



**Namasaka & 9 others v Kenya Medical Supplies Authority & 2 others;  
Public Service Commission & another (Interested Parties) (Petition  
E149 of 2022) [2023] KEELRC 2004 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2004 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E149 OF 2022**

**MN NDUMA, J  
JULY 27, 2023**

**BETWEEN**

**ENOS NAMASAKA ..... 1<sup>ST</sup> PETITIONER  
JOHN ADUDA ..... 2<sup>ND</sup> PETITIONER  
GEORGE WALUKANA ..... 3<sup>RD</sup> PETITIONER  
ABDI HADUN ..... 4<sup>TH</sup> PETITIONER  
CATHERINE MUNERIA ..... 5<sup>TH</sup> PETITIONER  
NAHASHON WAIGANJO ..... 6<sup>TH</sup> PETITIONER  
DAVID MUTU ..... 7<sup>TH</sup> PETITIONER  
JAMES KILONZO ..... 8<sup>TH</sup> PETITIONER  
IGNATIUS KABURU MARITHI ..... 9<sup>TH</sup> PETITIONER  
GEOFFREY MWANGI ..... 10<sup>TH</sup> PETITIONER**

**AND**

**KENYA MEDICAL SUPPLIES AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
CABINET SECRETARY, MINISTRY OF HEALTH ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY  
TERRY KIUNGE RAMADHANI ..... INTERESTED PARTY**



## JUDGMENT

1. Petition number 149 of 2022 was initially consolidated with Petitions Nos. E080 of 2022; Nelson Andayi Havi –vs- Kenya Medical Supplies Authority and Others – Petition No. E089 of 2022; David Njoe Kithuka -vs- Kenya Medical Supplies Authority and Others; and Petition No. 243 of 2022 - Sheria Mtaani na Shadrack Wambui –vs- KEMSA and Others but upon reflection by the parties the matter was de-consolidated and is being handled separately.
2. The ten (10) petitioners in petition 149 of 2022 seek the following reliefs:-
  - a. A declaration that the Petitioners are entitled as against the Respondents and all persons to the protection of their Fundamental Rights and Freedoms enshrined in the Bill of Rights which applies to all and binds all State Organs including but not limited to fair labour practices and the Respondents are under a duty to observe the provisions enshrined in Articles 10, 73, 232, 234 and 236 of *the Constitution* with regard to the contract of employment of the Petitioners.
  - b. A declaration that the decision of the 1<sup>st</sup> Respondent contained in the Advert published on 26<sup>th</sup> July, 2022 in its website and Daily Newspapers on various dates including in the Standard Newspaper of 2<sup>nd</sup> August, 2022 for new expanded Management team of 31 vacancies (Job References; KEMSA/CSLS/2022/001002:KEMSA/HPT/2022/001-004: KEMSA/CS/2022/001-004:KEMSA/PRM/2022/001003:KEMSA/SP/2022/001-003:KEMSA/SCMS/2022/001-005:KEMSA/CSD/2022/001006 & KEMSA/IARA/2022/001-004) is unconstitutional, null and void ab initio
  - c. A declaration that the decision of the 1<sup>st</sup> Respondent to keep the Petitioners and other staff of the 1<sup>st</sup> Respondent away from their work stations at the 1<sup>st</sup> Respondent purportedly to work from home while their access to 1<sup>st</sup> Respondent's ICT platform is denied is unconstitutional, null and void ab initio.
  - (d) A declaration that that appointment by 2<sup>nd</sup> Respondent of John Ndiritu Muturi and Albert Memusi to the Board of Directors of the 1<sup>st</sup> Respondent vide Gazette Notice No. 9327 dated 5<sup>th</sup> August, 2022, violated Articles 10, 73 and 232 of *the constitution* and the same is null and void ab initio.
  - e. A declaration that the appointment of Terry Kiunge Ramadhan as the Chief Executive officer by the Respondents violated Articles 10, 73 and 232 of *the constitution* and the same is null and void ab initio
  - e. Consequently an order of Certiorari to remove to this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent contained in the Advert published on 26<sup>th</sup> July, 2022 in its website and Daily Newspapers on various dates including in the Standard Newspaper of 2<sup>nd</sup> August, 2022 for new expanded Management team of 31 vacancies (Job References; KEMSA/CSLS/2022/001-002:KEMSA/HPT/2022/001-004: KEMSA/SCMS/2022/001-005:KEMSA/CSD/2022/001-006 & KEMSA/IARA/2022/001004) and any other attendant and subsequent process and appointment thereof.
  - (g) Consequently, an order of prohibition prohibiting the Respondents from pursuing the purported redundancy process at the 1<sup>st</sup> Respondent as contained in their letters of general



redundancy and Internal Memos dated 4<sup>th</sup> November, 2022, 10<sup>th</sup> June, 2022, 15<sup>th</sup> July, 2022 and any other related letter by the 1<sup>st</sup> Respondent.

