



REPUBLIC OF KENYA



**Kituku v Council of Legal Education & another (Employment and Labour Relations  
Petition E209 of 2022) [2023] KEELRC 1357 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1357 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**EMPLOYMENT AND LABOUR RELATIONS PETITION E209 OF 2022**

**K OCHARO, J**

**MAY 25, 2023**

**IN THE MATTER OF: THE CONTRAVENTION OF THE FUNDAMENTAL  
RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES  
22, 23, 24, 27, 41, & 47 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT ACT NO.11 OF 2007 AND IN THE  
MATTER OF: THE FAIR ADMINISTRATIVE ACTIONS ACT NO.4 OF 2015**

**BETWEEN**

**DR EMMANUEL WAMBUA KITUKU ..... PETITIONER**

**AND**

**THE COUNCIL OF LEGAL EDUCATION ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN NIKITA OTINGA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Through a petition dated 5<sup>th</sup> December 2022, the Petitioner approached this Court seeking the following reliefs:
  - a. A declaration that the actions and the omissions of the Respondent towards the Petitioner infringed on the Petitioner's fundamental rights and freedoms enshrined in Articles 27 and 41 of *the Constitution*.
  - b. A declaration that Clause 1 of the Petitioner's Contract of service with the Respondent dated 21<sup>st</sup> October 2021 in so far as the same speaks of a probationary period was discriminatory, in contravention of Article 27 and 41 of *the Constitution* of Kenya 2010.



- c. A declaration that the Respondent's contract of employment was not probationary in nature in light of section...of the Human Resource Manual and thus the said probationary requirement constituted an unfair labour practice contrary to Article 41 of the thus infringement.
- d. A declaration that the Performance Appraisal which the Petitioner was subjected to was wholly flawed in its entirety and the same violated the Petitioner's rights and freedoms as enshrined in Articles 27 and 41 of the Constitution of Kenya 2010.
- e. An Order for compensation by way of general damages, exemplary damages and aggravated damages under Article 23 (3) of the Constitution of Kenya 2010 for the breach of the Petitioner's fundamental rights and freedoms as enshrined in Article 27 of the Constitution of Kenya 2010.
- f. An Order for compensation by way of general damages, exemplary damages and aggravated damages under Article 23 (3) of the Constitution of Kenya 2010 for the breach of the Petitioner's rights and fundamental freedoms as enshrined in Article 41 of the Constitution as against the Respondent.
- g. An Order for compensation by way of general damages, exemplary damages and aggravated damages under Article 23 (3) of the Constitution of Kenya 2010 for the breach of the Petitioner's rights and fundamental freedoms as enshrined in Article 47 of the Constitution of Kenya 2010.
- h. A declaration that the Petitioner's termination was unlawful and unfair as prescribed in sections 41, 42, and 45 of the Employment Act 2007 and other employment laws.
- i. A Mandatory Injunction directed to the Respondent for the reinstatement and confirmation of the Petitioner as the Chief Executive Officer of the Respondent for the remainder of the contract period.
- j. In the alternative and without prejudice, an Order for payment of terminal dues to wit;
  - i. 3 months' salary and house allowance in lieu of notice of .....Ksh. 1, 750, 080.
  - ii. Unpaid leave days of Ksh...and leave allowance of Ksh...
  - iii. Gratuity as per Clause 11 of the Contract of service dated 21<sup>st</sup> October 2021.
  - iv. 12 months' salary as damages for the unfair termination or in alternative payment of salary for the remainder of the contract of service period.
  - v. The cost of the Petition and interest.

2. Contemporaneously with the filing of the petition, the Petitioner filed a Notice of Motion Application dated 6<sup>th</sup> December 2022 seeking temporary conservatory orders, stopping any and all transitional arrangements by the 1<sup>st</sup> Respondent in the implementation of its decision not to confirm him as Chief



- Executive Officer/ Secretary and an Order for his reinstatement as the Chief Executive Officer of the 1<sup>st</sup> Respondent, pending determination of the petition.
3. The 1<sup>st</sup> Respondent opposed the Petition upon premise of the grounds obtaining on the Replying affidavit sworn by Victoria Wahu, its Senior Legal Officer, sworn on 16<sup>th</sup> December 2022.
  4. Through a Notice of Motion Application dated 16<sup>th</sup> December 2022, the 2<sup>nd</sup> Respondent [then proposed 2<sup>nd</sup> Respondent/Applicant], sought leave to be enjoined as a party to the Petition, file and serve his reply to the Petition, and Cross-Petition thereto.
  5. The Petitioner filed Grounds of Opposition dated 22<sup>nd</sup> December 2022 in opposition to the 2<sup>nd</sup> Respondent's Application dated 16<sup>th</sup> December 2022 terming it as an abuse of the Court. He also filed a supplementary affidavit pursuant to the leave of this Court granted on 19<sup>th</sup> December 2022.
  6. On 17<sup>th</sup> January 2023, by consent of counsel for the parties, this Court gave the following directions:
    - a. That all the outstanding Applications herein are deemed abandoned in favour of the hearing of the substantive Petition.
    - b. That the proposed Respondent is hereby admitted as the 2<sup>nd</sup> Respondent.
    - c. That the 2<sup>nd</sup> Respondent to file and serve a response to the Petition within 7 days of today.
    - d. That the Petitioner to file and serve his submissions on the Petition plus a Supplementary Affidavit, if need be, within 14 days of service of the response.
    - e. That the Respondents to file and serve their written submissions within 14 days of service of the Petition.
    - f. That mention shall be on the 23/02/2023 to check on compliance and fix the matter for judgment.
    - g. That status quo be maintained.
  7. Prof. Wanyama Kulundu Bitonye who had been adversely mentioned by the Petitioner in his supplementary affidavit, to the effect that during his tenure as the 1<sup>st</sup> Respondent's Chief Executive Officer, he was a part time lecturer, filed an affidavit sworn on 9<sup>th</sup> January 2023, to counter the allegation. The 1<sup>st</sup> Respondent subsequently filed a supplementary affidavit sworn on 10<sup>th</sup> January 2023, by its senior legal Officer in answer to matters that came up in the Petitioner's Supplementary Affidavit.
  8. The 2<sup>nd</sup> Respondent in compliance with the Orders of the Court issued on 17<sup>th</sup> January 2023 filed his Response to the petition and a Cross-Petition.
  9. The Petitioner filed a Supplementary affidavit on 8<sup>th</sup> February 2023 in reply to the 2<sup>nd</sup> Respondent's response and Cross-Petition, affidavit that was sworn on the 23<sup>rd</sup> January 2023.
  10. The parties complied with the Courts directions on filing of submissions. Each of them has written submissions on record. The judgment herein is therefore with the benefit of all the parties' submissions.

### **The Petitioner's case**

11. The Petitioner stated that in October 2021, he was offered the position of the Chief Executive Officer of the Respondent after a rigorous and competitive interview process in which he emerged as a successful candidate. Following the offer, the parties herein executed a Contract of Service which was for a term of



- three years. The contract of service at Clause 1 stated that he was to be put on a supervised probationary period of six (6) months.
12. The Petitioner averred that following his appointment, he assumed his duties and responsibilities and began discharging them on 1<sup>st</sup> December 2021 as directed by the Respondent. Upon assuming office, he learnt that the Respondent had a Human Resource Policy and Procedure Manual dated August 2020 which outlined the guiding processes and procedures pertaining to all aspects of staff employment and staff life.
  13. It is averred that the said Human Resource Policy and Procedure Manual stated at Clause 2.25.5 stipulated;  

“Members of staff employed on contract terms will not be subject to probationary period, however quarterly appraisal shall be done on their performance in the first year of the contract.”
  14. It is contended that on 31<sup>st</sup> May 2022 the probationary period stated in the contract of service lapsed and on 7<sup>th</sup> June 2022, the Petitioner conducted a self-appraisal with the existing Staff Performance Appraisal system referenced in Clause 8.4 of the Human Resource Manual of the 1<sup>st</sup> Respondent which was emailed to the Chairperson of the 1<sup>st</sup> Respondent herein.
  15. The Petitioner contended that on 12<sup>th</sup> July 2022, he was informed by the Chairperson of the 1<sup>st</sup> Respondent that an appraisal committee had been constituted to evaluate his performance. On 5<sup>th</sup> August 2022 the Appraisal Committee and he had a meeting wherein his appraisal evaluation was discussed. He took the Committee through his self-appraisal form, providing documentary proof wherever it was needed.
  16. The Petitioner alleged that on 23<sup>rd</sup> September 2022, a Council meeting was held wherein the appraisal report by the Appraisal Committee was tabled and adopted as was without his input. He was not given any prior information that there was going to be a meeting wherein the report was to be adopted. The Petitioner contends that he only learnt of the adoption at the end of the meeting when he was called in and orally informed of the adoption. He was informed without much detail that a second different committee was to be constituted to present and discuss the Appraisal Report with him.
  17. The Petitioner contends that on 23<sup>rd</sup> September 2022, he wrote to the Chairperson of the Appraisal Committee requesting for the Appraisal Report as presented before the Council, the request didn't elicit any action by the Chairman. He got prompted to once more request for the same on 7<sup>th</sup> October 2022.
  18. On 12<sup>th</sup> October 2022, the Chairperson of both the Appraisal Committee and the newly convened feedback Committee responded to the request and shared a copy of the Appraisal Report with him. Upon reading the Performance Appraisal Report, he was shocked to learn that the Performance Appraisal Committee had departed from the then existing Performance Evaluation System and Formula and instead adopted a new unapproved Performance Evaluation System and Formula specifically for him.
  19. He further asserted that the evaluation report erroneously stated that he had not provided supporting documents in support of his Self-Appraisal Report. It further without his consent directed that he be subjected to a further six [6] months probationary.
  20. He went on to state that on the 13<sup>th</sup> October 2022 being aggrieved by the report, he wrote a detailed letter and email highlighting the shortcomings of the appraisal system, the resultant outcome, and his



grave concerns regarding the entire process. The letter and email were dismissively responded to by the 1<sup>st</sup> Respondent on the 15<sup>th</sup> October 2022.

21. On the 4<sup>th</sup> October 2022, a virtual meeting was held with the Feedback Committee. At the meeting he in line with his letter of 13<sup>th</sup> October 2022, reiterated his concerns on the Performance Appraisal System. The Committee took a position that the issue was outside the scope of its mandate. Eventually, the Committee gave a skewed report to the Chairperson of the Council, report which ignored his concerns.
22. The Petitioner further stated that subsequently the Performance Evaluation Committee convened and, in its conclusion, declared that the performance review wasn't in his favour and consequently he couldn't be confirmed into employment as Chief Executive Officer.
23. It is the Petitioner's position that the Respondent had from the onset subjected him to specialized terms and practices which were largely discriminatory to wit; subjecting the Petitioner to a Probationary period in clear departure of Clause 2.25.5 of the Respondent's Human Resource Policy and Procedure Manual, subjecting him to a Performance Appraisal System which wholly departed from the existing Performance Appraisal System stipulated in section 8 of the Human Resource and policy Manual, departing from the existing formula of Performance Appraisal wherein the Performance Evaluation Committee changed the computational formula for work objective and behavioural competency rating respectively from approved weighting of 70:30 and instead applied 30:70 weighting without prior approval and lastly subjecting the Petitioner to contract terms, systems and procedures specialized solely for him.
24. The Petitioner averred that on 29<sup>th</sup> November 2022 a Council meeting of the Respondent was held where the State Corporations Advisory Committee tabled the results of the Board Performance Evaluation Report which contained the results of the Council evaluation conducted on 13<sup>th</sup> October 2022. All the Council members was scored positively.
25. The Petitioner contended that an appraisal by an independent body yielded positive results towards him, a stark contrast with the results of a discriminatory body, which was heavily driven by vendetta and witch hunt against him.
26. It is contended that the results of the Performance Evaluation were flawed and marred with shortcomings which included;
  - a. The performance Appraisal departed from the existing Performance Management provided in section 8 of the Respondent's Human Resource Manual Policy and Procedures Manual.
  - b. The Performance Appraisal was carried out in a manner that was non-expeditious, inefficient, unlawful and procedurally unfair to wit;
    - i. The Appraisal Report was issued to the Petitioner two (2) months after the Performance Appraisal and three (3) weeks after the report was tabled before the Respondent's Council.
    - ii. The Appraisal Report extended the Probationary period for a further six (6) months without the consent of the Petitioner.
    - iii. The said six months extension Appraisal Report was back dated to run from when the Appraisal fell due being 31<sup>st</sup> May 2022 leaving the Petitioner with only one and a half months left in the extended probationary period by the time the contents of the report were made known to him.



