

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC PETITION NO. E230 OF 2023

NATIONAL NURSES ASSOCIATION OF
KENYA.....PETITIONER

VERSUS

NATIONAL COUNCIL OF KENYA.....1ST RESPONDENT

PROF. EUNICE NDIRANGU, THE CHAIRPERSON
NURSING COUNCIL OF KENYA.....2ND
RESPONDENT

DR. EDNA CHEMUTAI TALLAM, REGISTRAR/CEO
NURSING COUNCIL OF KENYA.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH
RESPONDENT

AND

THE CABINET SECRETARY,
MINISTRY OF HEALTH.....1ST INTERESTED PARTY

COMMISSION ON ADMINISTRATIVE
JUSTICE.....2ND INTERESTED
PARTY

PUBLIC SERVICE COMMISSION.....3RD INTERESTED
PARTY

PRINCIPAL SECRETARY,
MINISTRY OF HEALTH.....4TH INTERESTED PARTY

JUDGMENT

The petition was filed on 8/12/2023 by the National Nurses Association of Kenya (NNAK) against the Respondent and Interested Parties named seeking the following reliefs: -

- a. A declaration and a finding that the two-term tenure of Ms. Edna Chemutai Tallam serving as the Registrar/Chief Executive Officer of the Nursing Council of Kenya from 16/12/2014 lapsed on or about 16/12/2022 pursuant to section 11(6) of Nurses and Midwives Act, Cap 257 Laws of Kenya.
- b. A declaration and a finding that Ms. Edna Chemutai Tallam has been serving illegally and irregularly since 16/12/2022 as Registrar/Chief Executive Officer of the Nursing Council of Kenya when her second tenure of 4 years lapsed.
- c. An order of mandamus do issue compelling the 1st, 2nd and 4th Respondents as well as 1st, 3rd and 4th Interested Party to declare the office of Registrar/Chief Executive Officer of the Nursing Council of Kenya vacant.
- d. An order of mandamus do issue compelling the 1st, 2nd and 4th Respondents as well as 1st, 3rd and 4th Interested Party to initiate and advertise the position of Registrar/Chief Executive Officer of the Nursing Council of Kenya for recruitment of the appropriate replacement.
- e. A declaration and finding that the impugned Nurses and Midwives (Fees) Regulations 2023 were done without public participation and involvement of relevant stakeholders contrary to the provisions of article 10 and 47 of the Constitution of Kenya 2010 as read with sections 4 and 5 of the Fair Administrative Act, 2015.

- f. An order of certiorari do issue quashing the impugned Nurses and Midwives (Fees) Regulations 2023 for being arrived at devoid of the requisite public participation as required by law namely Article 47 of the Constitution as read together with sections 4 and 5 of the Fair Administrative Action Act, 2015.
- g. An order of mandamus does issue compelling the Ms. Edna Chemutai Tallam to reimburse all the monies and allowances illegally paid to her after the lapse of her tenure on or about the 16/12/2022.
- h. An order do issue against the members of the 1st Respondent to account for misuse and mismanagement of the public funds entrusted to them for the complete term they served.
- i. Any other, further or better relief that this honourable court will think fit just to give in this case.
- j. Costs of the petition be granted to the Petitioner.

The contentious issues in this petition which require determination are:

- (i) Whether Ms. Edna Chemutai Tallam, the Registrar/Chief Executive Officer of the Nursing Council of Kenya is serving illegally upon expiry of her two-term tenure on 16/12/2022 pursuant to section 11(6) of Nurses and Midwives Act Cap 257 Laws of Kenya.
- (ii) Whether the Nurses and Midwives (Fees) Regulation 2023 was promulgated in violation of Article 10 and 47 of the Constitution read with section 4 and 5 of the Fair Administrative Action 2015.
- (iii) Whether the Petitioner is entitled to the declaratory orders sought together with the orders of mandamus and certiorari.

- (iv) Whether the 1st Respondent has misused and/or mis-managed public funds which it should be called upon to account.
- (v) Whether an order to costs should be issued against any party.