- (h) Consequently, an order of prohibition prohibiting the Respondents from keeping away the Petitioners and other staff from their work stations at the 1<sup>st</sup> Respondent for purporting that they are working from home.
  - i. Consequently, an order of Mandamus to compel individual Board members and CEO of the 1<sup>st</sup> Respondent in their personal capacity to pay back to the consolidated fund all salaries paid to staff of 1<sup>st</sup> Respondent from the time they were sent to work from home while their access to 1<sup>st</sup> Respondent's ICT platform had been de-activated.
  - (m) Consequently, an order of Certiorari to remove to this Honourable Court and quash the Respondents' decision of appointment of Terry Kiunge Ramadhan as the Chief Executive Officer of the 1<sup>st</sup> Respondent.
  - (k) Consequently, an order of Certiorari to remove to this Honourable Court and quash the 2<sup>nd</sup> Respondent's decision contained in Gazette Notice No. 9327 dated 5<sup>th</sup> August, 2022 of appointment of John Ndiritu Muturi and Albert Memusi to the Board of Directors of the 1<sup>st</sup> Respondent.
  - (l) An order be issued by this Honourable Court for just compensation by the Respondents to the Petitioners for an amount or sum to be determined by the Court for contravention of Fundamental Rights and Freedoms and failure to observe the National values and principles of Kenya as well as principles of public service enshrined in *the Constitution* thus injuring the Petitioners feelings and dignity and exposing them to public ridicule and odium and possible prejudice as regards future National service in view of the requirements of Chapter 6 of *the Constitution* and occasioning them losses and damages.
  - (m) An order that the costs consequent upon this Petition be borne by the Respondents in any event.
3. The brief facts of the case are that on 20<sup>th</sup> July, 2022, the 1<sup>st</sup> respondent abolished and/or declared redundant all Twenty four (24) managerial positions held by petitioners and others on permanent and pensionable terms and in its place created new Thirty one (31) managerial positions that were advertised to the open market for interviews and since the managers - petitioners were also qualified/suitable, they were informed that they were at liberty to apply alongside any other interested person.
4. The 1<sup>st</sup> respondent on 4/11/2021 issued general redundancy notice addressed to all employees and copied to the Labour officer but none was issued or copied to the Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU), yet some employees are members of the said union.
5. Simultaneously on the said 4/11/2021, targeted employees for termination were sent to work from home and their access to ICT platform was denied for what respondents stated was "the nature of the ongoing reforms requires restricted access to the ICT Platform." The employees could not work from home in those circumstances.
6. By a letter dated 5<sup>th</sup> July, 2023, written by Musyoka Murambi & Associates Advocates to the Court, the Court was advised that the petitioners and other officers were recalled back to their respective work stations and allowed access to ICT platform in the course of discharging their duties. The Court was informed that prayer number 3 in the petition dated 5/8/2022 is now spent.



7. That the sending of the employees to work from home was done despite the judgment of the Court in ELRC Petition No. 174 of 2021 delivered on 27/5/2022 where the Court held that; “the mass sending home of almost all employees even if on full salary is not provided for by any law.” The respondents have not justified any cause for sending all the employees to work from home.
8. The petitioners state that the current management of 1<sup>st</sup> respondent is made up of 34 positions occupied by the petitioners and others. The Board had stated in the general notice of redundancy that it had embarked on restructuring, redundancy and/or re-organization of 1<sup>st</sup> Respondent (KEMSA). The Board vide the said action abolished the 24 management positions and subsequently created the 31 advertised management offices.
9. That the said action was unlawful and outright illegal in that restructuring and/or re-organisation of public bodies is a constitutional mandate of the Public Service Commission under Article 234 (2) (a) of the Constitution which provides that:-

