated the above averments on behalf of the 1<sup>st</sup> respondent and submitted that the petitioners' case is premised on the erroneous position taken by the petitioners that the 1<sup>st</sup> respondent is registered under the Business Names Act.

28. Counsel submitted further that the petitioners have taken the peculiar position that section 45 of the Act is unconstitutional if it does not refer to the 2<sup>nd</sup> petitioner, but that if it does, it is constitutional. It is the 1<sup>st</sup> respondent's case that the section confers some interim responsibilities on it, in order to operationalize the Act, and this in no way violates the petitioners' rights. The 1<sup>st</sup> respondent maintained that, contrary to the petitioners' and 2<sup>nd</sup> respondent's contentions, it had a governing council established for the purpose of carrying out the functions of the institute, and that the transition can only be from the former institute.

29. Further, the 1<sup>st</sup> respondent contends that the petitioners have not particularized the Articles of the Constitution which the section violates as they are required to do, relying in this regard on the decisions of the Court in **Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012**. What the petitioners had presented before the Court was a matter couched in the manner of a civil suit as was manifest from the questions for consideration set out in the Amended Petition and the prayers sought; that there was no constitutional issue for determination; and that the Amended Petition should be dismissed with costs.

### **The 2<sup>nd</sup> Respondent's Case**

30. Mr. Kaumba for the 2<sup>nd</sup> respondent relied on the written submissions dated 21<sup>st</sup> November 2013. He submitted that the Attorney General was involved in the proceedings, not as an adverse party, but to promote governance and public interest under Article 156.

31. According to the 2<sup>nd</sup> respondent, the central issue for determination is the interpretation of section 45 of the Act, which the petitioners allege is unconstitutional. Mr. Kaumba submitted, however, that not all provisions of law should be readily declared unconstitutional; that an Act of Parliament should be deemed constitutional unless shown otherwise; and that the onus of rebutting the presumption of constitutionality of a statute lay on those challenging its constitutionality. Mr. Kaumba relied on various decisions in support of this position, including the case of **Ruturi & Kenya Bankers Association vs Minister for Finance (2002)1KLR 84; Ndyanabo v Attorney General (2001)2 EA 485 and Kigula and Others v Attorney General (2005)1 EA 132**.

32. According to the 2<sup>nd</sup> respondent, the short note to section 45 of the Act indicates that it is a transitional provision; that the purpose of a transitional provision is to carry over from one situation to another contemplated under any law; and that to strike out a transitional provision would be adverse to the governance contemplated by law. Counsel also relied on the decision of the Court in **Abdi Sitar Yusuf vs Attorney General and Others High Court Petition No 334 of 2013** in which the Court held that transitional clauses should be dealt with from a practical point.

33. Mr. Kaumba submitted that Section 45(1) contemplates that there must have been a former institute with a governing council. However, if there was an institute with no governing council, it cannot be the institute contemplated under the Act; and that it was the duty of the 1<sup>st</sup> respondent and the 2<sup>nd</sup> petitioner to prove that they had governing council. It was the 2<sup>nd</sup> respondent's submission that while the 1<sup>st</sup> respondent stated that it was registered as a business name, then as a company, but had failed to discharge the burden of showing that it has a governing council; that further, it has gone ahead to hold elections, gazette members of the institute and regulations, which the 2<sup>nd</sup> respondent termed as contrary to the ethic of governance under Article 10 which includes public participation.

34. According to the 2<sup>nd</sup> respondent, Article 165 gives the Court jurisdiction to test the validity of any act done under the Constitution; that the Court should uphold the spirit of the law and declare that only a former institute with a governing council should operationalize the Act; and that any subsequent acts

devoid of constitutional principles should be declared null and void.

35. Further, it was the contention of the 2<sup>nd</sup> respondent that section 45(1) seems to have a specific institute defined; that the term 'former institute' should be read to mean any organization and therefore all former institutes which meet the criteria of section 45 should be given equal opportunity to do the transition. Counsel submitted therefore that all institutes should sit together and carry out elections without favouring one institute to do the transition. It was also Counsel's submission that the Court has a mandate to declare one institute over another as the proper institute with regard to transition.