- c. The Performance Appraisal Committee failed to address the concerns and the complaints pertaining the Appraisal system methodology adopted and utilized.
  - d. The Performance Appraisal Committee failed to furnish him with a copy of the second appraisal report pursuant to the meeting held on 23<sup>rd</sup> November 2022.
  - e. The Performance Appraisal Committee departed from the Respondent's set Performance Management System applicable to all staff members, applying an authorized appraisal system which consequentially greatly altered the results to his prejudice.
  - f. The Performance Appraisal System conducted as a whole was marred with cherry picking wherein the Appraisal Committee gaily cherry picked the laws, policy and manual applicable to his contract and service to the obvious prejudice of him.
27. The petitioner asserted throughout his relationship with the Respondent, he was subjected to discrimination and unfair labourer practices largely due to his stance on various decisions that he made that were within his mandate and aimed at curing various problems within the Council but which said decisions were largely opposed by various high-ranking employees and the Council members. They included;
- i. His decision to invite the National Intelligence Service to audit the Respondent's Enterprise Resource Planning System ( ERP) for purposes of uncovering erroneous award of marks in ATP Examinations, a decision that was opposed by the Chairman of the Respondent and consequentially shut down.
  - ii. The decision to invite Investigative agencies to carry out investigations of the exam leakage that happened in November 2021, a thing that was heavily opposed by the, Chairman and the Council members of the Respondent as the said Investigations would have implicated Mary Mutugi, the Director of Quality Assurance.
  - iii. His decision to invite the Investigative agencies to carry out Investigations over the theft and the loss of the Organization property and in particular the theft of printer toners worth Ksh. 1, 384, 150 was heavily opposed by the chairperson and the Council members of the Respondent and consequentially shut down.
28. The Petitioner averred that following his termination, the Respondent through various letters began alleging that among the reasons for the termination of his contract was a conflict of interest due to his position as a university lecturer. This notwithstanding that from the onset, he had made it known to the Respondent that he was a lecturer at the University of Nairobi. In fact, the acting C.E.O Mary Mutugi subsequent to the Petitioner's appointment issued an email to the Council speaking of his qualifications inclusive of his teaching role.
29. The Petitioner urges this Court to note that his predecessor Dr. Gakeri's served as the C.E.O of the Respondent, and a lecturer at the University of Nairobi at same time, without any allegations, concerns or complaints being levied against him.
30. The Petitioner averred that in a meeting held between the Chairperson of the Respondent Prof. Githu Muigai and the Council members Eric Gumbo, Mary Mutugi and him, he was assured by the Chairperson that his position as a lecturer would not be an issue vis-à-vis his role as C.E.O as he was similarly a lecturer teaching at the University of Nairobi.



31. It is averred that when it became apparent that yet again the Respondent was on a crusade against him, subjecting him to 'specialized treatment' and making his position as a University Lecturer and issue, he offered to resign from the said role.
32. It is the Petitioner's contention that the Respondent's actions in their entirety caused reputational damage in the public eye to him as seasoned advocate and academician, raised erroneous invalid questions on his capability to any would be employer and ultimately brought him personal and professional disrepute.
33. Lastly it is contended that at the time of the Respondent purportedly failing to confirm his appointment, the Petitioner was earning a monthly basic salary of Ksh. 503,360 and received a housing allowance of Ksh. 80,000 and communication allowance. Additionally, he had 24 days of unutilized leave days.

#### **1st Respondent's case.**

34. It is the 1<sup>st</sup> Respondent's case that the Petitioner has not been candid and truthful as he has camouflaged crucial facts preceding the Board's decision not to confirm him for employment as the Secretary/Chief Executive Officer of the Legal Education after the expiry of the probationary employment period.
35. It is stated that the reasons leading to the decision not to confirm his employment were;
  - a. The Board found the Petitioner culpable of unilaterally varying crucial Board decision. For example, In April 2022 the Board resolved that the Council publishes the list containing names of licensed legal education providers in Kenya with the exclusion of those that had failed to renew their license. The Petitioner caused to be uploaded on the Council's website, a list of licensed legal education providers including those whose licences the Council had not renewed.
  - b. In August the Board raised concerns about the Petitioner's continued teaching at the University of Nairobi at the expense of his core duties as the secretary/Chief Executive Officer of the Council of the Legal Education. As part of the remedial measures, the Petitioner expressly and unequivocally promised to resign from his former position. During the follow up appraisal in November 2022, it transpired that the Petitioner had not resigned from the position and was unapologetic about it. In fact, he told the Board that he had no intention of resigning until June 2023. The massive conflict of interest exhibited by the Petitioner left the Board with no option but to decline to confirm him for the position of Secretary/Chief Executive Officer.
  - c. During his tenure, the Petitioner absented himself from work on numerous occasions without sufficient reasons or permission. This created major operational and management problems at the Council. When this issue was pointed out in August 2022 appraisal, the Board required the Petitioner to take remedial action and provide it with evidence of compliance in the second appraisal in November 2022. He provided none.
  - d. When Board meetings were scheduled, the Petitioner attended the meetings late and when asked to explain his tardiness, he treated the Board members with disdain, arrogance and derision.
  - e. The Petitioner constantly exhibited practices and work tendencies that significantly affected the management of the Council. For example, the Petitioner threatened staff in the examination department by issuing numerous show-cause letters without Board approval, especially for persons employed as heads of Directorates. In the November 2022 appraisal the



Petitioner did not provide evidence to the committee regarding tangible measures he had taken to enhance staff collegiality and cohesion.

36. It is contended that the August and November appraisal reports contained the findings and recommendations. The two reports contained the underlying reasons that precipitated the decision of the Board. The final Board decision on the unsuitability of the Petitioner was unanimous.
37. The 1<sup>st</sup> Respondent averred that to fully operationalise its mandate, it has crafted a Strategic Plan with a visionary outlook to be globally competitive and offer transformative legal education and training in Kenya. The Strategic Plan also lists the Council's Mission as to assure quality legal education and training through licensing and the supervision of legal education provides; administration of the Advocates Training Program examination and advising the Government on legal education.
38. It is contended that as part of its core institutional structure, section 11 of the [Legal Education Act](#) requires the Council to recruit a Secretary who is also its Chief Executive Officer ('the C.E. O). The C.E.O is responsible for the day-to operations and management of the Council and is responsible and accountable to the Council's Board.
39. It is averred by the 1<sup>st</sup> Respondent that the person to be employed as the Chief Executive Officer of the Council is required without exception, to promote the fundamental national values and principles of governance in Article 10 of [the Constitution](#) that are binding to the Council, the Institution's statutory profile and prestige, and the core values that the Council has deduced to be crucial in the delivery of its mandate.
40. On 19<sup>th</sup> October 2021, the Council engaged the Petitioner to be its Secretary/Chief Executive Officer for a contractual period of 3 years subject to confirmation after serving on a supervised probationary period of 6 months.
41. The Petitioner's contract of service obligated him to report to the Board of Council of Legal Education. As per the Contract of service, the Petitioner was required to resolutely and fully implement all resolutions of the Board without exception, in a result oriented and timely manner to achieve the Council's constitutional obligations, statutory mandate, administrative procedures, the Council's objectives and core values.
42. It is contended that on 7<sup>th</sup> June 2022, the Petitioner initiated a self – Appraisal whereupon a Committee of the Board of the Council was formed to review. And after a thorough consideration and while according to the Petitioner a fair hearing, the Committee made key findings on the said report.
43. It is averred that a grave concern which was raised by the Board was the Petitioner's continued teaching at the University of Nairobi despite being a full-time employee of the Council. Specifically, the Board noted that the Petitioner had been allocated substantial man hours to supervise undergraduate and post graduate exams at the University of Nairobi for the 2021/2022 Academic year, a situation that made him to be away from the office during the designated working hours for long duration of time, thereby affecting crucial operations at the council and the Petitioner was required to remedy the situation.
44. The 1<sup>st</sup> Respondent states that flowing from of the findings in the said appraisal, the Board agreed to place him on a further probationary period of 6 months to enable him under its guidance to undertake remedial measures. Specifically, the extended duration was to enable the Petitioner to acquaint himself with the expectations of the Board of the Council in relation to his responsibilities as the C.E.O and further to facilitate the intended improvements and appreciation of the concerns raised by the Board.
45. It is contended that on November 2022, the Board constituted a committee to review the Petitioner's status of employment and ascertain the levels of compliance with the recommendations made in the



August 2022 Appraisal report, following the agreed interventions undertaken by himself and the designated Committee of the Board. The Committee heard the Petitioner during the review meeting on 23<sup>rd</sup> November 2022. In the said review meeting, the Committee found as hereunder;

- a. Conflict of interest; the Petitioner continued teaching at the University of Nairobi, an institution that the Council requires to continuously comply with licensing regime and conditions in the [Legal Education Act](#). This comprised massive conflict of interest. The Petitioner admitted the conflict of interest and openly stated that he would continue to teach at the University until June 2023, the Council found this untenable. Further, Council noted severally that the Petitioner failed to declare the conflict of interest as provided for in section 16 (7) and (8) of the [Leadership and Integrity Act](#), 2012 when the council deliberated on matter regarding the University of Nairobi. That he deliberately participated in those matters.
  - b. Accuracy of the information provided to the Board; the Committee noted improvement on this issue and commended the Petitioner.
  - c. Timeliness and accuracy of the information provided to the Board; the Committee raised concerns on this item- the Petitioner was indicted for sending piecemeal and incomplete reports in unreasonable timelines.
  - d. Unilateral and unauthorized variation of Board resolution; the Petitioner still attempted to vary resolution of the Board directives. Specifically, the Board reprimanded the Petitioner for attempting to vary Board resolutions on the licensing of the proposed Bachelors of Laws Programme of Maseno University, Kisumu Campus.
  - e. Implementation of Board Resolution; the Committee found that the Petitioner still did not implement the Board resolution by the Board of the Council. Specifically, the Petitioner declined, neglected and failed to implement the Board resolution from the Quality Assurance and Compliance Committee of the Council recorded in the meeting held on 3<sup>rd</sup> June 2022 under MIN. 8/1/ CLE/QCL/ 2022/2023. The Petitioner failed to publish names of the status of legal education providers despite a standing Board Resolution of April 2022 for which he was reprimanded by the Board.
  - f. Inclusive and consultative leadership; the Petitioner did not provide evidence on this aspect. Specifically, there was no evidence that as the CEO He convened and held an ordinary management meeting, nor meetings with senior management of the Council to facilitate collective decision making as envisaged by the Board.
  - g. Tardiness; the Petitioner had not self-improved on time management and it was noted that he still arrived at the meetings late despite that this issue was pointed out in August appraisal for the Petitioner to undertake remedial measures.
46. It is further stated that because of the grave issues raised in the appraisal reports and the inability of the Petitioner to remedy the situation, the Board of the Council unanimously resolved not to confirm the Petitioner for the employment as the CEO of the Council of legal Education, consequently, the Board issued a letter dated 29<sup>th</sup> November 2022 to the Petitioner communicating the decision. The Board further wrote a letter to the Attorney General explaining its decision not to confirm the Petitioner.
47. It is contended that the Petition herein has not been filed in good faith. The Petitioner simply wants to use the court proceedings to advance personal interests and not the wider objectives of the Council of Legal Education and the Public interest.



48. Lastly it is contended that the report dated 29<sup>th</sup> November 2022 by the State Corporation Advisory Committee was not an appraisal report contemplated by Clause 3 of the Petitioner's employment contract. The report contains an evaluation of all Board members regarding their role in the Board of the Council of legal Education. In the said report the Petitioner was ranked last.

### **The Petitioner's Rejoinder.**

49. The Petitioner filed a supplementary affidavit sworn on 22<sup>nd</sup> December 2022. In it he contends that the 1<sup>st</sup> Respondent's replying affidavit is premised on both factual and legal mischaracterization and misrepresentation thereby rendering it untenable and therefore incredible.

