

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**

**ELRC PETITION NO. E184 OF 2023**

***(Before Hon. Lady Justice Hellen Wasilwa, J)***

**WILLIAM EGO.....**

**.....PETITIONER**

**VS**

**KENYA AGRICULTURAL & LIVESTOCK**

**RESEARCH ORGANIZATION.....**

**RESPONDENT**

**JUDGMENT**

1. By an Amended Petition dated 26<sup>th</sup> May 2025, the Petitioner sought for the following orders; -
  - a) *A declaration that the action of the Respondent is opaque, egregious, clandestine, capricious whimsical and contrary to articles 10, 27, 28,41, 47, 50, & 236 of the constitution of Kenya, 2010 hence unconstitutional and consequently null and void.*
  - b) *A declaration that the decision made by the Respondent vide the letter dated 3 May 2023 is unlawful, null and void.*
  - c) *A declaration that the decision made by the Respondent to surcharge the Petitioner the sums of Kshs. 4,081,149.10 vide the letter dated 3<sup>rd</sup> May 2023 be set aside and / or vacated.*
  - d) *A declaration that the interdiction of the Petitioner for a period of over two years is against Section 11.9.1(h)*

*of the Respondent's Human Resource Manual (September 2017) is inhumane and unconstitutional and violated the dignity of the Petitioner contrary to article 28 of the Constitution.*

- e) A declaration that the Petitioner having worked for 23 years without promotion when his junior colleagues with lower qualifications than himself having been promoted by the Respondent, is discriminatory and contrary to article 27 of the constitution of Kenya 2010, hence unconstitutional.*
- f) An Order prohibiting the Respondent from implementing the decision of surcharge made vide the letter dated 3<sup>rd</sup> May 2023.*
- g) An order that the Respondent refunds to the Petitioner the money deducted from the Petitioner's salary as surcharge.*
- h) THAT this Honourable court be pleased to grant an order of permanent injunction prohibiting/restraining the Respondent, its servants, officials, representatives, and/or agents from deducting the Petitioner's salaries and/or taking disciplinary action against the Petitioner or having so taken disciplinary action or deducted the Petitioner's salaries be restrained from acting further or otherwise in any other manner.*
- i) General damages for the constitutional violations of the Petitioner's fundamental rights.*

- j) The Honourable Court do issue any other Orders and give such directions as it may deem it to meet the ends of justice.*
- k) Costs of the Petition*
- l) Interest on the above at Court rates*

### **Petitioner's Case**

2. The Petitioner avers he was employed by the Respondent on 15<sup>th</sup> February 1989 as an Assistant Research Officer on permanent and pensionable terms. He rose through the ranks to the position of Senior Research Scientist Job Group KRG, a position, he currently holds.
3. The Petitioner avers that he applied for a 3-year study leave vide a letter dated 13<sup>th</sup> June 2012 to pursue a PhD course on Climate Change at Mt. Kenya University (MKU).
4. In response, the Respondent vide a letter dated 28<sup>th</sup> August 2012 advised the Petitioner that his name had been included in the Respondent's Headquarters Training Committee, awaiting deliberations during the next Central Training Committee Meeting. Thereafter, the Respondent's CTC meeting was held on 29<sup>th</sup> August 2012 and approved the request for paid study leave, from 3<sup>rd</sup> September 2012 to 31<sup>st</sup> August 2015.
5. The Petitioner avers that upon approval, he proceeded for the study leave, however, it occurred that Mount Kenya University (MKU) had no lecturer who could supervise him.

The Petitioner thus applied to the study at the University of Eldoret (UoE), where he was admitted in 2012 and given admission No. AGR/D.PHIL/07/12 to study Crop Ecophysiology at the School of Agriculture and Biotechnology, Department of Seed Crops and Horticultural Sciences.

6. The Petitioner avers that vide a letter dated 15<sup>th</sup> April 2014, he informed the Respondent of his change of institution from (MKU- Kitale Campus to UoE and the reasons for the change, which had been necessitated by the unavailability of a suitable supervisor at MKU- Kitale Campus. The Respondent acknowledged receipt of the same vide a letter dated 14<sup>th</sup> May 2014.
7. The Petitioner avers that while undertaking his studies he consistently updated the Respondent of the progress of his studies. Upon expiry of the study leave, he informed the Respondent vide a letter dated 1<sup>st</sup> October 2015 of his resumption and indicated to the Respondent the successful completion of his coursework and highlighted that he was still working on his project and that his transcripts had not been released by the University.
8. Vide a letter dated 14<sup>th</sup> October 2015, the Respondent acknowledged receipt of the Petitioner's letter dated 1<sup>st</sup> October 2015 regarding completion of his coursework. However, on 24<sup>th</sup> May 2017, he received a letter from the Respondent directing him to inform the Director General of

his study status within 21 days failure to which disciplinary action would be taken against him.

9. The Petitioner avers that he responded on 22<sup>nd</sup> June 2017 wherein he indicated that he had successfully completed his coursework however, the second part, the thesis component was still unaccomplished for the reasons that he had been experiencing financial constraints.
10. He was subsequently issued with an interdiction letter dated 10<sup>th</sup> January 2020 on allegations of failing to complete his studies. The interdiction letter stated in part that; *"It is noted with concern that after transfer of your training programme to the University of Eldoret and your subsequent admission, you deserted studies after a period of 3 weeks. To date you have neither been in touch with the University nor appraised the management appropriately on the status of your studies which is against service regulations. In view of your misconduct, it has been decided that you be interdicted with immediate effect pending determination of your case. While on interdiction you will be entitled to half of your basic salary with full allowances and medical benefits."*
11. The Petitioner avers that the Respondent further requested for his academic transcripts vide a letter dated 16<sup>th</sup> January 2020.
12. In response to these letters, the Petitioner vide a letter dated 4<sup>th</sup> February 2020 reiterated to the Respondent that

he had been continually updating it of the progress of his studies. He further indicated the challenge he had been experiencing in obtaining the academic transcripts from the University of Eldoret, which was as a result of financial constraints he was facing.

13. However, he received another letter from the Respondent dated 23<sup>rd</sup> March 2021, while still on interdiction, requesting for submission of his academic transcripts. The Petitioner responded vide a letter dated 18<sup>th</sup> April 2021 requesting for more time to obtain his academic transcripts.
14. The Petitioner submitted that in a bid to complete his PhD studies, he applied for a PhD scholarship under the Kenya Climate Smart Agriculture Project (KCSAP) Programme run by the Respondent sometime in 2019, with a view of carrying out the remaining thesis research component of his studies. However, to date he has not received any communication regarding the outcome of his application.
15. The Petitioner submitted that the Respondent lifted his interdiction vide a letter dated 14<sup>th</sup> April 2023 pending determination of his case. Subsequently, he was required to report to a junior officer, Mr. Anthony Namaswa, the head of Pasture Section.
16. The Petitioner avers that in 2009, he was invited for a promotional interview for the position of Principal Research Officer, to which he attended. However, to date, he has not received any communication on the interview outcome.

Surprisingly, he received two letters of regret in 2013 for an evaluation exercise that was carried out in the year 2012.

17. It is the Petitioner's case that he was never issued with the performance evaluation reports that formed the basis of his disqualification from promotion.
18. The Petitioner avers that he has suffered from career non-progression specifically from the year 2009 to date. Currently, the Respondent's staff, Bernard Korir and Richard Kimitei who have similar qualifications as him, hold higher positions at job grade KR4 as Center Director and Deputy Institute Director respectively, while he holds a position at grade KR6. Some of these employees were employed when he was already a Senior Research Scientist, a position that he has remained in for over 23 years.
19. The Petitioner avers that vide a letter dated 3<sup>rd</sup> May 2023, he was issued with a surcharge letter by the Respondent, in which the Respondent seeks to recover the sum of Kshs. 4,081,149.10 from the Petitioner for allegedly failing to complete his studies. Sometime in April 2023, the Petitioner received a Pay Change Advice (hereinafter referred to as "PCA™") dated 26<sup>th</sup> April 2023, indicating that he pays for the surcharge in monthly installments of Kshs. 25,600.
20. It is the Petitioner's case that the Respondent proceeded to arbitrarily deduct inconsistent sums of money from his salaries from the month of May 2023 to date which sums are way above the Kshs. 25,600.00 indicated in the PCA of

May 2023. The Respondent unilaterally added Kshs. 99,375 in the contribution column of PCA after its closure. This new figure was not carbonated as the upper columns of the PCA for the month of May and is way above one third of his monthly basic salary of Kshs 154.363.