Facts by Petitioner

The Nursing Council of Kenya (The Council) is a body corporate established under the Nurses and Midwives Act, Cap 257 Laws of Kenya whose main mandate is to regulate training and practice of nurses in Kenya whereas the National Nurses Association of Kenya (NNAK) is duly registered under the Societies Act Cap 108 as a professional association representing all cadre of nurses in Kenya drawn from practice, training, education and research institutions.

The council is mandated under section 11(1) of the Act to appoint a Regional/Chief Executive Officer to council pursuant to section 11(6) for a term of four (4) years renewable once subject to satisfactory performance.

That the 3rd Respondent was appointed to the position of CEO on 16/12/2014 upon a rigorous recruitment process. That the 3rd Respondent served and completed her term on or about 16th December 2018. The council reappointed the 3rd Respondent for a second and final term commencing on or about 16th December 2018. That the second and final term expired on or about 16th December 2022.

That the 3rd Respondent has however illegally/irregularly continued to hold office as CEO despite expiry of her lawful tenure hence the filing of the suit seeking the reliefs set out in the petition.

Secondly, on or about November 2023, the 3rd Respondent together with members of the council proposed an increase of regulatory and other fees for Midwives and Nurses by estimation percentage rates of up to 200% without holding any stakeholder engagements to get the necessary input in line with Article 10 and 47 of the Constitution which mandate public participation and fair administrative action by any person in authority before taking key decisions such as this one.

The proposed fees are as set out below:

Service provided	Initial fee	Proposed fee in the Regulation	Percentage increase
Registration of enrolment of the Nurse or midwife	Kshs. 7,000.00	Kshs. 11,000,00	57.1429%
Retention of the Nurses or Midwife in the register	Kshs. 1,500.00	Kshs. 3,000.00	100%
Retention of a Nurse or Midwife specialist	Kshs. 1,500.00	Kshs. 5,000.00	233%
Curriculum study	Kshs. 100,000.00	Kshs. 150,000.00	50%

That the CEO and council did not involve the Petitioner at all in the making of the above drastic changes which affect the professional practice and livelihood of members of the Petitioner. That the said participation should

have been conducted vide the offices of the Petitioner in all the 47 counties which did not happen.

That efforts to engage the 1st, 2nd and 3rd Respondents to reconsider the promulgated Nurses and Midwives (fees) Regulations 2023 has not borne any fruit hence the suit and the reliefs sought.

Replying Affidavit by Respondent dated 24/9/2024

The 1st 2nd and 3rd Respondents deposes vide the affidavit of Eugene Ayubu Onduma, the acting Corporation Secretary and Director of Legal Services of the 1st Respondent that the provisions relating to the appointment to office of the Registrar/Chief Executive Officer of the 1st Respondent, as at the time of the appointment of Ms Edna Talaam did not provide for the term limit of the office of the Registrar/ Chief Executive Officer of the 1st Respondent, which was purely in the discretion of the appointing officer and a contractual agreement between the 1st Respondent and Ms Edna Tallam.

That the provision for the two-term limit only came to operation via an amendment to the Health Laws Amendment Act 2019 which came into effect in 2019 which included the term limit of the office of the Registrar/Chief Executive Officer to be in line with the recommendations of Mwongozo.

It is deposed that upon vacation of Ms Edna Tallam from office in December 2023, the 1st Respondent in keeping with continuity and diligence, appointed one Ms Anne N. Mukuma as the acting Chief

Executive Officer/Registrar pending the appointment of substantive Chief Executive Officer/Registrar. That the allegations that Ms. Edna Tallam Chemutai continued carrying out her mandate as Chief Executive Officer/Registrar even after the end of her term is pure conjecture and an attempt to mislead the Honourable Court as to the facts relevant in this case.

The abstraction of facts by the Petitioner/Applicant no less backed by any fact nor evidence, is aimed at sensationalizing the mind of this Honourable Court. That at the time of filing this Petition Ms. Anne N. Mukuma had already lawfully been appointed as acting CEO/Registrar following Council meeting held on 6th December 2024. That the allegations that Ms Edna Tallam continued to discharge functions at the CEO/Registrar of the NCK is utterly misplaced and fails. The Petitioners have made allegations that Ms Edna Tallam Chemutai is still operating as the Chief Executive Officer/Registrar and that she is still predominantly present in the processes of the Council.

