IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 101 OF 2015

BETWEEN

KENYA MEDICAL RESEARCH INSTITUTE.....APPELLANT

AND

DR. SAMSON GWER.....1ST RESPONDENT

DR. MICHAEL MWANIKI.....2ND RESPONDENT

DR. NAHASHON THUO..... 3RD RESPONDENT

DR. JOHN WANGAI.....4TH RESPONDENT

DR. MOSES NDIRITU.....5TH RESPONDENT

DR. ALBERT KOMBA .....6TH RESPONDENT

MINISTRY OF PUBLIC HEALTH AND SANITATION.....7TH RESPONDENT

THE HON. ATTORNEY GENERAL.....8TH RESPONDENT

UNION OF NATIONAL RESEARCH AND ALLIED

INSTITUTES STAFF OF KENYA.....9TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Nduma, J.) dated 18th *July 2014*

in

Petition No. 21 of 2012

Formerly Petition No. 295 of 2011)

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JUDGMENT OF THE COURT

This appeal is a challenge by the appellant, **Kenya Medical Research Institute** (KEMRI) against the judgment and decree of the Industrial Court of Kenya at Nairobi (Nduma, J.) by which it granted a petition filed by the 1st to 6th respondents (the Doctors) and ordered as follows;

"(a) That the 1*st respondent?s conduct amounts to and is discriminatory against the petitioners under Article 27(4) of the Constitution.*

b. That the 1*st respondent?s conduct, acts and or omissions are unlawful, illegal and or unfair and the same violates Articles 27(1), 28, 29(d) & (f), 35(1) (b) 40(1) and 41(1) & (2) of the Constitution.*

c. That each of the petitioners is entitled to compensation for the said violations under Article 23 of the Constitution in the sum of Kshs. 5 million within thirty (30) days of this judgment.

d. That the petitioners are entitled to access all the outcomes of their scientific research and to the credit and benefit attached to the outcomes under Articles 35 and 40 of the Constitution.

e. That each of the petitioners is entitled to a certificate of service acknowledging the service and scientific outcomes attributed to their research and work within 30 days from the date of this judgment

f. The 1*st* respondent to pay interest at Court rates on (c) above from date of this judgment to payment in full.

g. The 1*st respondent to pay costs of the petition."*

The doctors had all been employees of KEMRI under various contracts renewed and extended from time to time over a period of several years. They had also been specifically attached to the KEMRI Wellcome Trust Research Programme („the Programme?) hosted by KEMRI as clinical researchers and were also pursuing post-graduate studies to lead to the award of Doctor of Philosophy (PhD) degrees in their fields of research. That programme was owned by Oxford University and operated through the Nuffield Department of Medicine as one of its global health centers founded by Wellcome Trust.

The directors complained that their contracts under the Programme, which were later subsumed under KEMRI, were renewed or extended short term and under unclear basis but more substantially that KEMRI discriminated against and treated them unequally on account of their race in various respects including in the award of Wellcome Trust Research grants which were skewed in favour of European Economic Area Residents and *"white expatriates"* at the expense of *"equally or more qualified local black scientists"* as well as in the distribution of senior scientific positions and significant and high impact publications. They alleged that there was prejudice and condescension against local African workers and a lack of commitment to racial equality. All of this was contrary to **Article 27** of the Constitution.

The doctors next complained of violation of their right to fair labour practices contrary to **Article 41(1)** of the Constitution in particular by the extremely short multi-contracts; offending the rules of natural justice by unfair dismissal without hearing or reasons; conflicting contracting authority with contracts from both KEMRI and the programme leading to unclear chain of command; differential gratuity and staff guidelines between the two and curtailing the doctors right to join a trade union of their choice.

There was also an unfavourable working environment leading to or involving career stagnation for the doctors; interference with their training opportunities and access to clinical funds; suspending them for raising these grievances; forcing them on indefinite leave, coercing them to withdraw their public petition; failing to disclose reports or results of investigations into the grievances; failing to address contract and terminal dues issues; and denying their plea to meet KEMRI?S director. KEMRI had, moreover, failed and refused to set up appropriate reforms in the programme to address the violations complained of.

The doctors also complained that KEMRI in violation of **Article 40** of the Constitution acted in a manner that infringed on their right to intellectual property by; *inter alia,* taking credit for their „*work*? and scientific innovations; Disregard Syndrome; Mathew Effect, under which discovery credit is inadvertently reassigned to a better known researcher; disapproving their and other local scientists? innovations; and misappropriating of their work to benefit expatriate scientists. They stated the effects of these violations as amounting to inhuman and degrading treatment; taking away of their dignity and subjecting them to modern-day slavery in violation of **Articles 28**, **29** and **30**, respectively, of the Constitution.

The conduct complained of negated the possibility of progress, research autonomy or Kenyanization of scientific innovations contrary to the national values and principles of Governance in **Article 10** of the Constitution. Moreover, it violated the principles set out in relevant international instruments to which Kenya is party, including in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights; the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the African Charter on Human and Peoples Rights and the Intellectual Labour Organizations Conventions.

In consequence the doctors sought declaration of constitutional violation, an order for unconditional reinstatement, of entitlement to access to information and compensation. The petition was supported evidentially by the remarkably lengthy and detailed affidavit of **Dr. Samson Gwer** sworn on 10th December 2010 as well as those of **Drs. Moses Nderitu** (who later swore a supplementary one), **Michael Mwaniki**, **Nahashon Thuo**, **John Wangai**, **Albert Komba**, **James Iglas Koola** and **Prof. Alexis Nzila** sworn on the same day. To these affidavits were attached bulky annextures.