50. He states that the allegations brought forth by the 1<sup>st</sup> Respondent are spurious and factually incorrect, as;

a. The November Appraisal Report annexed to the affidavit filed by the Respondent was never availed to him at all by the Respondent. Whereof, he did not get the opportunity to rebut its contents. The Report is overtly and excessively negative in its contents. It obscures his achievements which contributed to overall good performance of the Council.

b. Alleged Conflict of interest:

i. The Petitioner disclosed that he was teaching at the University of Nairobi upon taking up his employment. The council was at all material times aware of the Petitioner's engagement at the University as unpaid lecturer. The Dean of the Faculty of law where he taught postgraduate courses under CASELAP was aware of this fact.

ii. The Chairperson of the Board, SC Githu Muigai, who also teaches at the University was aware of this fact. The issue of conflict of interest became an issue late in the appraisal process pointing to the vendetta against him.

iii. This is compounded by the fact that the predecessor of the Petitioner was allowed to teach at the same University without any protestation from the Board.

iv. In the Board meeting where the matter of Nairobi was discussed the Petitioner did not have a vote (ex-officio) and therefore could not have influenced any decision.

v. The issue of appointment was communicated to all the Board members on email, thread sent by M/s Mary Mutugi. She pointed out his involvement with the University of Nairobi where some Board members positively responded to the said email.

c. Variation of Board Resolution and implementation

i. Contrary to the assertion in the Report, he attempted to implement faithfully the resolution of the Board regarding licensing of Legal Education providers but was thwarted by the Board members of the Committee on Quality Assurance, Compliance and licensing. In its meeting on 20<sup>th</sup> April 2022 Council resolved as follows:

“The Council shall issue provisional licences to the Legal education providers that have applied for licensing and the renewal of the license in respect to the Legal Education programmes which have met all the requirements. The Provisional licence shall run for a period of one year renewable annually as per the management request.”



- ii. After the Investigation of Maseno University premises, the QCL Committee resolved to recommend to the council to award Maseno University a licence but did not state the duration. When the Report of the Inspection was shared with the Committee members, the same indicated that the proposed licence duration would be five years.
  - iii. He brought to the attention of the members of the 20<sup>th</sup> April 2022 Council resolution which had not been vacated or varied by the Council. He requested the Director, Quality Assurance, Compliance and Licensing to clarify the matter to the Committee since she was the author of the Board paper which resulted in the said resolution but she declined.
  - iv. The Chair of the Committee and the members overruled his position and decided instead to recommend an award of a five-year licence against the 20<sup>th</sup> April Resolution. This clearly reflects a persistent trend where the Board members particularly (Mr. Eric Gumbo) misinterpreted Board Resolution to create the impression that the Petitioner deliberately varied or refused to implement the same.
  - v. Whereas the Board resolution reads that: “Management shall publish a notice on institutions licensed as at 30<sup>th</sup> June 2022,” the same did not preclude publication of institutions whose Application for licences were under consideration. CLE has maintained a tradition of publishing a comprehensive list containing licensed institutions as well as those whose applications were under consideration, which informs all the stakeholders the institutional licensing status of the legal education providers.
  - vi. The Petitioner approved for publication, a notice which was in line with this long-standing tradition, and on advice from the Director of the Quality Assurance Compliance and licensing which was similarly to the notice he had approved for publication on 31<sup>st</sup> December 2021 and had no reason to believe that the advice from Ms. Mutugi was a variation of the Board resolution.
- d. On alleged Absenteeism and Tardiness:
- i. The only instance where he was absent from office was when he was away on duty by virtue of being a CEO and Accounting Officer of CLE. Due to the nature of his role, he was required most of his time to attend numerous workshops and conferences.
  - ii. He provided evidence of the same to the Chairman of the Appraisal Committee by way of an email dated 28<sup>th</sup> November 2022; Being away on duty did not in any way create operational and Management problems.
  - iii. All approvals for payments and operations were granted in good time, causing no disruption to the Council business. In most of the activities, the CEO was in the company of members of the Management team and regularly consulted on management issues.
  - iv. CLE had instituted business continuity measures in response to COVID-19 Pandemic, which facilitated virtual consultations and decision making. Absence from office while on duty did not undermine continuity of CLE Business.
  - v. No board meeting minutes ever indicated that he was late.



- e. The Petitioner never issued show-cause letter to the staff in the Examination Department as alleged. However, on 23<sup>rd</sup> June 2022 as part of the due diligence, he wrote to four staff members requesting them to respond to the whistle-blower email that had been circulated widely accusing CLE staff of abetting in “Hawking of grades at the Council. “The same staff had been adversely mentioned in the whistle-blower email. The response of the staff was presented to a Board meeting convened on 19<sup>th</sup> July 2022. Because of trying to get to the root of the incessant whistle blower emails on past irregularities at the CLE, the Council initiated and pursued a vendetta against him. The Petitioner convened senior Management meetings to promote collegiality and provided the chairperson of the Appraisal Committee with email inviting the Directors to the meetings held in October and November for that purpose.
  - f. The Clause in contract on probation offends the Guidelines on terms and Conditions of Service for State Corporation Committee on Contracts of Employment for the CEOs in State Corporations (13<sup>th</sup> January 2016 and the Human Resources Policies and Procedures Manual for Public Service (2016) whereof the said peremptory directives excludes the CEOs on contract from being subjected to probation.
51. It is contended that it was always the tradition for the Respondent to appoint University Lecturers as the CEO and this is demonstrated by the fact that two of his predecessors; Hon. Justice Dr. Jacob Gakeri and Prof. Kulundu Bitonye were part time lecturers during their tenure.
  52. The Petitioner avers that given that his appointment was done by the Board with full knowledge of his involvement with the University of Nairobi and the fact that the first time the issue was brought up was six months to his employment, the application of the doctrines of estoppel, Acquiescence and waiver apply in his favour.
  53. It is his position that the issue of Conflict of interest does not have a substantive bearing on discharge of his duties owing to section 5 of the University Education (Amendment) Act 2016 and the holding in the case of Kenya Medical Laboratories and Technicians and Technologists Board & 4 Others vs Attorney General; Council of Legal Education; Kenya Law Reform Commission & 4 Others (2020) eKLR where the Respondent’s justification based on this issue is just an act of expediency.
  54. It is averred that the minutes dated 22<sup>nd</sup> September 2022 are a total fabrication and contains fictitious deliberations and it makes no sense for a Council member (Mr. Eric Gumbo) to sign-off minutes of a Council meeting where the Petitioner as Secretary to Council was recorded as present during the proceedings. The authentic minutes written and signed by the Petitioner were confirmed by the Board in its sitting on 29<sup>th</sup> November 2022, he never agreed to the extension of the Probation.
  55. The Petitioner contends that the said Appraisal report was purportedly presented and considered by the Board during the period he had been asked to recuse himself from the meeting. He was therefore not privy to the contents of its report and its recommendations. The Chairperson of the Council merely verbalized the outcome of the report when he was called back in the meeting. The resolutions of the meeting did not benefit from his consideration of the content of the appraisal report.
  56. He asserts that he requested for the Appraisal report and got an opportunity to read the contents, contents which he disputed their entirety. No evidence has been rendered by the 1<sup>st</sup> Respondent showing that he consented to the extension of the probation period. He continued engagement with the Appraisal Committee over the contents of the report under protest. The Respondent arrantly disregarded the Statutory Safeguards contemplated under the Employment Act especially on the substantive and procedural justice thus the termination was unfair.



### **The 1st Respondent's Rejoinder**

57. The 1<sup>st</sup> Respondent filed a supplementary affidavit sworn by Victoria Wahu on 10<sup>th</sup> January 2023. In it she contends that the Petitioner is out of touch with the role of the Chairperson of the Board of the Council of Legal Education, who was appointed by the President as a Non-Executive Chairperson and can hold other offices including teaching at any institution in Kenya, and therefore a non-comparable situation, upon which the Petitioner seeks to rely on.
58. The Council was not aware that during his tenure as Secretary/CEOs, Dr. Hon. Jacob Gakeri taught at any Institution. Relatedly, Prof. Wanyama Kulundu- Bitonye had sworn an affidavit equivocally denying that during his tenure as the CEO of the 1<sup>st</sup> Respondent, he taught at any institution as alleged by the Petitioner.
59. It is contended that there was a standing Board resolution that required the exclusion of the University of Nairobi Mombasa Branch from the list of licensed Legal education providers, which directives the Petitioner failed to implement in spite by the caution given to him by the Technical Officer.
60. The 1<sup>st</sup> Respondent takes a position that the Petitioner was at all material times required to declare a conflict of interest in spite of his status as an ex-officio member of the Board. The Petitioner took part in the discussions in the Board on the matter of the University of Nairobi- Mombasa campus which created a negative perception of the Council in the eyes of other universities, especially private Universities.
61. It is stated that the Respondent was guided by the Employment Contract signed with the Petitioner, which provided for the terms of his engagement, duly executed with no variations by him. The Respondent being a State Corporation and guided by the *Leadership and Integrity Act*, informed the Petitioner that he was required to finalize and resign from teaching position at the University of Nairobi a position the Board found to be untenable and concentrate on his work as the CEO at the Council of Legal education. However, he failed to sever the relationship and instead stated that he was to continue teaching until June 2023, perpetuating the conflict even further.
62. The allegation by the Petitioner that one of the Board members signed minutes instead of him is mis anchored. The main agenda of the meeting was the Petitioner's Appraisal as evidenced in the minutes and the Petitioner could not have recorded the minutes of a meeting in which he was a subject of discussion and by his admission had recused himself. The Board merely appointed one member to record the deliberations.
63. Lastly, the Petitioner consented to the extension of his probation period and wilfully participated in the Performance Improvement and resulting Appraisal culminating in November 2022 report.

### **Affidavit by Prof. Wanyama Kulundu Bitonye.**

64. Prof. Wanyama Kulundu filed an affidavit sworn on 9<sup>th</sup> January 2023 in opposition to the Petitioner's supplementary affidavit in which it was alleged that during his tenure as the Chief Executive Officer of the 1<sup>st</sup> Respondent between 2004 and 2020 he was a part time lecturer.
65. He contends that during his tenure as the CEO at the Council of Legal Education he did not work as a lecturer in any University in Kenya or anywhere in the world. Such an engagement would amount to a conspicuous manifestation of conflict of interest.



## 2nd Respondent's Response to the Petition.

66. The 2<sup>nd</sup> Respondent filed his Response to the Petition and cross-Petition on 23<sup>rd</sup> January 2023. He contended that the Petitioner as CEO of the 1<sup>st</sup> Respondent was not subject to the stipulations of its Human Resource Policy and Procedure Manual of August 2020.
67. He further asserted that there was no valid contract that existed between the Petitioner and the 1<sup>st</sup> Respondent in the first placed, so as to call the operation of the manual into operation in the relationship under the contract.
68. It was averred that the issuance of the letters of appointment and the assumption of duties by the Petitioner effective 1<sup>st</sup> December 2021 as the Chief Executive Officer of the 1<sup>st</sup> Respondent while still in active employment or association with the University of Nairobi School of Law constituted an outright violation of the law given the mandate of the 1<sup>st</sup> Respondent under section 8 (1) of the [Legal Education Act](#), 2012.
69. It is averred that no lawful, formal and valid Appraisal or evaluation of the Petitioner's performance could be undertaken by the 1<sup>st</sup> Respondent given that his purported employment ipso facto violated section 16 (2) of the [Leadership and Integrity Act](#), 2012 which provides that a state or public officer shall not hold shares or having other interest in a corporation or other body if holding those shares or having that interest would result in a conflict of that state officer's pr public officer's personal interest and other Officers' official duties.
70. The Petitioner's claim on discrimination stands on lose ground as it is anchored on the 1<sup>st</sup> Respondent's Human Resource and Procedures Manual, 2020 and which was not applicable to him as the CEO.
71. The allegation that a flawed performance appraisal was undertaken against the Petitioner has no sound basis for the following reasons that;
- a. The 1<sup>st</sup> Respondent's Human Resource Policy and Procedures Manual was not applicable to the Petitioner, who was purportedly employed as the CEO.
  - b. The Petitioner was employed through a process that was flawed and contrary to both [the constitution](#) and legislation.
  - c. There was no obligation on the part of the 1<sup>st</sup> Respondent to confirm his employment or confer any benefit to him upon the realization that during the subsistence of his employment as the CEO, he was and continued to be employed by the university of Nairobi, school of law an institution that the 1<sup>st</sup> Respondent was mandated to regulate, license and supervise.
72. The 2<sup>nd</sup> Respondent contends that it was illegal, irregular, and a violation of both [the Constitution](#) and the statute for the petitioner to serve as the Chief Executive Officer of the 1<sup>st</sup> Respondent while still in the employment of the University of Nairobi School of Law as a lecturer, an institution that the 1<sup>st</sup> Respondent is mandated to regulate, licence and supervise in pursuance to the Act establishing it.
73. The termination of his employment on this account was justified and it is immaterial that he offered to resign as a University Lecturer.
74. The 2<sup>nd</sup> Respondent admits the fact that the Petitioner is a seasoned Advocate of the High Court of Kenya but denied that the actions of the 1<sup>st</sup> Respondent caused him any reputational damage as alleged and being a seasoned Advocate, he knew or ought to have known that;



- i. The 1<sup>st</sup> Respondent is a state corporation that is established under the [Legal Education Act](#) 2012.
  - ii. The 1<sup>st</sup> Respondent is mandated by section 8 of the [Legal Education Act](#) 2012 to regulate, license and supervise the Legal education in Kenya.
  - iii. One of the institutions that the 1<sup>st</sup> Respondent has licensed and is mandated to regulate and supervise is the University of Nairobi.
  - iv. The CEO of the 1<sup>st</sup> Respondent is according to section 11 (4) of the [Legal Education Act](#) 2012, responsible for the day-day running of its affairs and its principle, responsible for the licensing and the regulation of the Legal Education in Kenya.
  - v. The law and in particular Article 10 (2) and 232 (2) of [the Constitution](#) and section 16 (1) of the [Leadership and Integrity Act](#) 2012, enjoins a public officer such as the CEO of the 1<sup>st</sup> Respondent to use his best efforts to avoid being in a situation where personal interest conflict or appear to conflict with the public officer's official duties.
  - vi. It is in conflict of interest and a violation of the national values of good governance, integrity, transparency and accountability for a serving CEO of the 1<sup>st</sup> Respondent to continue to hold office and be in employment as a Lecturer in the institution the 1<sup>st</sup> Respondent was mandated to regulate and license.
75. Lastly it is averred that the Petitioner's employment as the Chief Executive Officer was unlawful and preceded by lack of or improper due diligence in regard to the conflict of interest and his continued holding office while at the same time serving as a Lecturer at the University of Nairobi and drawing benefits from both institutions was dishonest and violation of the law.