That the Petitioners in support of this allegation have produced a screenshot of the Nursing Council of Kenya website which screenshot is undated, unaccompanied by a certificate of electronic evidence and baseless. Further, the screenshot message alluded to has been the introduction of the Council on its website for the last seven (7) years and has not been updated since the vacation of office of Ms. Tallam.

That the Council is mandated pursuant to section 26 of the Nurses and Midwives Act to make regulations generally for better carrying out of the

provisions of the Act, and in particular relevant to this case, to make regulations for the provision of fees payable in respect of any other related matters. That contrary to the allegation that the draft proposed rates of fees and charges had never been brought to the attention of the National Nurses Association of Kenya and the National Executive Council, the Council had drafted the proposals herein and invited the different stakeholders to an engagement to discuss the same. That on the 15th November 2023 a Consultative Meeting for the Development of Nurses and Midwives (Fees) Regulations was undertaken at the Enashipai Resort and Spa, which consultative meeting was attended by the National Chairperson of the Petitioner, Mr. Collins Ajwang. It is deposed that the Stakeholders attending the consultative meeting on the 15th November 2023, including the Petitioner submitted their proposals which were reduced down in a summary format on the proposed rate of fees and charges that had been presented to them.

It is deposed that the allegations that the Council may by stealth submit the Regulations for approval to the Cabinet Secretary is pure conjecture and an allegation meant to bring disrepute to the Council. That it would be prudent that the 1st Respondent is allowed to undertake to completion the process for enactment of such regulations and thereafter if the Petitioner is aggrieved, they can bring a Petition challenging the decision on the basis of the undertaken process, other than a preconceived and imagined process yet to be undertaken.

That the dispute arising from the draft Regulations is not a ripe dispute for determination by this Honourable Court and that the Court should adopt the

doctrine of avoidance and await when a real dispute manifest. This is because there was a stakeholder engagement which was to culminate in an improvement of the draft zero of the Regulations which was thereafter to be gazetted for public participation by the larger nurses and midwives in the profession, which process is yet to be undertaken and the draft regulations still remain proposals.

That the Petitioner/Applicant in seeking to stop the processes of appointment of a substantive office holder into the office of the Registrar/Chief Executive Officer is an abuse of process of the Honourable Court, and that the allegation that the Council is undertaking recruitment without justification and seeking that an impartial body be appointed to recruit the Registrar/Executive Officer is an attempt to subvert the law.

That the Petitioner in seeking that this Court holds that the 1st Respondent misused and mismanaged public funds is an abuse of the Court process and the Court should exercise the doctrine of avoidance on the issue as there are other relevant bodies that audit the processes of the 1st Respondent.

Further Affidavit

The Petitioner filed further affidavit joining issues with the Respondents and reiterates that section 11(6) of the Nurses and Midwives Act, Cap 257 (as revised in 2017) prescribes a two-term appointment limit as follows: -

“The Chief Executive Officer shall serve for a term of four years and shall be eligible for reappointment for one further term of four years, subject to satisfactory performance.”

That the continued occupation of the office by the 3rd Respondent is patently illegal. That the belated advertisement of the position of the CEO more than 16 months after expiry of her tenure is unlawful and contravenes the Mwongozo Code.

That the action by the Petitioner is not premature but necessary due to the council's continued inaction.

That purported engagement on the Nurses and Midwives (Fees) Regulation 2023 was superficial, exclusionary and procedurally flawed since the stakeholders were engaged for the first time on the proposed fee increase at a meeting held on 8/11/2023 between 2 p.m. and 4 p.m. That the stakeholders outrightly rejected the proposal due to lack of proper notice, stakeholder consultation, justification or impact assessment and immediately sought time to conduct internal consultations with members across 47 counties as request granted with a restrictive of seven (7) day timelines was impractical.

That following quick consultation, the Petitioner submitted its objection to the fee increment via a virtual meeting, followed by a formal email and physical letter clearly rejecting the proposal in its entirety.

That there was no stakeholder consensus as alleged by the Respondent or at all.