The petition was opposed. **Margaret Rigoro** Kemri?s legal officer, expressing herself as duly authorized by KEMRI and its Board of Management swore a replying affidavit on 27th April 2012 in which she stated that the doctors each had negotiated and mutually agreed contracts with KEMRI setting out the applicable terms and conditions of their engagement. They acted in bad faith and breached these terms when they circulated their complaints to other parties before KEMRI and its collaborative partners completed investigations thereon. She denied the allegations of sexual harassment and annexed documents detailing KEMRI?s policies and guidelines on harassment at the work place. She asserted that the Programme offered favourable terms and benefits to its researchers including the doctors, which were better than those offered by researchers in Government and other organizations. Responding to the emails exchanged with the doctors after their complaints, she pointed out that two doctors initially included in the complaint, namely **Dr. Abdisale Noor** and **Dr. Franck Wafula** had

categorically denied allegations of racial and economic discrimination which were merely issues of perception as Dr. Wafula was in fact a beneficiary of the programme?s capacity building support scheme without facing any discrimination. The two did not join in the petition.

The deponent swore that after the doctors? complaints were received, a meeting of all concerned parties was called to deliberate the same and thereafter the Board of Management and Chief Executive Officer of KEMRI initiated independent investigations into the issues raised. Several other meetings were held including a day-long one on 25th November, 2010 chaired by a respected senior scientist, Dr. Kariuki. He held a smaller meeting with the doctors and requested for evidence to support the serious allegations raised against KEMRI but they refused or failed to provide it, even when requested in the absence of the Centre Director Prof. Dr. Norbet Peshu and Scientific Team Leader Prof. Kevin Marsh to obviate any possibility of intimidation.

Despite repeated requests to which they promised to avail evidence of their complaints over the following days, the doctors did not do so but instead, it was sworn at paragraphs 31 to 33;

> **"31. On 28*th November 2010 or thereabout some of the petitioners circulated widely another email with a memorandum entitled „Issue of racial discrimination and sexual exploitation at KEMRI Welcome Trust Research Programme? to Government and Non-Governmental Organizations within Kenya and to KEMRI?s* major partners in *the United Kingdom including the vice Chancellor of Oxford University and the Director of Wellcome Trust as borne out in the enclosed copies marked „MR-9? .* This fact is admitted by the 1*st petitioner in paragraph 154 of his affidavit in paragraph 131 of the 2nd petitioner?s affidavit and paragraph 238 of the affidavit of the 5th* petitioner but there is no rationale or justification given why the said memorandum was forwarded by the petitioners to all the parties cited therein.**
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> **32. I do verily believe that the action by the petitioners and other parties involved in the negotiations to circulate additional and detrimental emails and correspondence to third parties was in bad faith and intended to distract the aforesaid meeting as Dr. Sam Kariuki had requested for written evidence to the allegations previously made by the 5*th* petitioner. I further believe that the petitioners had another intention of damaging the reputation of the KEMRI, CFMRC and the Programme without due regard to the *apparent risk to all other beneficiaries of the programme.***
>
> **33. I am aware that the petitioners failed to provide Dr. Sam Kariuki with written evidence of their allegations as set out in paragraph 29 *herein above despite promises to do so."***

On allegations of racial discrimination, the deponent explained that KEMRI had many collaborators and visiting foreign researchers from other institutions across the world and that;

> **"A fundamental *feature of such collaborators,* both in Kenya and worldwide is that visiting foreign researchers or workers retain the career structures and terms of employment of their home *institute or parent employer."***

She went on to swear that;

> **"In this case, it relates also to instances of researchers and staff who had previous employment contracts with universities in United Kingdom and who had retained the terms of their respective contracts after being transferred or sent to Kenya save for additional allowances for working out of their parent or mother country.**
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> **The terms of employment of visiting researcher as stated in clause 35(iv) above cannot be reduced when the researchers or expatriates are transferred or sent to KEMRI in Kenya as this could be a breach of employment contracts or employment terms by the employer or contractual terms agreed prior to their arrival in Kenya. Further, I do sincerely believe that continuation of expatriates? or researchers? employment terms, as they were prior to their transfer to Kenya, cannot be termed as discrimination.**
>
> **I am not aware of any foreign researcher who was primarily employed or hired by KEMRI or the Programme in Kilifi in a manner discriminatory to local researchers.**
>
> **I do sincerely believe that the researchers or staff hired by KEMRI for the Programme and by the programme have the option to accept or reject the offers or terms of contracts given to them at the inception or prior to joining the programme but I do believe that they do accept the contracts as the terms are very good in comparison to others of similar qualifications within the country.**
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> ***I do believe that continuous use of the terms „white researchers? „white expatriates?, or „black Kenyans? by the petitioners herein in their pleadings and affidavits is demeaning, in bad faith, unmerited, insulting to the cited parties and more so against the spirit and letter of the Constitution of Kenya."***

She dismissed the claim of racial discrimination as *"misconceived and proceeding from a lack of knowledge on how funds for training, research and other purposes are expended by the programme and other collaborations."* She denied claims of career stagnation and gave details of the high quality PhD training offered by KEMRI. The programme restricted the PhD scholarships to citizens of the East African counties and had established an internationally competitive post-doctoral career programme. She denied allegations of sexual favouritism and harassment which she swore KEMRI and the programme *„cannot tolerate'*.

After listing some eight names of senior researchers that the programme had *"over the years promoted and developed*," the deponent swore that it had a very strong cadre of emerging researchers and research leaders already holding grants and developing their careers and

developing their own groups of younger post doctoral researchers in the same direction. She went on to comment and clarify quotes from reports by referees on the proposal to fund the programme?s scientific programmes which she stated the doctors quoted only in a selective and misleading manner. She was emphatic that substantive decisions relating to training and capacity building are made by respective committees and not by an individual as claimed by the doctors and there were minutes and records to support that. She defended Dr. Peshu against the doctors? challenge to his competence and reputation, praised his work of over 20 years and attached his curriculum vitae.

