



Kenyanya, & 2 others (Suing as the Officials and on Behalf of the Society of Radiography in Kenya) v Kenya Nuclear Regulatory Authority & 2 others (Petition E600 of 2024) [2026] KEHC 557 (KLR) (Constitutional and Human Rights) (29 January 2026) (Judgment)

Neutral citation: [2026] KEHC 557 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E600 OF 2024

LN MUGAMBI, J

JANUARY 29, 2026

BETWEEN

JEVAS KENYANYA, NIMROD ONYANCHA AND SYDNEY NJAU (SUING AS THE OFFICIALS AND ON BEHALF OF THE SOCIETY OF RADIOGRAPHY IN KENYA) PETITIONER

AND

KENYA NUCLEAR REGULATORY AUTHORITY 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF HEALTH 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction

1. The Petition dated 29th October 2024 is supported by the affidavit of similar date of Nimrod Onyancha, the Honorary Secretary to the Petitioner. He also swore a further affidavit dated 4th December 2024.
2. The Petition challenges the 1st Respondent’s usurpation of the mandate of the Radiographers Board of Kenya contrary to the Radiographers Act CAP 253F. Further, the failure by the 2nd Respondent’s to establish and operationalize the Radiographers Board pursuant to the provisions of the Radiographers Act. Consequently, the Petitioner seeks the following reliefs against the Respondents:
 - i. An order of mandamus be issued compelling the 2nd Respondent to constitute, form, appoint and/or gazette the would-be members of the Radiographer’s Board of Kenya.



- ii. An order of certiorari be issued bringing into this Court and quashing the notice by the 1st Respondent published in the local dailies on or about the 30th July, 2024.
- iii. An Order of certiorari be issued bringing into this Court and quashing the decision on the purported increase of the Petitioner's members' licensing fees and/or all practicing radiographers in Kenya pursuant thereto.
- iv. An order of prohibition be issued prohibiting the 1st Respondent from licensing and collecting practicing fees from the Petitioner's members and/or all practicing radiographers in Kenya, and keeping a register of the Petitioner's members and/or all practicing Radiographers in Kenya.
- v. A declaration be issued declaring that the licensing and collecting practicing fees from the Petitioner's members and/or all practicing radiographers in Kenya by the 1st Respondent is illegal, null and void.
- vi. A declaration be issued declaring the Radiographer's Board of Kenya as the rightful and sole legal body vested with the power and authority to license and collect practicing fees from the Petitioner's members and/or all practicing radiographers in Kenya unless otherwise stated in written law.
- vii. An order by way of structural interdict compelling the 1st and 2nd Respondents to present to the Court for scrutiny a report on the appointment and/or gazette of the would be members of the Radiographer's Board of Kenya and the transfer of the register of registered radiographers and practicing fees of registered radiographers to the established Radiographer's Board of Kenya in custody of the 1st Respondent.

Petitioner's Case

3. For context, the Petitioner stated that on 21st June 2022, the Radiographers Act CAP 253F was enacted. It provides for the establishment of the Radiographer's Board of Kenya which has a mandate inter alia to exercise supervision and control over the training and practice of radiography in Kenya and to advice the Government in relation to all aspects thereof, including under Section 4 (2) (d), the licensing of the private practice of radiographers.
4. He states that the Act was enacted after the enactment and operationalization of the [Nuclear Regulatory Act](#). He asserts that the two statutes are diverse and distinct hence the reason for the two distinct statutes.
5. The Petitioner deponed that on 30th July 2024, the 1st Respondent published a notice in the local dailies notifying that all 'radiation workers, radiation safety officers and radiation facilities to submit new/renewal licenses for the period 1st July, 2024 to 30th June, 2025'. In addition, the notice stated that failure to comply with this directive would attract enforcement action without further notification of the same. These applications were required to be sent by 31st July 2024.
6. The 1st Respondent, through the notice, required the Petitioner's members to comply with its terms otherwise they would not practice their profession. As a result, the 1st Respondent has persistently been harassing the Petitioner's members for alleged non-compliance with the said requirements.
7. The Petitioner maintains that the 1st Respondent does not have the authority, power and mandate to license, supervise and control the practice of the Petitioner's members hence these actions are ultra vires and an affront to the rule of law and the Petitioner's members' rights.