21. The Petitioner avers that the Respondent has arbitrarily and unlawfully reduced his house allowance from Kshs. 90,000 to Kshs. 45,000 and his commuter allowance has been reduced from 24,000 to 12,000 without prior communication to the Petitioner and without providing any reason for the said reduction.
22. It is the Petitioner's case that the Respondent discriminated against him by failing to promote him despite advancing his studies and meeting the qualifications for promotion. The Respondent singled him by interdicting him around the period that promotions were being made, and purportedly lifting the interdiction after the conclusion of the promotions. The Petitioner has also been subjected to harassment, threats, intimidation and psychological torture; and he has also been subjected by the Respondents to discrimination and unequal treatment in breach of his rights under Articles 27 and 236 of the Constitution and the Respondent's Human Resource Policy and Procedure Manual.
23. The Petitioner avers that the Respondent interdicting him for a prolonged period of time contrary to the provisions of Section 11.9.1 of the Respondent's Human Resource Manual

(2017). Subsequently, the interdiction lifted and he surcharged without being any basis whatsoever and without according him due process; in violation of his right to fair labour practices and fair administrative action under Articles 41 and 47 of the Constitution.

24. The Petitioner avers that his right to fair hearing before an independent and impartial tribunal or body under Article 50 of the Constitution as provided for under the Respondents Human Resource Manual (September 2017) is callously, deliberately and arbitrarily breached by the Respondent, to achieve the common goal of mistreating him and rendering him destitute.

### **Respondent's Case**

25. In opposition to the petition, the Respondent filed a replying affidavit dated 8<sup>th</sup> July 2025 sworn by its Director of Training, Dr. Kepha Ombui.
26. The Respondent avers that Section 6.10 of its Human Resource Manual, 2017 has the following salient features:
- a) Any employee wishing to pursue further studies, whether privately or sponsored by the Respondent, full time or part time, must obtain approval from the Director General.*
  - b) In granting a long-term full-time leave, whether fully sponsored or self-sponsored, an employee shall be required to sign an agreement binding him to work for*

*the organization for a specified period following the completion of the course or pay the Respondent.*

*c) An employee returning from study leave shall be required to submit a written report of the activities undertaken during the leave in addition to the certificates attained. Employees will also be required to submit copies of thesis written in the course of their studies.*

*d) On completion of training, the employee will be required to formally inform the Director General of his resumption of duties.*

*e) While on study leave, an employee shall be subject to the Respondent's rules and regulations.*

27. The Respondent avers that it approved the Petitioner's paid study leave vide a letter dated 4<sup>th</sup> September 2012 which stated that the leave would run from 3<sup>rd</sup> September 2012 to 31<sup>st</sup> August, 2015. The maximum period was for three years.

28. The Respondent avers that the Petitioner was required to comply with its Human Resource Manual which provides: Upon returning from study leave it was mandatory for the Petitioner to submit a written report of the activities undertaken during the leave in addition to the certificates attained. It was also mandatory to submit copies of thesis written in the course of his studies. Upon completion of training, he was required to formally inform the Director General of his resumption of duties. While on study leave, he was subject to the Respondent's rules and regulations.

29. It is the Respondents' case that in compliance with Section 6.10.2 (x) of the Human Resource Manual., the Petitioner resumed his duties on 1<sup>st</sup> October, 2015 and formally informed its Director General of the resumption of his duties vide his letter dated even date. He further informed it that he had completed his coursework but was still working on his project.
30. However, he failed to comply with Section 6.10.2 (viii) of the Human Resource Manual which required him upon returning from study leave to submit a written report of the activities undertaken during the leave in addition to the certificates attained together with copies of the thesis written in the course of his studies. Instead of providing the complete report for the activities undertaken for the three years of study together with a certificate, he alleged that his transcripts had not been released by the University. He promised to submit the transcripts to the Respondent as soon as possible.
31. The Respondent avers that at no time during his study leave did the Petitioner inform it that there is a likelihood that he might be unable to be furnish his transcripts upon completion of PHD studies due to delay on the part of the University or for any other reason beyond his control.
32. The Respondent avers that it was not possible for the Petitioner to have undertaken his PhD studies for three years without being provided with a single transcript to

enable him know whether he was to progress with his studies to the next year having passed or there was need to re-take a course and /or exam having failed.

33. It is the Respondent's case that despite its doubts, vide its letter dated 14<sup>th</sup> October 2015 it requested him to keep updating the Director General of the progress of his studies as soon as possible.
34. The Respondent avers that the Petitioner did not furnish it with his transcripts as earlier promised and remained silent for almost two years prompting its letter dated 24<sup>th</sup> May 2017. The letter was meant to remind him that it had not received his certificate and thesis notwithstanding the fact that his study leave had expired on 31<sup>st</sup> August 2015. The Respondent in the said letter required the Petitioner to inform the Respondent's Director General of the progress of his studies within twenty one days and in default, disciplinary action be taken against him.
35. The Respondent avers that the Petitioner responded vide a letter erroneously dated 19<sup>th</sup> May 2017 and reiterated that he had completed his coursework. However, he introduced a new component which was that he was unable to undertake his thesis due to financial constraints. This was an admission that he had been in contravention of Section 6.10.2 (viii) of the Human Resource Manual for almost two years.

36. The Respondent avers that the Petitioner's allegation that he was unable to pursue his thesis due to financial constraints did not in any way justify his failure to avail the certificates and thesis since at the time of applying for paid leave, he must have calculated the fees for the entire three years and arrived at the conclusion that he could afford to pay for his PHD studies.
37. The Respondent avers that it wrote to the Vice Chancellor, University of Eldoret on 24<sup>th</sup> May 2019 and requested to be provided with a precise status report in respect of the Petitioner's PhD program.
38. In its response on 28<sup>th</sup> June 2019, the Deputy Vice Chancellor, University of Eldoret stated as follows; *"This is to inform that William Ego (AGR/D.Phil/07/12) was admitted as a D. Phil student in the year 2012. He deserted his studies after a period of three weeks and has not been in touch with the university to date."*
39. The Respondent avers that it notified the Petitioner vide a letter dated 10<sup>th</sup> January 2020 that it was aware that he deserted studies at the University of Eldoret after a period of three weeks; and that his conduct amounted to gross misconduct having violated Section 6.10.2(xi) of the Respondent's Human Resource Manual. The Respondent then proceeded to interdict the Claimant and required him to within 21 days show cause why disciplinary action should not be taken against him

40. Vide a letter dated 16<sup>th</sup> January 2020 the Respondent further reminded the Petitioner that through his letter of 1<sup>st</sup> October 2015 he had promised to provide it with his transcripts and asked him to furnish it with his transcripts within 7 days.
41. The Respondent avers that the Petitioner responded to its letters on 4<sup>th</sup> February 2020 wherein he denied deserting his coursework and further reiterated that the university could not release his transcripts before he cleared his fees.
42. It is the Respondent's case that the Petitioner's attempt to prove that he had not deserted his studies by relying on a letter from the University of Eldoret dated 30<sup>th</sup> July, 2019 by the Head of Department, Crop and Horticulture Sciences cannot succeed since it did not contain any particulars of when he commenced and completed his coursework.
43. Having found the Petitioner's response unsatisfactory, the Respondent had the option of taking immediate disciplinary action against him which among other sanctions included surcharging his gross salary for the period he was neither at the university nor at work. However, it decided to withhold any disciplinary action to allow more time to the Petitioner to prove that he had not deserted his studies and also avail his transcripts.
44. It is the Respondent's case that the reason why it did not conclude the disciplinary process within six months as provided under Section 11.91 (h) of the Human Resource

Manual, was due to the fact that the Petitioner insisted that he had completed his studies but was unable to get the transcripts from the University. Therefore, it gave the Petitioner more time to avail the transcripts before it could make its decision.