### **The 2nd Respondent's Cross-Petition**

76. In his Cross-Petition, the 2<sup>nd</sup> Respondent challenges the legality and the constitutionality of the appointment and employment of the Petitioner as the Chief Executive Officer of the 1<sup>st</sup> Respondent vide a contract dated 19<sup>th</sup> October 2021.
77. It is contended that the Petitioner having been appointed as the CEO and while discharging his duties for the 1<sup>st</sup> Respondent, continued to be in employment as a lecturer of the University of Nairobi in which the 1<sup>st</sup> Respondent had the oversight role in licensing and supervising at the same time. He ought to have resigned from his employment as the lecturer of the University of Nairobi before accepting his appointment as the CEO of the 1<sup>st</sup> Respondent. Unfortunately, he accepted the appointment and assumed office as the 1<sup>st</sup> Respondent's CEO while continuing his employment as a Law Lecturer and continues to draw benefits to date, attributable to gainful employment within the meaning of section 26 of the [Leadership and Integrity Act](#) 2012.
78. The 2<sup>nd</sup> Respondent asserts that the Petitioner violated the national values and principles of good governance provided for under Article 10 of [the Constitution](#) of Kenya, 2010. It states that Section 8[1] of the [Legal Education Act](#), 2012 envisages that the functions of the 1<sup>st</sup> Respondent shall be to regulate legal education and training in Kenya, licensing and supervising legal education providers. Pursuant to subsection [2], it is responsible for setting and enforcing standards relating to the accreditation of legal education providers for the purposes of licencing.
79. Section 11[1] of the [Legal Education Act](#),2012, bestows upon the Council of Legal Education with the authority to appoint a Chief Executive Officer to the Council. The Chief Executive Officer is



responsible for the day -to -day running of the affairs of the Council. In such a position, she or he is required to uphold national values and principles of good governance as envisaged in Article 10 of [the Constitution](#).

80. It is the 2<sup>nd</sup> Respondent's position that the conduct of the Petitioner of accepting employment with the 1<sup>st</sup> Respondent and failing to relinquish his position and services as a lecturer at the University of Nairobi was a clear violation of the national values and principles of governance. The 1<sup>st</sup> Respondent failed to uphold good governance, transparency and integrity when offering the Petitioner herein the contract of service when it was evident that he was and continued to be employed as a lecturer by an institution that the 1<sup>st</sup> Respondent was mandated to regulate and supervise.
81. It is contended the Petitioner's employment by the 1<sup>st</sup> Respondent as the CEO violates Article 10 (20) of [the Constitution](#) in that:
- i. There are over twenty legal education providers in Kenya. The University of Nairobi is one of the accredited legal education providers.
  - ii. All Legal education providers are, pursuant to Article 27 (1) of [the Constitution](#), equal before the law and have the right to equal protection and equal benefit of the law.
  - iii. That a lecturer employed by one legal education provider, namely the university of Nairobi, for gain would simultaneously be appointed as the CEO of the 1<sup>st</sup> Respondent and therefore responsible for the regulation, licensing and supervision of the other nineteen legal education providers in addition to the university of Nairobi creates unequal imbalance and brings dishonour in the regulation of legal education and training in Kenya contrary to the national values of good governance and accountability.
  - iv. It is not transparent and accountable for the 1<sup>st</sup> Respondent to employ a serving lecturer in an institution that it is by law mandated to be regulated, licensed and supervised.
82. It is contended that the Petitioner having a clear knowledge that being the CEO of the 1<sup>st</sup> Respondent he had the mandate to supervise the institution that he was still offering services for as a lecturer depicts a lack of integrity and clear conflict of interest in breach of [the Constitution](#) and statute law. Clause 23 of the Petitioner's contract of service outlawed conflict of interest. The holding and continuation of the Petitioner as a lecturer constituted an outright violation of the law and relevant code of conduct.
83. The petitioner knowingly put himself in a situation of conflict of interest, contrary to the provisions of section 12 and 16 of the Public Officer Ethics and the [Leadership and Integrity Act](#).
84. The 2<sup>nd</sup> Respondent asserts further that the Petitioner's conduct affronted the provisions of Article 232 of [the Constitution](#). The conduct depicted lack of high standards of professionalism on his part, and lack of impartial and equitable provision of services.
85. By reason of the premises foregoing, the 2<sup>nd</sup> Respondent seeks for the following reliefs;
- a. A declaration be and is hereby issued that given the mandate of the 1<sup>st</sup> Respondent under section 8 of the [Legal Education Act](#), 2012, to wit, the regulation, licensing and supervision of the legal education providers in the Republic of Kenya, the employment of the Petitioner as its CEO vide a contract dated 19<sup>th</sup> October 2021 during the subsistence of his association and or employment as a lecturer at the University of Nairobi amounts to conflict of interest and contravenes section 12 and 16 of the [Public Officer Ethics Act](#) 2003 and the [Leadership and Integrity Act](#) 2012.



- b. A declaration be and is hereby issued that the 1<sup>st</sup> Respondent acted irregularly and in contravention of the law to wit article 10 (2) and 232 as well as Chapter six of the Constitution of Kenya, 2010 in issuing the Petitioner with the contract of service dated 19<sup>th</sup> October 2021 as its CEO when he was still employed and offering services as a lecturer at the University Faculty of law.
- c. A declaration be and its hereby issued that the Petitioner’s employment with the 1<sup>st</sup> Respondent’s CEO and at the same time, offering services as a law lecturer was and remains an outright illegality and amounts to conflict of interest in breach of national values and principles of good governance under Article 10 of the Constitution and as well as the Leadership and Integrity Act 2012 and thus null and void.
- d. A declaration be and its hereby issued that the Petitioner violated Articles 10 (2) and 232 of the Constitution of Kenya in accepting to be employed as the CEO of the 1<sup>st</sup> Respondent vide a contract dated 19<sup>th</sup> October 2021 and purporting to discharge duties that pertain to that office while in active employment or association with the University of Nairobi faculty of Law an institution and legal education provider that the 1<sup>st</sup> Respondent is enjoined to regulate, license, accredit and supervise.
- e. A declaration be and is hereby issued that having violated Articles 10 (2) and 232 of the Constitution and holding public office contrary to section 12 and 16 of the Public Officer Ethics Act 2003 and the Leadership and Integrity Act 2012, the Petitioner. Emmanuel Kituku Wambua is unfit to hold any public office.
- f. An Order be and is hereby issued directing the 1<sup>st</sup> Respondent either directly or through relevant agencies to recover all the salaries, benefits and any allowance paid to the Petitioner pursuant to the illegal contract of service dated 19<sup>th</sup> October 2021 appointing him as the 1<sup>st</sup> Respondent’s CEO when he was already employed serving as a University lecturer an institution that he was mandated to regulate, license and supervise.

**Petitioner’s Rejoinder to the 2<sup>nd</sup> Respondent’s Response and Cross-Petition**

- 86. The Petitioner filed replying affidavit to the 2<sup>nd</sup> Respondent’s response and Cross-Petition sworn on 8<sup>th</sup> February 2023. He, contended that the cross-petition was premised on misapprehension and ignorance of both factual and legal issues surrounding his employment with the 1<sup>st</sup> Respondent and the same constituted an abuse of Court.
- 87. It is averred that the 2<sup>nd</sup> Respondent’s Cross-Petition and the involvement in these proceedings is vexatious as they are wont on serving a collateral objective cleverly engineered by the 1<sup>st</sup> Respondent.
- 88. It is averred that the Petitioner’s employment as the CEO of the Council of the Legal Education was through a competitive process and was therefore above the Board. Several candidates were shortlisted but he emerged the successful candidate. The same was communicated to his referees at the University wherefore they responded accordingly.
- 89. The Petitioner contends that his association with the University as a lecturer, his terms of engagement with them were based on volunteer basis and he was neither remunerated for services nor recognized



as an employee. His period of service under the appointment letter dated 18<sup>th</sup> March 2021 was for a fixed term of one year.

90. The Petitioner avers that in any event, his decision to teach for free at the University of Nairobi was a public-spirited gesture for which no personal benefits was expected and none accrued as said. The Course which he was teaching was a multi-disciplinary in nature and was therefore not the kind envisaged under section 22 and 23 as read with the second schedule of the [Legal Education Act](#).
91. The Petitioner contends that though section 8 of the [Legal Education Act](#) 2012 provides for the function of the Council, the said provision was effectively over ridden by section 5 A of the [Universities Act](#) 2012 and in so far as the legal foundation of the 2<sup>nd</sup> Respondent's case is predicated on section 8 of the [Legal education Act](#), the claim was baseless and a non-starter. The sole mandate of accrediting and supervising universities was exclusively reposed in the Commission for University Education.
92. It is contended that the said section 5A preceded his appointment and therefore no conflict can be imputed in discharge of his functions. That assuming that there was a conflict of interest, the same was not that is inconsistent, incompatible or prejudicial to the discharge of his official duties. Section 12 (3) of the [Public Officer Ethics Act](#) 2012 envisage permissive situations where personal interests of the public officer conflict with official duties without necessarily violating the laws especially where the said officer discloses or declare the conflict of interest.
93. The affiant contends that the [Leadership and Integrity Act](#) under section 16 and part IV provide for an elaborate mechanism of addressing or curing conflict of interest and the same do not include automatic or abinitio voiding contracts of employment. In any event section 43 and 44 of the Act provide for the procedure to be followed before an integrity pronouncement or determination of public officer can be made. Furthermore, the alleged acts of violation of [the Constitution](#) are borne out of misapprehension of the law and therefore unfounded.
94. Lastly it was averred that Part III of the [Legal Education Act](#) provides that it is the Council and not the CEO Which was vested with the power to license universities. The CEO though the Accounting Officer, is an ex-officio member of the Council with no voting right. This means that in any event even if the CEO was conflicted, his conduct would not have any bearing whatsoever as the Council was the decision-making organ. Furthermore, the Cross-Petition should be dismissed for being vexatious, frivolous and an abuse of the Court process.

### **Petitioner's submissions**

95. The Petitioner submits that his employment relationship with the 1<sup>st</sup> Respondent was to be guided by the employment contract that was entered into between him and the 1<sup>st</sup> Respondent, and the Staff Rules and Regulations under the Human Resource Manual. Further that since his position was in the public service, the 1<sup>st</sup> Respondent was deemed to draw guidance from inter alia Guidelines and Terms and conditions of Service for State Corporations [2004], the Advisory from the state Corporations Committee on Contracts of Employment for CEOs in state corporations and the Human Resource Policy and Procedures Manual for Public Service [2016].
96. The petitioner further submits that it was unlawful and discriminatory for the 1<sup>st</sup> Respondent to put him under probation yet Clause 2.25.5 of its Human Resource Policy and Procedural Manual provided that members of staff employed on contract terms Guidelines on were not subject to probationary period. Too, the Public Service Guidelines on Terms and Conditions of Service, do not allow probationary service for employees on contract.



