



**Havi & 2 others v Kenya Medical Supplies Authority & 4 others;
Ramadhani (Interested Party) (Petition E080 & E089 of 2022 & 16 of 2023
(Consolidated)) [2023] KEELRC 2010 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2010 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E080 & E089 OF 2022 & 16 OF 2023 (CONSOLIDATED)**

MN NDUMA, J

JULY 27, 2023

**THE MATTER OF ARTICLES ,2,3,10,21,22,23, 27, 35, 47, 48, 50, 159, 162(2) (2) (A)
232 & 234 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF
VIOLATION OF ARTICLES 1, 10,35 AND OF THE CONSTITUTION OF KENYA, 2010**

**AND IN THE MATTER OF KENYA MEDICAL SUPPLIES AUTHORITY ACT
(NO. 20 OF 2013) AND IN THE MATTER OF THE FAIR ADMINISTRATIVE
ACTION ACT (NO. 4 OF 2013) AND IN THE MATTER OF THE EMPLOYMENT
AND LABOUR RELATIONS COURT ACT (NO. 20 OF 2011) AND IN THE
MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

**NELSON ANDAYI HAVI 1ST PETITIONER
DAVID NJOE KITHUKA 2ND PETITIONER
SHERIA MTAANI NA SHADRACK WAMBUI 3RD PETITIONER**

AND

**KENYA MEDICAL SUPPLIES AUTHORITY 1ST RESPONDENT
CABINET SECRETARY, MINISTRY OF HEALTH 2ND RESPONDENT
THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH 3RD RESPONDENT
THE PUBLIC SERVICE COMMISSION 4TH RESPONDENT
THE HON ATTORNEY GENERAL 5TH RESPONDENT**

AND

TERRY KIUNGE RAMADHANI INTERESTED PARTY



JUDGMENT

1. The petition was initially filed at the Nairobi High Court as Constitutional petition No. 243 of 2022. It was transferred to Employment and Labour Relations Court by Hon. Thande J. on 24/1/2023.
2. On 22nd February, 2023, the petition was consolidated with three other petitions namely; Petition No. E080 of 2022; *Nelson Andayi Havi v Kenya Medical Supplies Authority and Others* – Petition No. E089 of 2022; *David Njoe Kithuka v Kenya Medical Supplies Authority and Others*; and Petition No. E149 of 2022 – *Dr. George Walukana v State Law and Ministry of Health and others*.
3. On 13/7/2023, upon submissions orally made by counsel for the parties, the Court de-consolidated Petition No. 149 of 2022 aforesaid from the three (3) others upon realization that the subject matter of Petition No. 149 (*supra*) was considerably different from the subject matter of Petitions 243; 080 and 089 of 2022.

Factual Background

4. The facts common in the three consolidated petitions is that on 5/3/2022, the 1st respondent (herein after the Board') advertised for the filling of a vacancy in the office of the Chief Executive Officer's position (herein after the (CEO of the 2nd respondent hereinafter - Kenya Medical Supplies Authority KEMSA). The advertisement was widely circulated through the Daily Nation Newspaper and the KEMSA website.
5. KEMSA released a press release on 19/5/2022 that it had appointed the 1st interested party as the CEO on 1/7/2022.
6. The petitioners state that the process leading to the appointment of the CEO was a sham, shrouded in secrecy and failed to involve the public by failing to disclose the names of the applicants, the shortlisted applicants and the dates and venues of the interview to enable members of the public to participate and give views of the applicants.
7. That members of the public were not invited to give their views in the first place.
8. That the petitioners have reason to believe that the recruitment process was not competitive as required under Section 8 of the *KEMSA Act* which provides:-
 - (1) There shall be chief executive officer of the Authority who shall be competitively recruited and appointed by the Board and whose terms and conditions of service shall be determined by the Board, upon the advice of the Salaries and Remuneration Commission, in the instrument of appointment or otherwise in writing from time to time.
 - (2) A person shall be qualified for appointment under Subsection (1) if the person—
 - a. holds a minimum of a first degree in pharmacy; Medicine, Business Management, Finance , Supply Chain Management or any other related field from a recognized university.
 - b. holds a postgraduate degree in business management or postgraduate training in supplies management;
 - c. possesses at least five years experience in senior management;