8. The Petitioner contended that since the operationalization of the Radiographers Act, it has petitioned the 2nd Respondent through various correspondence, to form and constitute the Radiographer's Board of Kenya. However, the 2nd Respondent has failed to do so, thereby denying Petitioner's members' rights by denying them legal recognition and protection of their practice.
9. In addition, the 2nd Respondent's failure to establish the Board has left them exposed to harassment and threats by the 1st Respondent and infiltration of quacks, denying them business from their practice. This has affected their income and brought their practice disrepute. Consequently, it is stated that the 2nd Respondent's inaction is in contravention of Article 2(4), 10, 47 and 232 of *the Constitution*.
10. Furthermore, he makes known that the Petitioner has equally sought to have an amicable solution to the impasse between it and the 1st Respondent to no avail.
11. The Petitioner avers that the 1st Respondent has been keeping registers of all radiographers practicing in Kenya and has been authenticating academic documents before registration of new members, a matter that has made the profession be infiltrated by quacks and unauthorized practitioners. The Petitioner as such urges this Court to intervene so as to protect its members rights.
12. Additionally, he asserts that the 1st Respondent's action of singling out radiographers by virtue of using ionizing radiation and operating radiological equipment is discriminatory. This is because, radiological equipment is also used by radiologists, radiotherapists, cardiologists, physicists, oncologists yet they are not regulated by the 1st Respondent neither are they classified as radiation workers by the 1st Respondent or the Nuclear Act.
13. Moreover, the Petitioner deposed that the Radiographers Act was enacted to cure the mischief of the lack of exclusive legislative framework for the training, registration and licensing of radiographers in Kenya, so as to regulate their practice as professionals. He contended that if existence of the 1st Respondent met the need for regulation of the practice of radiography, then the legislature would have had no need of enacting a law to specifically provide for the same. Equally, that if the legislature intended the 1st Respondent to license Radiographers, the same would have been expressly stated in the Radiographers Act which is not the case as there is no mention of the 1st Respondent.
14. Further, that the *Nuclear Regulatory Act* does not define a radiographer nor radiography, which the Radiographers Act does. He thus contends that the 1st Respondent cannot purport to license and regulate Radiographers as this is not covered in the legislation establishing it.
15. The Petitioner in closing avers that the 1st Respondent's deponent, Beth Mushi is a stranger in these proceedings as has not demonstrated that she has authority to swear the affidavit on its behalf. For this reason, he contends that the affidavit should be to expunged from the Court record.

1st and 3rd Respondents' Case

16. In response to the Petitioner's case, the 1st and 3rd Respondents filed a replying affidavit through the 1st Respondent's representative, Beth Mushi sworn on 3rd December 2024.
17. She swore that the 1st Respondent was established under the *Nuclear Regulatory Act* as a State Corporation under the Ministry of Health.
18. She contended that radiographers in Kenya are classified as occupation radiation workers and so are required to apply for a license to administer ionizing radiation to persons, who in this case are patients. Some of them are also appointed as radiation safety officers so as to ensure radiation protection



and safety requirements are adhered to. In addition, radiographers are required to be provided with personal radiation monitoring services referred to as dosimetry.