45. The Respondent avers that the Petitioner remained silent for over a period of one year prompting it to write a letter dated 23<sup>rd</sup> March 2021 reminding him that he had failed to avail the transcripts within the 7 days and in default disciplinary action would be taken against him.
46. The Respondent avers that despite the Petitioner's claim that he was kept on a lengthy, unlawful interdiction and that the Respondent did not make a decision within 60 days as contemplated in the Human Resources Manual, in his letter dated 18<sup>th</sup> April 2021, the Petitioner stated: "*I wish to thank you for according me the chance to submit the transcripts...The University is currently processing the transcripts and I will present them soonest possible.*"
47. It is the Respondent's case that having sought for further time to submit his transcripts which time was obviously outside the 60 days, the Petitioner has no right to allege non-compliance with the Human Resources Manual since the non-compliance was solely as a result of his pleas for more time and he indeed took every opportunity beyond the 60 days to defend himself.

48. Subsequent to the Petitioner's letter of 18<sup>th</sup> April 2021, he failed to furnish the Respondent with his transcripts leading another year to lapse.
49. The Respondent avers that the Petitioner vide a letter dated 24<sup>th</sup> August 2022 forwarded a transcript dated 29<sup>th</sup> June 2022. However, upon perusal of the transcript, it revealed that: his first year of study was 2020/2021 and not 2012/2013; and that he had scored grade B and the recommendation was "*Good, proceed to 2<sup>nd</sup> Year of Study*", thus the Petitioner's second year of study was 2021/2022.
50. It is the Respondent's case that the Petitioner's first academic year was 2020/2021, thus, he never completed his coursework between the years 2012 to 2015 despite taking paid study leave for the period.
51. The Respondent asserts that if the Petitioner had completed his three years study but was prevented from being issued with transcripts due to his inability to clear his fees, he would only be missing the transcript for his last year of study since the University is required to inform the student of the results of the examinations and whether or not the student should proceed to the next year of study.
52. The Respondent therefore contends that the Petitioner has not furnished it with transcripts for the three-year period he alleged to have taken and completed his PhD studies is due to the fact that he deserted his studies.

53. The Respondent avers that vide a letter dated 14<sup>th</sup> April 2023, it lifted the Petitioner's interdiction pending determination of his case. Thereafter, it informed the Petitioner vide a letter dated 3<sup>rd</sup> May 2023 that the KALRO Management Advisory Committee had made the decision to surcharge his gross salary during the period he was neither at the university nor at his work station.
54. The Respondent avers that the Public Service Commission's the Guidelines on the Bond for Public Servants, July 2018, ensure that trained employees are retained in the service for a specified period to facilitate utilization of knowledge acquired during training. Since the Petitioner did not complete his PhD studies, it was unable to benefit from the knowledge that was to be obtained upon successful completion of his studies. The Respondent was thus justified in surcharging the Petitioner's gross salary paid during the period he was neither at the university nor at work.
55. It is the Respondent's case that the decision to surcharge the salary was made after the Petitioner was given a chance to defend himself vide a letter dated 10<sup>th</sup> January 2020 which he responded to on 4<sup>th</sup> February 2020.
56. The Respondent avers that under Section 11.23.3 of its Human Resource Manual, the Petitioner has a right to appeal the decision of the KALRO Management Advisory Committee to the Respondent's Board. Therefore, the Petitioner failed to follow and exhaust the provisions of the

Human Resource Manual and cannot purport to file a constitutional petition alleging violation of his rights.

57. The Respondent avers that the interdiction letter required the Petitioner to immediately hand over his office and all the official documents in his custody to the officer identified by the Institute Director. Since the Institute Director had the right to direct him upon interdiction to hand over his office and documents to any officer either superior or junior to him, the same power applied upon lifting of interdiction. The Petitioner therefore had no right to choose who would assign him duties upon his return.
58. The Respondent avers that its Career Progression Guidelines provide for guidelines to be considered before promoting an employee to the position of Principal Research Scientist, Chief Research Scientist and Chief Research Scientist. Additionally, it is not mandatory or possible for it to inform all applicants of the results of a promotional interview.
59. It further avers that the decision of whether or not to promote an employee having considered the guidelines is entirely discretionary. The Petitioner therefore cannot purport that he was the most appropriate person to be promoted to the positions of Principal Research Scientist, Chief Research Scientist and Chief Research Scientist.
60. The Respondent avers that the Petitioner has failed to disclose that the process of promotion of scientists is based on the Scientist Evaluation Form which among other

requirements requires Scientists to self-evaluate and provide evidence as indicated in the notes accompanying the evaluation form. Further, the Petitioner has not provided verifiable information and evidence in support of his self evaluation form which demonstrates that his total scores in respect of all the outputs would without any form of doubt convince the Centre Scientists' Evaluation Committee (CSEC), Institute Scientists' Evaluation Committee (ISEC) and KALRO Headquarters Research Scientists' Evaluation Committee (RSEC) that he should be promoted.

61. The Respondent avers that the Petitioner spent 11 years attempting to prove that he undertook and completed his PhD course at the University of Eldoret. This period cannot be considered to be a period when he expected a promotion considering the circumstances surrounding his employment.
62. It is the Respondent's case that the Petitioner's inability to present his transcripts as proof of completion of his PhD studies was a relevant consideration that prevented it from promoting him to a higher position since it had lost trust and confidence in him having failed to prove that he had successfully completed his PHD studies.
63. The Respondent avers that Section 12.2 of its Human Resource Manual provides for a procedure for handling grievances. Firstly, an employee is to his immediate supervisor with a view to solving the grievance; the immediate supervisor is required to settle the matter or refer to the Head of Department for the appropriate action;

if the employee is not satisfied with the decision, he may appeal to the Director General through the head of Department; and where the employee is dissatisfied with the decision he has a right of appeal to the Organization.

64. The Respondent avers that since the Petitioner never followed the grievance procedures provided for under Section 12.2 of the Human Resource Manual in respect of alleged discrimination and promotion, he cannot by way of the petition herein introduce them for the very first time.
65. The Respondent avers that its Human Resource Manual under Section 8.4 provides for three forms of staff appraisal: Mid Year Performance Review; End of Year Performance Review; End of Year Appraisal. Under each appraisal, the supervisor and the appraisee are required to discuss the results of the appraisal.
66. The Respondent avers that the process of appraisal is not a responsibility placed entirely on it since Section 8.11.3 of its Human Resource Manual places responsibility upon both the supervisor and appraisee to ensure that evaluations are completed in time.
67. The Respondent avers that if the Petitioner was discontented with the results of the evaluation which subsequently disqualified him from promotion, he had a right of appeal to the Director General through the Head of Department vide Section 8.13 of the Human Resource Manual.

68. The Petitioner's failure to follow the process of appeal renders his complaints in this petition hinged on his dissatisfaction with the Performance evaluation reports and failure to be promoted as hollow and untenable in law.
69. The Respondent avers that Kenya Climate Smart Agriculture Project (KCSAP) was a grant issued to it on behalf of the Government of Kenya by the World Bank. The project is available to members of the public service both in the national and county governments. To be awarded a scholarship, each candidate has to go through the competitive process. Considering the numerous applications that are processed, it was not possible to inform the Petitioner that his application for a scholarship was unsuccessful. Additionally, it was not automatic that upon application for the scholarship and attendance of an interview, the Petitioner would be granted the scholarship.
70. The Respondent avers that grant of sponsorship is dependent on the availability of funds and prioritization of the courses taken. The Petitioner was aware that the moment he did not get positive feedback of the results of his scholarship within a reasonable period, his application was unsuccessful.
71. It is only upon grant of a scholarship that the Respondent required to pay the expenses provided for at Section 9.11.1 of the Human Resources Manual. So long that as the Petitioner had not been granted a scholarship, the

Respondent could not pay any of the expenses under Section 9.11.1 thereof.