9. That at the time of the recruitment of the 1st interested party as the new Chief Executive Officer, the 1st interested party was the Director and Head of the Human Resource Committee of KEMSA and only resigned from that position a few days from the date the recruitment process commenced.
10. The petitioners depose that the 1st interested party, in her capacity, then designed and developed the job description and job specifications of the Chief Executive Officer thereby granting herself undue advantage in the entire process.
11. That the 1st interested party was selected by her fellow board members and so the process was marred by conflict of interest since the 1st interested party served the Board until a few days before her recruitment.
12. The petitioners depose that they have since learnt that the 1st interested party does not meet the minimum substantive educational requirements when examined under Section 8(2) of KEMSA Act, No. 20 of 2013 as she holds a Bachelor of Education Degree.
13. That the 1st interested party has since assumed office.
14. The petitioners have deposed in the petition, supporting Affidavits and Statements of fact that the 1st and 2nd respondents have violated the Constitution in that the process did not comply with national values enshrined under Article 10 of the Constitution and that the action by the respondents violated Article 47 of the Constitution in that it was not a fair administrative process and the Rules of Natural justice, Nemo iudex in causa sua, (No one can be a judge in his own cause and the deciding authority must be impartial and without bias) were too violated by the 1st respondent and 1st interested party, colluding to appoint one of their own to the position of CEO, following a process clouded in secrecy and malpractice.
15. The petitioners in addition depose that the respondents violated Article 35 of the Constitution by disregarding the request by the petitioners' access to the information as pertains the recruitment process. That the entire process was opaque and lacking in openness and transparency. That the respondents have therefore failed the test of accountability.
16. In addition, the process violated Article 73 which provides:-
 - (2) The guiding principles of Leadership and integrity includes:-
 - a. selection on the basis of personal integrity, competence and suitability-”
17. Furthermore the recruitment process violated Article 232 on values and principles of Public Service which provides:-
 - (1) The values and Principles of Public Service include:-
 - (i) Subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions.”
18. Reasons wherefore the petitioners pray that the Court grants the following reliefs:-
 - a. A declaration be and is hereby made that the 2nd Respondent is bound and must comply with Section 8(2) of the *Kenya Medical Supplies Authority Act*, No. 20 of 2013 in the appointment of the 1st Respondent's Chief Executive Officer by ensuring that the appointees meet the minimum educational qualification that is a first degree in Pharmacy, Medicine, Business Management, Finance, Supply Chain Management or any other related field from a recognized university.



- b. A declaration be and is hereby made that the 1st Interested Party is unqualified to be appointed as the 1st Respondent's Chief Executive Officer as she does not meet the minimum educational qualifications under Section 8(2) of the *Kenya Medical Supplies Authority Act*, No. 20 of 2013.
- c. A declaration be and is hereby made that the 2nd Respondent's appointment of the 1st interested party as the 1st Respondent's Chief Executive Officer is illegal, unconstitutional, null and void for the 1st interested party's failure to meet the tenets of good governance, transparency, accountability and public participation under Article 10 of the *Constitution*.
- d. A judicial review order of Certiorari does hereby issue to bring to this Court for the purpose of quashing the decision of the 2nd Respondent appointing the 1st Interested party as the 1st Respondent's Chief Executive Officer as communicated in the press release of the 19th May, 2022 for being illegal, unconstitutional, null and void due for being contrary to the national values under Article 10 and 47 of the *Constitution* and Section 8(2) of the *Kenya Medical Supplies Authority Act*, No. 20 of 2013.
- e. A declaration be and is hereby made that the Respondents have a duty to grant access to the petitioners information on the recruitment process of its Chief Executive Officer under Article 35 of the *Constitution*.
- f. A judicial review order of mandamus does hereby
Issue compelling the 2nd Respondent to disclose and grant the Petitioners access to the information, documents, board minutes and resolutions with regard to the recruitment process of its Chief Executive Officer under Article 35 of the *Constitution*.
- g. A judicial review order of mandamus does hereby issue compelling the Respondents to commence afresh the competitive process of recruiting its Chief Executive Officer in strict conformity with the *Constitution*, the *Fair Administrative Action Act* and the *Kenya Medical Supplies Authority Act*.
- h. A conservatory order staying the implementation of the 2nd Respondent's decision appointing the 1st Interested Party herein, Terry Kiunge Ramadhani as the 1st Respondent's Chief Executive Officer as communicated to the public vide the statement dated the 19th may, 2022.
- i. Costs of this petition be awarded to the petitioners.
- j. Any other relief that this Court may deem fit and just in the circumstances.