Ms. Rigoro swore that any inventions that the doctors may have made while executing their work or research as staff or employees of KEMRI belonged to KEMRI as their employer and so denied allegations of deprivation of intellectual property. She detailed at length the goings-on regarding studies into the risk factors and transmission patterns of non-typh salmonellosis and the collaborative work involving Dr. Alex Acken and Dr. Issac Mugoya as well as Dr. Moses Ndiritu, who was the 5th Petitioner. In denying that Dr. Ndiritu was in any way mistreated academically or professionally or his research work diverted or misappropriated, she swore as follows;

> **"81. I am aware *from my perusal of the records with KEMRI that the 5th petitioner has been able to present his work directly to both the Programme?s International scientific Advisory Board in 2009 and to the panel of international reviewers who were assessing the three programmes in 2010. In addition the 5th* petitioner has given presentations of his work at three international scientific meetings, which are the 6*th* International Symposium on Pneumococci and pneumococcal diseases in Reykjavit, Iceland in June 2008, the Oxford Tropical Network meeting in Oxford United Kingdom (UK) in September 2009 and the 7*th International Symposium of Pneumococcal Disease in Tel Aviv, Israel in March 2010.***
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> **82. Further, the 5*th petitioner also had the opportunity to present his work at the Center for Disease Control and Prevention in Atlanta United States of America (USA), whilst he was on attachment in July and August 2010. As a PhD* student he also had an unusually large number of opportunities to interact with international scientists to explain his work in person and take care for his endeavours."**

The deponent, while admitting that doctors were suspended for cause having breached KEMRI?s policies and acted in bad faith to the detriment of the interest of the programme by their highly demanding and widely circulated memorandum aforesaid, stated that the Board of Management of KEMRI lifted their suspension two days later and placed them on leave with pay to facilitate investigations without interference.

She concluded by pleading that the petition be dismissed because;

> **"(i) The petitioners claims should have been filed in the Industrial Court or the Civil Division of the High Court as the issues pleaded relates to employment disputes and disputes framed or arising from employment contracts;**
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> **ii. The petition as pleaded and filed herein lacks in merit it has been brought in bad faith.**
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> **iii. The petitioners have failed to disclose material facts to the Court**
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> **iv. The petitioners have misrepresented material facts with a view to mislead this honourable court.**
>
> **v. The petitioners have come to these Courts of equity with unclean hands and as such they do not deserve the remedies sought.**
>
> **vi. The petition as pleaded and filed herein raised no Constitutional issues to warrant the remedies sought."**

That replying affidavit was answered by a supplementary affidavit of the doctors sworn by **Dr. Moses Ndiritu Ndiragu** on 25th June 2012 who denied practically every averment in the replying affidavit and went on to make assertions reiterative of the positions taken by the doctors on all contentious issues and to furnish particulars and annextures in support of these positions. There was also an affidavit by **Zacharia Alum Achache** to the same end.

Those supplementary affidavits provoked another by **Dr. Solomon Mpoke** the Director and Chief Executive Officer of KEMRI sworn on 28th August 2012 which adopted and supplemented the very detailed one by Margaret Rigoro. Dr. Mpoke swore how each of the doctors was suspended on 30th November 2010 but the suspensions were in each case rescinded or retracted on 2nd December 2010. He swore how about 9 months later he wrote to each of the doctors separately advising each to resume his studies. They were each deployed elsewhere and emerged to complete their theses but they each wrote back refusing to accept the terms of the resumption of studies offered and making demands of their own.

Despite their refusal to resume studies, they were each paid for the remainder of their contracts even though they were not working. He swore that KEMRI treated the doctors in a professional and fair manner "*to the point of offering benefits not envisaged in their respective employment contracts but they refused to accept the good will offered*."

On the claims of racial discrimination, Mpoke swore that the programme had 124 scientific staff including post-graduate and post-doctoral researchers 99 of whom were citizens of the East Africa Community. He listed not less than 21 local senior researchers trained through KEMRI?s said programme and listed local senior researchers who had obtained project grants, research fellowships and masters fellowships. He swore how a sub-committee of the Board was appointed to investigate the serious allegations made by the doctors and it visited the various sites which the complaints related and held 3 meetings with the doctors in addition to reviewing all materials and correspondence availed by the concerned parties. The finding or conclusions it arrived at included;

"(i) The committee found that there was no direct evidence on any of the allegations raised by the petitioners herein, It also noted that the petitioners had refused to submit any evidence to substantiate their allegations when they indicated that they then were apprehensive and preferred doing so through their lawyers. However, no such evidence was produced to the committee at any point.

ii. The committee recommended that the petitioners be facilitated to complete their programmes but they also be re-deployed to other *stations."*

It was in furtherance of the second recommendation that the deponent advised the doctors to resume studies even as he redeployed them as directed, but they all rejected that overture. One, **Dr. Stephen W. Ntomburi**, who was part of the group however, accepted the offer. The deponent also swore as follows;

"I do verily believe that the petitioners herein have come to this court of equity with unclean hands and bad faith as they have continually used derogatory and demeaning words as set out in paragraph 15 of the Supplementary Affidavit of Dr. Moses Ndiritu Ndirangu. Further, the petitioners have failed to disclose that they received their full pay even for the period they were not working until completion of their respective contracts and they were also offered opportunities to resume work and their studies but they refused to accept the offers. Annexed *herewith and marked „SM-9? are copies demonstrating the aforegoing."*

The learned Judge had all of these affidavits before him and we have carefully and painstakingly perused and analyzed them as we must as a first appellate court proceeding by way of a rehearing, so as to arrive at our own inferences of fact and to make our own independent conclusions thereon. See **SELLE vs. ASSOCIATED MOTOR BOAT CO.** ***[1968] EA 424***; as well as **Rule 29** of the Court of Appeal Rules. Even though the replying affidavit of **Margaret**

Rigoro contained in length, content and timing, KEMRI?s substantive response to the doctors? petition, the learned Judge made neither reference to nor any mention of the same. We shall return to this curious omission.

In its memorandum of appeal KEMRI raises some 23 grounds of complaint. Those grounds are, however, rather repetitive and can be conveniently condensed into half a dozen or so as its advocates on record have done in their written submissions. These are essentially that the learned Judge erred in;

- Holding that the Industrial Court had jurisdiction to receive and adjudicate on the petition which was transferred to it from the High Court which was bereft of jurisdiction.
- Failing to consider and appreciate the pleadings, documents, facts and issues before court and the submissions made therein.

- Determining the issue of discrimination on the basis of issues and facts not pleaded.
- Finding without evidentiary proof to the requisite standard that the rights to equality and non discrimination, human dignity, property ad access to information had been infringed.
- Granting undeserved orders and awarding the doctors the sum of Kshs. 5 million each against established principles and without legal justification.