72. The Respondent avers that to recover the Kshs.4,081,149.10 being an amount paid to the Petitioner when he was neither in the University nor at work, the Respondent had initially decided to surcharge him an amount of Kshs. 25,600 per month. It later reviewed its decision to surcharge the Petitioner and arrived at the conclusion that since the Petitioner was then 59 years of age, he will retire in six years' time. This therefore meant that by the time the Petitioner retires from employment, Kshs.4,081,149.10 would not have been recovered.
73. Upon further interrogation of Section 11.20.4 of the Human Resource Manual, it was clear that whereas it limited a surcharge to a maximum of one third of the basic salary, it did not consider the peculiar realities of a scenario where it was not possible to recover the entire amount before the employee's retirement if the one third rule was applied mechanically. Therefore, the Respondent found it appropriate to surcharge the Petitioner an amount of Kshs.99,375 considering that the entire amount to be surcharged within 6 years was Kshs.4,081,149.10.
74. The Respondent avers that in the month of May 2023, it refunded Kshs.99,375 to the Petitioner having realized that the said amount of money had been erroneously deducted from the Petitioner's salary for the month of April, 2023. The same amount of money upon refund was deducted the

same month as a surcharge arising out of the failure of the Petitioner to complete his PhD Studies during the period he was on paid study leave.

75. The Respondent avers that from the letter of appointment dated 18<sup>th</sup> May, 2018, the Petitioner's current house allowance is Kshs.45,000 per month. In April to July 2023, the Petitioner was erroneously paid a house allowance of Kshs.90,000, therefore, there was need to correct the error by rectifying the monthly house allowance amount from Kshs.90,000 to Kshs.45,000.
76. From the Petitioner's letter of appointment, his current commuter allowance is Kshs. 12,000 per month. In April to July 2023, he was erroneously paid a monthly commuter allowance of Kshs.24,000, therefore, there was need to correct the error by rectifying the commuter allowance from Kshs. 24,000 to Kshs 12,000.
77. Additionally, his current basic salary is Kshs. 154,363 per month, however, the Petitioner was erroneously paid Kshs. 169,563 in July 2023. Therefore, there was need to correct the error by rectifying the basic salary from Kshs.169,563 to Kshs.154,363.
78. The Respondent avers that the issues raised by the Petitioner are not constitutional issues and can be adequately addressed by interpretation of the Human Resource Manual, Employment Act and Employment and Labour Relations Court Act.

79. It is the Respondent's case that the Petitioner has approached this court with dirty hands and cannot succeed in seeking discretionary orders. The evidence presented demonstrates that it is the Petitioner who has breached the Human Resources Manual and he therefore cannot have any basis whatsoever to allege that the Respondent has breached his constitutional rights.

### **Petitioner's Submissions**

80. The Petitioner submitted that Article 22 of the Constitution empowers every person to institute a petition claiming violation, denial, infringement or a threatened violation of his/her rights or fundamental freedoms in the Bill of Rights. Additionally, Article 23 clothes the High Court with the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and grant the appropriate reliefs in terms of Article 23 (3) of the Constitution. Thus, this court enjoys equal status as the High Court by virtue of Article 162 (2) of the constitution.

81. The Petitioner submitted that the amended petition has set out with reasonable degree of precision that which he complains of as provided in ***Mumo Matemu V Trusted Society of Human Right Alliance and 5 Others [2013] eKLR*** and Rule 10 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Petition demonstrates that he has indicated the constitutional provisions infringed by

the Respondent and has provided the particulars and/or the manner of said infringements and violation of his rights. Further, he seeks constitutional reliefs in terms of Article 23 (3) of the Constitution.

82. The Petitioner submitted that the court ought to interfere with the disciplinary action taken by the Respondent against him as it is a constitutional assault by the Respondent on the rights of the Petitioner, particularly Articles 10, 27, 28, 41, 47, 50 (1) & 236 of the Constitution.
83. The Petitioner submitted that he was interdicted indefinitely for a prolonged period of time thereafter, the interdiction was lifted and he has been unlawfully surcharged the sum of Kshs. 4,081,149.10 without being accorded procedural fairness in terms of Articles 47 and 50 (1) of the Constitution and the provisions of the Respondent's Human Resource Manual.
84. The Petitioner then proceeded to submit on four issues: whether the surcharge imposed on the Petitioner by the Respondent is unlawful; whether the Petitioner's fundamental rights and freedoms have been violated by the Respondent; whether the Petitioner is entitled to the remedies sought; and who bears the costs.
85. On the first issue, the Petitioner submitted that where the employer's action fails to comply with the relevant legal and policy parameters, the court is obliged to intervene. He cited [Jane Achieng & another v University of Nairobi](#)

[\[2015\] KEELRC 1251 \(KLR\)](#) wherein the court held: “In adjudicating disputes between employers and employees, the Employment and Labour Relations Court is well advised to respect decisions made by the employer in as far as they comply with the law and internal policies. However, where the employer's action fails to comply with the relevant legal and policy parameters, the Court is obliged to intervene.”

86. The Petitioner submitted Section 11.9.1 (h) of the Respondent’s Human Resource Manual provides that: “Disciplinary cases shall be dealt with promptly and finalized within a period of six (6) months.” His indefinite interdiction lasted for over two years contrary to the provisions of the Respondent’s Human Resource Manual. The Respondent’s action was therefore illegal and unlawful and a violation of his rights to fair labour practice and fair administrative action guaranteed under Article 41 and 47 of the Constitution.
87. The Petitioner submitted that he was heavily prejudiced by the disciplinary process taken against him by the Respondent, noting that he was interdicted for a period of over two years during which he was receiving half pay and thereafter surcharged a colossal amount of money. Accordingly, it was imperative for the Respondent to ensure that the disciplinary process was fair and lawful in terms of its manual and the law.
88. The Petitioner submitted that the interdiction letter dated 10<sup>th</sup> January 2020 was also the show cause letter and the

same was issued to him over two years before the surcharge decision by the Respondent. This is contrary to Clause 11.16.1 of the Respondent's Human Resource Manual which provides that; *"An officer may be interdicted to allow investigations to be conducted in a case where proceedings may lead to dismissal."*

89. The Petitioner submitted that the Respondent has not adduced any evidence to demonstrate that investigations were conducted into his alleged misconduct. Further, the Respondent has failed to demonstrate that he was issued with a show cause letter informing him of the charges against him, in terms of Section 11.20.3 of the Respondent's Human Resource Manual which states: *"In all surcharge cases, a show cause letter must be issued and the employee allowed to submit his defence."*
90. It is the Petitioner's submission that the Respondent's decision to surcharge the Petitioner was arrived at in total disregard of the provisions of Section 11.7 and 11.9 of the Human Resource Manual and Articles 41, 47, 50 (1) and 236 of the Constitution. He was never given the opportunity to submit his defence and no disciplinary hearing was ever conducted by the Respondent to enable him make representations and present his case.
91. The Petitioner submitted that the Respondent's decision to subject him to a prolonged interdiction and thereafter surcharge him without according him due process has

violated and continues to violate the Petitioner's constitutional rights.