“The Public Service Commission shall:--subject to this Constitution and legislation– establish and abolish offices in the public service.”
10. Pursuant to the above constitutional mandate, Section 27(1) of the Public Service Commission Act, provides that:-

“The Commission may establish an office in the public service after receipt of a written request by an authorized officer of a public body if the Commission is satisfied that—

  - a. the request is based on comprehensive plans
  - b. informed by the public body's workload analysis;
  - b the financial implications of creating the office are indicated;
  - c. the office to be created relates to or supports the core functions of the public body;
  - d. the office to be created is to be domiciled in the requesting public body;
  - e information on the current authorized establishment, level of grading, designation, extra posts required and evidence of optimum utilization of existing posts has been submitted;
  - e. the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the public service or occasion unfair competition for staff among public bodies;

and

  - f. the functions of the office to be established are consistent with the Constitution or any other legislation.

(2) The written request for establishment of an office shall include a statement by the respective authorized officer verifying that the conditions in subsection (1) have been met.”



11. On the other hand, Section 28(1) of the Act provides:-

- “(1) The Commission shall abolish an office in the public service upon receiving a written request by an authorised officer.
- (2) The Commission in making a determination as to Whether to abolish an office, shall satisfy itself that:-
- a. the office relates to the provision of public services that are no longer necessary in view of improved methods for service delivery;
  - b. the request is based on a comprehensive plan informed by the department’s workload analysis;
  - c. there is an indication of the financial implications of abolishing the office, including savings to be made in relation to services relating to the office;
  - d. information on the current authorized establishment, level of grading, designation, and evidence of optimum utilization of existing posts is submitted;
  - e. the office when abolished shall eliminate duplication and overlaps of functions by public bodies; and
  - f. the functions of the office, if not abolished are inconsistent with *the Constitution* or any other legislation.
- (3) Any decision by the Commission to abolish an office in the public service shall be subject to the due process of deployment, transfer, removing or retiring the affected public officer as prescribed under this Act or the terms and conditions applicable to the public officer.”

12. The petitioners depose that the respondent did not at all involve the staff of the respondent being key stakeholders, in the purported restructuring process of the 1<sup>st</sup> respondent.

13. The action by the respondents was not lawful and was not a genuine redundancy exercise but was solely and maliciously designed to get rid of the petitioners and other holders of the stated management positions and this is borne out by the fact that the Board of KEMSA declared the occupant of the position of Corporation Secretary redundant and immediately thereafter proceeded to advertise for the filling of the position of Corporation Secretary in the impugned advert. This position was created by Mwongozo Code of Regulations pursuant to Section 3 of the *State Corporations Act* and in KEMSA Act, Section 9 A (1) which provides:-

“There shall be Corporation Secretary of the authority who shall be competitively recruited 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.”

14. Furthermore, in the impugned advert, some of the purported restricted new offices bear the same title, job description and qualification as the current offices, while the rest that bear slightly changed