The parties filed written submissions through their advocates.

Muriu Mungai & Co. filed theirs dated 14th October 2016 for KEMRI; Chigiti & Chigiti Advocates filed theirs dated 14th November 2016 for the doctors, while Enonda, Makoloo, Makori & Co. Advocates filed theirs dated 13th December 2016 on behalf of the Union of National Research and Allied Institutes Staff of Kenya (the

„Union?) which is the 9th respondent in the appeal. Counsel for the parties addressed us during the panel hearing of the appeal as follows.

For KEMRI, learned counsel **Mr. Munge** projected this matter as an employment dispute in which the doctors published a damaging document for which they were suspended for a day and whereafter the Board lifted the suspension. When they were required to report back to work, some of those who had taken part in the offending correspondence did so but the doctors, numbering 6, refused and stayed put. That notwithstanding, KEMRI continued paying them salaries per contract until the respective contacts expired whereupon, having received the last coin they filed the suit.

Mr. Munge criticized the learned Judge for summing up the case and approaching it as if there was no response or opposition from KEMRI and also improperly delving into a history of this country and treating the case as if KEMRI was facing a criminal trial before him. The Judge was wrong to rely on various documents including extracts printed from web-sites dealing with employment terms and conditions for Wellcome Trust, U.K. and Ireland the proceeding to apply those U.K standards yet the applicable standards were the Kenyan ones as captured in the employment contracts.

Counsel assailed the learned Judge for terming the doctors? suspensions as harassment thereby disregarding the uncontested fact that the suspensions were lifted almost immediately within a day or so. He also criticized the learned Judge for granting orders not sought especially with regard to **Article 35** of the Constitution the breach of which was neither pleaded nor particularized in the petition.

According to counsel, there was no basis for the learned Judge?s conclusion that the doctors had been denied opportunities to complete their studies when they were the authors of their own misfortune for snubbing the opportunity to resume their studies. Those who heeded the call to return to work and resume their studies were able to do so, but not so the doctors. There was equally no justification for the learned Judge? s conclusion that Kenyan scholars were subjected to loss and detriment by KEMRI.

Regarding the award of Kshs. 5 million each for the doctors, Mr. Munge contended that the learned Judge made no attempt to justify the sum, which, in counsel?s view, he *"plucked from the air"*. He also sought to show how the various prayers granted by the learned Judge did not actually lie. The declaration that the outcomes of scientific research belong to the doctors was erroneous because under **Section 32** of the **Industrial Properties Act** and **section 27** of the **Science and Technology Act** such outputs belonged to KEMRI as the doctors? employer. The learned Judge therefore fell into error in reading **Article 40** on intellectual property entirely in isolation from the relevant statutes. Moreover, in granting the doctors? petition, the learned Judge erroneously disregarded the contracts between KEMRI and the doctors as well as relevant statutes and ended up misconstruing the Constitution. He urged us to consider the written submissions and authorities and set aside the judgment.

Opposing the appeal, **Mr. Chigiti**, learned counsel for the doctors submitted that the criticism levelled at the learned Judge was not at all merited. He contended that the doctors and KEMRI, the Wellcome Trust and Oxford University had a tripartite relationship governed by certain principles that were applicable to all programmes. He conceded that after the doctors were recalled from the one-day suspension for raising concerns over racial discrimination and sexual exploitation at KEMRI Wellcome Trust, they "*in their wisdom stayed put*." According to counsel, the sub-committee appointed by KEMRI to investigate those allegations confirmed what had been raised in the memorandum but KEMRI failed to release its report. He blamed KEMRI for the failure of mediation by the Kenya National Commission on Human Rights and the Ministry of Labour. KEMRI had entrenched institutional discrimination and there was a lack or lapse of policies to deal with it. He referred us to the Steven Lawrence definition of institutional discrimination which he termed a *subtle form of evolving discrimination*. He dismissed as of no moment KEMRI?s non-discrimination policy which he asserted was uploaded after the petition was filed and insisted that the European Economic Community criteria disqualified the doctors from accessing grants, blocked their career progress and robbed them of dignity. The short term contracts were also unfair.

Terming their case on the right to dignity as a consequential violation, Mr. Chigiti stated that in not having their intellectual property rights recognized over their inventions and research outputs, the doctors? rights to dignity were compromised. The learned Judge was therefore correct to order that they be given access to their intellectual property under **Article 35** of the Constitution. The basis of this, even though it was not pleaded in the petition was, in counsel?s words;

> **"A judge has discretionary powers to expand his findings so as to enable a party to realize that which the judge is granting."**

As to the basis for sum of Kshs. 5 million compensation awarded, we recorded Mr. Chigiti verbatim as starting that *"it was based on submissions made by counsel informed by current advertizing for similar jobs, the nature of grants and funding then running from Wellcome Trust and based on future earning capacity."*

Mr. Enonda, learned counsel for the Union made very brief submissions indicating that the Union had filed a cross-appeal out of dissatisfaction with the learned Judge?s failure to give full consideration to its plea that the doctors had been unfairly terminated and ought to have been reinstated with back pay as well as full compensation for unfair termination.

Mr. Munge?s response to all those submissions was that the doctors were responsible for their failure to complete the studies because they refused to return to work. They could only be paid for their studies as they worked. As a sign of good faith KEMRI had in fact paid their salaries even when they deliberately refused to work. He asserted that the doctors were never terminated and asked us to disregard the conciliator?s recommendation for reinstatement because the same was never binding and KEMRI did, moreover, recall the doctors but they refused to return to work.

Mr. Munge submitted that the learned Judge gave no explanation whatsoever for the Ksh. 5 million award to the doctors and denied that judges possess powers to expand and exceed what the Constitution and statutes confer on them. Regarding the doctors? property rights said to have been infringed, he invited us to find that they never particularized any inventions for which they were never paid. He also pointed out that the expatriates were paid more because their terms at Oxford were favourable, and not because of their value. He rested by contending that KEMRI was not a signatory to the Concordant setting some terms and conditions of employment and the same did not apply in Kenya, anyway, because it was limited to the United Kingdom.