92. It is the Petitioner's submission that the Respondent ought to have the proper procedure provided in its Human Resource Manual and Articles 47 and 50 (1) of the Constitution was to inter alia, conduct investigations into his alleged conduct, inform him of such investigations, write a show cause letter enumerating the charges, give him an opportunity to rebut the accusations in the show cause letter, notify him of a disciplinary hearing before a panel formed by the Respondent, inform him to be accompanied by a witness of his choice, supply the Petitioner with all the material and/or evidence against him, grant the Petitioner the opportunity to cross examine any witnesses that gave adverse testimony against him, inform the Petitioner of the outcome of the disciplinary hearing and finally advise him on his right of appeal.
93. The Petitioner submitted that the Respondent's decision to surcharge him the sum of Kshs. 4,081,149.10 lacked both substantive and procedural fairness and the same is unlawful.
94. The Petitioner submitted that Section 11.20.4 of the Human Resource Manual provides: *"Surcharge cases should be implemented as follows; a) In monthly installments that shall not exceed one third of employee's basic salary; b) At termination or expiry of contract, any outstanding amount*

*of surcharge will be settled from the employee's terminal dues....."*

95. The Petitioner submitted that the Respondent's action of deducting Kshs. 99,375 from his salary, which is way above one third of his salary; is contrary to Section 11.20.4 (a) of the Human Resource Manual. This provision is couched in mandatory terms; therefore, it is not open for the Respondent to arbitrarily adjust the surcharge amount.
96. It is the Petitioner's submission that the Respondent cannot unilaterally bypass the express provisions of its own internal policies and to do so is an outright abuse of power. Further, the Respondent did not inform the Petitioner the reasons for such an adverse action against him. Thus, the Respondent is proceeding in an unfair and unlawful manner thereby warranting the rightful intervention of this court.
97. On the second issue, the Petitioner submitted that the Respondent's decision to interdict him indefinitely, lift the interdiction and thereafter surcharge him was in violation of Article 10 of the Constitution and seeks to prejudice the human rights, social justice, accountability and transparency in the discharge of national duty.
98. The Petitioner submitted that the Respondent infringed his right to inherent dignity under Article 28 of the Constitution by unlawfully and unreasonably implementing the surcharge decision made vide the letter dated 3<sup>rd</sup> May 2023.

The Petitioner continues to suffer wanton damage to his livelihood following the unlawful and arbitrary deduction of his salaries by the Respondent which rendered him destitute as he has no other source of income.

99. The Petitioner submitted that Respondent's decision to surcharge him without according him both substantive and procedural fairness according to Sections 11.7, 11.9, 11.9.1 (h) 11.20.3 of its Human Resource Manual. The Respondent's actions exposed the Petitioner to unjustified mental and psychological torture in violation of his right to fair labour practice under Article 41 of the Constitution.
100. The Petitioner submitted that the Respondent failed to comply with Section 41 of the Employment Act and did not accord him a fair hearing as contemplated in ***Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] KEELRC 905 (KLR)***: *"The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognisance of the fair hearing principles as well as natural justice tenets."*
101. The Petitioner further submitted that the Respondent's decision to surcharge him vide the letter dated 3<sup>rd</sup> May 2023 violated Article 47 (2) of the Constitution which requires that where an administrative action is likely to adversely affect the rights and fundamental freedoms of a person, the administrator should give the person to be affected by the decision prior and adequate notice on the nature and

reasons for the intended action, an opportunity to be heard and make representations. In that regard, the Petitioner was entitled to an administrative action that was not only procedurally fair and lawful but also reasonable.

102. The Petitioner submitted that the Respondents violated his right to fair labour practices under Article 41 of the Constitution. This right confers upon every employee the right to reasonable working conditions free from sexual harassment, assault, and threats. The Respondent failed in their duty to provide same to the Petitioner and in turn fostered hostile and toxic working conditions that inevitably led to the sexual harassment towards her.

103. The Petitioner submitted that the Respondent's action of failing to grant him an opportunity to present his case before the surcharge decision was made. Further, that the Respondent failed to subject the Petitioner to the procedure contemplated in its Human Resource Manual before the surcharge decision was made against him contrary to the provisions of Articles 47, 50 (1) and 236 of the Constitution.

104. It is the Petitioner's submission that the Respondent effected the surcharge against the Petitioner in total disregard of the rules of natural justice and the law, and violated his rights under Article 10, 27, 28, 41, 47, 50(1) and 236 of the Constitution.

105. On the third issue, the Petitioner submitted that the disciplinary process taken by the Respondent against him

fell short of the required standard provided in its Human Resource Manual and the provisions of Articles 41, 47, 50(1) and 236 of the Constitution and the surcharge imposed on him is unlawful. Thus, he is entitled to the declaratory orders sought under prayers no. (a), (b), (c), (d) and (e) of the Amended Petition.

106. The Petitioner submitted that he has worked for the Respondent for a period of 23 years without promotion when his junior colleagues with lower qualifications than himself have been promoted by the Respondent. By failing to promote the Petitioner while promoting his colleagues with similar qualifications, the Respondent has discriminated against the Petitioner and the Petitioner is deserving of the relief sought at prayer no (e) of the Amended Petition.
107. The Petitioner submitted that he was not subjected to due process prior to the Respondent's decision to surcharge him; as a consequence, he is deserving of an order prohibiting the implementation of the surcharge decision against him.
108. The Petitioner submitted that the Respondent's decision to impose a surcharge against him being unlawful, he urged the court to issue an order directing the Respondent to refund to him the monies unlawfully deducted from his salaries as surcharge.

109. It is the Petitioner's submission that his rights have been arbitrarily and maliciously violated by the Respondent thus it is proper and appropriate that the Respondent be condemned to pay to him general damages for the gross constitutional violations occasioned to him by the Respondent's actions. He cited [Mundia Njeru Gateria v Embu County Government & 5 others \[2015\] KEELRC 249 \(KLR\)](#) wherein the court held: "***In Arnacherry Limited -Versus- Attorney General [2014]eKLR*** the High Court ( Lenaola J) awarded Kshs. 3,000,000.00 where there had been violation of Article 40 on the right to protection of property and the petitioner having been fully compensated the value of the land at Kshs. 850,000.00 and the destroyed assets at Kshs. 30,000,000.00. In ***Mak'Onyango-Versus- Attorney General and Another [2013]1EA*** at 353 the High Court (Rawal J) awarded Kshs. 20,000,000.00 for violation of rights for unlawful and malicious arrest, search and detention during the aftermath of the attempted coup d'etat on 01.08.1982 and the same having amounted to torture, cruelty, inhuman and degrading treatment. The court has awarded the petitioner the full withheld salaries. Taking into account the cited cases and the awarded salaries the court finds that Kshs.10, 000,000.00 as submitted for the petitioner would be on the higher scale. The respondents on their part did not offer any submissions to guide the court on the quantum of the compensation. The court has already pointed out the aggravating circumstances as submitted for the petitioner and finds that Kshs. 5,000,000.00 for violation

*of the fundamental rights and freedoms will meet the ends of justice in this case.”*

110. The Petitioner submitted that the Respondent’s actions against him was marred with irregularities and illegalities. The Petitioner’s rights have been violated following the unlawful surcharge imposed upon him by the Respondent. The Petitioner has been exposed to mental and psychological torture and has since suffered severe loss and damage in his livelihood

111. On the fourth issue, the Petitioner submitted that having demonstrated that the surcharge imposed upon him by the Respondent was unlawful and it has violated his constitutional rights, thus, he is entitled to costs of this suit.