97. The Employment contract provided for his appraisal from time to time. The 1<sup>st</sup> Respondent as a matter of practice had adopted a framework document for appraisal of its staff, a framework which the Respondent unilaterally amended when it came to his appraisal and to his prejudice. His protests didn't bear any fruits.
98. On the Respondents position that he was conflicted, the petitioner submits that from the outset he had made known to the 1<sup>st</sup> Respondent of his engagement with the University of Nairobi as a volunteer Lecturer. The engagement with the University was for a fixed term of one year, with an appointed lapse date, 26<sup>th</sup> March 2022.
99. His predecessors also doubled up as lecturers of the University of Nairobi, the principle of legitimate expectation demands that he be not treated differently.
100. The Petitioner further submits that Section 42 of the *Employment Act*, provides that a probationary period shall not be more than six months but may be extended for a further period of not more than six months with the agreement of the employee. The probation period terminated on 31<sup>st</sup> May 2022 by operation of the Law. The alleged extension of the period was done retrospectively and outside the statutory 6 months. At the lapse of the probation period without termination, he by operation of the law got confirmed into employment. To buttress this point, he places reliance on the decision in *Lennox Hodari Mwilo v Absa [K] PLC [2022] eKLR*.
101. His employment status at the time of his termination was that of a confirmed employee and all the safeguards availed under section 41 of the *Employment Act* crystalized ipso facto. The extension of his probationary period was done without his consent. Reliance was placed on the case of *Monica Munira Kibuchi & 60 Others v Mount Kenya University [2021] eKLR*.
102. It was the Petitioner's submission that the procedural edicts contemplated under section 41 of the Act were not adhered to by the 1<sup>st</sup> Respondent. Reliance was placed on the case of *Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR*.
103. The Petitioner submits that there is no doubt that the termination of his employment was no account of poor performance. Thus, the 1<sup>st</sup> Respondent was required under law to demonstrate that there is an employment policy or practice on how to measure good or bad performance. It was also obliged to show that it had evaluation policies or tools in place in achieving a fair and just review of an employee's performance. The Petitioner relies on the case of *National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR* where the Court of Appeal held:
- “It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place.”
104. On the issue of conflict of interest, it was further submitted that Furthermore, the doctrine of waiver, acquiescence and estoppel apply in respect to the interpretation of whether or not there was conflict of interest. The 1<sup>st</sup> Respondent had created institutional acquiescence or condonation on the issue of conflict of interest. Reliance was placed on the case of *748 AIR Services Limited v Theuri Munyi [2017] eKLR* where the court held:
- “This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the *Serah Njeri Mwobi* case (*supra*) and we adopt its analysis in respect of waiver and estoppel by conduct, thus: -



The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”

105. The Petitioner submits that his Constitutional right under Article 27 was breached by the Respondent as there was preferential treatment by the 1<sup>st</sup> Respondent. Reliance is placed on the case of Telkom Kenya Limited v John O. Ochanda [2013] eKLR, where the Court of Appeal held;

“The right to work is a basic human right whereas here, the employer decides to retrench employees, it is under a duty to do so fairly and equitably ..... But where as in this case, the Appellant deliberately decided to use a formula which resulted in preferential treatment of employees that action amounted to blatant discrimination.”

106. On the breach of Article 41 and 47 of *the Constitution* the Petitioner asserted that through citing various incidents, he has sufficiently demonstrated that his rights were breached. The Respondent put him on probation yet he was not a permanent and pensionable employee; whereas his predecessors had doubled up as a lecturer, he was not vilified or his contract terminated; the Respondent deviated and tinkered the appraisal system thereby formulating a different yardstick to his disadvantage; and he was not given an opportunity to defend himself against the accusation of poor performance. To bolster this submission, he relies on the case of Anthony Yamo Ihito v Basco Products Kenya Limited [2022] eKLR where it was held:

“The Claimant was not accorded an opportunity to respond to the issues raised or be heard in relation thereto, contrary to the express requirements of the Section 41 of the *Employment Act* and Section 4 of the Fair Administrative Actions Act. Further, nothing points to the validity or fairness of the reasons for the termination. In Loice Otieno v Kenya Commercial Bank Limited Cause No. 1050 of 2011 it was held that it is a mandatory requirement to comply with the principles of natural justice.”

107. The Petitioner submits that an award of Ksh. 8,000,000 would be adequate compensation for discrimination and unfair labour practices. Reliance was placed on the case of Olpejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR.

108. Lastly it is submitted that an award of damages for breach of fundamental rights in the Bill of rights can be awarded in conjunction with an award for unfair termination. Reliance was placed on the case of Gichuru v Package Insurance Brokers Limited [2021] eKLR.

### **The 1st Respondent’s submissions.**

109. The 1<sup>st</sup> Respondent filed its submissions on 13<sup>th</sup> February 2023 distilling the following issues for determination;

- i. Whether the Honourable Court can sit on a merit review of the 1<sup>st</sup> Respondent’s decision not to confirm the Petitioner as the Chief Executive Officer.
- ii. Whether the Petitioner’s termination from his employment as the Chief Executive Officer was procedurally and substantively fair.



- iii. What relief if any, are available to the Petitioner in the circumstances of this matter?
- iv. Who should bear the cost?

110. For the first issue it was submitted that a probationary term of employment contract, the employee must demonstrate certain suitability requirements set by the employer and no employee may be confirmed without meeting the requirements. The 1<sup>st</sup> Respondent relied on the case of Daniel Mutuku Njuguna v Kenya Institute of Mass Communication [2021] eKLR and National Bank of Kenya Ltd v Pipeplastic Samkolit K Ltd and Another [2001] eKLR in fortification of its submission.

111. It is submitted that whereas this court can review the 1<sup>st</sup> Respondent's decision to establish whether there was procedural impropriety, going ahead to review the merit of the decision will contravene the doctrine of separation of powers and the court cannot conduct its own inquiry as this would constitute judicial usurpation of functions vested elsewhere. Reliance was placed on the case of Community Advocacy and Awareness Trust and Others v The Attorney General and Others [2012] eKLR and the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where it was held:

“It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function.”

112. The 1<sup>st</sup> Respondent further submitted that the principle of rotationality also applies in this case and should be used in the determination of the dispute herein. Reliance was placed on the case of Mumo Matemu v Trusted Society of Human Rights Alliance (Supra).

113. The 1<sup>st</sup> Respondent also relied on the case of Peter Oduyo Ogada & 9 Others v Independent Electoral and Boundaries Commission of Kenya & 14 Others [2013] eKLR in fortification of its submission.

114. For the second issue it was submitted that the main reason of terminating the Petitioner was not conflict of interest and his performance was overall unsatisfactory and the conflict of interest was just one of the reasons for his termination. The Petitioner was appraised in a fair manner. The Petitioner had failed to offer any form of comparison as evidence and the claim for discrimination does not hold. Reliance was placed on the case of Mohammed Abduba Dida v Debate Media Limited & Another [2018] eKLR where it was held:

“The burden of demonstrating that a right was infringed would be upon the person alleging such violation, as, that person would be in the better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which are matters that are within the petitioner's knowledge. Once the case is made out, the burden shifts to the other party. More particularly, in view of the observation that the rights alleged to have been infringed do not fall within the grounds classified by Article 27 (4), more so the reason for the petitioner have to prove that his or her rights have been infringed in respect of the grounds alleged. In other words, the burden of proof was on Dida to show that, on a balance of probabilities, the guidelines



were in violation of the prohibition set out in Article 27 which burden did not shift until a case was made out. And this is why the learned judge stated, and we agree, that, “...where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.”

115. For the last issue it was submitted that the remedies for termination of the employment must be proportionate to the economic injuries suffered by the employees and should not be aimed at facilitating unjust enrichment. Reliance was placed on the case of *Hema Hospital v Wilson Makongo Marwa* [2015] eKLR where it was held;

“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee’s loss and not to punish the employer.”

116. For the relief of exemplary and aggravated damages, the 1<sup>st</sup> Respondent submitted that the Respondent has not demonstrated any arbitrary and oppressive treatment from it. The 1<sup>st</sup> Respondent relied on the case of *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County* [2018] eKLR where it was held:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes V Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute.”

117. For the relief of reinstatement, the 1<sup>st</sup> Respondent submitted that it was not an automatic right of an employee. Reliance was placed on the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR and *Kenya Power and Lighting Company Limited vs Aggrey Lukorito Wasike* [2017] eKLR in fortification of its submission.

118. Lastly it was submitted that the court cannot grant both the main reliefs and the alternatives at the same time. The Court has to choose one. Reliance was placed on the case of *Alex Wainaina t/a John Commercial Agencies v Janson Mwangi Wanjihia* [2015] eKLR where it was held:

“On the first issue, we think it is trite law that where relief is prayed for in the alternative, a court of law has to choose, on the facts, whether to grant the main relief or the alternative and give reasons either way. Both ought not to be granted in a blanket form. On this the trial court was in error.”

### **The 2nd Respondent’s submissions.**

119. In his written submissions, the 2<sup>nd</sup> Respondent first addresses the issue of his locus standi in bringing up the cross -petition and participating in the proceedings herein. He submits that Article 22 [1] and 258 of [the Constitution](#) provides every person a right to institute court proceedings, claiming that [the](#)



Constitution has been contravened, or is threatened with contravention. Further that Article 258[2] of the Constitution allows proceedings to be undertaken by a person acting in public interest on basis that the Constitution has been contravened. It is upon this premise that he instituted the Cross -petition. To buttress this point, he places reliance on the case of Kiluwa Limited & Another v Commissioner of Lands & 3 Others [2015] eKLR.

120. He further submits that Article 22 of the Constitution deals with enforcement of the Bill of Rights and provides that every person can bring court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated, or infringed.
121. By reason of the premises, and the order herein of 17<sup>th</sup> January, 2023, the Petitioner’s submissions on joinder and participation of the 2<sup>nd</sup> Respondent in these proceedings stands on lose ground.
122. The 2<sup>nd</sup> Respondent further submits that the issue whether the appointment and subsistence of the petitioner as a CEO of the 1<sup>st</sup> Respondent and therefore a public officer offended of Articles 10, 73, 232, and 249 of the Constitution as he was already associated and working with the University of Nairobi.
123. Article 260 of the Constitution defines a public office thus;

“An office in the National Government, a County Government or Public Service, if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by Parliament.”

The Supreme Court elaborated of who a public officer is in the case of Fredrick Otieno Outa vs Jared Odoyo Okello [2014] eKLR, thus;

“Strictly speaking, the proper meaning of public officer ... is that embodied in Article 260 of the Constitution... The different definitions in other statutory provisions, such as those enumerated earlier on, ought not to take precedence over the said constitutional provisions. And thus, the proper meaning of public officer- currently is; (i) the person concerned is a state officer; or (ii) any other person who holds? public office an office within the National Government, County Government or Public Service; (iii) a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.”

124. Reliance was also placed in the case of Felix Kiprono Matagei v Attorney General & 3 others [2016] eKLR where it was held:

“Kenya University, it is not contested, is a public university duly chartered under the Universities Act, No. 42 of 2012. It draws its capitation and funding out of, inter alia, funds provided by Parliament. KUCSU is said to be an independent unit of Kenya University. It is unclear whether it is self-sustaining or generates its own funds. From its agreed mandate of providing a consultancy platform for the staff of Kenya University, I have little doubt that it generates its own funds besides any funds which trickle from its parent institution being Kenya University. There was however no denial that it is a unit within Kenya University. As the employees of public universities, including Kenya University, get their remuneration and benefits paid by the university which in turn draws funds from Parliament’s allocation of public funds, by the better reason, employees of public universities whether on contract, full-time or part-time basis are public officers.”

125. It is argued that following the definition, the Petitioner in his position as CEO of the 1<sup>st</sup> Respondent was a public officer. As a lecturer, he was too. No doubt, he held two public offices at the same time.