The Ministry of Public Health and Sanitation and the Attorney General, being the 7th and 8th respondents, elected not to participate in the appeal not being affected or interested. We granted the request by learned counsel **Mr. Ngubi** for the two, to be excused from the hearing, and so he was.

We have carefully considered all of the oral submissions made before us, the written submissions and the totality of the record of appeal which is unusually long as it runs into more than 5,000 pages due principally to the lengthy affidavits filed and the numerous and bulky annextures attached thereto.

We have also noted the learned Judge?s findings and conclusions on various issues about which KEMRI complains. In a first appeal we do respect such findings but are at liberty to depart therefrom when they are erroneous. Our latitude for departure is greater where, as herein, the first instant judge did not enjoy the extra and critical advantage of seeing and hearing witnesses during *viva voce* evidence for then he would have been the better judge of credibility of such witnesses. In the case before us no live testimony was taken and the findings and conclusions were based on rival affidavits and the construction of various documents and application of various constitutional and statutory provisions.

As the decision also depended on the learned Judge?s exercise of discretion, we would generally be slow to interfere but would and must do so if, as has been stated in a long list of cases including ***UNITED INDIA INSURANCE CO. LTD vs. E.A. UNDERWRITERS (K) LTD***

[1985] KLR 898 and ***MBOGO vs. SHAH & ANOTHER [1968] EA 93,*** it is shown to our satisfaction that the judge misdirected himself in some factual or legal matter; has considered matters he ought not to have considered; has failed to consider matters he ought to have considered and therefore arrived at an erroneous decision or it is manifest from a consideration of the case as a whole that he was clearly wrong in the exercise of discretion and as a consequence there has been misjustice which we must undo and correct.

The first issue raised by KEMRI in this appeal is that the learned Judge was bereft of jurisdiction to hear and determine the petition. That petition had initially been filed before the High Court in Nairobi on 5th December 2011 before it was later transferred to the Industrial Court. It is not in dispute that the Industrial Court was the proper forum for the determination of the dispute between the parties but KEMRI complains that the initial filing at the High Court was star-crossed because that court did not have jurisdiction to entertain an employment and labour relations dispute, being a matter reserved by the Constitution to a court to be established under **Article 162(2).** Those matters were expressly excluded from the High Court?s jurisdiction by **Article 165(5)(b).** As such, so KEMRI argues, the petition as filed before the High Court was incompetent and the High Court had no jurisdiction to transfer it to the Industrial Court meaning that upon its transfer, it was received dead on arrival as suits can only be transferred from and to courts of competent jurisdiction. In support of those contentions a number of decision of the High Court were cited in KEMRI?s written submissions including ***BISHOP CHRISTOPHER NDUNGU vs. ANDREW ABUNGU ALIAS CHRISTOPHER ABUNGU OUMA [2006]eKLR*** and ***JULIUS PANYAKO SAMBU vs. KHALID SEIF MBARUI T/A TAKRIM BUS SERVICES [2006] eKLR.***

The respondents? answer to that contention is that the High Court did have jurisdiction over the matter as at the time the petition was filed since the Industrial Court had not been constituted in accordance with the **Industrial Court Act, 2011**. They cited in aid the decision of Majanja, J in ***UNITED STATES INTERNATIONAL UNIVERSITY (USIU) vs. ATTORNEY GENERAL [2012]eKLR.***

We do not intend to spend much time on the question of jurisdiction. We think that as at the time the petition was filed the High Court did have jurisdiction to entertain the dispute and we do not accept the submission that it did not have jurisdiction to transfer the suit to the Industrial Court. The position as we see it is that even were KEMRI right that the High Court did not have jurisdiction, but it did, the proper way to deal with the matter had it found it to be improperly before it, would have been to transfer it to the proper forum, as it in fact did. That is the position we took in ***DANIEL N. MUGENDI VS. KENYATTA UNIVERSITY & 3 OTHERS [2013] eKLR*** in these words that bear repeating;

> **"Believing as we do that approach taken by Majanja, J. (supra) is the correct one, and in endevouring to meet the ends of justice untrammeled by procedural technicalities, we set aside the order striking out the appellant?s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to Article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file "mixed grill" causes in any court they fancy. This will only delay dispensation of justice.**
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> **In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment and Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental right associated with the two subjects."**

We need only add that it was mischievous of KEMRI to raise this matter substantively in this appeal when the issue of the jurisdiction of the court below and the propriety of the transfer of the petition to it by the High Court had been raised by KEMRI in a preliminary objection and ruled upon by the learned Judge on 3rd May 2013 holding, *inter alia*, as follows;

> **"I am clear in mind that the establishment of the Industrial Court as presently constituted was in transition at the time this petition was filed at the High Court on 5th December, 2011 because there was not in place a functional Industrial Court that could entertain, hear and determine, matters preserved for the High Court under Article 23(1) of the Constitution of Kenya 2010. This was only realized on 19th July 2012 when the judges of the New Industrial Court duly appointed on 12th July 2012 were gazetted via Gazette Notice No. 9797 of 2012.**
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> **It is therefore my considered decision that the High Court had at the time the matter was filed, jurisdiction to entertain, hear and determine this petition and therefore had power and authority to transfer it to the Industrial Court when it became duly established and legally functional.**
>
> **It would be unreasonable and dis-proportionate to order the petitioner to start their proceedings afresh, before this court, in a matter where all the pleadings have closed and final submissions filed both on the preliminary issues and on the merits of the case. Indeed the proceedings run into more than a thousand pages including those submitted in electronic form."**

KEMRI did not appeal against that ruling and it was remiss of it to later raise it in this appeal. We are of the same view and there is no merit in the complaint of jurisdictional incapacity.

The next issue for our consideration is the complaint that the learned Judge failed to consider or appreciate pleadings, facts, documents and submissions placed and made before him. In an adversarial system of justice such as ours, it is critically important that the entire case of parties that appear before courts be considered. It is only when pleadings and evidence be it by affidavit, *viva voce* or documentary, are seen to have been considered and decided upon by the trier of fact that litigants can be satisfied, whatever the outcome of the case, that they have been afforded a fair hearing. That consideration and decision must take the form, at the minimum, of their case, evidence and arguments

being stated, analyzed or evaluated, compared or juxtaposed with the opposing case, evidence and arguments, and a decision given thereon one way or the other and reasons assigned for the said decision or determination.