- title contain the same job description and qualifications as current positions. That this exercise is not genuine and is a sham.
15. That the provisions of Section 40(1) of the [Employment Act](#) were not followed by the respondents. There was no genuine effort to mitigate the imminent loss of Permanent and Pensionable jobs on short notice to make the exercise humane and tenable.
  16. That the petition has merit and it be allowed and the orders sought be granted.
  17. The 1<sup>st</sup> respondent and the 1<sup>st</sup> interested party filed replying affidavits to the consolidated petition.
  18. Mary Chao Mwandime, the Chairperson of KEMSA Board deposes at length to matters which according to her justified the restructuring exercise, abolition of office and declaration of redundancies as complained of by the petitioners.
  19. The deponent states that whereas the 1<sup>st</sup> respondent had an establishment of 378 employees, KEMSA had employed 900 employees contrary to the Establishment and the current exercise of redundancy was to return KEMSA to the mandated staff compliment.
  20. In further response, the 1<sup>st</sup> Interested Party Terry Kiunge Ramadhani deposes that the petitioners and others are not holders of office of the Public Service Commission in that the Public Service Commission was not involved in the recruitment of the petitioners and on boarding process and similarly the Commission is not required to be involved in the redundancy exercise being undertaken by the 1<sup>st</sup> respondent. That the power to hire and fire staff on behalf of the Authority is vested in the Board of the Authority by the KEMSA Act.
  21. That the Board carried out extensive consultations with the entire staff of the 1<sup>st</sup> respondent on various dates in compliance with Section 40(1) of the [Employment Act](#), 2007. The employees were invited to air their concerns which were to be taken into account and factored in the decision to be taken by KEMSA on the redundancy exercise.
  22. That the Redundancy exercise underway is being carried out by KEMSA pursuant to a Report by the KEMSA Reforms Implementation Committee “the Reforms Committee” which was established on 21/1/2021 which was mandated to work closely with the Board to implement a report by KEMSA. Immediate Action Plan and Medium Term Reforms Working Committee (KIAPRWC) which was set up to unravel the over-procurement by KEMSA in the Covid- 19 period between April 2020 and July, 2020 the result of which KEMSA was stuck with supplies worth over Kshs.6 billion which have strained the liquidity of KEMSA.
  23. That to facilitate the reforms, a new Board was appointed vide Gazette Notice dated 28<sup>th</sup> April, 2021 with a clear mandate to overhaul KEMSA. The staff rationalization was commenced in earnest by the new Board accordingly. The process was started by the Acting Chief Executive Officer Mr. Edward Njoroge Njuguna by a Notice issued on 4/11/2021 in which all employees were informed of the potential redundancy taking place in line with Section 40 of the [Employment Act](#).
  24. Following the issuance of the general redundancy notice of 4/11/2021, three (3) petitioners filed ELRC Petition No. 173 of 2021. ELRC Petition No. E174 of 2021 and ELRC Petition No. 187 of 2021. That the said petitions were consolidated, heard and judgment delivered by Maureen Onyango, J. on 27/5/2022. The said notice was re-issued on 10/6/2022 after the judgment of the Court.
  25. That the said judgment found inter alia that carrying out a redundancy was a prerogative of the employer subject to the provisions of the [Employment Act](#) with respect to “notice, the procedure and the benefits payable.”



26. The Court further found that, at the time the consolidated petitions were filed, KEMSA had only issued a general notice of redundancy and it had not taken any action that would be considered to be unlawful with respect to the procedure for redundancy as set out in Section 40 of the [Employment Act](#).
27. The Court found the consolidated petition to be without merit and was filed to pre-empt the lawful process under Section 40 of the [Employment Act](#), which had just commenced and the employment of the petitioners was still in place.
28. The 2<sup>nd</sup> Interested party deposes further that following the delivery of the said judgment, KEMSA on 10/6/2022 issued another General Notice of intended redundancy in which KEMSA informed its staff that in carrying out the redundancy exercise, it will engage all staff in consultations and thereafter make an informed decision on the intended redundancy. It also informed the staff of the criteria it will be employing in the selection process of the employees affected to include seniority; skills and competence; merit; ability and reliability.
29. The 2<sup>nd</sup> Interested party deposes that extensive consultations were subsequently carried out with entire staff on various dates beyond the mandatory period of one month.
30. That it is true 31 management positions have been advertised but the exercise of restructuring and re-organisation being carried out by KEMSA is “aimed at achieving the established workforce of 378 as recommended by SCAC as against current workforce of 900” (Emphasis added). That the mechanics behind how this is being achieved is a Board prerogative that is being exercised in line with the provisions of the [Employment Act](#), after all the petitioners are not holders of Public Service office having not been recruited by the Public Service Commission but by the Board.
31. Therefore, KEMSA is not carrying out an unfair termination clothed as redundancy as alleged by the petitioners or at all. That none of the petitioners or any other member of staff have had their employment terminated as alleged or at all.

### **Submissions**

32. The petitioners filed written submissions in which the facts set out in the petition and supporting affidavit are summarized.
33. The petitioners submit that it was outright unlawful for the board to abolish all offices and positions which are underpinned by statute to discharge the functions of KEMSA under Section 4(1) of KEMSA Act. That the functions are set out under subsection 4(1) (a) to (e).
34. The petitioner submits further that the Board of management of KEMSA in 2014 approved the establishment of 341 workforce on permanent and pensionable terms and had on 15/10/2013 approved appointment of contractual staff from time to time on need basis which together explains the current combined employment of 754 workforce and so there is no excess of any staff and if any, then the respondents are at liberty not to renew the short contracts of service of the employees.
35. Furthermore, the needs of the year 2014 may not be similar to those of the present organization. That in any event creation and abolition of offices in public bodies is a constitutional and statutory mandate of Public Service Commission. That the current process is a clear usurpation of the mandate of Public Service Commission as set out under Article 234 (2) (a) and Section 25-30 of the [Public Service Commission Act](#).
36. That advertising for the positions in public service in a purported redundancy exercise is a clear violation of the provisions of Section 40(1) (c) of the [Employment Act](#) and case law.