### **Determination**

36. The petition before me demonstrates valiant efforts by human resource management practitioners in Kenya to have a clear legislative framework to govern their profession. However, just when they have, as it were, the baby in their hands, the two main organisations involved in promoting the profession of human resource management begin to split the baby apart, so to speak, by fighting, no quarter being given, over whom among them is best suited to nurture the baby. The result appears to be a stalemate that leaves the profession where it was before the enactment of the Act in 2012: divided and antagonistic, and, doubtless, with great uncertainty and no clear direction for their respective members.

37. The petitioners have couched their case as a constitutional petition in which they allege discrimination against them in the implementation of the Act. They also challenge the constitutionality of section 45 of the Act. Their argument is that if the institute referred to in the section is the 1<sup>st</sup> respondent, then the section is discriminatory against them. A second plank of their argument is that the 2<sup>nd</sup> petitioner is the institute referred to in section 45, as it is the only body with the capacity to fulfil the requirements of the section as it has a governing council, and can hold an annual general meeting and elections. Their extension of this argument is that if the section refers to the 2<sup>nd</sup> petitioner, then it is not unconstitutional.

38. As this is a constitutional petition, the petitioners are required, in accordance with the principles set out in **Anarita Karimi Njeru v Republic and Trusted Society of Human Rights Alliance-v- Attorney General & Others**, to demonstrate the provisions of the Constitution that have been violated, and the manner in which they have been violated, with regard to them. Further, as they allege that the Act is unconstitutional, they have a duty to demonstrate how it is in violation of the Constitution, and which provisions of the Constitution it violates. As Majanja J observed in the case of **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers vs Kenya Revenue Authority & Others High Court Petition No. 544 of 2013**.

*[25.] The principles upon which the court determines the constitutionality of statutes are now well settled. It is well established that every statute enjoys a presumption of constitutionality and the court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the petitioner. In considering whether an enactment is unconstitutional, the court must look at the character of the legislation as a whole, its purpose and objects and effect of its provisions (see Ndyanabo v Attorney General of Tanzania (2001) 2 EA 485, Joseph Kimani and Others v Attorney General and Others Mombasa Petition No. 669 of 2009 [2010] eKLR, Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)), Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported). (Emphasis added)*

39. In determining this petition therefore, I will do so by considering two issues: whether there has been a violation of the petitioners' rights under the Constitution as alleged; and whether the provisions of section 45 of the Act are unconstitutional. As the allegations of violation of rights and unconstitutionality stem from the provisions and application of section 45 of the Act, it is important to consider the provisions of the Act in general, and the impugned section in particular, before weighing them against the facts before me.

### **The Objects and Purpose of the Act**

40. The Human Resource Management Professionals Act No. 52 of 2012, is stated to be “**An Act of Parliament to provide for the establishment of the Institute of Human Resource Management and the Human Resource Management Professionals Board; to provide for the examination, registration and regulation of the standards and practice of human resource management professionals and for connected purposes.**”

41. In the interpretation section contained in section 2 of the Act, the term ‘**Cabinet Secretary**’ is defined to mean the Cabinet Secretary responsible for labour and human resource development, while the term “**Council**” means the Council of the Institute constituted pursuant to section 7.

42. Section 3 of the Act establishes an institute to be known as the **Institute of Human Resource Management**, a body corporate with perpetual succession and a common seal.

43. At section 6, the Act sets out the functions of the institute, while Section 7 provides for the management of the institute by providing at section 7(1) as follows:

#### ***Council of the Institute***

***1. The management of the Institute shall vest in a Council which shall comprise of—***

***(a) a chairperson who shall be a qualified human resource professional with at least five years experience in human resource management, elected by the members of the Institute in the manner prescribed by regulations.***

***(b) the Principal Secretary of the Ministry for the time being responsible for public service or a representative designated in writing by the Principal Secretary;***

***(c) the Principal Secretary of the Ministry for the time being responsible for labour and human resource development or a representative designated in writing by the Principal Secretary;***

***(d) six other members, who shall be persons with knowledge and experience in human resource management, elected by the human resource professionals in the manner prescribed under Regulations.***

***(e) the Executive Director;***

44. Section 16 sets up the **Human Resource Management Professionals Examinations Board** whose functions include the setting of syllabi for human resource personnel training, examinations and issuance of certificates to human resource professionals.

45. At section 18, the Act sets up a Committee for registration of human resource management professionals, while section 19 sets out the qualification criteria for eligibility for registration as a human resource management professional. The disqualification, suspension and disciplining of human resource management practitioners are also provided for and regulated under the Act.