As we have already stated, this case was presented and decided on the basis of affidavit evidence with copious correspondence and documentation attached. We think that given the nature of the claims made about the conduct of the parties, accounts of meetings held and conversations had with various people, more light would have been shed and a more accurate picture of the truth attained had it proceeded by way of *viva voce* evidence with witnesses being placed on oath and confronted or challenged on the contentious issues through cross examination. That not having occurred it behoved the learned Judge to scrupulously and thoroughly analyze the affidavits and weigh conflicting claims before arriving at his conclusions.

A perusal of the judgment does reveal the curious and unusual fact that the replying affidavit of **Margaret Rigiro**, which was KEMRI?s 95 paragraph and, with annextures, 210-page blow by blow substantive and detailed response to the doctors? case is not referred to or even mentioned therein. Also unreferred to and totally unmentioned is her "Further Supplementary Affidavit" sworn on 30th October 2012 indicating that KEMRI paid the doctors all the agreed remuneration per contracts including for the periods they were not working, in proof whereof she attached schedules of payment. This latter affidavit was additional to the one by **Dr. Mpoke** which the learned Judge does refer to in his judgment but which, in detail and in supportive documentation, is much lighter than the first unmentioned one by Rigoro.

We think that KEMRI?S complaint that the learned Judge fell into error and misdirected himself in failing to appreciate or consider the pleadings, facts and documents is totally unanswerable in the face of that inexplicable non-reference, non-mention and non-evaluation of KEMRI?s main response as captured in Rigoro?s replying affidavit . That omission amounted to a gross non-direction, a failure to consider relevant, indeed mandatory material and there can be no doubt whatsoever that this was an error of principle and it resulted in patent misjustice. It is an omission that left the indelible impression that the pleadings, evidence and documents of one party, its entire case, was given no consideration, and that cannot be said to be a fair trial. For our purposes, there can be no doubt that the learned Judge committed reversible error that invites, indeed compels our interference.

It is KEMRI?s grievance that the learned Judge erred in determining issues of discrimination and making orders on access to information on the basis of matters not pleaded. It contends that the learned Judge entered the realm of speculation and made conclusions based on extraneous matters when, at paragraph 78 of his judgment for instance, he stated as follows;

> **"*78.* Having said that, given the history of this country, racial discrimination at the workplace be it perpetuated by individuals or by an institution is completely unacceptable and should not be tolerated for purposes of accessing funds, exchange programmes and other benefits provided by our international benefactors.**
>
> **79. A requirement that a scientific researcher under the employment of KEMRI must have *„relevant connection to the European Economic Area (EEA).? is discriminatory as against colleagues under the same employment who do not have such relevant connection."***

It is contended for KEMRI that it was wrong for the learned Judge to launch into an address on Kenya?s historical experiences and to allow them to prejudicially colour his judgment herein and lead to the wrong conclusion that it practiced racial discrimination. It is also complained that the Judge was wrong to assert, without evidence, that advertisements of some international jobs by KEMRI or access to funds and other benefits required relevant connection to the European Economic Area, when that was not the case at all.

KEMRI also charges that the learned Judge went beyond the pleadings and prayers when he held that it had in violation of **Article 35(1)(b)** of the Constitution failed to provide the doctors with the report of investigation essential for the prosecution of their case when the body of the petition itself did not contain particulars of alleged violation of that right.

Having perused the record we come to the conclusion that these complaints are not idle. Indeed, the petition does not include **Article 35** on access to information as one of the rights violated or infringed by KEMRI. There is neither mention nor particulars of abuse of that right so that it was speculative and a re-working of the doctors? case for the learned Judge to have held that the right was violated. Courts do not plead and they do not present cases for parties who are bound by their pleadings. See ***GALAXY PAINTS CO. LTD vs. FALCON GROUNDS LTD [2000] EA 385, GREAT LAKES TRANSPORT LTD vs. KENYA REVENUE AUTHORITY [2009] KLR 720***. Judges can only decide cases on the basis of claims pleaded and material evidence presented in proof of those claims. To alter the claim at judgment stage is wholly impermissible, not least because it makes the Judge an active participant in the dispute as he would then appear to descend to the arena of conflict weighing in on the side of one party without the other party being afforded a fair opportunity to respond. This, too, amounts to injudicious exercise of discretion and calls for appellate intervention.

Coming now to the issue of racial discrimination, the main complaint is that in dealing with the doctors? allegations of the same in the awarding of intellectual jobs, grants funding tending to bar non residents, distribution of senior scientific positions at the programme pay inequalities and prejudice or condescension against local Africa workers with no commitment to racial equality, the learned Judge in arriving at the conclusion that the *"pleadings and submissions point to discriminative policy prescribed under international sponsorship programme"* considered only the doctor?s averments and did not consider or even mention KEMRI?S response.

This much is evident from what we have already found about the Judge?s non consideration of Margaret Rigoro?s replying affidavit which was KEMRI?s substantive response to those claims of racial discrimination. We think, with respect, that had the learned Judge perused, analyzed and evaluated the said replying affidavit and the hundreds of pages of documentation annexed thereto, he would have arrived at a different conclusion bearing in mind that from that unconsidered affidavit, KEMRI did not directly employ foreign researchers and those visiting retained their career structures and terms of employment of their home institutes and universities, over which KEMRI had no control; the programme had trained more than a score senior legal researchers; KEMRI had in place an extremely well-funded remuneration structure that was competitive and better than that the doctors peers were paid in the public sector and elsewhere, and any differential with what the expatriates were paid was on the basis of their different contracts with third parties to which KEMRI was not privy; KEMRI had a robust training policy towards PhD with a vast majority of the students being Kenyans and KEMRI offered benefits to the doctors not expressly

stipulated in their contracts but which were similar to those it offered to all employees of similar positions at great costs to itself.