Replying Affidavit

19. In the replying affidavit of Mary Chao Mwandime, the Chairperson of the Board of KEMSA is deposed that [KEMSA Act](#) establishes the office of the Chief Executive Officer under Section 8.
20. The deponent sets out the provisions of Sections 8(1) (2) and (4) which provide for recruitment of CEO of KEMSA already set out herein before.
21. The deponent states further that sometimes in January, 2015, the Government of Kenya established the Parastatal Reform Implementation Committee which was tasked with establishing a framework for streamlining of the organizational structure of all parastatals in Kenya. Pursuant to this, Mwongozo Code of Governance of State Corporations was established, hereinafter "Mwongozo".
22. That the said Mwongozo was issued jointly by the Public Service Commission and the State Corporations Advisory Committee, herein after S.C.A.C and under Clause 1.118 Mwongozo provides



that in the appointment of the Chief Executive Officer of any parastatal, including KEMSA, the Board should:-

- (a) Appoint and remove the Chief Executive Officer;
 - (b) Ensure that the Chief Executive Officer is recruited through a competitive process;
 - (c) Ensure that the Chief Executive Officer possesses the minimum qualifications set out in the Attachment.
 - (d) Define authority levels for the Chief Executive Officer;
 - (e) Set the performance targets of the Chief Executive Officer; and
 - (f) Ensure that it has put in place a succession plan for the Chief Executive Officer and the Management staff.
23. Attachment (1) referred to above sets out the specifications for any person eligible to serve as a Chief Executive Officer of any state corporation as follows:-
- (a) Holds degree in relevant field from a University recognized in Kenya.
 - (b) Has at least ten (10) years knowledge and experience in the relevant field.
 - (c) Meet the requirements of Chapter six of the *Constitution*.
 - (d) Has served in a position of Senior Management for a period of at least five years.
 - (e) Meets the requirements of the fit and proper test.
24. The respondents depose further that the Career Guidelines for KEMSA provides that the Chief Executive Officer will in addition to the provision of Section 8(1) of the *Act*, have the following qualifications:-
- (a) At least fifteen (15) years proven work experience in relevant field, five (5) years of which must have been in senior management level;
 - (b) Bachelor's Degree in any of the following disciplines; Pharmacy, Medicine, Business Management, Finance, Supply Chain Management or any other related field from a recognized institution.
 - (c) Master's degree in a relevant field.
 - (d) Postgraduate degree in business management or postgraduate training in supplies management.
 - (e) Certificate in Leadership Development course from a recognized institution;
 - (f) Membership to a relevant professional body.
 - (g) Proficiency in computer applications.
 - (h) Fulfilling the requirements of Chapter Six of the *Constitution*;
 - (i) Demonstrate a clear understanding of *KEMSA Act, 2013, Public Finance Act 2012; and Public Procurement and Asset Disposal Act* of 2015.
25. The Guidelines further provides the key competences and skills required for the position of Chief Executive Officer thus:-