46. The transitional provisions of the Act contained at section 45, which are at the core of the present dispute, are as follows:

***1. The Governing Council of the Institute of Human Resource Management professionals existing before the enactment of this Act shall assume the responsibilities imposed on the Council and Registration Committee by this Act as an Interim Council and Interim Registration Committee until the first elections held under this Act.***

***2. The chairperson elected at the last annual general meeting of the former Institute shall continue to act as chairperson of the Institute until the first elections held under this Act.***

**3. The Interim Council to facilitate the registration of members of the Institute and the convening of the first annual general meeting at which Council members shall be elected.**

**4. The first annual general meeting of the Institute shall be convened by the Interim Council within a period of twelve months of the commencement of this Act.**

**5. Any human resource professional carrying out any business contrary to this Act shall ensure that the business is complaint with the Act within twelve months of the commencement of this Act.**

**6. Any examinations currently being conducted by any statutory body for the purpose of qualifying as a human resource professional shall be transferred to the Examinations Board within twelve months of the commencement of this Act.**

**7. “former institute” means the institute of Human Resource Management professionals existing before the enactment of this Act”.**

47. What emerges from a perusal of the Act is that, first, it is not the epitome of clarity in drafting. While its intention to regulate the human resource management professionals sector is clear, the manner of such management and the responsibility for such management is not set out in the most elegant of language, leading to confusion with regard to its implementation and on whom rests the responsibility to exercise various powers under the Act.

48. While, for instance, the Act makes provision for various things, including the election of members of the Council under section 7, to be done in accordance with prescriptions in regulations, it is silent with regard to who has the responsibility to make such regulations. Section 44 grants the Council power, with the approval of the Cabinet Secretary, to make regulations. However, it is not clear whether such regulations include regulations for election of its members, who would then have the responsibility of making regulations under the Act, or whether such regulations for elections would be made by the interim council as provided under section 45 of the Act. The section provides as follows:

***“The Council may, with the approval of the Cabinet Secretary, make regulations generally for the better carrying out of the provisions of this Act, and without prejudice to the generality of the foregoing, may make regulations—***

***a. prescribing the curriculum and the courses of study to be pursued by the students and candidates in order to satisfy the academic requirements of any particular registration;***

***(b) prescribing the experience criteria to be met by candidates for registration;***

***(c) prescribing a code of ethics, rules of professional conduct and standards of practice;***

***(d) providing for the suspension, expulsion or other penalty for professional misconduct, incapacity or incompetence;***

***(e) prescribing fees payable to the Association;***

***(f) governing the calling, holding and conducting of meetings of the board and of the members of the association; and***

***(g) authorizing the making of grants for any purpose that may tend to advance knowledge of human resources management or improve standards of practice.***

49. That notwithstanding, certain things, which are also borne out by the evidence before the Court, can be gleaned from the provisions of the Act. First, it is apparent that the drafters of the Act had a specific institute for human resource management in mind. Section 45(1) and (2) make reference to “**The**

***Governing Council of the Institute of Human Resource Management professionals existing before the enactment of this Act*** “ and the ***“chairperson elected at the last annual general meeting of the former Institute”*** while section 45(7) defines the former institute as ***“... the institute of Human Resource Management professionals existing before the enactment of this Act”***.

50. These provisions, taken together with the history of the enactment of the Act set out in the affidavit of Mr. Osero, which have not been controverted by the petitioners, and the concession by the petitioners that the “institute” referred to the 1<sup>st</sup> respondent, leave little doubt that the drafters of the Act intended that the 1<sup>st</sup> respondent was the body in which the Act vested the initial, albeit interim responsibility, as conceded by Mr. Kaka, of operationalizing the Act.

51. The petitioners and 2<sup>nd</sup> respondent have contended that the 1<sup>st</sup> respondent did not have a governing council, and that it was registered as a business name. I have considered the averments of Mr. Osero, the documents annexed to his affidavit, as well as the averments by Mr. Nyakina in his affidavit in support of the initial petition, the contents of which I shall revert to later in this judgment. Suffice to say that from these documents, I am satisfied that the 1<sup>st</sup> respondent was indeed registered initially as a business name, but was thereafter incorporated as a company limited by guarantee. Whether or not it had a governing council depends on what interpretation one gives to the term. A governing council, in my view, is the body of persons or officers in an organisation responsible for the management of that organisation. Black’s Law Dictionary, Ninth Edition, defines a governing body as **“a group of (esp. corporate) officers or persons having ultimate control”**, and gives a board of directors as an illustration. The Concise Oxford English Dictionary defines a governing body as **“a group of people who govern an institution in partnership with the managers”**.