19. She states that before the 1st Respondent's transition to a State Corporation, it was operating as a technical Board (Radiation Protection Board) established under the Radiation Protection Act Cap 243. She notes that under this Act the functions of the Board included grant or refusal to grant extension of licenses issued and to impose necessary conditions on a license granted.
20. Moreover, the Act under Section 9(2) provided that no person shall administer ionizing radiation to another person unless they are in possession of a valid license. She notes that the guidelines of the applicable fees to be paid were provided in the Radiation Protection (Safety) Regulations, 2010.
21. She states that currently, the newly enacted Radiographers Act CAP 253F establishes the Radiographers Board of Kenya. However, that Board is yet to be established. Meanwhile, the 1st Respondent has continued to issue practicing licenses to radiographers pending the Board's establishment and operationalization to ensure that there is no vacuum in licensing and regulating radiographers in Kenya.
22. She contends that this is in public interest as the use of nuclear energy cannot be left unregulated. She urges the Court to take judicial notice of the sensitive nature of nuclear energy and the harm it can cause the public. She states that without regulation, quacks will easily take advantage of that vacuum. In sum, she contends that the Petitioner has not demonstrated the prejudice it will suffer if the 1st Respondent continues to regulate its profession as it awaits establishment of the Board.

2nd Respondent's Case

23. The 2nd Respondent did not respond to the Petition.

Petitioner's Submissions

24. Gachoki Muriuki and Associates Advocates for the Petitioner filed submissions dated 20th January 2025.
25. They emphasized the fact that there was no contest to the fact that there is now the Radiographers Act CAP 253F which establishes the Radiographers Board of Kenya (herein referred to as the Board) with the mandate to regulate the practice and profession of Radiography in Kenya.
26. Counsel submitted that the *Nuclear Regulatory Act* and the Radiographers Act provide for distinct and varied functions and powers of the 1st Respondent and the Board. As such, Counsel stressed that the Radiographers Act did not envision the exercise of the Board's mandate by the 1st Respondent and neither is the same provided for. The *Nuclear Regulatory Act* does not give it that mandate either. Consequently, Counsel argued that the 1st Respondent cannot exercise the role and mandate of the Board without being in violation of the law.
27. In this regard, Counsel urged the Court to be guided by the principles of interpretation of the law. In this case being the intent of the legislature and the mischief rule being, what the law sought to address or cure. Counsel contended that in the enactment of the Radiographers Act, the Act superseded all other laws in place on the issue of the regulation of the practice and profession of radiographers.
28. Turning to the next point, Counsel submitted that the 1st Respondent's actions had violated the Petitioner's members rights. To begin with, Article 47 of *the Constitution* as they are being unlawfully deprived of their right to practice their profession without arbitrary interference. This is owing to the 2nd Respondent's failure to constitute and gazette the members of the Board which exacerbates this



violation by leaving radiographers vulnerable to the unlawful regulation by the 1st Respondent hence the need of this Court's intervention.

29. Counsel stressed that the failure of the 2nd Respondent to operationalize the Board translates into an infringement of the rights and interests of radiographers in Kenya. Reliance was placed in *Republic v. Commissioner of Police & Another ex parte Michael Monari & Another* [2019] eKLR where the Court held that:

“It is the duty of public bodies to fulfill their statutory mandates without delay. The failure to do so hampers justice and undercuts the rule of law.”

30. In addition, the continued unlawful regulatory actions of the 1st Respondent and increase of fees are argued to be an affront to the rule of law. Reliance was placed in *Republic v Kenya Revenue Authority Ex Parte Style Industries Limited* [2019] KEHC 11965 (KLR) where the Court held that:

“An administrative body acting outside its jurisdiction is committing an ultra vires act, and such acts are null and void.”

31. Comparable reliance was placed in *Kenya National Examination Council vs Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR, *Republic v. The Public Service Commission & 2 Others* (2019) eKLR and *Speaker of the National Assembly v. James Njenga Karume* [1992] KLR.

32. Counsel submitted that the Petitioner in this matter had established that the 1st Respondent lacks legal authority over the licensing and oversight of radiographers and thus its impugned notice constitutes an overreach of its mandate, undermining the established legal framework and infringing the rights of the Petitioner's members. It was noted that the Court in *Mumo Matemu Mutungi v. Trusted Society of Human Rights Alliance & 2 others* [2014] eKLR, emphasized that a public officer must act within their lawful authority and that any act done beyond their authority is null and void. As such, it was argued that the 1st Respondent's actions were ultra vires.