112. The Petitioner submitted that Section 27 of the Civil Procedure Act (Cap 21) grants unfettered discretion to this court in awarding costs but based on the general established rule that costs follow event. Additionally, Section 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016 on the other hand, provides as follows regarding costs; *“The Court shall be guided by section 12(4) of the Employment and Labour Relations Court Act (No. 20 of 2011) and the Advocates (Remuneration) Order in awarding costs. (1) The Court may order reasonable reimbursements of money spent by litigants in the course of litigation. (2) Where a suit involves a liquidated amount that is claimed and specified at the time of filing a statement of claim and the Court orders that the amount claimed or part of the amount be paid to the*

*claimant, it may, in addition to that order, direct that interest be paid on the liquidated amount awarded at Court rate.”*

### **Respondent’s Submissions**

113. The Respondent submitted on four issues: whether the petition is incompetent having offended the principle of avoidance; whether the interdiction and lifting thereof offended the constitution; whether the respondent’s decision to surcharge the petitioner offended the constitution; and whether the petitioner has proved his allegations of discrimination.
114. On the first issue, the Respondent submitted that the issue of interdiction, lifting thereof, surcharge and alleged discrimination should have been addressed through the dispute resolution mechanisms provided in the Human Resource Manual. If the issues were to be presented to court then an ordinary claim would have been sufficient as opposed to a constitutional petition. There being no cause of action anchored on the Constitution in the present petition, the same is incompetent and should be struck out.
115. The Respondent submitted that it was mandatory for the Petitioner to exhaust all the dispute resolution mechanisms in the Human Resource Manual before moving the court under a constitutional petition. Therefore, the Petition is improperly before the court. It cited the Court of Appeal in

***Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others [2017] KECA 743 (KLR).***

116. The Respondent submitted that the petition's central issue is interdiction and surcharging of the Petitioner, all which are adequately provided for in the Human Resource Manual. The fact that the Petitioner has invoked the provisions of the Constitution does not change the ordinary contractual dispute which can be determined by interpretation of the Human Resource Manual and Employment Act. It cited ***Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] KECA 107 (KLR)***: *"In conclusion, we find that the alleged unlawful interdiction and termination of a contract of employment was not a constitutional issue and thus the petition did not disclose a cause of action anchored on the Constitution. Accordingly, the petition being incompetent, the court acted in excess of jurisdiction and erred in law in determining the petition....."*
117. The Respondents submitted that Section 11.20 of the Human Resource Manual provides for a surcharge. If the Petitioner was aggrieved by the surcharge he was at liberty to invoke Section 11.23 of the Human Resource Manual by way of an appeal or review.
118. The Respondent submitted that its Human Resource Manual at Section 12.1 provides for the manner of handling various grievances as follows; *"The Organization is committed to ensuring fair treatment of all employees when dealing with grievances with a view to addressing concerns in the best*

*manner possible. The grievances may include but not limited to; management deficiency, recruitment, promotion...”*

119. On the second issue, the Respondent submitted that upon approval of the study leave, the Petitioner was required to comply with Section 6.10.2 of the Respondent’s Human Resource Manual that provides: upon returning from study leave it was mandatory for the Petitioner to submit a written report of the activities undertaken during the leave in addition to the certificates attained. It was also mandatory for the Petitioner to submit copies of thesis written in the course of his studies; upon completion of training, the Petitioner/ was required to formally inform the Director General of his resumption of duties; and while on study leave, the Petitioner was subject to the Respondent’s rules and regulations.
120. It is the Respondent’s submission that instead of providing the complete report for the activities undertaken for the three years of his PhD studies together with certificates, the Petitioner alleged that his transcripts had not been released by the University. He promised to submit the transcripts to the Respondent as soon as possible. Having failed amongst others to submit his transcripts, certificates, written report of activities and thesis upon expiry of his study leave, he was in breach of Section 6.10.2 (viii) of the Human Resource Manual.

121. The Respondent submitted that at no time during the Petitioner's study leave did he inform the Respondent that there is a likelihood that he might be unable to be furnish his transcripts upon completion of PhD studies due to delay on the part of the University or for any other reason beyond his control. The Petitioner's averment that the University had not supplied him with transcripts for an unknown reason was therefore lacking any substance. It contends that it was not possible for the Petitioner to have undertaken his PhD studies for three years without being provided with a single transcript to enable him know whether he was to progress with his studies to the next year having passed or there was need to re-take a course and /or exam having failed

122. The Respondent submitted that despite its doubts, it requested the Petitioner vide a letter dated 14<sup>th</sup> October 2025 to keep updating the Director General of the progress of his studies as soon as possible. However, the Petitioner did not furnish the Respondent with his transcripts as earlier promised and remained silent for almost two years.

123. The Respondent submitted that it wrote to the Vice Chancellor, University of Eldoret vide a letter dated 24<sup>th</sup> May 2019 and requested to be provided with a precise status report in respect of the Petitioner's PhD program. In response, the Deputy Vice Chancellor, University of Eldoret responded vide a letter dated 28<sup>th</sup> June 2019 and stated: "... *This is to inform that William Ego (AGR/D.Phil/07/12) was admitted as a D. Phil student in the year 2012. He deserted*

*his studies after a period of three weeks and has not been in touch with the university to date”.*

124. The Respondent submitted that it notified the Respondent vide a letter dated 10<sup>th</sup> January 2020, that it was aware that he deserted studies at the University of Eldoret after a period of three weeks. The Respondent further notified the Petitioner that his conduct amounted to gross misconduct having violated Section 6.10.2(xi) of the Human Resource Manual. In the same the letter, the Respondent interdicted the Claimant and required him to within 21 days show cause why disciplinary action should not be taken against him.

125. It is the Respondents’ submission that the issue of the Petitioner’s interdiction does not stem from the Constitution but from the Human Resource Manual. The Respondent has proved through evidence that it granted the Petitioner two opportunities to respond before interdicting him. Thus, the allegation that it denied the Petitioner a chance to be heard prior to his interdiction has been rebutted by the Respondent.

126. The Respondents submitted that it did not conclude the disciplinary process within six months provided by Section 11.9.1(h) of the Human Resource Manual; was due to the fact that the Petitioner insisted that he had completed his studies but was unable to get the transcripts from the University. The Respondent therefore gave the Petitioner more time to avail the transcripts before it could make its

decision. Further, the Petitioner was glad to be given more time and even sought for more time to avail his transcripts, therefore, he failed to demonstrate that the Respondent offended the Constitution.

127. On the right to privacy under Article 31 of the Constitution, the Respondents submitted that the Petitioner's version of events regarding her mobile phone being searched remains unsubstantiated. The Respondents assert that no such act occurred and no forensic report or witness has validated that the 1<sup>st</sup> Respondent's management deleted evidence from her phone.

128. On the third issue, the Respondent submitted that Section 11.20.3 of its Human Resource Manual reveals that all that is required before surcharge is a show cause letter to be issued and the employee allowed to submit his defence. There is no reference to the employee being invited for a disciplinary hearing before being surcharged.

129. It is the Respondent's submission that whether or not the Petitioner completed his studies within the period of study leave is a matter of documentary evidence. Requiring the Petitioner to submit a written defence was therefore adequate in the circumstances. Reliance was placed in the Court of Appeal case of ***Kenya Revenue Authority v Menginya Salim Murgani [2010] KECA 164 (KLR)***: *"However, in our view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter*

*before us and we are satisfied that it was a fair hearing. In the case of **LOCAL GOVERNMENT BOARD vs ARLIDGE [1915] A.C. 120, 132-133, SELVARAJAN vs RACE RELATIONS BOARD [1975] I WLR 1686, 1694, and in R vs IMMIGRATION APPEAL TRIBUNAL ex-parte JONES [1988] I WLR 477, 481** it was held:- “the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.” Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ...” According to the evidence adduced, it cannot be said that the respondent did not receive adequate notice of the charges leveled against him and allowed to present his case in writing.”*

130. The Respondent submitted that vide a letter dated 16<sup>th</sup> January 2020 it reminded the Petitioner that he had promised to provide his transcripts as soon as they were released; and asked the Petitioner to furnish it with his transcripts within 7 days. The Petitioner responded to the show cause letter dated 10<sup>th</sup> January 2020 and the letter dated 16<sup>th</sup> February vide his letter dated 4<sup>th</sup> February, 2020. In his letter, the Petitioner denied deserting his coursework

and further reiterated that the university could not release his transcripts before he cleared his fees.

131. The Respondent submitted that the Petitioner does not raise the complaint raised in the petition to the effect that he was interdicted without a notice to show cause being issued. Instead, he requests the Respondent to lift the interdiction as opposed to demand the interdiction be lifted. By the time the petition was filed in court, the right of appeal provided for under Section 11.23.1 of the Human Resource Manual had long lapsed. The Petitioner cannot therefore purport to make complaints in court on the subject of interdiction when the window for challenging the same in the Human Resource Manual had long lapsed.