52. As a company limited by guarantee, the affairs of the 1<sup>st</sup> respondent were managed by a Board of Directors in accordance with the provisions of the Companies Act. As this Court has found, the reference to the ‘former institute’ was to the 1<sup>st</sup> respondent, and the reference to the ‘governing council’ of the former institute and the chairperson of that institute was to the directors and chairperson of the 1<sup>st</sup> respondent; and it was to them that the Act imposed the mandate to implement the transitional provisions of the Act.

### **Whether the Provisions of the Act are Unconstitutional or in Violation of the Rights of the Petitioners**

53. The argument by the petitioners is that either the reference in section 45(2) and (7) of the Act is to the 2<sup>nd</sup> petitioner, or it is unconstitutional for discriminating against the petitioners. Apart from being quite self-serving, this argument is in essence self-defeating. The petitioners are, in effect, saying, as submitted by the 1<sup>st</sup> respondent, that the provisions of section 45 are acceptable so long as they refer to the 2<sup>nd</sup> petitioner, but discriminatory and unconstitutional if they do not. This is not a tenable argument. An Act of Parliament is either unconstitutional for violating the rights of a party or the Constitution, or it is not. It cannot be one or the other at the convenience of a party.

54. The petitioners have not demonstrated the manner in which the provisions are discriminatory or unconstitutional. The basis of their contention is that on the facts, the 2<sup>nd</sup> petitioner better merits the description of **‘former institute’** contained in section 45(7).

55. However, the evidence that the petitioners have placed before the Court does not bear this out. From the Amended Petition and the affidavit in support, the core of the petitioners’ objection to the 1<sup>st</sup> respondent being the **‘former institute’** under section 45(7) is that it is a business name, and therefore, incapable of, among other things, having a ‘governing council’. As noted above, however, the evidence before this Court is that the 1<sup>st</sup> respondent, while its promoters had at some point registered it as a business name, it was subsequently, on 26<sup>th</sup> February 2008, incorporated as a company limited by guarantee.

56. The totality of the evidence before the Court suggests, and this is indeed tacitly conceded by the petitioners in their averments and directly in the submissions of their Counsel, Mr. Omwanza, at the hearing of this matter, that the 1<sup>st</sup> respondent is the ***‘former institute’*** contemplated under the Act.

57. What is at issue, and what, in the view of this Court, really explains the difficulties of the petitioners in, on the one hand, accepting the Act if it refers to them, and repudiating it if it refers to the 1<sup>st</sup> respondent, is the failure by the parties, or the refusal by the 1<sup>st</sup> respondent, to accommodate and include the 2<sup>nd</sup> petitioner in the process of operationalizing of the Act. The averments by Mr. Nyakina contained in the affidavit sworn in support of the initial petition on 9<sup>th</sup> September 2013, which forms part of the Court record, are instructive in this regard.

58. At paragraph 3 thereof, he depones that the 2<sup>nd</sup> petitioner, the Association of Human Resource Practitioners of Kenya (AHRPK) was founded on 7<sup>th</sup> April 2007 as a voluntary association of Human Resource Management Professionals in Kenya; that it was officially recognized by the government as a society of professional human resource practitioners on 27<sup>th</sup> January 2010 upon its registration; and that on 1<sup>st</sup> September 2010, by letter Ref MSPS/3/2A(129) and Ref. MSPS 3/2A(137) dated 24<sup>th</sup> June 2011, the Ministry of State for Public Service wrote to the Association directing it to liaise with the ***“Institute of Human Resource Management, the 1<sup>st</sup> respondent, to foster a collaborative working relationship in the development of the profession”***.

59. He avers further that the Hon Attorney General, by letter dated 12<sup>th</sup> August 2011 Ref. No 523/1/2, also asked the 2<sup>nd</sup> petitioner to collaborate with the 1<sup>st</sup> respondent. He states that the Institute has however, totally refused and constantly isolated the Association in complete disregard of the Ministry and the Hon. Attorney General’s directive. He further avers that at the time the Act was assented to by the President in December 2012, there ***“was more than one body governing and regulating the profession, the Human Resource Practitioners of Kenya (HRPK) registered under the Societies Rules, 1968 (Rule 4) and referred to as the Association/Society and the Institute of Human Resource Management (IHRM) registered under the Company’s Act Cap 486, referred to as the Company/Institute.”***

60. He further states that the two bodies have ***“separate and distinct governing councils which serve as the top most management organs of the organizations”*** and maintain separate and distinct registers of members, and are governed by different rules and regulations as spelled out in their constitution. He states, however, that despite the fact that the organisations are required by their respective constitutions to ***“confer, consult, contact and co-operate with associations having [similar] objects”*** the two governing councils have been unable to agree on how to operationalize the Act.