We think, with respect, that in the face of averments in the replying affidavit some which were not rebutted or controverted, on balance the doctors did not discharge their burden to prove that any differentials in pay were unreasonable, unaccountable and therefore discriminatory. We are not persuaded by the arguments in submissions made on their behalf, which stand out more for their markedly intemperate tone and colourful phraseology than for the accuracy. They include paragraph 29 which states that;

> **"29. We wish to bring to the attention of this *honourable court to paragraph 63(e) in page 29 of the appellant?s submission where they actually* confirm that many African researchers are enrolled as PHD students, and note as follows:**
>
> **a. That PhD is not an independent research position but rather an entry level in which Africans *are meant to do the difficult „legwork? for the White researchers.***
>
> **b. It is telling to note that PhD studentships are the only opening Africans researchers are not required by the white masters to have a relevant European Economic Area connection as seen in paragraph 87 – *113 in the Record of Appeal Volume 1 pages 32 – 39 and contained in -20 documentary proof in the Record of Appeal Volume 2 page 694 – 720 and also briefly outlined in paragraph 24 (C, I-V) above of this submission.***
>
> **c. The sole purpose of structuring the PhD studentship this way is to ensure the White master class of researchers have a steady stream of cheap, brilliant African doctors and scientists slaving under them and propelling their careers, which further highlights a well-orchestrated Apartheid-like system culminating in sorry pyramid depicted n the Record of Appeal Volume 1 page 457-459.**
>
> **d. We humbly invite this honourable court to question why the funding for all the other positions in KWTRP that lead to being independent research leaders made it mandatory to hold a relevant European Economic Area connection while this is a Kenya programme operated by the appellant.**
>
> **e. Research arrangements such as KWTRP have now been recognized internationally as annexed sites, which propagate a colonial approach to science and are characterized by:-**
>
> > **i. Foreign-led research based in a developing country with colonial extractive tendencies to the detriment of natives**
> >
> > **ii. Expatriate led with disregard of local institutions and leadership**
> >
> > **iii. Lacking in any principles of equal research, equal growth and equal partnership or any way of transparently monitoring equity."**

For the doctors to succeed on their claims of racial discrimination, it was incumbent upon them to prove that they were treated differently and to their prejudice on account only of their skin colour or racial extraction. They needed to prove that only because they were „blacks? and not „whites?, they were placed at a disadvantage. In so saying they needed to have dispelled the case made by KEMRI that what differences there were were devoid of any other rational basis. We do not think that they dispelled KEMRI?s contention that; first, whatever requirements for a connection with the European Area did not relate the programme but related to Wellcome Trust Programme in the United Kingdom and elsewhere and so were not relevant to the doctors? case, and; second, that whatever differentials in pay resulting in expatriates being renumerated more handsomely than local scientists was wholly the function of their retaining their more favourable terms from the institutes and universities from their home countries in Europe to which they belonged.

It is erroneous for the doctors to contend, and for the learned Judge to be seen to have accepted, that any differential treatment is *ipso facto* discriminatory. The proper position is that for a differentiation of treatment to be unconstitutional and impermissible it has to be based on any of the prohibited grounds as captured in **Article 27** of the Constitution;

> **"27 (4) The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**
>
> **(5) A person shall not discriminate directly or indirectly against another on any of the grounds specified or contemplated in clause (4)".**

It would be ingenuous for one to suppose that the equality contemplated by the Constitution leaves no room for difference and seeks absolutism. Rather, as Judge Tanaka famously stated in the ***SOUTH WEST AFRICA CASE*** **[1966] ICJ REP**, equality does not mean;

> **"…absolute equality, namely the equal treatment of men without regard to individual concrete circumstances, but it means – relative equality, namely the principle to treat equally what are equal and unequally what are unequal .....To treat unequal matters differently according to the inequality is not only permitted but required"**

For different treatment to amount to discrimination, it must fall within the definition of the term as found in **BLACKS LAW DICTIONARY 10TH EDITION** at p1566 namely *"differential treatment; esp a failure to treat all persons equally when no reasonable*

distinction can be found between those favoured and those not favoured." The learned authors then proceed to exemplify the trap that one could get so easily entangled in if one fails to appreciate that not all cases of distinction amount to discrimination by citing this passage from Robert K. Fullinwider; ***The Reverse Discrimination Controversy*** 11-12 (1980);

> **"The dictionary sense of „discrimination? is neutral while the current political use of the term is frequently non-neutral, pejorative. With both a neutral and a non-neutral use of the word having currently, the opportunity for confusion in arguments about racial discrimination is enormously multiplied. For some, it may be enough that a practice is called discriminatory for them to judge it wrong. Others may be mystified that the first group condemns the practice without further argument or inquiry. Many may be led to the false sense that they have actually made a moral argument by showing that the practice discriminates (distinguishes in favor of or against). The temptation is to move from *„X distinguishes in favor of or against? to „X discriminates? to „X is wrong? without being aware of the equivocation involved."***

A. three-judge bench of the High Court (Mwera, Warsame & Mwilu, JJ.A, as they then were) well-articulated the difference between mere differentiation and differentiation or unequal treatment that is constitutionally proscribed when they expressed themselves thus in ***FEDERATION OF WOMEN LAWYERS FIDA KENYA & 5 OTHERS vs. ATTORNEY GENERAL & ANOR [2011] eKLR;***

> **"In our view, mere differentiation or unequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases".**

Thus where, as in this case, a reasonable explanation is given for differential treatment that is apart and independent of a prohibited basis or categorization, we are of the view that a claim for relief for alleged discrimination has to fail. For precisely that reason we hold the view that the High Court decisions cited before us by the Union, namely ***VMK vs. CUEA [2013] eKLR***; **DAVID WANJAU MUHORO vs. OL PAJETA RANCHING LIMITED** ***[2014] eKLR and MARY MWAKI MASINDE vs. COUNTRY GOVERNMENT OF VIHIGA & 2 OTHERS***, which could only be of persuasive authority to us, are nevertheless distinguishable for the reasons that it was not shown that the differential treatment of the claimants therein was explicable on other reasonable bases than the HIV Status, race and marital status, respectively, of the petitioners.