132. It is the Respondents' submission that the Petitioner having sought for more time to provide his transcripts meant that the Respondent would not lift the interdiction since absence of transcripts, is evidence of breach of Section 6.10.2 (viii) of the Human Resource Manual. By the time, the Petitioner was interdicted he had remained in breach of the same rule for several years.

133. The Respondent submitted that by requesting for extension of time to provide his transcripts on 4<sup>th</sup> February, 2020, the Petitioner was requesting it not to determine his case within the six months. The Petitioner having requested was fully aware that the consequence was extension of his interdiction. By seeking extension of time, the Petitioner must be taken to have waived any right to complain that

the Respondent had failed to comply with 11.9.1 of the Respondent's Human Resource Manual.

134. The Respondent submitted that over four years since lapse of his study leave, the Petitioner had failed to demonstrate that he had made any effort to obtain the transcripts in absence of any letters written to the University requesting for the same. The Petitioner found it convenient to generally claim that he was denied his transcripts since he had not cleared his fees. He however did not give any specific details of the amount of fees which were outstanding and for which period.
135. The Respondent submitted that upon receipt of the letters dated 10<sup>th</sup> and 16<sup>th</sup> January 2020, the Petitioner did not provide any documentary evidence to demonstrate that he had pursued and completed his studies within his paid study leave which ran from 3<sup>rd</sup> September 2012 to 31<sup>st</sup> August, 2015.
136. The Respondent submitted that the Petitioner's attempt to prove that he had not deserted his studies after 3 weeks by relying on a letter from the University of Eldoret dated 30<sup>th</sup> July 2019 by the Head of Department, Crop and Horticulture Sciences, cannot succeed since it did not contain any particulars of when he commenced and completed his coursework. To the Respondent, the most important period was between 3<sup>rd</sup> September 2012 and 1<sup>st</sup> October 2015.

137. It is the Respondent's submission that it had a right to take immediate disciplinary action against the Petitioner upon receipt of his response dated 4<sup>th</sup> February 2020 including surcharging his gross salary for the period he was neither at the university nor at work. The Respondent however decided to withhold any disciplinary action to allow more time to the Petitioner to prove that he had not deserted his studies and also avail his transcripts.
138. The Respondent submitted that after the Petitioner's letter of 4<sup>th</sup> February 2020, he remained silent for over a period of one year prompting the Respondent to write a letter dated 23<sup>rd</sup> March, 2021 reminding him that he had failed to avail the transcripts within the 7 days granted in the Respondent's letter dated 16<sup>th</sup> January 2020.
139. The Respondent submitted that it is the Respondent who got impatient with the inaction of the Petitioner to supply his transcripts. The Respondent vide the letter dated 23<sup>rd</sup> March, 2021 gave the Petitioner seven days to avail the same and in default, take disciplinary action against him without further reference to him. In his letter dated 18<sup>th</sup> April 2021, the Petitioner thanks the Respondent for according him another chance in addition to the previous chances to present his transcripts.
140. The Respondent submitted that despite all the time given to the Petitioner to prove that he had successfully completed his PhD studies within his study leave, he was unsuccessful in absence of his Certificate, Thesis and Transcripts. He only

provided one transcript but for a different study period unrelated to the sanctioned period of the study leave. The Respondent is indeed the wronged party since despite granting the Petitioner paid study leave which lapsed over ten years ago, there is no proof that he ever undertook his studies within the paid study leave period. The Respondent is entitled to benefit from the knowledge and skills of an employee who returns upon successful completion of study leave.

141. The Respondent submitted that since the Petitioner did not complete his PhD studies, the Respondent was unable to benefit from the knowledge that was to be obtained upon successful completion of his studies. The Respondent was thus justified in surcharging the Petitioner's gross salary paid during the period he was neither at the university nor at work.

142. It is the Respondent's submission that Section 11.23.1 of the Human Resource Manual provides that appeals or applications for review should be made within 42 days and 1 year respectively. Failure to appeal as provided in the Manual renders the complaint against the surcharge hollow.

143. The Respondent submitted that although Section 11.20.4 of the Human Resource Manual, limits a surcharge to a maximum of one third of the basic salary, the said manual did not consider whether it was possible to recover the entire amount before the employee's retirement. Considering the peculiar facts of the case, the Respondent

found it appropriate to surcharge the Petitioner an amount of Kshs.99,375 considering that the entire amount to be surcharged within 6 years was Kshs.4,081,149.10.

144. The Respondent submitted that in May 2023, it refunded Kshs.99,375 to the Petitioner having realized that the said amount of money had been erroneously deducted from the Petitioner's salary for the month of April, 2023. The same amount of money upon refund was deducted the same month as a surcharge arising out of the failure of the Petitioner to complete his PhD studies during the period he was on paid study leave. The refund is described as a miscellaneous refund while the deduction is described as fines and surcharge.
145. The Respondent submitted that in the months of April, May, June and July 2023, the Petitioner was erroneously paid double commuter allowance, housing allowance and basis pay, therefore, there rectify the same through deduction of the overpayments to him.
146. It is the Respondent's submission that there was nothing warranting filing of a constitutional petition, if the Petitioner had complaints, he could have addressed the same through the avenues provided for in the Human Resource Manual and the Employment Act. It cited ***Ernest C.O. Muga v Attorney General [2018] KECA 254 (KLR)*** wherein the Court of Appeal held: *"This Court has consistently and variously stated that the Constitutional Court should not be misused for the determination of ordinary civil and*

legislative disputes that are made to masquerade as Constitutional litigation, seeking to enforce fundamental rights..... And in the recent case of **Francis Gathangu vs Kenyatta University [2018] eKLR** where the question, in a dispute brought as a constitutional petition, whether the appellant was entitled to payment of his salary and other benefits during the period of his suspension from employment, this Court also held that; "... the dispute was not a suitable matter to be characterized as or presented as a constitutional petition. It was no more than a regular employment dispute between an employer and an employee based on the contract of employment, and statutes governing that contract. The remedies sought were, on the facts, unavailable under the Constitution and the learned Judge was within rights and entirety justified in dismissing the petition".

147. It is the Respondent's submission that the subject of the surcharge by stating that despite the Petitioner's paid study leave lapsing in the year 2015, over a decade later, he has not provided inter alia transcripts proving that he completed his studies within the period of study leave. The Petitioner has therefore failed to demonstrate that the Respondent offended the Constitution.

148. On discrimination, the Respondent submitted that it notified the Petitioner vide the interdiction letter that he should immediately hand over his office and all the official documents in his custody to the officer identified by the Institute Director. Since the Institute Director had the right

to direct the Petitioner upon interdiction to hand over his office and documents to any officer either superior or junior to him, the same power applied upon lifting of interdiction. The Petitioner therefore had no right to choose who would assign him duties upon his return.

149. The Respondent submitted that it invited the Petitioner for a promotional interview vide a letter dated 5<sup>th</sup> May 2009. Having considered all the candidates for the position, it found that the Petitioner was not the most appropriate person for the position. However, it is not possible for the Respondent to inform all applicants of the results of a promotional interview. Since the Petitioner was its employee, he was aware that he was unsuccessful for the application since he learnt of the office holder of the position of Principal Research Officer the moment the position was taken.

150. The Respondents submitted that the decision of whether or not to promote an employee having considered its Career Progression Guidelines is entirely discretionary. The Petitioner therefore cannot purport that he was the most appropriate person to be promoted to the positions of Principal Research Scientist, Chief Research Scientist and Chief Research Scientist.