61. What is apparent therefore is that the basis of the petitioners’ complaint is not the unconstitutionality of the Act or that it is discriminatory against them. Rather, at the core of their dispute with the 1<sup>st</sup> respondent is a failure by the 1<sup>st</sup> respondent to accommodate them in the process of implementation of the Act.

62. I have set out above the intention and purpose of the Act. While it was enacted pursuant to a Private Member’s Bill which, from the averments by Mr. Osero and the annexures to his affidavit, particularly the letters dated 24<sup>th</sup> January 2012 and 20<sup>th</sup> November 2012 from the 1<sup>st</sup> respondent to the Clerk to the National Assembly, was at the initiative of the 1<sup>st</sup> respondent, it now forms the law of Kenya for the regulation of the human resource management profession. Accordingly, in line with the provisions of the Constitution, its implementation must have the input and participation of all those whose lives, professions and indeed livelihoods it is intended to regulate; and must, further, be in accord with the tenets of the Constitution which, at Article 10, requires, amongst others, inclusiveness and participation of the people.

63. The question is whether, in commencing the implementation of the Act as directed by the provisions of section 45 of the Act, the 1<sup>st</sup> respondent acted in accordance with the constitutional tenets of

inclusiveness and participation of the people.

64. At paragraph 19 of his affidavit sworn in opposition to the petition, Mr. Osero concedes indirectly that an overture was made to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> petitioner to meet and consult on the implementation of the Act. The letter from the 2<sup>nd</sup> petitioner, which is dated 24<sup>th</sup> May 2013 addressed to the Institute of Human Resource Management and marked for the attention of Mr. Osero, is in the following terms:

*Dear Mr. Osero*

***REF: CONSULTATION ON THE OPERATIONALIZATION OF THE IHRM ACT***

***Following the successful enactment of the IHRM Act of 2012, we would like to request for a consultative meeting between AHRPK and IHRM to map out the practical modalities of implementing the IHRM Act. You can remember that before the passing of the Act, there were two institutions regulating the profession with distinct councils: AHRPK and IHRM. It is therefore of great concern to our members that we consult and agree on a workable and mutually beneficial way forward.*** (Emphasis added)

***Whereas our actions may have looked isolated, we share the same objectives of professionalizing the teaching and practice of HRM in Kenya. Now that the IHRM Act has been passed, we strongly feel that it is in the best interest of the industry for us to work together.***

***We therefore look forward for an appointment with you if possible within seven (7) working days from the day of receiving this letter. Thanking you in anticipation***

***Yours faithfully***

***Wyclife Nyakina***

***072291 63 97***

***Secretary General (AHRPK)***

65. It appears that no consultative meeting as proposed by the 2<sup>nd</sup> petitioner took place. The 1<sup>st</sup> respondent proceeded to carry out plans for implementation of the Act, including the elections to the Council, in isolation, while the 2<sup>nd</sup> petitioner made a belated attempt to stop the elections in September 2013. Upon failing to get the conservatory orders it sought, it proceeded to hold its own rival elections in December 2013. Thus, the participation and consultation required by the Constitution was clearly missing in the purported implementation of the Act by both the 1<sup>st</sup> respondent and the 2<sup>nd</sup> petitioner.

66. Consequently, while the Court is unable to find any violation of the constitutional rights of the petitioners or any way in which the provisions of the Act are unconstitutional, I am satisfied that the implementation of the Act do not meet the requirements of the Constitution with regard to the participation of those to be governed under the Act and the bodies, such as the Council, established thereunder.

67. Also of some concern are the provisions of the Act and their implementation, which display weaknesses that seem to stem from the 1<sup>st</sup> respondent's conceptualisation of the Act and the institute that it creates. In its letter to the Social and Welfare Committee of the National Assembly dated 4<sup>th</sup> December 2012, the 1<sup>st</sup> respondent seeks various amendments to the Human Resource Management Professionals Bill on the basis that the professional body established under the Act will not be a government department or agency, but a private institute.