37. That the purported consultation conducted at a meeting constituted by the Chief Executive Officer on 20/6/2022 was not adequate since each cohort of staff had 1 ½ hour session with the Chief Executive Officer and the staff had not been informed in advance of the purpose of the meeting to which they were invited by a letter dated 17/6/2022. Furthermore, in the judgment of the Court dated 27/5/2022 in Petition No. 174 of 2021, the Court had quashed the appointment of the four (4) Board Members who had participated in the impugned restructuring exercise. The 2<sup>nd</sup> respondent in disregard to the guideline given in the said judgment went ahead to appoint two (2) new members to the Board without advertising, shortlisting and/or interviewing any candidates. Therefore, the two appointees were also appointed unlawfully vide Gazette Notice No.9327 of 5/8/2022 and the appointment should be quashed.
38. That the targeted employees have done no wrong so that even if there was a genuine reason to declare some of them redundant, this should be done without inflicting unnecessary pain on the employees while giving them opportunities for re-employment to other positions on priority basis. That the ongoing exercise is ill intended and is unlawful and unfair. That the petition be allowed and the orders sought be granted.

### **Submissions by 2<sup>nd</sup> Interested Party**

39. The 2<sup>nd</sup> interested party submits with regard to the intended redundancy by the 1<sup>st</sup> Respondent that the government of Kenya acting on its own motion and through the Ministry of Health and the National Assembly, and the Office of the Auditor General exercising its constitutional duties, had spear headed the preparation of various reports pursuant to investigations and consultation. The following reports were prepared regarding the operations of the Respondent;
- (a) The Auditor General's Special Audit Report on utilization of Covid 19 Funds by KEMSA for the period 13<sup>th</sup> March -31<sup>st</sup> July 2021.
  - (b) Departmental Committee on Health Inquiry Report on utilization of Covid funds in the Ministry of Health with focus on KEMSA.
  - (c) KEMSA Immediate Action Plan and Medium-Term Reforms Working Committee (KIAPRWC)
  - (d) Delberg's KEMSA readiness for Universal Health Coverage Scale up report; and
  - (e) USAID and Global Fund Review of the KEMSA

### **Management Systems.**

40. It is argued that following the issuance of the general redundancy notice dated the 4<sup>th</sup> of November 2021, three Petitions were filed in the Employment and Labour Relations Court being ELRC Petition No. E 173 of 2021, ELRC Petition No 174 of 2021 and ELRC Petition No. 187 of 2021. The said petitions were consolidated, heard and judgment delivered on the 27<sup>th</sup> of May, 2022 by the Honourable Lady Justice Maureen Onyango who declined to interfere with the intended redundancy process initiated by the 1<sup>st</sup> Respondent. That the matter is thus res judicata and cannot be re-opened afresh before this Court.
41. The respondents and interested parties relied on the Court of Appeal decision in Africa Nazarene University -vs- David Mutere and Others – C.A. No. 236 of 2015 and Thomas De la Rue (K) Limited -vs- David Opondo Omutelema - C.A. No. 65 of 2012 to argue that the redundancy process was lawful and fair.



42. The issues for determination are as follows:-
- (a) Whether the action by the 1<sup>st</sup> respondent amounts to establishment and abolition of office and if so, whether the same action violates Article 234 of *the Constitution*.
  - (b) If the answer to (a) is in the negative whether the intended exercise amounts to a redundancy which ought to be allowed to run its course being a lawful mandate of the 1<sup>st</sup> respondent.
  - (c) Whether in any event the issues raised in this petition are res-judicata having been determined by the Court in a judgment delivered in ELRC consolidated petition No. E173 of 2021; ELRC Petition No. 174 of 2021 and ELRC Petition No. 187 of 2021 in a judgment delivered on 27/5/2022 by Lady Justice Maureen Onyango.
  - (d) Whether the petitioners are entitled to the reliefs sought.

**Issue (a)**

43. The Court has carefully considered the depositions by the respondents and interested parties, the documentation attached to the said depositions and submissions by the parties. In particular, the General notice of potential redundancy dated 4/11/2021 issued by Mr. Edward Njoroge Njuguna, the erstwhile Acting Chief Executive Officer of KEMSA and copied to the Labour office points the Court to the intention of the 1<sup>st</sup> respondent as expressed in the said letter as follows:-

“The contemplated organizational restructuring will involve changes of the Authority to enable it effectively and efficiently discharge its statutory mandate. The changes will involve amongst other things re-examining the various roles played by each of its employees and re-designating those roles as to achieve the objective of the restructuring and align the roles to the approved staff members. The said exercise may lead to some or all positions as presently constituted being rendered redundant.”

44. The notice was re-issued on 10/6/2022 after the judgment of the Court in the consolidated petition delivered on 27/5/2022.
45. Upon issuance of the notice all the petitioners and other management staff were asked to work from home except for staff tasked with essential services with effect from 5/11/2021.
46. In the engagement meetings between the Chief Executive Officer and members of staff in which the intended action by the Board was discussed, the Chief Executive Officer presented new approved organization structure comprising of eight directorates as well as redefined roles and functions. This presentation clearly sets out the nature of the exercise conducted by the 1<sup>st</sup> respondent. It not only involved introduction of new officers but also entailed remodeling of old offices and abolition of others.
47. In addition, members of staff were to be declared redundant in line with the restructured organization, that had rendered their continued retention superfluous. The old staff were then given opportunity to apply for employment in the new positions but to compete for the same positions with members of the public in an open recruitment process. The General notice was issued on 4/11/2021 and re-issued on 10/6/2022.
48. Section 2 of the *Employment Act*, 2007 define redundancy as follows:-

“Redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and



the practices commonly known as abolition of office, job or occupation and loss of employment.”(emphasis is added)

49. It is pertinent to note that the 1<sup>st</sup> respondent in the intended exercise and discussions with staff did not differentiate between the permanent and pensionable positions in the establishment said to be 378 positions and the rest of the positions filled by staff on fixed term contract. The Chief Executive Officer deposes that the total staff compliant was 900 against a permanent establishment of 378.
50. It is clear therefore that the exercise targeted both the permanent and pensionable positions and positions held on contractual basis.
51. A plain reading of the General notice issued by KEMSA to its staff dated 4/11/2021 and re-issued on 10/6/2022 together with express deposition by 1<sup>st</sup> and 2<sup>nd</sup> interested parties in their replying affidavits and submissions, leads the Court to the conclusion that KEMSA was involved in establishing and abolition of office within the meaning of Article 234(2) (a) of *the Constitution* of Kenya, 2010. The Public Service Commission was not involved by the 1<sup>st</sup> respondent and the 2<sup>nd</sup> interested party in the intended restructuring exercises which in the Court’s considered finding constitutes establishment and abolition of office.
52. The 1<sup>st</sup> and 2<sup>nd</sup> respondent and 2<sup>nd</sup> interested party expressly states that Public Service Commission had no business in the intended exercise for this was an exclusive preserve and mandate of KEMSA Board.
53. There is no evidence at all that Public Service Commission had delegated their mandate to establish and abolish office in KEMSA to the board.
54. Indeed, it is clear that KEMSA did not inform Public Service Commission at all of the exercise they were undertaking.
55. To the extent that the intended exercise by KEMSA amounts to establishment and abolition of office, the action is ultra vires Article 234(2) (a) of *the Constitution* and is null and void ab initio. Indeed in Petition No E 161 OF 2021 Manyara Muchui Anthony -vs- Communications Authority of Kenya and 3 Others it was held that:-

“The constitutional threshold for regulation of public service is a mandate of the 3<sup>rd</sup> respondent (Public Service Commission).”
56. To the extent that the intended termination of employment of staff was founded on unconstitutional and unlawful establishment of new offices and abolition of established offices, the intended termination on grounds of redundancy is unlawful, and unfair ab initio.
57. The said exercise cannot therefore be sanitized by purported subsequent compliance with the provisions of Section 40(1) of the *Employment Act*, 2007, the same having been tainted with gross illegality and violation of *the Constitution* of Kenya, 2010.
58. Furthermore, an intended redundancy if founded on lawful reasons is firstly an internal process guided by Section 40(1) of the *Employment Act*, 2007. It cannot involve abolition of office, creation of new similar or same offices and then open the filling up of the newly created offices to the public at large without giving priority to the existing staff.
59. The exercise intended by the 1<sup>st</sup> respondent which is common cause is clearly in violation of Section 40(1) of the *Employment Act*, and all known principles established by case law to guide separation of staff and employer on the basis of redundancy.