126. The 2<sup>nd</sup> Respondent submits that the Petitioner doesn't deny having been continued lecturing in the university foretasted even after his employment with the 1<sup>st</sup> Respondent. His defence against the accusation of conflict of interest to the effect that he was not drawing any salary from the university does not come to his aid at all. The test on conflict of interest is what a common man in the streets would perceive of the prevailing circumstances in a situation where an accounting officer of a regulator is engaged as a lecturer of a University that the regulator is mandated to regulate and considering that there are at least other twenty legal education providers.
127. The Petitioner's assertion that the Section 5A of the *Universities Act*, exclusively vests the mandate to accredit and supervise universities is misleading. It is a product of deliberate selective reading of provisions of the law. Contrary to the Petitioner's submissions, the mandate under section 5A [2] has to be discharged in consultation with other legal entities, pursuant to the provisions of subsection 3.
128. A reading of Section 21 of the *Legal Education Act*, 2012 shows that the 1<sup>st</sup> Respondent is vested with the powers to suspend or revoke a licence of a legal education provider. This power or function is not expressly vested on CUE by section 5A of the *Universities Act*.
129. The Petitioner's submissions that the 1<sup>st</sup> Respondent condoned or acquiesced to his conduct which reads;
- “Except with the written consent of Council, you shall not, either directly or indirectly during your service, engage or be concerned in any other service or business or receive any reward, commission, or profit by virtue of your office other than as provided for in this letter of appointment.”
130. Considering the circumstances of this matter in their totality, it is clear that the Petitioner violated the national values and principles of governance, and principles of accountability, transparency, and integrity under Article 10 and 232 of *the Constitution*. Sections 12 and 16 of the *Public Officer Ethics Act*, 2003, and *Leadership and Integrity Act*, respectively.
131. By reason of the premises, the orders sought in the cross petition should be granted.

### **The Petitioner's Supplementary submissions**

132. The Petitioner filed supplementary submissions on 8<sup>th</sup> March 2023 in respect of the 2<sup>nd</sup> Respondent's cross-petition. He distils the following issues as emerging for determination on the cross-petition, thus;
- a. The Applicable test to be applied in determination of the alleged conflict of interest.
  - b. The implication of the decision in *Kenya Medical Laboratory Technicians & Technologists & 7 others v the Attorney General; Commission of University Education and Another* [2020] eKLR (The Cue case on the allegation of conflict of interest.
  - c. The Applicability of the decision in *Felix Matagei v the Attorney General and 3 others* [2016] eKLR on the petitioner's case.
  - d. The Applicability of the doctrine of illegality in respect to the contract of employment.
133. On the first issue, the Petitioner submits that the applicable test on conflict of interest was propounded in the case of *Felix Matagei v Attorney General & 3 Others* [2016] eKLR as follows;



” ..... a person in whom trust or responsibility has been placed must never act so as to have his interest in the force of others. ....the question [of whether one is afflicted by conflict of interest] has to be entirely objective as the answer is dependent [sic] the facts would view it improper and wrong.....”

134. Further in the case of *Belvin Wanjiru Namu v National Police Service Commission & Another* [2019] eKLR where it was held:

Work. Otherwise put, conflict of interest is a situation where an individual has interests or loyalties competing against each conflict of interest must be real and incompatible with the officer’s. It involves dual relationships where person in a position in one relationship is in another competing relationship in another position such that the person has conflicting responsibilities.”

135. The terms of engagement between him and the University of Nairobi reveal that he was a volunteer lecturer, a non-remunerative position, which for all intents and purposes cannot be termed as gainful employment and self-serving.
136. To counter the 2<sup>nd</sup> Respondent’s assertion that in violation of Articles 10, and 232, he held two public offices, the Petitioner submitted that the position at the University of Nairobi was non-remunerative and therefore cannot be deemed a public office. He places reliance on the Supreme Court holding in *Fredrick Otieno Outa v Jared Odoyo Okello* [2014] eKLR.
137. On the second issue the Petitioner submits that section 5 A of the University Act takes away the mandate of licencing, supervision and the accreditation of University programmes by the Council of Legal Education, through the doctrine of implied repeal. Therefore, the provisions of sections 2, 8, [1] [b] ,18,19, 20, 21,22, 23, and 48 of the [Legal Education Act](#) are deemed to be inoperative to the extent that they conflict with the corresponding provisions of the [Universities Act, 2012](#). Reliance was placed on the case of *Kenya Medical Laboratory Technicians & Technologists & 7 Others v Attorney General, Commission of University Education & Another (Interested Parties)* [2020] eKLR in fortification of his submission.
138. The Petitioner also relied on the case of *Kenya School of Law v Otieno Richard Akomo & 41 Others* 2021 and *The Engineers Board of Kenya v Jesse Waweru Wahome & Others* 2013 eKLR where it where it was held;

“ Accreditation takes various forms including assessment; audit; benchmarking; evaluation; and recognition. In this case we are concerned with recognition which falls into two main categories: academic and professional recognition. Academic recognition is the “approval of courses [and] qualifications ... from a higher education institution ... for purposes of ... [inter alia] access” to the labour market. Professional recognition on the other hand refers to the professional status accorded to a holder of a qualification to practice in that profession. Recognition of an individual’s qualifications is therefore done with a view to facilitating access of holders to educational and/or employment activities.

These definitions can be applied at two levels. The first level is where an institution seeks authorization from the Government or any authorized body to be registered to offer a given training or a given service. This is important because the Government is, in general, the custodian of the standards that should be maintained by all professions. The government can, by itself or its designated bodies, grant such authorization to permit, by way of registration, institutions or firms to offer given academic trainings or given services. Examples include the Commission of Higher Education, which, under the [Universities Act](#),



authorizes private universities to offer degree courses and the Kenya Medical Practitioners & Dentists Board which, under the Medical Practitioners and Dentist Act authorizes hospitals or clinics to offer medical services.

The second level of accreditation is not governmental in the sense that it is not required for purposes of authorization or registration to offer an academic training or a given professional service. It is the quality assurance accreditation for the purposes of recognition, call it approval if you like, that a given institution or firm offers an academic course or service that meets the required standards of a given profession. This is the level in which the Council of Legal Education, the Medical Practitioners and Dentist Board, the Accountants Board and the appellants Board, to mention but a few, fall. The way I understand it is that these bodies do not, as such, permit or authorize institutions to offer given courses or trainings. However, in the regulation of the conduct of their respective professions they demand evidence of appropriate academic qualification or competence before registering applicants to practice as professionals in their respective professions. The best example I can think of is the Council of Legal Education which does not admit advocates to the advocates training programme on the basis of the university degrees flashed by applicants for admission into that programme but demands evidence of having adequately covered the core subjects.

For me you can call the process of ascertaining that one is qualified to practice a given profession “accreditation” or “recognition.” The bottom line, as I have observed, is to be satisfied that one has the requisite academic qualification or professional competence.”

139. For the third issue the Petitioner submitted that the court should depart from the application of the decision in *Felix Matagei* and decline from finding real or apparent conflict of interest on his part, on his account of his engagement or association with the University of Nairobi.
140. Lastly the Petitioner invited this court to reject the applicability of the doctrine of illegality which the 2<sup>nd</sup> Respondent appear to invoke to justify the dismissal of the Claimant’s claim. Reliance was placed on the case of *Partel vs Mirza* (2016) UKSC 42.

### **Analysis and determination**

141. I have carefully considered the material placed before me by the parties herein and in my considered view, the following issues emerge for determination on the on the petitioner’s petition and the 2<sup>nd</sup> Respondent’s cross-petition, thus;
  - [a]. Whether the doctrine of constitutional avoidance comes into play in this matter.
  - [b]. whether the 1<sup>st</sup> Respondent violated the Petitioner’s rights put forth in the petition or any of them.
  - [c]. whether the termination of the petitioner’s employment was procedurally and substantively unfair.
  - [d]. whether the Petitioner is entitled to the reliefs sought in the petition or any of them.
  - [e]. whether the 2<sup>nd</sup> Respondent had the necessary locus standi to bring up the cross petition and participate in the proceedings herein.
  - [f]. whether the contract of employment between the 1<sup>st</sup> Respondent and the Petitioner was an illegality ab initio.



[h]. Whether the Petitioner violated the statutory and constitutional provisions set out in the cross petition.

**Whether the doctrine of constitutional avoidance comes into play in this matter.**

142. Though none of the parties has raised the issue, this Court is not handicapped in any manner from rendering itself on how it relates to, and its import on, the petition herein. In my view, it is a jurisdictional issue and or an issue of law that a Court can raise without necessarily being moved by any of the parties. It is worth stating that after the promulgation of the 2010, Constitution there has been a assurgency of litigants constitutionalising every dispute, a practice that Courts abhor.

143. In *KKB v SCM & 5 others* [ Constitutional Petition 014 of 2020] KEH 289[KLR] on the doctrine, Justice Mativo, stated and I agree, thus;

“Constitutional avoidance has been defined as a preference of deciding a case on any other basis than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on Constitutional arguments that courts will entertain. It encompasses three main principles which are standing, ripeness and mootness. The doctrine of avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor.* [2001][2] ZLR 501 [s], in which Ebrahim JA said the following:-

“ ..... Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition, a breach of the Declaration of Rights....”

144. The Constitutional Court of Zimbabwe in *Chewira & others v Minister of Justice Legal and Parliamentary Affairs & others* held;

“As we have already seen, in the normal run of things courts are generally loath to determine a constitutional issue in the face of alternative remedies. In that event they would skirt and avoid the constitutional issue and resort to the available alternative remedies.”

145. The Supreme Court of Kenya in the case of *Communications Commission of Kenya & 5 others v – Royal Media Services Limited & 5 others* [2014] eKLR stated on the principle;

“256. The Appellant in this are seeking to invoke the “principle of avoidance”, also known as “Constitutional avoidance”. The principle of avoidance entails that court will not determine a constitutional issue, when a matter may be properly decided on another basis.....”

146. In *COD & another v Nairobi City Water & Sewerage Company Limited* [2015] eKLR, the Court stated;

“Of justice and right that should guide and inform the law and actions of man. While an infringement of *the Constitution* might in certain cases give rise to redress for under Section 1“11. Similarly, in *Papinder Kaur Atwal v- Masnjit Singh Amrit*, Nairobi Petition No. 236 of 2011 where after considering several authorities Justice Lenaola remarked as follows;

” All the authorities above would point to the fact that *the Constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions



or mere control of excesses within the Administrative processes..... I must add the following; the Bill of rights is robust. It has been hailed as one of the best in any constitution in the world. Our courts must interpret it with all the liberalism they can marshal. However, not every pain can be addressed through the Bill of Rights and alleged violation thereof.”

12. The Supreme Court of India also has held that ordinary remedies available under common law and statutes must be pursued in the ordinary manner as provided under statute. For instance, see *Re Application by Bahadur* [1986] LRC [Cost.] The Court expressed itself as follows at page 307:

“The Courts have said time and again that where infringement of rights is alleged which can be founded in a claim under substantive law, the proper course is to bring the claim under such law and not *the constitution*. This case highlights the un-wisdom of ignoring that advice.....

*The Constitution* sets out to declare in general terms the fundamental concepts 4, yet, as has been proclaimed by the highest Court in the land, it is not a general substitute for the normal procedures for invoking judicial control of Administrative Action.”[see *Harrison v A.G* [1979]3 WKR.....”
147. The common thread across all the decisions cited above is that the constitutional litigation path is one that is narrow, only to be travelled on, in exceptional and very necessary situations. Not every grievance or dispute shall be litigated under *the Constitution*. Where a matter can be handled through other processes, the best course is to allow them be under those processes. It matters not that alternatively, they can be dealt with under a constitutional litigation. I have carefully considered the issues raised and as presented, in the Petitioner’s petition. They are largely on the procedural and substantive fairness of the termination of the Petitioner’s probationary employment with the 1<sup>st</sup> Respondent, and failure to confirm him into employment at the end of the probation period that was. Weighing the material presented before me, leaves me with no option other than conclude that the substantive remedies sought by the Petitioner, do not depend upon the “constitutional issues” raised by the petitioner. The reliefs sought are reliefs that ought to have been under the *Employment Act* in an ordinary claim, through the procedure provided for under the *Employment and Labour Relations Court Act*, and the Practice and procedure Rules of this court.
148. It is here that I must state that a mere allegation that a human right or fundamental freedom, or *the Constitution* has been or is threatened to be violated is not sufficient to attract the Court to engage its jurisdiction under the provisions of *the Constitution*, instead of the jurisdiction under statute.
149. By reason of the premises, I find that applicability of the avoidance principle militates against the petitioner’s petition herein. The grievance of the petitioner is improperly presented to this Court for interrogation. The petition should fail at this point, therefore.
150. Assuming that wrong on this, still the Petitioner’s petition shall fail on the grounds as shall emerge shortly hereafter. It becomes imperative then that I turn to the other issues for determination.