- (a) Analytical Skills;
 - (b) Communication skills;
 - (c) Strategic and innovative thinking;
 - (d) Interpersonal skills;
 - (e) Ability to mobilise resources; and
 - (f) Negotiation skills.
26. The respondent further depose that the incumbent Chief Executive Officer of KEMSA then did not indicate an intention to have his four (4) year contract renewed on or before 31/1/2022 as provided in his letter of appointment. KEMSA then commenced its internal procedures for the recruitment of a new Chief Executive Officer.
 27. Accordingly, the job advertisement for the position of Chief Executive Officer was prepared taking into account the provisions of *KEMSA Act* read together with Mwongozo and Career guidelines and was published on 5/3/2022 for the general public in the Standard Newspaper issue of Saturday 5/3/2022 and in the KEMSA official website as well as the Government official pull out newspaper - My Government, that was in the Star Newspaper issue of Tuesday 15/3/2022.
 28. The advert provided that applications to be sent to KEMSA on or before 28/3/2022.
 29. On 28/3/2022, the Chairperson of KEMSA Human Resource Committee and two other members convened a meeting to consider receipt and opening of applications for the recruitment of the Chief Executive Officer's position.
 30. That 25 applications were received. That on 29/3/2022, at the 31st Special Board Committee meeting, the Human Resource Committee met with the agenda to consider approval of the shortlisting criteria for the Chief Executive Officer's position. A long list of applicants with a matrix of qualifications was prepared and same was considered by the 32nd Special Board Committee on 4/4/2022. The Committee also had Consultant retained by KEMSA to spearhead the recruitment process. The committee shortlisted six persons who had met the minimum requirements to be presented to the full Board for interviews.
 31. The Board comprising of Chairperson, Dr. Tom Menga, Mary Atieno Owino, Captain (Rtd.) Lawrence Wahome and Linton Nyaga – Kinyua, had a meeting on 8/4/2022 to interview the applicants at Windsor Golf Hotel. Present at the interviews was a representative of SCAC The shortlisted persons were interviewed and scored. At the end of the process, three of the candidates interviewed had attained the minimum score of 70% and their names were forwarded to the Cabinet Secretary Ministry of Health for consideration for appointment.
 32. The Cabinet Secretary by a letter date 13/5/2022 appointed the highest ranked candidate, the 1st interested party as the Chief Executive Officer of KEMSA. The Board notified the 1st Interested Party of her appointment as the Chief Executive Officer of KEMSA for a renewable term of four (4) years. The appointment was in terms of Section 8(1) of *KEMSA Act*. The appointment was then communicated to all members of staff by a letter dated 19/5/2022.
 33. The respondents depose that the recruitment of the Chief Executive Officer was carried out with utmost transparency and in compliance with the law, the Mwongozo and Career guidelines established by KEMSA. The respondents deny the allegations of opaqueness, Secrecy and lack of transparency as set out by the petitioners. The respondents state that the allegation by the petitioners are merely



- speculative and there is no basis established of the belief by the petitioners that the process was flawed and or unlawful as alleged or at all. That under Section 8(1) of *KEMSA Act*, the Cabinet Secretary has mandate to appoint the Chief Executive Officer and has not been joined to these proceedings, and to this extent, the suit is flawed as would violate the right of the Cabinet Secretary to a fair hearing.
34. That though Section 8(2) of KEMSA provides that a person is qualified for appointment as Chief Executive Officer if the person holds a minimum first degree in Pharmacy, Medicine, Business Management, Finance, Supply Chain Management or any other related field from a recognised university, and to this extent, grants latitude to KEMSA to determine the related field alluded to thereof. The respondents depose that the 1st interested party being a holder of a first degree of Bachelors of Education was suitably qualified for appointment as Chief Executive Officer given her experience within KEMSA. That the process was open, competitive, transparent and met all constitutional and statutory provisions as deposed herein.
 35. That in response to the allegation of non-disclosure of information in violation of Article 35 of the *Constitution*, the respondents state that the information sought if granted at the time, would have amounted to an unwarranted invasion of the privacy of the applicants' contrary to the law.
 36. That the consolidated petition lacks merit and it be dismissed with costs.
 37. The response is buttressed by a replying affidavit of the 1st Interested Party sworn to on 18/7/2022 in which she reiterates the deposition set out in the replying affidavit of the respondents.
 38. The Interested Party deposes that she was properly appointed and suitably qualified to hold the position of Chief Executive Officer, KEMSA. She deposes that the Human Resource Committee she chaired never designed or developed the job description and specifications for the Chief Executive Officer. That the job description and specification were derived from the Act, and Career Guidelines of KEMSA and Mwongozo. The 1st interested party deposes further that she effectively resigned from the Board on 5/3/2022 upon serving the Cabinet Secretary, Health with a letter of resignation dated the same day. That she submitted her application for the position of Chief Executive Officer on 28/3/2022. That allegation made by petitioners that her appointment was revoked on 14/3/2022 is false. In any event, Mwongozo or any law does not preclude any person who prior to applying for the position of Chief Executive Officer of any State Corporation served as a Board member of such state corporation. Mwongozo precludes appointment of any person as a board member to a State Corporation, if such person has been employed by the Corporation in an executive capacity within the previous five years, is associated to an advisor or consultant to the state corporation or a member of the state corporation's Senior Management or a significant customer or supplier of the state corporation, has personal service contracts within the state corporation or a member of the state corporation's Senior Management, or is a member of the immediate family of any person described above.
 39. The 1st Interested Party denies that she was involved in the recruitment and/influenced the process in any manner or at all, having resigned on 5/3/2022. The Interested Party reiterates that she has the proper qualification to be appointed Chief Executive Officer of KEMSA. She states that she holds a first degree in Bachelor of Education (Home Economics) from Kenyatta University. That the courses that comprise the degree include 21 courses offered in Business Administration and Finance, including communication skills, Development studies and Critical Thinking; (7) Psychology and Counselling related courses, 5 management related courses and 5 Economics and Administration related courses. She attached the Transcript of the Bachelor Degree she had attained. She deposes that her first degree is related to a Bachelor of Business Administration and Finance and is one of the requisite degrees listed under Section 8(2) (b) of *KEMSA Act*, 2013,