The council claim of financial strain lacks merit and financial records indicate a strong financial standing and steady cash flow. There is therefore no justification for raising regulatory fees by up to 150%.

That the Petitioner's members stand to suffer grave prejudice if the impugned regulations are gazetted and operationalized without their input in breach of Article 10, 47 and 232 of the Constitution read with section 4 and 5 of Fair Administrative Action Act, 2015.

That the petition be allowed and reliefs sought be granted.

DETERMINATION

The court has considered the veracity and credibility of the allegations made by the Petitioner which have been countered by the Respondents with regard to the three main issues in dispute to wit:

- (i) That the 3rd Respondent is still in office upon completion of the 2nd term:
- (ii) The Nurses and Midwives (Fees) Regulation 2023 have been promulgated by the Respondent without stakeholder engagement:
- and
- (iii) The 1st Respondent is guilty of mismanagement of public funds they handle on behalf of members.

The court is of the finding that the 1st Respondent appointed M/s. Anne N. Mukuma as the Acting Registrar/CEO of the 1st Respondent upon completion of the 2nd term of the 3rd Respondent and therefore the Petitioner has not proved on a balance of probability that the Respondents have violated Regulation 11(6) of the Nurses and Midwives Act Cap 257 Laws of Kenya.

Secondly, the Petitioner has failed to prove that the Respondents have developed to completion the Nurses and Midwives (Fees) Regulations 2023 without sufficient stakeholder participation in violation of Article 10, and 47 of the Constitution of Kenya 2010. The allegation by the Petitioner has been sufficiently rebutted by the Respondents vide the replying affidavit.

Thirdly, the allegation that the 1st Respondent has mismanaged the funds held by it in trust of the members of the Petitioner is completely not supported by any evidence adduced by the Petitioner and is without any basis.

Having found that the Petitioner has not proved as a matter of fact that the 3rd Petitioner has been in office beyond the two-term period, it is merely academic to consider the applicable principles on retrospective effect of the law as was stated in the case of ***Mathenge and 4 others versus Inspector General of Police and 3 others; Kenya Human Rights Commission (Interested Party [2022] KEE LRC 4872(KLR)*** M. N. Nduma J.

Section 11(6) of the Nurses and Midwives Act came into effect on 17th May 2019 while the 3rd Petitioner was serving her 1st term. The 2nd term of the 3rd Respondent ended on 23rd December 2023 and the term had commenced after the Health Laws (Amendment) Act No. 5 OF 2019 which became effective on 17th May 2019 and introduced the two-term limit per section 11(6) which came to effect on 17th May 2019 does not count for purposes of the application of the two-term rule as same retroactively divests the vested rights of the 3rd Respondent to seek another term upon completion of the 2nd term on 23rd December 2022.

On the facts of this case, the issue of the 3rd Petitioner being in office is not factual and the matter is moot.

Similarly, the Petitioner has not proved that there is real danger that the 1st Respondent will promulgate the Nurses and Midwives (fees) Regulations 2023 without following the provisions of the Constitution and the law applicable.

In this regard the words of Mwongo J. in *Martin Nyaga Wambora versus County Assembly of Embu, Speaker of the County Assembly of Embu, Speaker of the Senate, Parliamentary Service Commission on Administration of Justice, Andrew Ileri Njeru and 31 others [2015] KECA 137 (KLR)* ring true as follows:

“To those erudite words I would only highlight the importance of demonstration of “real danger.” The danger must be imminent

and evident, true and actual and not fictitious so much so that it deserves immediate remedial attention on redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."

All the complaints by the Petitioners in this matter fall in the described category of not evident, not proved, almost fictitious and so not all of the issues raised by the Petitioner deserve immediate attention of the court. The petition being a public interest one is dismissed with no order as to costs.

Dated at Nairobi this 27th Day of November 2025.



Mathews Nduma

JUDGE

Appearance:

M/s. Murigu for Petitioner

Mr. Abuga for 2nd and 3rd Respondent

Mr. Cherogony for 3rd Interested Party

Mr. Kioko for 1st and 4th Interested party and 4th Respondent

Mr. Kemboi – Court Assistant