**Whether the 1st Respondent violated the Petitioner's rights put forth in the petition.**

151. The petitioner and submitted that his fundamental right under Article 27 of *the Constitution* was violated by the 1<sup>st</sup> Respondent. Article 27 [4] & [5] of *the Constitution* of Kenya, make a provision, thus;

“[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, labour, age, disability, conscience, belief, culture. Dress, language or birth.

[5.] A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause [4].”

152. Imperative to state that neither *the Constitution* nor the *Employment Act* defines discrimination. However, in a galaxy of judicial decisions, courts have defined the term. The ILO Convention 111, concerning Discrimination in respect of Employment and Occupation also provides a definition for the term.

153. Article 1 of the Convention defines it thus;

“a Any distinction, exclusion, or preference made on basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality opportunity in treatment in employment or occupation.

b. Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organization, where such exist and with other appropriate bodies.”

154. In the case of *Law Society of Kenya v Attorney General & COTU*, Petition No. 4 of 2019, the Supreme Court of Kenya defined discrimination, thus;

“A distinction, whether intentional or not but based on the grounds relating to personal characteristics of individuals or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withhold limits access to opportunities, benefits and advantages available to members of society.”

155. The Court of Appeal in the case of *Barclays Bank of Kenya Limited & another v Gladys Muthoni & 2 others* [2018] eKLR, defined discrimination in the following manner;

“Discrimination means affording different treatment to different persons attributed wholly or mainly to their description .... Where persons of such description are subjected to..... Restrictions to which persons of another description are not made subject to are accorded privileges or advantages which are not accorded to persons of another description.....

Discrimination also meant unfair treatment or denial of normal privileges to persons because of their race, age, sex... a failure to treat all persons equally where no reasonable distinction can be found between the favoured and those not favoured.”



156. The objective nature of the ILO definition makes it unnecessary would to venture into the space of inquiring into the intention of the employer. In the South African Case of Leonard Dinglar Employee Representative Council v Leonard Dinglar [pty] Limited [1997] 11 BLLR 1438[LC], the Court held that intention or motive of the employer is not relevant to the finding of discrimination.
157. Having said as I have hereinabove, I now turn to consider the burden of proof in disputes regarding workplace discrimination or discrimination generally. I have no doubt in my mind that the burden lies on the person asserting that discrimination has occurred. On this view I find fortification in the Court of Appeal holding in the case of Mohammed Abduba Dida v Debate Media Limited & Another [2018] eKLR, thus;
- “..... ordinarily, the burden of demonstrating that a right has been infringed would be upon the person alleging such violation, as the person would be in a better position to prove it. It is for the petitioner to show that, compared to another person, he or she has been denied a benefit or suffered a disadvantage, which matter are within the petitioner’s knowledge. Once the case is made, the burden shifts to the other party. More particularly, in view of the observation that the rights alleged to have been infringed do not fall within the grounds classified by Article 27[4], more so the petitioner has to prove that his or her have been infringed in respect of the grounds alleged. And this is why the learned Judge state and I agree, that; “where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair.”
158. Looking at the Petitioner’s petition, his affidavits herein, and the submissions filed by his Counsel, it is not difficulty to observe that his grievance on discrimination is not based on any of those constitutionally prohibited grounds. Further, that he has not asserted that he was discriminated against on this ground or the other, ground akin to the prohibited grounds or otherwise. This heightened the requirement on him to clearly prove that indeed discrimination occurred.
159. The Court has not lost sight of the fact that the Petitioner’s allegation on discrimination is based on the alleged conduct of the 1<sup>st</sup> Respondent. That the formula that was used to appraise him was changed from 70:30 [Work objective: Behavioural Competency] to 30: 70, a departure from the approved weighting. The applied weighting of 30:70 didn’t have any prior approval. That being the case it behoved the Petitioner to prove that the conduct was irrational, arbitrary, and unreasonable which was targeted to prejudice him.
160. The Petitioner put forth a performance assessment Form [CLE 1-CLE3], 2021/2022 that he used for self-appraisal. In my view this was a standard form for the purpose. The Court notes that under Competency Assessment, the weighting allocated between work objectives and behavioural competency was 70:30. The computational formula, thus,
- [Work objective rating \*70]100=x
- [Behavioural Competency rating \*30]/100=y
- X+y=overall rating
161. However, it is clear that this formula was changed by the Appraisal Committee that was constituted by the Chair of the Council to appraise the Petitioner for purposes of determining the question of his confirmation into employment. This comes out clearly in the Performance Appraisal, August 2022



under the item, Methodology. Apparently, the change was effected following detailed deliberations respecting the need to, no doubt the Petitioner was involved. The document at page 6 read in part;

“[c]. that the signed self-assessment of the Secretary/CEO be adopted as submitted and therefore form the baseline for additional inquiries as to his competencies attached and marked Annexure 2 and;

[d]. that scoring on Section B [Work Objectives/Goals be complied once Secretary/ CEO submits evidence of achievement or otherwise of the agreed targets and goals.

[e]. that this approach was discussed and agreed on with the Secretary/ CEO before the actual evaluation commenced.” [Emphasis added].

162. The Petitioner didn't dispute the fact that he was involved in the discussions and that he agreed to the change as indicated in the document. It cannot be available to him assert that the change of the formula was improper, and prejudicial to his score. Consequently, I find that the petitioner has not managed to demonstrate that the conduct of the 1<sup>st</sup> Respondent was arbitrary and unreasonable, to serve as a stable anchor for his grievance of discrimination.

163. The Court notes further, that to take care of the change of the formula, it was agreed that the scoring on the work/goals be completed once the Petitioner submitted evidence of achievement or otherwise of the agreed targets and goals. This supports the Court's view that the conduct or action complained of was not arbitrary.

164. On his allegation on discrimination, the petitioner further contended, and his Counsel submitted, that the 1<sup>st</sup> Respondent employed a performance appraisal procedure, to appraise him, different from that provided for in section 8 of the Human Resource Manual. I have carefully gone through the stipulations of the section, and conclude that the same did not provide for appraisal of the 1<sup>st</sup> Respondent's CEO.

165. In further fortification of his case that he was discriminated against, the Petitioner pleaded and his Counsel submitted that contrary to the provisions of its own Human Resource Manual, which were clear that members of staff employed on contract terms were not to be subjected to a probationary period, the 1<sup>st</sup> Respondent engaged him in a contract of employment that subjected him to a supervised probationary period. True, section 2.25.5 of the Manual stipulates;

“Members of staff employed on contract will not be subject to probationary period, however quarterly appraisals shall be done of their performance in the first year of the contract.”

166. However, two questions arise on what the Petitioner posits on this. First, when did he come to learn that the probationary term in his contract of employment ran counter the stipulations of the 1<sup>st</sup> Respondent's Human Resource Manual? Second what did he do to have the conflict dealt with? Going through the material placed before this Court by the petitioner, one sees not any that comes to his aid to answer these two questions. In a situation like was in this matter, one would reasonably expect an employee to issue a protest letter to the employer concerning the term. If the employer carries or delays to act on it, the employee shall be deemed to work under protest. This will have the effect of protecting the employee and undermining any argument that may be advanced that he or she acquiesced to work under the term.

167. No doubt, the alleged departure from the stipulations of the Manual related to a matter that had an immediate practical application, yet the Petitioner continued to work without objection after the



departure was given effect as a term of the contract. With this, it is my view that he impliedly agreed with the term.

168. By reason of the foregoing premises, coupled with the fact that the Petitioner only deemed it fit to raise the issue after an unsuccessful probation period, I am persuaded to conclude that the Petitioner knowingly, voluntarily and consciously got into the contract of employment, and bound himself to the terms and conditions thereof.
169. To be persuaded by the Petitioner's position on the term of his contract of employment and make the declaration sought in regard thereto shall amount to the Court re-writing a contract for the parties. Courts of law do not re-write contracts for parties but enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal in *Globe Motors INC & Others vs TRW Lucas Electric Steering Ltd & Others*, Lord Justice Beatson stated;
- “ Absent statutory or common law restrictions, the general principle of the English law of the contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree to whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.”
170. The decision in the case of *Telkom Kenya Limited v John O. Ochanda* [2013] eKLR, cited by counsel for the Petitioner is clearly distinguishable from the instant one, therefore.
171. In sum, the Petitioner's Claim to the effect that he was discriminated against has not merit.
172. The Petitioner's Counsel submitted that Article 41 of *the Constitution* of Kenya, 2010 protects employees from unfair labour practices. Further that Article 47 provides for fair administrative action that is expeditious efficient, lawful reasonable and procedurally fair. Largely, the 1<sup>st</sup> Respondent's alleged inactions and actions that formed the Petitioner's Claim on discrimination, form basis for the alleged violation of his rights under Article 41 and 47. Having found as I have hereinabove on the grounds, I hold that the Petitioner hasn't proved violation of the rights.

**Whether the termination of the Petitioner's employment was procedurally and substantively fair.**

173. Before I delve further into interrogating this issue, it is imperative to state from the onset that this Court's view has been and is, that an employee under probation enjoys the expansive rights and protections that the post 2008 employment and labour relations regime came in with, and more particularly those that relate to fairness in termination of their employment. The obligations on the employer relating to matters fairness in the termination must be discharged. Therefore, the provisions of sections, 41, 43, 45 and 47[5] fully come into play.
174. In the case of *Janet Nyandiko v Kenya Commercial Bank Ltd*[2017], the Court held, and which holding was cited with approval by the Court of Appeal in the case *National Bank of Kenya v Anthony Njue* [2019] eKLR, ,thus,
- “Section 45 of the *Employment Act* makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility, or alternatively that the employer did not act in accordance with justice and equity.



The parameters for determining whether the employer acted in accordance with the justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of the decision to the employee and handling of any appeal against the decision. Also, not to be overlooked is the conduct and culpability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41.....”

175. In the case of Pius Macha Isunde v Lavington Security Guards Limited [ 2017], the Court of Appeal stated;

“There can be no doubt that the Act, which was enacted in 2007, places a heavy legal obligation on the employer in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating [section 43]- Prove the reasons are valid and fair [ section 45]- prove that the grounds are justified [section 47[5], amongst the other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

176. When approached to interrogate fairness, the Court looks at two aspects, procedural and substantive fairness. Section 43, 45[2] and 47[5] of the Employment Act speak to substantive fairness, while Section 41 speaks to procedural fairness.

177. Section 43 of the Employment Act places a legal burden on the employer, in a dispute regarding termination of an employee’s employment to prove the reason[s] for the termination. There is no contestation as regards the reasons for the 1<sup>st</sup> Respondent’s failure to confirm the Petitioner into employment. The reasons were elaborately brought out in the Replying affidavit filed herein by the 1<sup>st</sup> Respondent. In summation, unsatisfactory performance during the probation period, and conflict of interest. In light of the no contest, one can safely conclude that the 1<sup>st</sup> Respondent did discharge its burden under the stated provision.

178. As this Court has stated before, it is not enough for the employer to discharge the burden under Section 43, he or she must go a further mile to establish that the reason[s] was fair and valid, therefore discharging the burden under Section 45[2]. The Petitioner asserted that the reasons were not fair and valid. The Respondent on the other hand contended that they were.

179. The Court will elaborately deal with the reason “Conflict of interest” when interrogating the 2<sup>nd</sup> Respondent’s cross-petition shortly hereinafter. As shall come out, the Petitioner was conflicted. In my view any reasonable employer could in circumstances similar to those surrounding the issue of conflict herein, decline to confirm an employee into employment as the 1<sup>st</sup> Respondent did.

180. In discussing appropriateness of the sanction, the Court in Evans Kamadi Misingo v Barclays Bank of Kenya Limited [2015] eKLR, the Court held;

“To my mind, the burden placed on the employer by section 43 is to demonstrate that there was a valid reason which would cause a reasonable employer to terminate the employment of an employee....”



Denning MR in *British Leyland UK Limited v Swift* [1981] RLR 91 at 93, stated;

“Was it reasonable for the employer to dismiss [the employee]? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, the dismissal was fair.”