40. She deposes that the allegation by the petitioners of lack of transparency, competitiveness and bias are far-fetched, without any basis and the petition be dismissed for lack of merit.
41. The Public Service Commission which was cited as an Interested Party in the consolidated petition before this petition was de-consolidated with the rest filed a replying affidavit deposed to by the CEO, Dr. Simon K. Rotich CEO [KEMSA](#) in which he impugns the process leading to the appointment of the interested party as the CEO of KEMSA. PSC states that they learnt of the impugned recruitment process through the instant Petition.
43. That the Commission upon being served with the instant Petition on its own motion initiated investigations into the matter pursuant to the provisions of Article 234 (2) (d) and 252 (1) (a) of the [Constitution](#) and Part IX of the [Public Service Commission Act, 2017](#).
44. That Commission in this regard requested for the minutes of the 1st Respondent Board's Human Resource Committee related to the vacancy of the position of Chief Executive Officer, the minutes of the Board on the entire recruitment process of the Chief Executive Officer, list of applicants and qualifications, the list of the shortlisted applicants, the interview score card for the shortlisted candidates, the shortlisted candidates and the venue of the interview.
45. That on the same day the 1st Respondent positively responded to the Commission's letter and the Commission discerned that;
- i. The interested party's qualifications do not meet the requirements of section 8(2) (a) of the [KEMSA Act, 2013](#).
 - ii. The interested Party resigned from the Board of KEMSA vide a letter dated 5th March, 2022 which letter was acknowledged by the Cabinet Secretary for Health vide his letter of 7th March, 2022. By this time, she had already kickstarted the process of recruitment of the CEO in her capacity as the Chairperson of the Human Resource Committee.
 - iii. The Interested Party attended all the KEMSA Committee meetings in which her recruitment was being discussed and deliberated upon even after she had resigned from KEMSA. Under the circumstances, there was clear conflict of interest and illegality on her part and that of KEMSA for entertaining such an act.
 - iv. There was no meaningful public participation in terms of the legal requirement for the advert to be placed in the Commission's website, the longlisting, the shortlisting, venue and date of interview and asking the public to give views on shortlisted candidates.
 - v. Further, the actions aforementioned are contrary to chapter six of the [Constitution](#) as well as sections 8, 10, 11, 13, 16, 22 and 24 of the [Leadership and Integrity Act, No. 19 of 2012](#).
 - vi. The advert for the Position of KEMSA CEO was never placed in the Commission's website contrary to section 37 of the [PSC Act, 2017](#) as read together with the Human Resource Policies and Procedures Manual for the Public Service. The Commission ought to have been notified by the Board of KEMSA before advertising for the said position.
46. The deponent further states that he has been correctly advised by the Commission's legal counsel that in the case of [Chama Cha Mawakili \(CCM\) versus Chairperson Independent Electoral and Boundaries Commission & 2 others](#) 2020 eKLR, the Court emphasised the need to comply with the constitutional requirements of public participation and competitiveness in the recruitment process of the position of Secretary/CEO of IEBC and that the same judicial pronouncement applies to the instant case.