60. To this extent, the redundancy process underway is in violation of Section 40(1) of the *Employment Act*, 2007 and therefore is unlawful ab initio. This answers issue (b) as set out herein before.
61. With regard to issue (c), it is clear that this suit relates to an exercise commenced by the General notice dated 10<sup>th</sup> June, 2022 after the judgment of the Court delivered on 27/5/2022. The judgment of the Court had dismissed petitions intended to stop redundancy exercise commenced by a General notice dated 4/11/2021. The issues of establishment and abolition of office in violation of Article 234(2) (a) of *the Constitution* were not issues for determination in the consolidated petition determined on 27/5/2022. These are new issues raised in this petition by different petitioners not parties in that consolidated petition. The 1<sup>st</sup> and 2<sup>nd</sup> interested parties were also not parties in the concluded consolidated petition.
62. The issues the Court has dealt with in this petition and in particular the legality or otherwise of establishment and abolition of office by KEMSA in violation of the constitutional mandate of Public Service Commission, the 1<sup>st</sup> interest party herein, were not issues heard and determined in that previous consolidated petition. Henderson versus Henderson 1843 ALL ER 378 Wigram VC held that:-
- “where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”
63. The Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, that:-
- “For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- a. The suit or issue was directly and substantially in issue in the former suit.
  - b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was heard and finally determined in the former suit.
  - e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
64. The Court finds therefore that the issues raised in the petition E149 of 2022 are not res-judicata and this Court has jurisdiction to determine them though the same are somehow related to matters canvassed in the earlier consolidated petition.
65. Accordingly, the Court finds that the petition has merit and is allowed and the following orders made in favour of the petitioners as against the respondents:-



- (a) A Declaration is issued that the decision of the 1<sup>st</sup> Respondent contained in the Advert published on 26<sup>th</sup> July, 2022 in its website and Daily Newspapers on various dates including in the Standard Newspaper of 2<sup>nd</sup> August, 2022 for new expanded Management team of 31 vacancies (Job References;

KEMSA/CSLS/2022/001002: KEMSA/HPT/2022/001-004: KEMSA/CS/2022/001-004  
KEMSA/PRM/2022/001003 KEMSA/SP/2022/001-003: KEMSA/  
SCMS/2022/001-005:KEMSA/CSD/2022/001006& KEMSA/IARA/2022/001-004) is unconstitutional, null and void ab initio

- (b) An Order of Certiorari is hereby issued to remove to this Honourable Court and quash the decision of the 1<sup>st</sup> Respondent contained in the Advert published on 26<sup>th</sup> July, 2022 in its website and Daily Newspapers on various dates including in the Standard Newspaper of 2<sup>nd</sup> August, 2022 for new expanded Management team of 31 vacancies

(Job References KEMSA/CSLS/2022/001-002: KEMSA/HPT/2022/001-004: KEMSA/  
SCMS/2022/001-005: KEMSA/CSD/2022/001-006 & KEMSA/IARA/2022/001004) and any other attendant and subsequent process and appointment thereof.

- (c) An Order of Prohibition prohibiting the respondents from pursuing the purported redundancy process at the 1<sup>st</sup> respondent as contained in their letters of General redundancy and internal memos dated 10<sup>th</sup> June, 2022 and 15<sup>th</sup> July, 2022 and any other related letter by the 1<sup>st</sup> respondent as the process is tainted with illegality.

- (d) Costs of the suit.

66. For the avoidance of doubt, the Court makes no specific finding that the 1<sup>st</sup> respondent has violated rights and fundamental freedoms of the petitioners since that particular claim has not been sufficiently proved based on the pleadings in the petition and evidence adduced before Court.

67. The Court therefore grants no orders with regard to this aspect of the petition.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 27<sup>TH</sup> DAY OF JULY, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearance**

Musyoka Murambi & Co. Advocate for the Petitioner/Applicant

Titus Makhanu & Associates for the Interested Party

J.A. Guserwa for 1<sup>st</sup> Interested Party

Mr. Rabut for Chacha Odera for 1<sup>st</sup> respondent

Ekale - Court