68. However, aside from the fact that the amendments were not made and the reference to the Cabinet

Secretary for Labour, which the 1<sup>st</sup> respondent had sought removal of, was retained, the Act has heavy representation by government. Further, the functions of the institutions it establishes such as the institute, the Registration Committee and Examination Board, are clearly not functions that ought to be performed by a private entity. At section 16(3), the Act provides as follows with regard to the composition of the Examinations Board:

***“The Examinations Board shall consist of—***

***(a) four persons who shall be qualified human resource professionals nominated by the Council, one of whom shall be appointed by the Council from amongst the members of the Institute as Chairperson of the Board;***

***(b) two persons nominated by the Cabinet Secretary of the Ministry for the time being responsible for education, one of whom shall be from Kenya Institute of Education and one from the Kenya National Examination Council***

***(c) the Director of Personnel Management or a representative designated in writing by the Director of Personnel Management;***

***(d) one person nominated by the Commission for Higher Education; and***

***(e) one person nominated by the Attorney General.”***

69. Section 18 provides as follows with regard to the composition of the Committee:

***1. There is hereby established a committee to be known as the Registration Committee.***

***(2) The Committee shall consist of—***

***(a) a chairperson appointed by the Council from amongst members of the Council;***

***(b) one person nominated by the Federation of Kenya Employers;***

***(c) one person nominated by the Examination Board;***

***(e) one person nominated by the Kenya National Examination Council; and***

***(e) the Attorney General or his representative designated by him in writing.”***

70. The functions of the bodies set up under the Act are therefore public functions relating to the regulation of human resource management professionals. To suggest that such regulation can be left entirely to the operations of the private sector would be erroneous. More importantly, a body that regulates entry into a profession, sets the criteria for entry into that profession, and therefore has a critical role to play in the lives and careers of citizens, cannot be a purely private entity.

71. If one may draw a parallel with another Act that establishes an institute and provides the mechanism for regulating the conduct of members, of a profession, the Certified Public Secretaries of Kenya Act, Cap 534 of the Laws of Kenya, is apt. Like the Human Resource Management Professionals Act, the Certified Public Secretaries Act sets up a Public Secretaries Institute and a Registration Board, and provides for regulation of the profession of public secretaries generally. In the Act, the making of regulations is expressly vested in the Minister responsible for Commerce. Section 37 provides as follows:

***“The Minister may make regulations prescribing anything which is required to be or which maybe prescribed under this Act, and for carrying out or giving effect to this Act.”***

72. There are thus at least two critical points that need to be addressed if the operationalization of the Act

and the regulation of the human resource management professionals sector is to be effective. The first relates to the composition of the Council of the institute that was put in place subsequent to the elections.

73. The Attorney General has invited the Court to consider an amicable settlement between the parties by applying a broader definition of the word “*former institute*’ to include all the former institutes in existence prior to the enactment of the Act. As conceded by the petitioners, however, and as the Court has found, the reference to the former institute is to the 1<sup>st</sup> respondent. Indeed, interpreting the term to mean all the former institutes dealing with human resource practitioners would only muddy the waters further.

74. Nonetheless, the first obligation imposed on the 1<sup>st</sup> respondent by the Act, which would have been in consonance with the Constitution, would have been to put in place a mechanism, prior to the elections, that would have ensured inclusiveness and participation of all persons and institutions which had hitherto been involved in human resource management. This could have been done well before the elections which were, under the Act, required to take place at the end of a year from the enactment of the Act. Despite the request of the petitioners that it does this, the 1<sup>st</sup> respondent appears to have disregarded this requirement and proceeded as though it was the sole party with an interest and mandate in the area.

75. The 1<sup>st</sup> respondent concedes that its role was an interim, transitional one. Such transitional role, if the institute established under the Act was to be started on the right footing, should have been undertaken within the spirit of inclusiveness and participation envisaged in the Constitution. To constitute a council that effectively leaves out the members of the 2<sup>nd</sup> petitioner and those of other organisations in the human resource management profession does not accord with these requirements.