Submissions

47. The petitioners identified the following issues for determination in their comprehensive submissions which the Court has carefully considered together with the deposition by the parties.
- (i) Whether the 1st Interested Party met the minimum substantive academic qualification for appointment as the 1st respondent's Chief Executive Officer under Section 8(2) of the *KEMSA Act* No. 20 of 2013.
 - (ii) Whether the recruitment was flawed.
 - (iii) Whether there was public participation in the recruitment process;
48. In their extensive submissions, the petitioners correctly set out the applicable provisions of the law in the recruitment of Chief Executive Officer, KEMSA, including Sections 8(1) and 8(2) of the *Act*. They submit that the words "any other related field" under Section 8(2) (b) must be deciphered within the context of the medical field in which KEMSA operates. That a qualification in Education cannot be deemed therefore to be a related field and therefore the 1st interested party did not meet the minimum substantive academic requirement to be appointed.
49. The petitioners refer Court to the Court of Appeal decision in *County Government of Nyeri and Another v Cecilia Wangechi Ndung'u* [2015] eKLR in which the Court held that:-
- "Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, of the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual content, and where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the Court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."
50. The petitioners further submit that competence is a constitutional imperative under Article 73(2) of the *Constitution* which was violated by the respondent.
51. The respondent and the Interested Party disagree profoundly on this matter in their submissions and rely on the case of *Anarita Karimi Njeru v Attorney General* [No. 11 /1979] KCR 154, where the Court stated:-
- "If a person seeking redress from the High Court on a matter which involves a reference to the Constitution}}, it is important (If only to ensure that Justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."
52. The respondent and interested party further submit that Section 5(3) of *State Corporation Act*, provides that:-
- "A State Corporation may engage and employ such number of staff, including the Chief Executive on such terms and conditions of service as the Minister may in consultation with the committee approve."



53. That the petitioners have failed to demonstrate that the respondent violated the Constitution, the KEMSA Act, approved Human Resource Guidelines and Mwongozo in the recruitment of the interested party. That the onus of proving alleged infringement lies with the petitioners in terms of Section 108 and 109 of the Evidence Act, Cap. 180 Laws of Kenya on a balance of probability. That the petitioners have failed in that regard and the petition must fail.
54. On the specific issue as to whether or not the interested party has requisite qualifications to hold the position of Chief Executive Officer KEMSA, I must state without any hesitation that the petitioners have failed to prove on a balance of probabilities that the Interested Party being a holder of a first Degree of Bachelor of Education (Home Economics) does not hold a first degree in a related field within the meaning of Section 8(2) of the KEMSA Act. To the contrary, the Interested Party in her extensive replying affidavit and in particular under paragraph 20 of the affidavit demonstrated sufficiently that her first degree in Education was from a reputable university and comprised of at least 21 courses relevant within the meaning of Section 8(2) (a) of the KEMSA Act. Accordingly on the question whether the Interested party had the right qualification for appointment as Chief Executive Officer of KEMSA, the answer by the Court is resoundingly in the affirmative. The fact that the Interested Party had worked for KEMSA as a Human Resource Director adds but not subtract from the credentials required to be appointed Chief Executive Officer KEMSA.
55. On the issue whether the recruitment process was flawed, it was incumbent on the petitioners to prove on a balance of probabilities that the respondent violated Articles 8, 10, 35, 47 and 73 as alleged in the consolidated petition. The petitioners alleged in general terms that they had reasons to believe that the 1st interested party tailored the job requirements for the position of Chief Executive Officer, fashioned the advertisement to suit her own qualifications and carried the advertisement to be placed before she then resigned a few days to the scheduled interviews from the Human Resource portfolio she held at KEMSA.
56. The Public Service Commission stated in their deposition that they carried out investigations and from the minutes observed that the 1st Interested Party had participated in the Board meetings in which the recruitment process of the CEO were discussed before and after she had resigned from KEMSA. The deposition by PSC does not however state in specific terms what aspects of the recruitment of the CEO were discussed by the Board in the presence of the Interested Party and how this in their view impacted the process and actual appointment by the Cabinet Secretary.
57. These kind of serious allegations must be supported by tangible evidence. The 1st interested party ably demonstrated that she was detached and not involved in her own recruitment as the Chief Executive Officer of KEMSA. That she did not design the job description and specification for the position of Chief Executive Officer. That, she was not involved in the advertisement, longlisting; shortlisting, interviews and the eventual appointment of herself as the Chief Executive Officer of KEMSA. That the process was conducted by named members of the Board in the Human Resource Committee of the Board. That the eventual appointment was properly done by Cabinet Secretary responsible for the Ministry of Health.
58. The Court finds that the Interested party was not conflicted within the meaning in Hon Philomena Mwilu v the Director of Public Prosecution & 4 others [2019] eKLR in which was stated:
59. A conflict of interest means:-
- “a situation where a person finds himself or herself conflicted by two different interests so that serving one interest would be against another interest. The definition of a conflict of interest in Black’s law dictionary, 10th Edition, that is applicable in this matter is that ‘conflict