33. Additional reliance was placed in *Republic v. Kenya Medical Practitioners and Dentists Board ex parte Dr. Karanja* [2018] eKLR and *Kenya National Examination Council v. Rep.* [1997] eKLR.

34. For this reason, Counsel submitted that the Petitioner seeks orders for mandamus to compel formation of the Board, certiorari to quash the 1st Respondent's notice and decisions and declarations affirming the Board's exclusive jurisdiction.

35. Furthermore, Counsel noted that the Petitioner seeks the relief of a structural interdict so that the Respondents can present before the Court for scrutiny a report regarding the appointment and gazette of the prospective members of the Board. Reliance was placed in *Kibera Primary School v. Kenya National Examinations Council* [2023] eKLR, where the Court emphasized judicial oversight in matters involving statutory compliance. Like dependence was placed in *Republic v. Director of Public Prosecutions & 4 others* [2023] eKLR.

Respondents' Submissions

36. Principal State Counsel, Deborah Were filed submissions dated 16th October 2025 and highlighted the issues for discussion as: whether the 1st Respondent acted within its statutory mandate in issuing the impugned notice and licensing radiation workers (including radiographers); whether the Petitioner has demonstrated breach of Article 47 or the *Fair Administrative Action Act* and whether the Petitioner has made out a case for the issuance of an order in form of a structural interdict against the Respondents.



37. On the first issue, Counsel stated that the 1st Respondent is established under the *Nuclear Regulatory Act* as the successor to the Radiation Protection Board. As such, the 1st Respondent assumed all the rights, duties and functions of radiation protection, including the licensing of occupational radiation workers, in continuity with the former Radiation Protection Board. Counsel stated thus that there was no regulatory vacuum. Counsel noted that Section 9(2) of the repealed Radiation Protection Act, prohibited administration of ionizing radiation without a license.
38. Counsel considering this submitted that the Petitioner’s argument is flawed as the Radiographers Act, though enacted, has not been operationalized through *the constitution* of the Board. Counsel emphasized that statutory bodies cannot exercise powers in vacuum. Furthermore, Counsel submitted that there is no express statutory provision ousting the mandate of the 1st Respondent. Counsel argued therefore that to hold otherwise would create an untenable regulatory vacuum in a sector that directly implicates public health and safety. Counsel stressed that ensuring radiological and nuclear safety cannot be suspended merely because the Radiographers Board is yet to be operationalized.
39. Counsel urged that the Court is enjoined to interpret and harmonize statutes to promote institutional continuity and prevent a paralysis of statutory functions. Equally, that *the Constitution* and enabling statutes must be read purposively to secure functional continuity of governance structures.
40. On the second issue, Counsel submitted that the Respondents’ contrary to the Petitioner’s allegation, did not violate Article 47 of *the Constitution*. Counsel submitted that the impugned notice was a general regulatory notice to ensure compliance with safety requirements thus lawful and reasonable, while affording all radiation workers sufficient notice to comply.
41. Furthermore, Counsel submitted that the Petitioner had not demonstrated how they were denied audience, subjected to discrimination or otherwise prejudiced in a manner warranting this Court’s intervention in this case. Similarly, it was argued that Petitioner had not demonstrated any form of harassment or intimidation by the 1st Respondent or shown unfairness or a violation of legitimate expectation.
42. For this reason, Counsel submitted that the Petitioner’s claim under Article 47 of *the Constitution* cannot be sustained. Counsel emphasized that quashing the 1st Respondent’s actions would expose the public to unsafe practices by unlicensed individuals, contrary to the public interest and the State’s obligations under Articles 43 and 46 of *the Constitution*.
43. On the final issue, Counsel questioned whether the Petitioner had met the requirement for this Court to issue an order of structural interdict. These requirements were set out in *R vs Council of Legal Education & Another ex-parte Mount Kenya University [2016] eKLR* where it was held that:
- i. “In the first instance the court issues a declaration identifying how the government has infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations.
 - ii. Secondly, the court mandates government compliance with constitutional responsibilities.
 - iii. The third stage is that the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government’s action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question,



rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached

- iv. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and
- v. whether it brings the government into compliance with its constitutional obligations.”

44. Similar reliance was placed in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34 (KLR).

45. Guided by this authority, Counsel stated that the Petitioner’s prayer is not specific and direct. Particularly, Counsel questioned why the Petitioner calls for the Court to scrutinize the names of the would-be Board members. Additionally, that the prayer for a transfer of the register to the Radiographers Board is untenable as the same is yet to be established and thus the order would be issued in vain. To this end, Counsel maintained that the Petition lacks merit and so should be dismissed.

Analysis and Determination

46. It is my considered take that the issues that arise for determination in this matter are as follows:

- i. Whether the regulation of the Petitioner’s members by the 1st Respondent is unlawful.
- ii. Whether the 2nd Respondent’s failure to establish the Radiographer’s Board of Kenya under the Radiographers Act CAP 253F is in contravention of *the Constitution* and the Act.
- iii. Whether the Petitioner is entitled to the relief sought.

Whether the regulation of the Petitioner’s members by the 1st Respondent is unlawful.

47. The Petition basically assails the 1st Respondent’s purportedly exercising mandate over Radiographers asserting that this is contrary to the provisions of the Radiographers Act Cap 253F which gives that power to the Radiographers Board of Kenya specified in the new Act. Further, the Petitioners contend that the 2nd Respondent has violated the law for its continued failure to establish and operationalize the Radiographers Board of Kenya as outlined in the Act.

48. The Respondent though not disputing that the law has now provided for the creation of the Radiographers Board of Kenya nevertheless refuted the assertion that it’s the exercise of that mandate is unlawful. The 1st and 3rd Respondent through its deponent justified the exercise of its mandate by going back to the history and stating that its involvement is justified by the need to protect the public pending *the constitution* of the new Board.

49. According to the 1st Respondent, it is a State Corporation under the *Nuclear Regulatory Act* and operating within the Ministry of Health. It was the 1st Respondent’s position that Radiographers fall in the category of occupation radiation workers who are required to obtain a licence to administer ionizing radiation to patients and some are even appointed as radiation safety officers to ensure protection and safety standards. Before becoming a State Corporation, the precursor to the 1st Respondent was the Radiation Protection Board under Cap 243 which could give, refuse or impose conditions on licenses. No person could operate without a valid licence.



50. The 1st Respondent conceded that there is now the Radiographers Act Cap 253F that has created the Radiographers Board of Kenya but the board is not yet operational and out of abundance of caution, given the potentially harmful nature of nuclear energy, the 1st Respondent has had to step in to ensure unqualified people do not take advantage of the vacuum created by the absence of a regulatory body at the moment.
51. One thing is clear from the above. That indeed, the Respondent does not dispute that the mandate over the Radiographers belongs to Board created under the Radiographers Act, Cap 253F, but out of necessity, being the one that has had hitherto been undertaking that mandate, it has to step in the gap until the new Board that is contemplated in the Act is constituted and takes over.
52. It is necessary that I examine the Radiographers Act, Cap 253F closely.
53. This introductory sentence to the Act Radiographers Act CAP. 253F indicates it was assented to on 21st June, 2022, published in Kenya Gazette Vol. CXXIV—No. 141 on 22 July 2022. It also has a note that reads: ‘Commenced: 12 months after the Date of publication in the Gazette.’
54. It would therefore mean that the date it became effective was 22nd July, 2023.
55. Moving on, its preamble declares that, it is

‘AN ACT of Parliament to make provision for the training, registration and licensing of radiographers; to regulate their practice; to provide for the establishment, powers and functions of the Radiographers Board of Kenya; and for connected purposes’

56. In simple terms, it is a comprehensive legal framework that sets out all that which it takes to be qualified and practice as a radiographer but also creates a governing body-the Radiographers Board of Kenya with specific responsibilities.
57. Sections 4 and 5 of the Act sets out those specific responsibilities and they are as follows:

4. Functions of the Board

- (1) The object and purpose for which the Board is established is to exercise supervision and control over the training and practice of radiography in Kenya and to advise the Government in relation to all aspects thereof
- (2) Without prejudice to the generality of subsection (1) the Board shall —
- (a) prescribe the minimum educational requirements for persons wishing to be registered radiographers under this Act;
 - (b) consider and approve the qualifications of radiographers for the purposes of registration under this Act;
 - (c) cause to be maintained a register of all persons registered and licensed to practice radiographers in accordance with this Act;
 - (d) license the private practice of radiographers;
 - (e) establish and maintain a professional code of conduct for all persons registered under this Act;



- (f) regulate the professional conduct of registered radiographers and take such disciplinary measures as may be appropriate to maintain proper professional standards;
- (g) establish, approve and accredit programs for continuing professional educational programs;
- (h) cause to be published in the Kenya Gazette every calendar year or on such other period as may be prescribed, the names of all registered radiographers; and
 - i. perform such other function as may be provided for in this Act or any other written law.

Powers of the Board

- (1) The Board shall have all powers necessary for the proper performance of its functions under this Act.
- (2) Without prejudice to the generality of subsection (1), the Board shall have power to —
 - (a) control, supervise and administer its assets in such manner and for such purpose as best promotes the purpose for which the Board is established;
 - (b) determine the provisions to be made for its capital and recurrent expenditure and for its reserves;
 - (c) receive any grants, gifts, donations or endowments and make legitimate disbursements there from;
 - (d) enter into association with other bodies or organisations within or outside Kenya as may be desirable or appropriate in furtherance of the purpose for which the Board is established;
 - (e) open a banking account or banking accounts for the funds of the Board; and
 - (f) invest any of its funds not immediately required for its purposes in the manner provided in Section 33

58. This is a specific mandate which can be contrasted with the general or the overarching mandate provided for under the [Nuclear Regulatory Act](#), 243 whose preamble states:

‘An Act of Parliament to provide for a comprehensive framework for the regulation of safe, secure and peaceful utilization of atomic energy and nuclear technology; the production and use of radiation sources and the management of radioactive waste; the repeal of the Radiation Protection Act and for connected purposes’

59. The authority is established under Section 5 and its functions set out under Section 6 as follows:

6. Functions of the Authority

The objects and functions of the Authority shall be to—

- a. ensure the safe, secure and peaceful use of nuclear science and technology;
- b. provide for the protection of persons, property and the environment against the harmful effects of ionizing radiation through the establishment of a system of regulatory control;
- (c) exercise regulatory control over—



- i. siting, design construction, operation, manufacture of component parts and decommissioning of facilities;
 - ii. nuclear and radioactive materials and facilities; and
 - iii. such other activities as may, with the prior approval of the National Assembly, be prescribed which the Authority may seek to exercise regulatory control over;
- c. ensure compliance with the conditions of authorization through the implementation of a system of inspections and enforcement;
 - d. co-ordinate the fulfillment of national obligations in respect of nuclear safety, security and safeguards;
 - e. co-operate with any relevant international agency by providing any assistance or information required;
 - f. establish appropriate awareness methods and procedures for informing and consulting the public and other interested parties about the regulatory process and the safety, health and environmental aspect of regulated activities including incidents, accidents and abnormal occurrences; and
- (h) perform any other functions as may be provided for in this Act.

60. Given the fact that the Radiographers Act, Cap 243F is the latter statute and is more specific, the canon of interpretation- ‘generalia specialibus non-derogant’ meaning the general does not override or detract from specific prevails. In the present case, Parliament very much aware of the earlier law when it passed the Radiographers Act which is a specific law on Radiographers and thus it intended to exempt them from the general, if any, that had applied to them prior to this specific law, hence even if not expressly stated, there was implied repeal of that other general law in relation to radiographers.
61. The reliance on the history by the 1st and 3rd Respondent is thus immaterial as far as the overriding mandate granted by the new Act to the Radiographers Board of Kenya is concerned. As such, it is the body that is now legally authorizing to among others approve qualifications, registration, supervise the training, enforce standards of practice and advise the government on all matters pertaining to radiography.
62. It follows therefore that the 1st Respondent’s exercise of that mandate amounts to usurpation of the mandate of the Radiographers Board of Kenya and is thus ultra vires.
63. Nevertheless, the Court has carefully considered the argument by the 1st Respondent, that it is only a stop-gap measure until the legally established body is constituted. This leads me to the next issue, has there been violation of *the Constitution* and the law by the 2nd Respondent in failing to constitute the Radiographers Board of Kenya as required by the law?

Whether the 2nd Respondent’s failure to establish the Radiographer’s Board of Kenya under the Radiographers Act CAP 253F is in contravention of *the Constitution* and the Act.

64. It was the Petitioner’s case that the continued the 2nd Respondent’s failure to put in place the Radiographers Regulatory Board is a violation of the principle of the rule of law.
65. To reiterate, the RADIOGRAPHERS ACT CAP. 253F was assented to on 21st June, 2022, published in Kenya Gazette Vol. CXXIV—No. 141 on 22 July 2022 and the note in the introductory part of the



Act indicates it was to ‘Commence: 12 months after the Date of publication in the Gazette. It would therefore mean that the date it became effective was 22nd July, 2023.

66. This Petition was filed in October, 2024 and one of the major grievances by the petitioner is the sentiment by the 2nd Respondent to establish the Radiographers Board of Kenya. This was One year, three months since the Act had officially commenced, the 2nd Respondent did not bother to file any response to explain why it has not constituted the board.
67. The Cabinet Secretary responsible for Health is the one that has been statutorily vested with responsibility of implementing the Act in view of Section 2 of the Radiographers Act hence it is safe to say that the mandate to ensure the Radiographers Board is constituted in accordance with section 6 of the Radiographers Act Cap 253F falls on the Cabinet Secretary for Health, the 2nd Respondent herein). Despite the glaring omission to put the Board in place, the 2nd Respondent did not bother to explain or justify this inaction. The 2nd respondent thus had not tabled any reasons for the failure to implement an unequivocal statutory provision. This is despite the fact that this Act effectively became operational in July, 2023 and the fact that the said Statute has not given the Cabinet Secretary the discretion to further delay any part of the Statute.
68. To allow the 2nd Respondent to act with unfettered discretion by overlooking express statutory provisions not only diminishes the authority law but also undermines the eminence of Parliament and is a direct threat to the doctrine of separation of powers and the rule of law principle under Article 10 (2) (a) of *the Constitution*. It reeks arbitrariness and disregards constitutionalism. Under Article 2 (4) of *the Constitution*, any act or omission in contravention of *the Constitution* is unconstitutional.
69. I am fortified in this reaching this finding by the decision of Leonard Otieno v Airtel Kenya Limited [2018] KEHC 9063 (KLR) where the Court held thus:

“49. It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and, if be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.

50. Indeed the words of Kitto J in the High Court of Australia decision of *Sovar vs Henry Lane Pty Ltd* seem appropriate:-

“[T]he question whether a contravention of a statutory requirement of the kind in question here is actionable at the suit of a person injured thereby is one of statutory interpretation... The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation.”

51. Breach of statutory duty arises, where a person or a body is under a statutory duty to perform an act or, more rarely, to refrain from doing an act; does not perform the act, either in accordance with the terms of the statute, or at all



or does the act when it should not be done; and a party suffers damage as a result of the statutory breach; and that statutory breach gives rise to ‘a right of action. To succeed, the person suing must establish (a) that the statute imposes a statutory duty, or obligation upon the Respondent, (b) that the Respondent acted contrary to its statutory duty or failed to act or perform his or its statutory duties, that the respondents action violates the statutory duty, and as a result of the breach the Petitioner suffered damage.”

70. Further, in *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti* [2018] KEHC 9435 (KLR) the Court observed as follows:

“7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality. Put differently, a failure to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law.”

71. This Court finds that the failure to constitute the Radiographers Board of Kenya by the 2nd Respondent is an infringement of not only the Statute but also the Constitutional principle of the rule of law. This body has the mandate of overseeing training of radiographers, register qualified professionals among them and enforce standards of discipline hence the omission not only prejudices the petitioners by exposing their profession to the potential threat of infiltration by quacks and but also, in the absence of an effective regulatory mechanism contemplated by the law compromises the health of the public generally. It is a dereliction of legal duty on the part of the 2nd Respondent that undermines the State's obligation under Article 43 (1) to ensure mechanisms are put in place for the highest attainable standards of health to be attained. The 2nd Respondent's failure to constitute such a critical institution to regulate the specific category of health professionals despite the existence of the law to that effect is thus inexcusable and unconstitutional.

72. The upshot of the foregoing is that this Petition succeeds.

73. Article 23 (3) specifies the reliefs the Court may grant in a Constitutional Petition. The introductory statement states;

“in any proceedings brought under Article 22, may grant appropriate relief, including”

74. The use of the word ‘appropriate relief and including’ makes the list non-exhaustive implying that in deserving cases, the Court may not be restricted to the list provided for in *the Constitution* and can suitably fashion reliefs that best suit the circumstances of each case.

75. In *L A W & 2 others v Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae)* [2022] KEHC 17132 (KLR) the Court affirmed this approach by holding thus:

“244. As is the case in constitutional petitions, there are arrays of available remedies. what a court endeavours to do upon confirming of any infringement is to



grant an appropriate remedy. Even in instances where a party fails to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief...”

76. After careful consideration, the Court issues the following orders:

- a. A declaration is hereby issued that the Radiographer’s Board of Kenya is the lawful body that is vested with the power and authority to oversee the training of radiographers, register qualified radiographer professionals, enforce disciplinary standards, license and collect practicing fees from the Petitioner’s members and all practicing radiographers in Kenya, in accordance with Section 4 and 5 of the Radiographers Act. That therefore, the usurpation these functions by the 1st Respondent derogates from the principle of the rule of law under Article 10 (2) (a) of *the Constitution* and is unconstitutional null and void ab-nitio. The declaration of invalidity is suspended for three months to allow for an orderly transition of functions from the 1st Respondent to the Radiographers Board of Kenya.
- b. An order of mandamus is hereby issued compelling the 2nd Respondent to constitute, form, appoint and/or gazette the members of the Radiographer’s Board of Kenya within three months days from the date of this order.
- c. An order of prohibition is hereby issued prohibiting the 1st Respondent, upon expiry of three months from the date of this order, from overseeing training, registering qualified radiographers, enforcing standards of discipline or licensing and collecting practicing fees from the Petitioner’s members or any practicing radiographers in Kenya or from maintaining a register of the Petitioner’s members or any practicing Radiographers in Kenya.
- d. A declaration is hereby issued declaring that any licensing of, or collection of practicing fees from the Petitioner’s members or any practicing radiographer in Kenya by the 1st Respondent after expiry of three month transition period from the date of this order, shall be illegal, null and void.
- e. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH JANUARY, 2026.

.....

L N MUGAMBI

JUDGE