151. The Respondent submitted that its Human Resources Manual at Section 12.1 provides for the manner of handling various grievances including promotion as; *“The Organization is committed to ensuring fair treatment of all*

*employees when dealing with grievances with a view to addressing concerns in the best manner possible. The grievances may include but not limited to; management deficiency, recruitment, promotion...” This provision does not provide an exhaustive list of all the grievances that can be presented before various officers and organs the Respondent, thus, the allegations in respect of discrimination should have been presented under Section 12.1.*

152. On constructive dismissal, the Respondents submitted that the Petitioner has not demonstrated the legal threshold established in ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR***, where the Court held that: *"A constructive dismissal occurs when an employee resigns because their employer's conduct has made it impossible for the employee to continue working."*

153. It is the Respondent's submission that Section 12.2 of the Human Resource Manual has a detailed procedure for handling of grievances as follows;

*a) An employee who has an individual problem or grievance not being a matter of discipline should in the first instance approach his immediate supervisor with a view to solving it.(Section 12.2.1)*

*b) The immediate supervisor is required to consider any submission made to him and endeavour to settle the matter or refer to the Head of Department for the appropriate action. (Section 12.2.2)*

c) *If the employee is not satisfied with the decision, he may appeal to the Director General through the head of Department. (Section 12.2.3)*

d) *Where the employee is dissatisfied with the decision he has a right of appeal to the Organization. (Section 12.2.8)*

154. The Respondent submitted that if the Petitioner had any issue in respect of promotion, he should have raised the same with his immediate supervisor. The Petitioner never followed the grievance procedures provided for by Section 12.2 aforesaid in respect of alleged discrimination and promotion. He therefore cannot by way of the petition herein introduce the same for the very first time.

155. The Respondent submitted that despite the Petitioner alleging that he should have been promoted, he did not provide any evidence to show that he qualified to be promoted to any specific post after considering inter alia the career progression guidelines and Scientist Evaluation Form of the Respondent. The need for the person claiming to be qualified to bring himself within the policies of employer was considered in the case of ***Universities Academic Staff Union (Pwani University Chapter) v Pwani University; Universities Academic Staff Union (UASU) (Interested Party) [2023] KEELRC 2377 (KLR)*** where the court found; *“For a promotion to take effect, the policy of the respondent as the employer must apply. the procedures and practice in place must be gone into and unless these can be demonstrated that upon application,*

*there is selection or differentiation that is unreasonable or arbitrary and created for an illegitimate or surreptitious purpose, a claim that there is discrimination against the employee cannot hold. Even where there is noted differentiation, which is not the case here, the petitioner must demonstrate that there is a violation of the Constitution and the law by creating a differentiation that is not for a legitimate purpose or that it is unfair. more fundamentally, the ultimate question is whether the different treatment is justifiable as held in Mohammed Abduba Dida vs Debate Media Limited & another [2018] eKLR.”*

156. The Respondent submitted that the qualifications of the persons alleged to have been promoted remain unknown. There cannot therefore be a basis whatsoever to allege there was discrimination in promoting employees. It cited [Monica Sang v Habib Bank Limited \[2019\] KEELRC 2064 \(KLR\)](#): *“There are no details of other Employees, who were promoted or paid higher salaries than the Claimant discriminatively. There are no comparators. No names are given, no salaries or grades relating to discrimination are given. There is no evidence that the Claimant was made to do account reconciliation weekly while others did so monthly. What would the Bank gain by asking the Claimant to reconcile accounts outside the Bank’s work policy? Again where are the comparators? The Claimant makes another generalized allegation about discrimination in accessing loan facilities. She has not given*

*to the Court details of the rules and regulations governing such facilities. She refers to unnamed Employees who were granted better loan terms.”*

157. The Respondent submitted that the Petitioner having failed to provide any iota of evidence in support of his allegations of discrimination which he claims have prevented him from being promoted, he has failed to establish a prima facie case on the said subject. The burden therefore did not shift to the Respondent to rebut the allegations of the Petitioner.
158. The Respondent submitted that Petitioner in respect of promotion date back to the years 2009 and 2012, therefore, the allegation of discrimination arose fourteen (14) years and eleven (11) years ago and are stale claims. It cited ***Mitei v National Social Security Fund Board of Trustees [2022] KECA 974 (KLR)***.
159. It is the Respondent's submission that the Petitioner has never raised a single complaint to the Respondent regarding his appraisal. If he had any complaints he could have lodged his complaint pursuant to Section 12.2 of the Human Resources Manual. The Petitioner's failure to follow the process of appeal renders his complaints hinged on his dissatisfaction with the Performance evaluation reports and failure to be promoted as hollow. It is important to note that there is no single letter by the Petitioner to the Respondent asking for his performance evaluation reports.

160. The Respondent submitted that the numerous applications that are processed in respect to Kenya Climate Smart Agriculture Project (KCSAP), it was not possible to inform the Petitioner that his application for a scholarship was unsuccessful. It is not a requirement of the Human Researches Manual that every applicant for a scholarship must get a response informing them of the outcome of the application.

161. The Respondent further submitted that the grant of sponsorship is dependent on the availability of funds and prioritization of the courses taken. The Petitioner was aware that the moment he did not get positive feedback of the results of his scholarship within a reasonable period, his application was unsuccessful. Additionally, it is only upon grant of a scholarship that the Respondent required to pay the expenses provided for at Section 9.11.1 of the Human Resources Manual. So long that as the Petitioner had not been granted a scholarship, the Respondent could not pay any of the expenses under Section 9.11.1 of the said Manual.

162. It is the Respondent's submission that the Petitioner in respect of discrimination, lack of promotion and flack of performance evaluation reports are hollow and cannot be sustained. Therefore, the Petitioner failed to demonstrate that it offended the Constitution.

163. I have examined all the evidence and submissions of the parties herein. It is true that the petitioner sought and was

granted study leave which he proceeded to attend to but failed to complete his studies in time.

164. The respondents averred that the petitioner resumed duty on 1/10/2015 but failed to submit transcript to show the evidence of the studies undertaken.

165. From the record, the petitioner was indeed asked to submit his transcripts to show he had studies during the study leave. The petitioner had been on study leave from September 2012 to August 2015. After the respondent persisted that the petitioner produces the transcripts, the respondent wrote to the University who confirmed that the petitioner absconded his studies in 2012 just after 3 weeks. The petitioner has exhibited some academic transcripts to show that he studied during the period. The transcripts submitted in court show the year of study was 2020/2021 and the same is dated 29/6/2022. This is an indication that the petitioner never did any studies in 2012 to 2015 as he had indicated.

166. Under the respondents HR manual at section 6.10 2(x) upon resumption of duty, the petitioner was required to inform his boss which he did and indicated that he had completed his course work but was still working on his thesis. Under clause 6.102(viii) he was however also expected to submit a written report on the activities undertaken during the leave in addition to the certificates attained. He was expected to submit copies of the written thesis written in the course of their studies.

167. The petitioner did not adhere to this requirement and despite being required to do so, only submitted a transcript indicating he had done his 1<sup>st</sup> year in 2020/2021.
168. My finding from the omission is that despite the petitioner being given a chance to study in 2012, he did not do so until 2020 when he joined 1<sup>st</sup> year. The time when he was away on study leave, he failed to attend to the study and also to work and so earned salary without working or studies. This was indeed breach of the HR manual which made him liable to punishment
169. It is from this understanding that the respondent proceeded to subject him to interdiction and later lifted the same and withheld the ½ salary not paid. The decision was communicated to the petitioner vide a letter dated 14/43/2923. This letter communicated the fact that the interdiction had been lifted and the petitioner's basic salary reinstated to the payroll. On 3/5/2023 the petitioner was now issued with another letter surcharging him of kshs 4,081,149.10. It is noteworthy that the surcharge was instituted without giving the petitioner any show cause letter on a chance to be heard on the matter which is a breach of the law and principles of natural justice and breach of his right to be heard before being condemned.
170. For this reason, it is my finding that the petition is merited and the decision to surcharge the petitioner without any hearing is illegal null and void. The letter of the respondent

to the petition dated 3/5/2023 is declared unlawful, null and void and is vacated accordingly.

171. The moneys already deducted as surcharge to be refunded accordingly. There shall be no order of costs.

**Dated, Signed and Delivered Virtually at Nairobi this 18<sup>th</sup> Day of November 2025.**

**HELLEN WASILWA**

**JUDGE**

ORIGINAL