We are satisfied on the whole, therefore, that the doctors did not prove their allegations that they had been subjected to racial discrimination contrary to **Article 27(4)** and **(5)** of the Constitution. That finding must perforce also dispose of in similar fashion the question of whether the doctors? right to dignity was violated. Human dignity, provided for and protected under **Article 28** of the Constitution, was defined in **REPUBLIC vs. KENYA NATIONAL EXAMINATIONS COUNCIL & ANOR Ex PARTE AUDREY MBUGUA ITHIBU [2014] eKLR** thus;

> **"Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanization. Each individual has inherent dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution."**

We agree with that definition and, applying it to this case, we are not persuaded that KEMRI humiliated, degraded or dehumanized the doctors and the learned Judge, with respect, did not have a secure basis for holding that they had been subjected to *"sustained invasion of personal dignity"* which called for recompose and vindication by way of damages, which we shall return to. He appears to have adopted wholesale the allegations made by the doctors on this score without any regard to the explanations and clarifications by KEMRI as contained in the replying affidavit of Ms. Rigoro.

Regarding the learned Judges? finding that the doctors? property rights under **Article 40** were violated, KEMRI complains that there was no proof of the allegations that KEMRI unlawfully took credit for their works and scientific innovations and misappropriated their work for the benefit of expatriate scientists as *"nowhere in [their] affidavits …did any of them give primary facts or annex evidence in support of such serious allegations."* KEMRI criticizes the learned Judge for failing to appreciate that both by contract and by law, any works and scientific inventions the doctors may have produced under the programme while executing their work as KEMRI?s employees belonged to it. Indeed, we have gone through the judgment and noted that the learned Judge did not engage with **clause 13(ii)** of the contracts of employment signed by the doctors which provided as follows;

> **"Any intellectual property including patents, copyrights etc which arises in the performance of the duties of the person engaged shall belong to the institute."**

The learned Judge also failed to pay heed to the provisions of **section 32(1)** of the Industrial Properties Act which provides that the right to a patent for an invention made in execution of an employment contract shall belong to the employer. There are qualifications to that general rule but the burden was on the doctors to assert and prove the same and the learned Judge was under a duty to enquire if there was a basis for departing from that general rule. We are not satisfied that he did so, and in that omission he erred. Indeed, if there arose a question of remuneration the proper forum for addressing it would have been the Tribunal established under that Act.

Turning finally to the remedies that the learned Judge awarded, KEMRI is sore aggrieved by the **Kshs. 5 million** it was ordered to pay to each doctor under **Article 23** of the Constitution which sum it says was against established principles and was without legal justification considering their conduct including their inflammatory e-mails to their superiors and third parties, their refusal to return to work when called upon to do so and their sustained media war aimed at tarnishing the reputation of KEMRI and many other researchers and scientists working

there. The circumstances of the case did not call for that kind of punitive award because, to KEMRI, its conduct was at all times fair and justified and included an immediate lifting of the doctors? suspension, the institution of an investigation into their complaints inviting them to offer evidence of the same, recalling the doctors to resume work and studies and paying them salaries up to the end of their contracts even when they were not working. To KEMRI, a consideration and appreciation of **Section 45** of the **Employment Act 2007**, which was mandatory for the Judge to consider when deciding on the remedy or relief to grant, but which he appears not to have considered, clearly militated against the Kshs. 5 million award as the doctors were the authors of their own misfortune and there was nothing culpable or reprehensible about KEMRI?s conduct. The cases of ***COMMUNICATIONS WORKERS UNION OF KENYA vs. TELCOM (K) LTD & 2 OTHERS [2006] eKRL***; ***OKONGO vs. ATTORNEY GENERAL & ANOR [1998] KLR 742*** and ***CONSOLATA KIHARA & 241 OTHERS vs. KENYA TRYPANOSOMIASIS RESEARCH INSTITUTE KLR*** were cited in support of the principle of freedom of contract in an employment relationship so that if a party chooses not to continue in employment, it would be untenable for a court to either order specific performance or otherwise punish the other party as that would be tantamount to converting a contract of employment into one of servitude.

The doctors? response to these submissions was that the Kshs. 5 million was *"commensurate to the nature of the violations and injuries suffered in the hands of [KEMRI]"*. They go on to state, even though they have not cross-appealed against quantum, that the same should be enhanced to Kshs. 10 million each since they missed full clinical specialty training, forfeited full government sponsorship training and funding for PhD training and *"they would be clinical consultants and research leaders attracting not less than Kshs. 14 million annually if they were to continue in service with [KEMRI]"*.

With respect to these submissions and to the learned Judge, the circumstances of this case do not disclose petitioners that were deserving of compensation at the level given or as claimed, for the rather straight-forward reason that not only were the alleged *"violations and injuries"* not proved; some, which are consequential upon their loss of employment and studies while at KEMRI, were fully of their own making. Their suspension was for merely a day after which they were recalled but they would hear none of it. Their fellow grievants who accepted the recall resumed employment and proceeded with studies while the doctors rebuffed both. Having created that state of affairs, it seems to us quite surreal that the doctors should turn around and seek compensation flowing therefrom. As already observed, even by the learned Judge himself, the doctors received remuneration for several months until the end of their respective contracts, notwithstanding that they adamantly refused to resume work. It would be unconscionable to add anything to their already underserved payments for the unworked period.

We think the learned Judge erred in granting the Kshs. 5 million which is all the more baffling because there is absolutely no basis for that sum. There is no reference to comparable awards and there was no pleading indicative of what amount of compensation was sought by the doctors. That means that the learned Judge essentially "plucked the sum of 5 million from the air" as submitted by Mr. Munge, and such an award of damages, even where damages, are found to be payable, would definitely be interfered with on appeal for lacking a rational basis and being wrong in principle.

In sum then, this appeal has merit and is for allowing, We accordingly set aside the judgment and decree dated 18th July 2014 and substitute therefor an order dismissing the petition dated 2nd December 2011 in its entirety.

In view of the nature of the dispute herein, each party shall bear its own costs of this appeal and at the court below.

Dated and delivered at Nairobi this 8th day of February, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR