



Nubian Rights Forum v National Hospital Insurance Fund & another; Ethics and Anti-Corruption Commission & 3 others (Interested Parties) (Petition E024 of 2022) [2023] KEELRC 241 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 241 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E024 OF 2022
JK GAKERI, J
FEBRUARY 2, 2023**

BETWEEN

NUBIAN RIGHTS FORUM PETITIONER

AND

NATIONAL HOSPITAL INSURANCE FUND 1ST RESPONDENT

PETER KAMUNYO 2ND RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

CABINET SECRETARY, MINISTRY OF HEALTH INTERESTED PARTY

PRINCIPAL SECRETARY, MINISTRY OF HEALTH INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

(CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 10(1), 10(2), 19, 22, 41, 47, 48 73(2) & 201 OF THE CONSTITUTION OF KENYA, 2010 - AND- IN THE MATTER OF: ALLEGED VIOLATION OF RIGHTS AND FREEDOMS UNDER ARTICLES 1(1), 2(1) & (2), 3(1), 10(1) & (2), 27, 73(2) & 201 OF THE CONSTITUTION OF KENYA, 2010 -AND- IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT, 2015)

JUDGMENT

1. Before me for determination is a Petition and an Application both dated 9th February, 2022. The Applicant seeks ORDERS THAT:

a. Spent;



- b. THAT pending, the hearing and determination of this application, this Honourable Court be pleased to issue orders compelling the 1st Respondent to provide the records and minutes of the interviews that led to the promotion of the 1st Respondent's members of staff in April, 2021;
 - c. THAT pending, the hearing and determination of this Application, this Honourable Court be pleased to issue orders compelling the 1st Respondent to provide a list of the promotions that have been made to members of staff since the 2nd Respondent's assumption of office in the year 2020 and the date the said promotions took effect;
 - d. THAT pending, the hearing and determination of this Application, this Honourable Court be pleased to issue orders staying the appointments of members of staff and promotions made by the 2nd Respondent without following due procedure;
 - e. THAT pending, the hearing and determination of the Petition filed herewith, this Honourable Court be pleased to issue orders compelling the 1st Respondent to provide the records and minutes of the interviews that led to the promotion of the 1st Respondent's members of staff in April, 2021;
 - f. THAT pending, the hearing and determination of this Application, this Honourable Court be pleased to issue orders compelling the 1st Respondent to provide a list of the promotions that have been made to members of staff since the 2nd Respondent's assumption of office in the year 2020 and the date the said promotions took effect;
 - g. THAT pending, the hearing and determination of the Petition filed herewith this Honourable Court be pleased to issue orders staying the appointments of members of staff and appointments made by the 2nd Respondent without following due procedure;
 - h. THAT consequent to the grant of the prayers above, this Honourable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders; and
 - i. THAT the costs of this application be in the cause.
2. The application is based on the grounds set out on the face of the Notice of Motion Application and the Supporting Affidavit of SHAFI ALI HUSSEIN, the General Secretary of the 3rd Respondent sworn on the 9th February, 2022.
 3. The petitioner seeks the following prayers:
 - a. A DECLARATION that the 2nd Respondent's actions are discriminatory and biased and are tantamount to abuse of office and gross misconduct.
 - b. A DECLARATION that the manner in which the appointments were made was unconstitutional and therefore null and void;
 - c. A DECLARATION that the 2nd Respondent is unfit to hold public office.



- d. AN ORDER COMPELLING the government of Kenya to surcharge the 2nd Respondent for any public funds that have been lost through the corrupt activities he has been overseeing at the 1st Respondent.
 - e. AN ORDER COMPELLING the 1st Respondent to embark on proper recruitment on its members of staff.
 - f. A PERMANENT ORDER staying the appointments that were made without following due procedure.
 - g. General damages
 - h. AN ORDER COMPELLING the Respondents to bear the costs of this suit.
4. The grounds advanced on the face of the application and the supporting affidavit arise from the reliefs sought by the Petitioner in its petition dated 9th February, 2022.
 5. Upon effecting service of the pleadings, the Respondents filed a Notice of preliminary objection dated 21st February 2022 which was canvassed and determined.
 6. The Respondents filed a replying Affidavit sworn by Jane Boit on the 19th September 2022, the 1st interested party filed a Replying Affidavit sworn by Jackson Mwai on 21st February 2022 while the 2nd to 4th interested parties filed grounds of opposition dated 21st February 2022 in response to the petition.

Petitioner's case

7. The petitioner is a Human Rights Organization that started in 1997.
8. The 1st Respondent is a state parastatal whose core mandate is to provide medical cover to all its members and their declared dependants.
9. The 2nd Respondent is the Chief Executive Officer of the 1st Respondent who has been sued for proliferating irregularities at the 1st Respondent through corruption, embezzlement of funds, unjustified backdating of salaries and making irregular appointments and transfers.
10. The 1st, 2nd, 3rd and 4th interested parties have been joined as parties as having a stake and legal interest.
11. The petitioner avers that the 2nd respondent who is a public officer and director of the 1st Respondent is on a rampage of proliferating irregularities at the 1st Respondent by abusing and misusing his power by directly discriminating against well deserving and hardworking members of the 1st Respondent.
12. The petitioner avers that the 2nd Respondent contravened the 1st Respondents right to information as to how promotions were done and no interviews were conducted which contravenes the principles under chapter 10 of *the Constitution* of Kenya, 2010.
13. The petitioner avers that the 2nd Respondent used tax payer's money for unjust enrichment of a few individuals in contravention of the guiding principles of integrity and public finance and unless the court intervenes there will be an inevitable crisis bound to affect tax payers.
14. The petitioner observes that unless the 2nd respondent is restrained he will continue to infringe on national values, principles of governance and values and principles of public service.



Respondents case

15. In opposition of the petition the Respondents filed a Preliminary Objection dated 21st February 2022 and later filed a Replying Affidavit sworn by Jane Boit on the 19th September 2022.
16. The affiant who is the Acting Corporation Secretary of the 1st Respondent states that the 1st Respondent being a state corporation and in fulfilment of its mandate of delivering Universal Health coverage was in the process of implementing 2018-2022 Strategic Plan.
17. She states that in line to the fulfilment of the mandate, there was a re-organization and restructuring of the fund acting in accordance with recommendation of a World Bank Consultant. That the Board of Management had revoked the appointment of three members of staff in the 2020.
18. The affiant states that vide a letter dated 16th March 2021 the Board of Management of the Respondent sought advice from the State Corporations Advisory Committee (SCAC) on the issue of staff appointment and specifically on reversal of the appointments of three officers.
19. The affiant states that the Board of Management Acting on the advice of SCAC reinstated the officers, Mr. Joseph K. Tanui, Mr. Stanely Wambugu and M/s Rosemary Gachemi.
20. Further the affiant states that an internal job advertisement was published but the same was later deferred by an internal memo dated 11th March 2021 and members of staff were advised to continue discharging their duties in the offices they held prior to the advertisement.
21. The affiant states that the appointment and recruitment of senior management had not been advertised and the allegations that the 2nd Respondent made appointments without following the laid procedure were misguided as the only action taken was to reinstate the three officers.
22. The affiant contends that the Petitioners allegations that that the 2nd Respondent proliferated irregularities through corruption and embezzlement of funds was untrue, and that there was no discrimination against anyone as no interviews or recruitments had been conducted.
23. The affiant states that the respondents had not violated, infringed or threatened the Petitioners constitutional rights.
24. The affiant states that the Application and Petition are misconceived, incompetent, unfounded and an abuse of the courts process and urges the court to dismiss the same with costs.

1st Interested Parties case

25. In opposition to the petition, the 1st interested party filed a Replying Affidavit sworn by Jackson Mwai an Ethics Officer with the 1st interested party stating that on the 21st July 2021, the Commission received a complaint and entered it into the investigations of the claim under Inquiry File number EACC/EL/INQ/025/2021.
26. The affiant states that the complaint related to irregular promotions, transfers and irregular backdating of salaries of staff at the National Hospital Insurance Fund.
27. The affiant states that the inclusion of the Commission as a party into the Petition was not warranted since the Commission had already taken up the complaint and the same was being investigated and once concluded the Commission will make recommendations and take any action in accordance to the law.



28. The affiant states that the Commission was not in violation of any law and no acts or commissions have been attributed to it and has no clear or identifiable stake in this matter and prays that its participation in the matter be dispensed with.

2nd to 4th Interested parties' case

29. The 2nd to 4th interested parties filed grounds of opposition in dated 9th February 2022 and raised the ground that the application has not met the threshold for grant of interlocutory injunctions as established under *Giella vs Cassman Brown & Co. Ltd* (973) E.A 358.
30. They urge that this being a public interest matter, it outweighs personal interest and that the petitioner stands to suffer no irreparable injury or prejudice if the court orders are not granted.
31. They state that conservatory orders are discretionary and their scope and purpose is limited to most deserving circumstances and the present Petition is not, therefore it is in the interest of justice that the orders sought be denied.
32. The 2nd to 4th interested parties state that the Petitioner is an unknown entity and has no interest or stake on the issues touching on the 1st Respondent and has not demonstrated how its interests are affected by promotion of constitutional principles.
33. Further the interested parties contend that the Petitioner is using public documents obtained contrary to the provisions of Article 35 of *the Constitution* and section 80 of the *Evidence Act* and urges the court to expunge the same from the court record.
34. The interested party further states that the petitioner lacks locus standi to commence these proceedings and in that regard the court lacks jurisdiction to hear and determine the issue herein.
35. The interested parties have further contended that the petitioner has not demonstrated why he joined the 2nd to 4th interested parties.
36. The interested parties urge the court to dismiss the Petition as it is frivolous, vexatious and an abuse of the court process.

Applicant's submissions

37. Counsel for the Petitioner identified two issues for determination;
- a. Whether the Petition before this court is merited.
 - b. Who should bear the cost of the Application/Petition?
38. On the first issue, the Petitioner submitted that on the 26th February, 2021, the 1st Respondent published an internal advertisement for vacant positions open to its members of staff. On the 11th March, 2021 the said advertisement was rescinded and employees were advised to proceed with their current roles. In April, 2021, the 2nd Respondent proceeded to make internal appointments despite the earlier notice rescinding the vacancies.
39. The petitioner submitted that the said appointments were made in a discriminatory manner and without following due procedure. It was urged that Section 2.13 of the NHIF Human Resource Policy and Procedure Manual, May 2019 provided that;

“The powers to appoint employees is vested in the board, however the board may delegate some of those powers in writing for a specific cadre of employees to the Chief Executive



Officer. The C.E.O shall therefore report such appointments not later than the next board meeting for noting and approval”

40. The Petitioner submitted that the actions of the 2nd Respondent had caused demoralisation, frustration and general apathy among employees.
41. The Petitioner further submitted that by declining to be guided by *the Constitution* and the laid down internal procedures, the 2nd Respondent infringed on the rights of employees of the 1st Respondent guaranteed under Article 27 of *the Constitution* of Kenya, 2010 and their legitimate expectations.
42. The Petitioner relied on the holding in *Trusted Society of Human Rights Alliance vs Nakuru Water & Sanitation Services Company & Another* (2013) eKLR where the court considered appointments made without following due process and held that a recruitment undertaken outside established policy guidelines was unlawful.
43. The Petitioner further submitted that the respondent’s actions breached the National Values and principles of governance prescribed in Article 10, 73 and 232 of *the Constitution* of Kenya, 2010.
44. The Petitioner further submitted that the 2nd Respondent failed to adhere to the responsibilities of leadership as provided under Article 73(1) of *the Constitution* and Section 52 of the *Leadership and Integrity Act* by failing to exercise authority in a manner consistent with the purpose and objects of *the Constitution*.
45. The Petitioner submitted that the actions of the 2nd Respondent were not only illegal but also undermined members of the public through misappropriation of public funds.
46. The Petitioner further submitted that there was eminent danger that the 2nd Respondent would continue to infringe on national values, principles of governance and principles of public service and prayed that the orders sought in the Petition be granted.
47. On the 2nd issue, the Petitioner urged the court to find that costs should follow the event and the successful party be awarded costs.

1st and 2nd Respondents submissions

48. Counsel for the 1st and 2nd Respondents identified four issues for determination namely;
 - i. Whether the Respondents acted in a discriminatory manner against any person contrary to and in breach of Article 27 of *the Constitution* of Kenya, 2010;
 - ii. Whether the Respondents violated any Constitutional rights, values and principles in exercising their mandate with respect to recruitment, appointment, promotion and reinstatement of any person/members of its staff; and if not, whether the instant Petition is frivolous, vexatious and/or actuated by malice;
 - iii. Whether the Petition is merited; and
 - iv. Whether costs should issue in the instant Petition.
49. The Respondent submitted that it initiated various reforms and restructuring that necessitated realignment of the human resource and organizational structure. This necessitated the appointment of three officers to fill critical positions of the Fund.



50. The reorganization led to the publishing of an internal advertisement seeking individuals to fill various positions in different departments, process different from the appointment of the three officers.
51. The Respondents submitted that the petitioner misconstrued the above facts and alleges discrimination by assuming that the appointments of the three officers was as a result of the internal job advertisement published by the Fund in February, 2021.
52. The Respondents further submitted that the interviews and the promotions the Petitioner was alleging are yet to take place as the process was deferred by the Cabinet Secretary for the Ministry of Health, for further consultations.
53. Further, the Respondents submitted that the three members of staff the Petitioner was alleging were promoted were in fact reinstated as they had initially been appointed on the 2nd September 2020 as their appointment had ben unprocedurally revoked.
54. The respondents submitted that they had not violated any constitutional provisions, values and principles as alleged and no evidence had been provided in support of the Applicant/Petitioner’s case.
55. It was further submitted that the allegations on embezzlement and loss of public funds was unsubstantiated as no evidence was adduced and the accusations were malicious and amounted to witch-hunt, mudslinging and in bad faith on the part of the Petitioner.
56. The Respondents contended that the Application/Petition herein was frivolous, vexatious and actuated by malice and urged the court to find that it was not merited as the Petitioner had not proved its case to warrant the issuance of the orders sought.
57. The Respondents urged the court to dismiss the Application/Petition with costs to the Respondents.

2nd – 4th Interested parties submissions

58. Counsel for the interested parties identified four issues for determination as hereunder,
 - i. Whether the petitioner has locus standi in this case?
 - ii. Whether the court has jurisdiction in this matter?
 - iii. Whether the petitioner’s evidence is admissible in court?
 - iv. Whether the petitioner has demonstrated why the 2nd- 4th interested parties were joined in this suit.
59. On the first issue, counsel for the parties submitted that the Petitioner had no locus standi or capacity to institute this suit. Reliance was made on the holding in Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, where the Court held that;-

“Locus Standi signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”.
60. Counsel submitted that the Petitioner’s suit was operating under the oblique considerations and intended to abuse the judicial process as the petitioner had not demonstrated any cause of action that would create any concrete injury.
61. Counsel further submitted that the basis of the Petition namely; embezzlement of tax payers money and wrongful appointment of staff had not been substantiated.



62. On the 2nd issue, counsel submitted that the court had no jurisdiction in the matters raised in the Petition. Reliance was made on the holding in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, where this Court emphasized that:-

“ . . . In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed....” In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance.”

63. It was submitted that challenging the appointment of staff through a constitutional petition was misguided and further, the issue of corruption and embezzlement of funds was not incidental to the matters that are set out in Section 12 of the *Employment and Labour Relations Court Act*, 2011 and as such the court had no jurisdiction to hear the matter.

64. On the third issue, counsel submitted that the public documents annexed to the Application/Petition were not compliant with section 80 of the *Evidence Act* and being public documents, they had not been certified by a public officer as provided under section 81 of the *Evidence Act* counsel urged the court to have them expunged from the record.

65. On the 4th issue, counsel submitted that the Petitioner had not demonstrated why they were joined in the suit and submitted that the Supreme Court had delineated the grounds for joining an interested party in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) where court stated that:

“ . . . Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

66. Counsel submitted that the Petitioner had not proved any of the grounds and urged the court to strike them out of the proceedings.

67. Counsel urged the court to find that the Petitioner lacked locus standi to institute the suit and that the court lacked jurisdiction on the issues raised and the Petitioner had not met the criteria for grant of conservatory orders. The court was urged to dismiss the Application and the Petition with costs.



Analysis and determination

68. From the pleadings and submissions on record, the issues for determination are;
- i. Whether the Petition before the court meets the Constitutional threshold of a Constitutional Petition.
 - ii. Whether the Petitioner has established its case against the Respondents.
69. As to whether the Petition meets the Constitutional threshold, the first port of call are the principles governing Petitions alleging violation of provisions of *the Constitution*.
70. The mantra that he who alleges must prove remains the operative principle. Since this is a Constitutional Petition, premised on alleged violations of *the Constitution*, it behoves the Petitioner to establish with sufficient clarity and precision the provisions of *the Constitution* allegedly violated, manner of violation and the extent of the alleged violation as enunciated in *Anarita Karimi Njeru V Republic (1979) eKLR* and elaborated in *Trusted Society of Human Rights Alliance V Attorney General & 2 others (2012) eKLR*.
71. In the *Anarita* case, Treverlyn and Hancox JJ stated as follows;
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
72. Similarly, in *Kiambu County Tenants Welfare Association V Attorney General and another (2017) eKLR*, the court stated as follows;
- “Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of rights, they must not only state the provisions of *the Constitution* allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of the injury.”
73. The Petitioner herein cites Articles 41(1), 73(1)(2)(b), (c) (i) and (d), 75, 201(a), (d) and (e), 226(5), 232(1)(a) as well as Articles 1(1), 2(1), (2), 3 and 259(1) and (3) of *the Constitution*.
74. It was the Petitioner’s assertion that the 2nd Respondent was proliferating irregularities at the 1st Respondent through corruption, embezzlement of funds, unjustified backdating of salaries and making irregular appointments and transfer of members of staff without due procedure.
75. In urging its case, the Petitioner relied on an undated advertisement for positions at 1st Respondent signed by the 2nd Respondent and its rescission dated 11th March, 2021 also signed by the 2nd Respondent, email communication from the 2nd Respondent to one Joseph Tonui dated 22nd October, 2020 on payment of acting allowance to one, Wambugu Kariuki, faded copies of reinstatement letters to Rosemary Wairimu Gachemi and Joseph Tonui dated 30th April, 2021. The two had been appointed to the offices by letters dated 2nd September, 2020. Their appeals are also attached. The foregoing is the evidential foundation of the Petitioner’s case.
76. In the response, the 1st and 2nd Respondents deposed that whereas the 1st Respondent was a Statutory Corporation, the 2nd Respondent was its Chief Executive Officer.



77. That in accord with the 1st Respondent's Strategic Plan 2018 – 2022, it had initiated reforms and restructuring to realign its Human Resource and Organizational Structures and developed all its Human Resource instruments which were subsequently approved by the State Corporations Advisory Committee herein after (SCAC) on August 31st 2020 and a human resource suitability assessment was conducted at the instigation of the 1st Respondent's Board of Directors and recommendations made to the board as a consequence of which the board of management appointed Wairimu Gachemi, Joseph Tonui and Wambugu Kariuki to various offices which appointments were subsequently revoked allegedly because of their qualifications and experience.
78. However, the subsequent reinstatements of the three (3) appointees was occasioned by the advise of SCAC on the risks inherent in the revocation of the appointments and in particular litigation. The appointees were reinstated by letters dated 30th April, 2021.
79. Meanwhile, the 2nd Respondent acting on behalf of the 1st Respondent sought SCAC's advise on revision of the Human Resource Instruments and was advised that the same could only be done, as necessary but had to be recommended by the Board of the 1st Respondent to the Parent Ministry. A letter dated 1st March, 2021 was sent to the Cabinet Secretary, National Treasury, Head of Civil Service and Cabinet Secretary Health for approval of recruitment of officers to various positions created by the re-organization but by letter dated 8th March, 2021, the Cabinet Secretary, Health advised the 2nd Respondent to halt the process of recruitment pending further consultations. Employees were notified of the suspension by an internal memo dated 11th March, 2021 and the status quo remains as submitted by the 1st and 2nd Respondents. The foregoing is the concatenation of events from 2020.
80. Contrary to the allegations by the Petitioner that certain unnamed 12 persons were appointed internally, in April 2021, the only evidence on record reveals that only 3 persons whose appointment made in 2020 had been revoked were reinstated in April 2021. The Petitioner did not furnish evidence of the alleged 12 appointees.
81. Needless to emphasize, the reinstatement was a consequence of the advice provided by the State Corporations Advisory Committee.
82. As observed in the Ruling delivered on 2nd November, 2022, the allegation of discrimination or opaqueness of alleged promotions was never substantiated by any evidence. The Petitioner did not file a single affidavit or document setting out who was promoted, when and in what manner and who was discriminated and how.
83. Likewise, the Petitioner adduced no proof of who was appointed to office without any shortlisting of candidates or interviews.
84. Finally, the allegations of corruption, embezzlement of funds, backdating of salaries and making of irregular appointments and transfers are undoubtedly grave allegations against the Chief Executive Officer of a Statutory Corporation and implicate not only his integrity but suitability to hold office and criminality.
85. It requires no belabouring that such weighty allegations ought to be supported by cogent evidence which can withstand scrutiny.
86. An allegation of corruption or embezzlement of funds without any scintilla of evidence of the alleged corruption or embezzlement is a matter courts frown upon as waste of judicial time.
87. While the Petitioner cited several provisions of *the Constitution* of Kenya, 2010 as allegedly violated by the 1st and 2nd Respondents, it has failed to adduce evidence to demonstrate with reasonable precision



that which he complained about and the manner in which the provisions were allegedly violated. The alleged violations of *the Constitution* were not supported by any shred of evidence.

88. The court is guided by the sentiments of Muriithi J. in *Josphat Koli Nanok & another V Ethics and Anti-Corruption Commission* as follows;

“ . . . I think it trivializes *the Constitution*, its values and principles when empty allegations of infringement are made. A Petitioner who cites a violation of *the Constitution*, must by cogent evidence relate alleged breaches with real concrete and direct loss, damage or injury arising out of the violation. It does not help to allege violation, drop conceptual abstracts and interpolations to fit some artificial textbook arguments of the nature and extent of constitutional principles.” (See *EG & 7 others V Attorney General: DKM & 9 others (2019) eKLR*).

89. For the foregoing reasons, the court is satisfied and finds that the Petition before the court does not meet the threshold enunciated in *Anarita Karimi Njeru V Republic (Supra)* and is unmeritorious.

90. The second and final issue which is to some extent related to the first relates to the evidential burden of proof and the nature of evidence relied upon by the Petitioner.

91. Section 107 of the *Evidence Act* proves as follows;

1. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

92. Section 108 of the Act provides that;

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all was given on either side.

93. Further, Section 109 provides that;

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in any particular person.

94. The upshot of these provisions is inescapably that he who alleges must prove. The dearth of facts and evidence to establish the Petitioner’s grave allegations against the 1st and 2nd Respondents is intriguing.

95. Strangely, the Petitioner provided no report, letter, affidavit or other documentary evidence to establish the alleged corruption activities the 2nd Respondent engaged in or the funds embezzled, let alone the backdating of salaries and irregular promotions.

96. Not a single document was availed to implicate the 1st and 2nd Respondents in the alleged acts of impropriety.

97. In a nutshell, the allegations by the Petitioner against the 1st and 2nd Respondents were not supported by any credible evidence and were unsubstantiated.

98. Closely related to the burden of proof is the nature and source of the evidence relied upon by the Petitioner, an issue raised by at least one of the interested parties and the Petitioner did not submit on it.

99. Article 35 of *the Constitution* of Kenya, 2010 states that;

1. Every Citizen has the right of access to –
a. Information held by the state; and



- b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.
100. Section 3 of the [Access to Information Act](#), 2016 provides that:-
The object and purpose of this Act is to –
- a. Give effect to the right of access to information by citizens as provided under Article 35 of [the Constitution](#);
101. In *Njonjo Mue & another V Chairperson of Independent Electoral and Boundaries Commission & 3 others* (2017) eKLR, the Supreme Court stated as follows;
- “Article 35(1)(a) and (b) of [the Constitution](#), read with Section 3 of the [Access to Information Act](#) would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the IEBC.”
102. Similar sentiments were expressed in *Reverend Timothy Njoya V Attorney General & another* (2014) eKLR where the court was emphatic that;
- “The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest . . . this I believe is the import of Article 35(3) of [the Constitution](#) of Kenya which imposes an obligation on the state to publish and publicise any information affecting the nation, but also provide open access to such specific information as people may require from the state.”
103. However, the right of access to information is not absolute as explained in *Njonjo Mue & another V I.E.B.C & 3 others* (Supra),
- “The right to access information is, however, not absolute and there are many circumstances in which a person may be denied particular information. Specifically, procedures are provided in a law on how a person ought to access information held by another person and particularly a state organ or entity . . . Section 8 of the [Access to Information Act](#) in the above context thus provides that a person may apply in writing, or where one is unable to write, may apply orally to an information officer who shall then put the request in written form and any such request for information must be processed within 21 days.”
104. It is unclear how the Petitioner obtained unauthenticated and undated copies of the 1st Respondent’s internal advertisement, internal memo from the 2nd Respondent to all staff dated 11th March, 2021, email communication between the 2nd Respondent and Mr. Joseph Tonui, and personal letters to Wairimu Gachemi and Joseph Tonui.
105. The Petitioner provided no evidence to demonstrate how the documents on record were obtained.
106. The foregoing notwithstanding, obtaining the documents irregularly does not of itself render them inadmissible as evidence.



107. As explained in *David Ogolla Okoth V Chief Magistrates Court, Kibera & 2 others* (2010) eKLR,

“There has been established that a right in the Bill of Rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, there must be shown that the admission of such evidence would render the trial unfair and detrimental to the administration of justice.”

108. The court is satisfied that although the unauthodox manner in which the internal communication was obtained by the Petitioner may have unjustifiably violated the 1st and 2nd Respondents right to privacy, it was not demonstrated that the admission of such documents would render the trial unfair or detrimental to the administration of justice.

109. Finally, and as adverted to elsewhere in this judgement, none of the documents relied upon by the Petitioner constituted cogent evidence to establish any of the allegations made against the 1st and 2nd Respondents.

110. Needless to belabour, the circumstances in this case are similar to those in *Mumo Matemu V Trusted Society of Human Rights Alliance & 5 others* where the court stated;

“Even where a party cites Article of *the Constitution* alleging that they have been violated, he/she is duty bound to adduce convincing evidence to prove the alleged violations. In the instant case, save for the allegations made in the Petition and affidavits, no tangible evidence was given in support of the allegations. No iota of evidence was tendered to establish any of the cited acts of discrimination. It is our finding that there is no basis at all upon which the court can uphold any of the alleged violations. . .”

111. These sentiments apply on all fours to the facts of the instant case.

112. The upshot of the foregoing is that the Petition herein is unmeritorious and is accordingly dismissed with no orders as to costs.

113. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI



JUDGE