76. The second concern relates to the provisions of the Act with regard to the making of regulations and setting of criteria for registration as members of the institute, among other things. The petitioners have complained that the regulations under the Act were made by the Executive Director of the 1<sup>st</sup> respondent, which he then proceeded to gazette. I have indeed observed that Gazetter Notices Nos. 277, 278, and 279 are issued by “Samson K. Osero, Executive Director, Institute of Human Resource Management.” The question is under what powers Mr. Osero, as Executive Director of the Institute, issued the Gazette Notices. He makes reference to various provisions of the Act, namely section 45, 29 and 19(2) of the Act.

77. However, as indicated above, the powers under the Act are vested in the Council, not the Executive Director; and the power to make regulations is vested in the Council, “**with the approval of the Cabinet Secretary**“, presumably the Cabinet Secretary “*responsible for labour and human resource development*” in accordance with the interpretation provisions contained in section 2 of the Act. A reading of the Gazette Notices against the provisions of the Act shows that there was no power vested in the Executive Director to issue any such notices. As the High Court of Tanzania observed in the case of **Mkono and Company Advocates v JW Ladwa (1977) Ltd [2002]1 EA 145**, power to make regulations with regard to any matter must be specifically spelt out in legislation:

***What do we gather from the above? The obvious is that the “TLS” Rules are issued by Tanganyika Law Society merely designed to guide the conduct of its members [the Advocates] as exemplified by the title thereto for “professional Conduct and Etiquette”. These however cannot be used to defeat the force of substantive law. They have no force of law. Can we categorise these rules as subsidiary legislation? Tanganyika Law Society which made those rules is a creature of statute. However, not every creature of statute is empowered to make subsidiary legislation. This power should specifically be in the parent Act.*** (Emphasis added)

78. In my view, the Executive Director of the Institute has no power under the Act to make any regulations, and consequently, any acts performed in accordance with those regulations are unlawful and of no effect.

79. The question is what relief or directions to give, in the present circumstances that would accord with the Constitution and the objects, purpose and intention behind the Act?

80. Article 23 of the Constitution grants to the Court jurisdiction to grant appropriate relief in a matter brought under the provisions of Article 22. As observed above, while the Act is not unconstitutional, and neither is there violation of the constitutional rights of the petitioners, there was a failure by the 1<sup>st</sup> respondent to act in accordance with the constitutional demand of participation by those concerned. For this reason, I am satisfied that the elections that were held from the 4<sup>th</sup> of January 2014 without the participation of the members of the 2<sup>nd</sup> petitioner, as well as the rival elections held by the 2<sup>nd</sup> petitioner on 9<sup>th</sup> December 2013, did not meet the requirements of the Act.

81. The Act placed responsibility for the transition to the new legal regime on the 1<sup>st</sup> respondent. This mandate still rests on it, and it must exercise it in accordance with the Constitution.

82. Similarly, there appears to be a manifest failure on the part of the 2<sup>nd</sup> respondent to guide in the proper drafting and enactment of the Act. While recognising that the Act was enacted pursuant to a Private Member's Bill, this did not take away the critical role of the Attorney General, as provided under Article 156, to give proper advice and technical support in the drafting of the Bill to ensure that it can be effectively implemented. It is not too late for the 2<sup>nd</sup> respondent to do this in order to ensure that the Act is one that can be implemented and meet its objectives and purposes.

83. In the circumstances, the orders that commend themselves to me are as follows:

*i. That the respondents do, within six months hereof and in consultation with all stakeholders, reconsider the provisions of the Human Resource Management Professionals Act with a view to making necessary amendments to its provisions with regard to making of regulations that would ensure its proper implementation;*

*ii. That within 6 months from the date hereof, the 1<sup>st</sup> respondent do organise elections for the Council of the institute to be conducted with the participation of the members of the 2<sup>nd</sup> petitioner, the 1<sup>st</sup> respondent and all other institutions and bodies involved in the human resource management profession.*

*iii. That Gazette Notice Numbers 277, 278 and 279 of 13<sup>th</sup> January, 2014 are null and void and are hereby quashed.*

*iv. Each party shall bear its own costs of this petition.*

**Dated, Delivered and Signed at Nairobi this 6<sup>th</sup> day of June 2014**

**Mumbi Ngugi**

**Judge**

**Mr. Omwansa instructed by the firm of Okenyo Omwansa & Co. Advocates for the petitioner**

**Mr. Kaka instructed by the firm of Kaka Kamau & Co Advocates for the 1<sup>st</sup> respondent**

**Mr. Kaumba instructed by the State Law Office for the 2<sup>nd</sup> respondent.**