181. I now turn to consider the reason “unsatisfactory performance”. The Petitioner submitted that he did sufficiently demonstrate that the appraisal system used by the 1<sup>st</sup> Respondent was flawed and skewed to his disadvantage. Herein before I observed and found that the methodology that was applied in appraising the Petitioner was with the knowledge and agreement of the petitioner. I am not persuaded that the system was flawed.
182. The Petitioner argued that where an employee anchors his or her decision to terminate and employee’s employment on account of poor performance, the law places a duty on him or her to prove certain specific aspects, in order for the termination on the account to be considered fair. To support this point, he placed reliance on the decision in the case of *National Bank of Kenya vs- Samuel Nguru Mutonya* [2019] eKLR, and concluded that the 1<sup>st</sup> Respondent didn’t discharge this obligation.
183. In the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* cause Number 823 of 2010; [2010] LLR 225[ICK], quoted with approval in the *National Bank of Kenya*, case [ *Supra*], the court elaborated what is required of an employee to satisfactorily satisfy the Court that a termination of an employee’s employment on account of unsatisfactory performance was fair, thus,
- a. Where poor performance is shown to be reason for termination, the employer is placed at a higher level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had in place an employment policy or practice on how to measure good performance as against poor performance.
  - b. It is imperative on the part of the employer to show that measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
  - c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
  - d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”
187. The Petitioner’s contention isn’t that the 1<sup>st</sup> Respondent didn’t have a performance appraisal system. Indeed, this can be confirmed for instance by the fact that the 1<sup>st</sup> Respondent had an appraisal tool, the appraisal form that the Petitioner used for self-appraisal and a Committee to review the self-appraisal and or appraise him. There is ample evidence that there were discussions between the Committee, prior during and after the 1<sup>st</sup> appraisal. No doubt, the after the 1<sup>st</sup> appraisal, the petitioner was given an



opportunity to improve on certain specific areas, and this informed the decision to have his probation period extended. He was appraised on the areas, and the 1<sup>st</sup> Respondent still found his performance on them unsatisfactory. The reason why he was not confirmed into employment was shared with him. By reason of these premises, I am persuaded that the 1<sup>st</sup> Respondent discharged the obligation[s] set out in the fore-stated land mark case.

### **Of the reliefs**

184. Having found as I have on all the other issues under discussion on the petition, I come to an inescapable conclusion that the reliefs sought by the Petitioner cannot be availed to him.

### **Whether the 2<sup>nd</sup> Respondent had the locus standi to bring the cross-petition and participate in the proceedings herein.**

185. On the 17<sup>th</sup> of March 2023, when this petition came up before this Court, among the consent orders that were given was the order on-boarding the 2<sup>nd</sup> Respondent into the proceedings herein. The order has not been assailed or successfully assailed, through any known legal forum. *The Constitution* of Kenya, 2010, unshackled constitutional litigation and litigators from the strictures of locus standi that obtained in the pre- 2010 constitution. It allowed a more liberalised manner of approaching locus standi in constitutional litigation. The Petitioner's assertion that the 2<sup>nd</sup> Respondent lacked standi is unfounded in the circumstances.

### **Whether the contract of employment between the Petitioner and the 1<sup>st</sup> Respondent was a nullity abinitio.**

186. The tone of the 2<sup>nd</sup> Respondent's Petition to an extent is that the 1<sup>st</sup> Respondent shouldn't have offered the Petitioner the employment in the first instance, as he was then lecturing in the University of Nairobi, Faculty of Law. I note there are reliefs sought in the cross- petition flowing from this thinking. With great respect, I find considerable difficulty in understanding what seriously informs the thinking. In my view, to allow such thinking hold sway shall be sanctioning an absurd presupposition that a job holder seeking a better job or other job must resign from the job he is holding immediately he contemplates applying for the other job, put in another way, way before executing a contract for the new job. The 2<sup>nd</sup> Respondent cannot be faulted that it caused to be executed a contract of employment between it and the Petitioner before he would resign from his lecturing position. It was duty upon the Petitioner upon executing the contract, to initiate cessation and lecturing, to avoid conflict of interest, real, potential or apparent.

### **Whether the Petitioner violated the statutory and Constitutional provisions brought out in the cross-petition.**

187. Arguing that the Petitioner as a public officer allowed himself to be afflicted by conflict of interest when he took up the position as CEO of the 1<sup>st</sup> Respondent whilst still serving as a lecturer, and continued to so serve even after entering into the contract of employment, considering the statutory functions of the 1<sup>st</sup> Respondent and how they related to the School of Law that he was rendering lecturing services for, the 2<sup>nd</sup> Respondent concluded that the Petitioner was afflicted with conflict of interest.

188. The Petitioner didn't deny that at the time he was being employed by the 1<sup>st</sup> Respondent he was a lecturer at the University of Nairobi, lecturing in the school above stated. There is no contention that in the position as CEO of the 1<sup>st</sup> Respondent, a state Corporation, he was a Public Officer.



189. The 1<sup>st</sup> Respondent is established under the *Legal Education Act*, No. 27 of 2012, and as can be discerned from the preamble of the Act, for purposes of regulating and licensing of legal education providers and for connected purposes. Section 8 thereof provides for the specific functions of the 1<sup>st</sup> Respondent thus;
- a. Regulate legal education and training in Kenya offered by legal education providers;
  - b. License legal education providers;
  - c. Supervise legal education providers;
  - d. Advise the Government of matters relating to legal education and training;
  - c. Recognize and approve qualifications obtained in Kenya for purposes of admission to the role; and
  - d. Administer such professional examinations as may be prescribed under section 13 of the *Advocates Act*.
190. Section 8[2] provides;
- “Without prejudice to the generality of subsection [1], the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the-
- a. Accreditation of legal education providers for purposes of licencing;
  - b. Curricula and mode of instructions;
  - c. Mode and quality of examinations;
  - d. Harmonization of legal education programmes; and
  - e. Monitoring and evaluation of legal education providers and programmes;
191. Section 18[1] of the Act provides that an institution that intends to offer any course or programme of legal education in Kenya for the award of a degree, diploma or certificate as a professional qualification in law shall apply to the Council [read 1<sup>st</sup> Respondent]. Power resides in the Council to issue the licence pursuant to the provisions of section 20, and to cancel or suspend the licence issued for good cause.
192. Up to this end, there can be no doubt that the provisions hereinabove brought forth, place the University of Nairobi, School of Law, under the licence, regulation and supervision of the 1<sup>st</sup> Respondent. However, the Petitioner counters this pointing out that these roles were at the material time no longer under the 1<sup>st</sup> Respondent to statutorily discharge, by operation of the Provisions of the University Education Act, 2012. To support this point, he placed reliance on the case of Kenya Medical Laboratory Technicians & Technologists & 7 Others V- Attorney General; Commission of University Education& another [Interested Party] [2020] eKLR. The Court notes that the appeal flowing from judgment in this matter is pending determination by the Court of Appeal. I totally refrain from discussing the applicability of the implied repeal doctrine.
193. Even if for a moment one were to agree with the submissions by counsel for the petitioner as regards implied repeal of the functions- licencing, regulating and supervision, of the 1<sup>st</sup> Respondent, still the issue of conflict of interest of the Petitioner, can be decided under the provisions of the *Universities Act*. Section 5[3] of the Act provides that the Commission i.e. the Commission established under the Act,



may before approving any academic programme consult with any relevant body established by written law to regulate the profession to which the academic programme relates where such law empowers the professional body to approve or accredit courses offered at any university or college. Subsection 4, provides,

” the Commission may engage professional bodies and associations to carry out inspection of universities on its behalf; the Auditor – General to offer the Commission Professional opinion on management and financial positions of a particular university.”

194. Considering the meaning of ‘consult’, this Court is not persuaded that the role contemplated of bodies like the 1<sup>st</sup> Respondent under subsection 3, is as nominal as the Petitioner suggests. Still the 1<sup>st</sup> Respondent could be involved in the regulation, licensing and supervision, activities. Real, apparent, or potential conflict of interest could afflict, the Petitioner.
195. The Petitioner Contended that the engagement with the University of Nairobi was as a volunteer lecturer, a non-remunerative position, which for all intents and purposes cannot be termed gainful employment and self-serving. Accordingly, there was no real conflict of interest. I am not persuaded by this argument. Conflict of interest is either, real, apparent or potential. Real conflict of interest denotes a situation where a public officer has knowledge of a private beneficial interest that is sufficient to influence the exercise of his or her public duties and responsibilities.
196. Apparent conflict of interest exists where it would be perceived or appears, that a Public Officer’s Private interests could improperly influence the performance of his or her duties, whether or not this is the fact in the case. The test is whether in the circumstances of the case a reasonably well-informed person could have a reasonable apprehension that there exists a conflict of interest. Appearance to the public is the key not the Public Officer’s integrity or good faith. A potential conflict of interest incorporates a concept of foreseeability; when an individual can foresee that a private interest may someday be sufficient to influence the exercise of their duty, but has not yet.
197. Knowing very well, the functions of the 1<sup>st</sup> Respondent under the *Legal Education Act*, summed up as regulatory, supervision, and licencing, or even if one were to buy the argument that the functions were chipped away by the *Universities Act*, that still the function of supervision could be delegated to the 1<sup>st</sup> Respondent by the Commission, or that in regulating, accrediting, and licensing legal education programmes, the Commission could consult the 1<sup>st</sup> Respondent, the Petitioner under the wrongful comfort that he was offering lecturing services to the University of Nairobi as a volunteer lecturer, and that his predecessors were also lecturers as they served the 1<sup>st</sup> Respondent, continued to serve the University and even refused to resign notwithstanding its direction that he so does. In my view, the Petitioner through wilful blindness, allowed himself to be afflicted by both apparent and potential conflict of interest.
198. A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints, given the heavy trust and responsibility taken by holding a public office. The Petitioner could not be exempted from this for whatever reason. A keen look at the provisions of Article 73, which provides for responsibilities of leadership and Article 232 which provides for values and principles of public service reveal golden threads- the characteristics of public service, impartiality, neutrality, integrity, accountability and transparency. The same threads are also discernible in Article 10. A conduct by a public officer which does not heed this characteristic definitely puts the officer concerned to be in breach of the principles and values. Appearance or perception is a key characteristic of impartiality, fairness, and integrity. The Petitioner placed himself in a situation of apparent and potential conflict of interest. Sensibly, he would



be perceived not to be impartial, and fair in matters where the 1<sup>st</sup> Respondent would be called upon to discharge the functions in the manner hereinabove.

199. Undoubtedly, the Petitioner was a full-time employee of the 1<sup>st</sup> Respondent, paid for a daily specified time to serve it. Yet he could spend part of that time to serve another entity, to the prejudice of rendering service to the employer paying him for that time salary. In my view, this was lack of accountability, transparency and integrity.
200. Public Officers serving public entities, are supposed to act within a web of law and codes which serve to preserve the integrity, reputation and legitimacy of the public entities they serve and the public service an important national institution in support of democratic government. At this point this Court states that the Petitioner was bound by the provisions the Leadership and integrity Act 2012 and the Public officers Ethics Act 2003, they applied to the Petitioner in his position, and that he was in breach thereof. Sections 12[1] and 16[1] expressly commands Public Officers to avoid being in situations of conflict of interest, a command that in the circumstances of this matter, the Petitioner didn't heed.
201. It is important to state that most of the reliefs sought by the 2<sup>nd</sup> Respondent are a duplication of each other, and as a consequence only one relief commends itself to this Court for grant. The Court has not lost sight of the fact that the Respondent sought for this Court directs that the Petitioner be barred from holding any public office, on account of the violation of the Constitution. I am of the view, that such an order is one given sparingly and in circumstances where the infraction is of an immense gravity so as not giving the order would amount to an abdication by the to protect the Constitution and or its aspirations. The gravity of the infraction is decided on the circumstances of each case. The Court considers the fact that the Petitioner's employment was terminated within the probation period, and the nature of the violation, and concludes that in the circumstances, the order won't be a proper order to issue.
202. By reason of the premises;
- i. The Petitioner's Petition herein is found to be lacking in merit and is hereby dismissed.
  - ii. The 2<sup>nd</sup> Respondent's Cross- petition succeeds only to the extent that a declaration is hereby made that the petitioner's wilful continuance of offering services as a lecturer at the University of Nairobi, School of Law, after securing the employment as the 1<sup>st</sup> Respondent's CEO placed him in, a situation of conflict of interest and, violation of the; national values and principles of good governance encapsulated in Article 10[2][c] , responsibilities of leadership enunciated under Article 73, and values and principles of public service encompassed in Article 232[a] [b] and [c], of the Constitution and; the stipulations of the Leadership and Integrity Act,2012.
  - iii. Each Party shall bear its own costs.

**READ, DELIVERED AND SIGNED THIS 25TH MAY 2023.**

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**OCHARO KEBIRA**

**JUDGE**

**In presence of;**

**Mr. Mainga for the Petitioner**

**Mr. Wanyama for the 1<sup>st</sup> Respondent.**

**Mr. Rapando for the 2<sup>nd</sup> Respondent.**



**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.**

**A signed copy will be availed to each party upon payment of Court fees.**

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**OCHARO KEBIRA**

**JUDGE**