of interest is a real or seeming incompatibility between one's private interest and ones public or fiduciary duties. Also, in *Felix Kiprono Matagei v the Honourable Attorney General & 3 others* where the court stated that 'it is clear that public officers are expected to ensure public confidence is maintained in the public service generally and in the integrity of their respective offices individually. Public officers must also exercise objectivity and impartiality in decision making to ensure that their decisions are not influenced by favouritism or other motives. Their personal interest must also not conflict with public duties. Additionally, the national values and principles of governance enshrined under Article 10 of the *Constitution* ought to guide the public officer all the times. These include accountability, transparency, integrity, equality and equity. The same principles are partly reiterated under Article 232 of the *Constitution* and additionally expounded by the *Public Service (Values and Principles) Act* No. 1A of 2015."

56. On the allegation that the respondents violated Article 35 of the *Constitution*, the petitioners did not seek provision of any information to be provided to them while the recruitment process was underway. It is pertinent to note that the position of Chief Executive Officer was widely advertised in the Standard Newspaper, in the KEMSA and in Government internal sites for the Court to find that the process was not shrouded in secrecy as alleged by the petitioner or at all. The request by the petitioners for information regarding the concluded process is a different matter all-together after the fact, and cannot, without any tangible evidence be said to be proof that the recruitment process was flawed and contrary to the law applicable. The petitioners have again failed to discharge their burden of prove in this regard.
57. The Court therefore finds that the appointment of the 1st Interested Party was proper and lawful and there was no violation of the *Constitution*, statute or policy documents in that recruitment process. It is not an offence to appoint, or promote an internal candidate provided he/she is suitable and qualified to be elevated to the position.
58. The petitioners have not provided any evidence to show that there is a requirement for public participation beyond the open, transparent and competitive process provided under Section 8(1) and (2) of *KEMSA Act*, Mwongozo and Human Resource Policy of KEMSA. There was no reference by the petitioners and PSC to any provision requiring Public participation in the recruitment of Chief Executive Officers of parastatal as compared to recruitment of state officers whose positions are established under the *Constitution* of Kenya, 2010.
59. Indeed Article 232(1) which provides for Values and Principles of Public Service, provides that these values and principles includes:-
 - (j) Involvement of the people in the process of policy making"
60. The provision does not specifically require involvement of the people directly in the recruitment process. It is not therefore a mandatory requirement for recruitment of a Chief Executive Officer of a parastatal. The petitioner have again failed in this respect.
61. The requirements of public participation provided under Article 10(2) (a) and (c) do not relate directly to recruitment of public officers in respect of whom Article 232 specifically provides for the principles and values to be observed in the recruitment and in particular Article 232(1) (g) requires fair competition, merit, and inclusiveness as the basis of appointment and promotions. The petitioners have failed to demonstrate that the process leading to the appointment of the 1st Interested Party was not competitive and was not done on merit. The evidence before Court paints to the contrary that indeed the Chief Executive Officer emerged the best candidate out of those who had applied, shortlisted



and interviewed in an open process that concluded in the appointment of the Chief Executive Officer by Cabinet Secretary, Health.

62. There must be real Public participation in enactment of legislation and development of policy that guide the process of recruitment of public officers and in the absence of a specific provision that require direct public participation in a specific recruitment process, this cannot be the basis of nullifying the process despite how desirable it may seem to the petitioners.
63. In this regard, this Court is not bound by the decisions cited by the petitioners including *Abdi Abemed Abdi v Cabinet Secretary Interior and Co-ordination of National Government and 7 others* HC Petition No. 238 of 2015 and *Henry Mutundu v Chairperson Independent Electoral and Boundaries Commission and Another; Anthony General (interested party)* [2019] eKLR and *Legeus Lomasi Mudegu v Board, Kenya Water Towers Agency* [2020] eKLR. Each case must be judged on its own facts, the law and policy applicable and merit.
64. Accordingly, the petition fails in its entirety for lack of merit.
65. This being a public litigation, each party to bear their own costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 27TH DAY OF JULY, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

Kamwaro & Associates for Petitioner/Applicant

Mr. Titus Makhanu & Associates Advocates

for the Interested Party.

Oraro & Co. Advocates for the 1st Respondent

Mr. Odukenya for Attorney General

Ekale – Court Assistant

