



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. E184 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2020

AND

IN THE MATTER OF VIOLATION OF ARTICLE 2(5), 10(2)(b), 23, 31, 41, 465,

230 AND 232 & 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF DATA PROTECTION ACT, 2019

AND

IN THE MATTER OF PUBLIC OFFICER ETHICS ACT, 2003

AND

IN THE MATTER OF LABOUR RELATIONS ACT, 2007

AND

IN THE MATTER OF UNFAIR LABOUR PRACTICES &

UNFAIR ADMINISTRATIVE ACTION

BETWEEN

KENYA ELECTRICAL TRADES AND

ALLIED WORKERS UNION.....PETITIONER

AND

KENYA POWER AND

LIGHTING COMPANY.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner herein is a Union mandated to promote and protect the labour rights and interests of its members in the energy sector to facilitate achievement of favourable working conditions, enhance social protection and provide effective representation to its members.

2. The Respondent commonly referred to as Kenya Power or Kenya Power and Lighting Company, is a public liability company which transmits, distributes and retails electricity to customers throughout Kenya.

3. The parties herein have a Recognition Agreement and Collective Bargaining Agreements (CBAs) negotiated from time to time. The last CBA registered being for the period 2017/2021 which commenced on 1st January, 2017.

4. The Petitioner questions the constitutionality of the Respondent's decision of vetting of Employees in line with the circular issued on 18th November, 2021 and further the constitutionality of calling for sensitive information and data belonging to the employees and third parties. The Petitioner further averred that the Respondent in its circular directed that the employees avail the required information within one (1) working day.

5. The Petitioner maintained that the Respondent's acts were ultra vires and were made in complete disregard of the employees' right to privacy and the laws on data protection. The Petitioner further maintained that no explanation was given by the Respondent on why it wished to vet persons not under its employment.

6. In its petition, the Petitioner seeks the following reliefs: -

(i) A declaration that the vetting of employees by the Respondent as per the circular issued on 18th November, 2021 and the call for the confidential information are unconstitutional and of no legal effect for breach of the Constitution.

(ii) A declaration that the members of the Petitioner have a

constitutional right to privacy

(iii) A permanent injunction be issued against the Respondent whether by themselves, their servants and or agents or whomsoever is acting on their behalf from conducting a vetting exercise on its employees who are members of the Petitioner

(iv) Any other relief that this Honourable Court deems fit to grant in the interest of Justice.

(v) Costs of the Petition be provided for.

7. In support of the Petition, the Petitioner filed an Affidavit deponed by **ERNEST NADOME**, its Secretary General on 19th November, 2020 in which he reiterates the averments made on the face of the Petition.

8. Given the urgency of this matter the Petitioner filed its Petition together with the Notice of Motion Application dated 19th November, 2021 under Certificate of Urgency seeking the following Orders:

a. The Application be certified as Urgent and heard ex-parte in the first instance (Spent)

b. The service of this Application upon the Respondent be

dispensed with at the first instance

c. Pending the hearing and determination of this Application inter partes, a conservatory order be issued restraining the Respondent whether themselves, their servants and/or agents or whomsoever is acting on their behalf from implementing the circular dated 18th November, 2021.

d. Pending hearing and determination of the substantive Petition the Honourable Court be pleased to issue a Conservatory, Prohibitory and restraining Order be issued restraining the Respondent whether by themselves, their servants and/or agents or whomsoever is acting on their behalf from implementing the circular dated 18th November, 2021.

e. Pending hearing and determination of this Application and the substantive Petition, the Honourable Court be pleased to suspend the intended vetting exercise.

f. The costs of this Application and suit be met by the Respondent.

9. The Application is premised on the grounds on the face of the motion and is further supported by the Affidavit of **ERNEST NADOME** sworn on 19th November, 2021.

10. In response to the Petition and Application the Respondent filed a Replying Affidavit deponed by **DAVID MONANDI**, its Manager – Human Resource Services on 6th December, 2021 in which he avers that following public outcry on the high cost of power as compared to neighbouring countries, the President constituted the Presidential Taskforce on the Review of Power Purchase Agreement vide the Gazette Notice 3076 with an aim of reducing the cost of electricity to consumers.

11. The core mandate of the Taskforce was to undertake a comprehensive review and analysis of the terms of all Power Purchase Agreements (PPAs) entered into by the Respondent and develop a suitable strategy for engagement with the Independent Power Producers

and lenders to achieve relief for electricity consumers while ensuring long term viability and sustainability of the energy sector.

12. The Affiant averred that the taskforce did prepare a report on its findings and presented the same to the President on 29th September, 2021, which report was approved and directions given on the immediate implementation of the recommendations contained therein.

13. That, part of the recommendation made by the Taskforce was that the Respondent undertakes a suitability vetting of its members of staff thus assuring itself of the qualifications, competencies and integrity of its officers and staff.

14. Mr. Monandi, further stated that the taskforce recommended the use of wealth declaration forms for purposes of vetting of the members of staff.

15. The Respondent holds that the vetting is lawful and legally justified by dint of the provisions of Articles 10, 75, 76, 132(1)(c) and 132(3) (b) as read with Section 7 of the State Corporations Act and Sections 7 and 8 of the National Government Coordination Act.

16. It is further the Respondent's contention that following the President's directive it did seek guidance from the Attorney General on how the Vetting Process would be conducted. In response to the Respondent's letter the Attorney General gave guidance and as a result the Respondent issued the impugned circular of 18th November, 2021 requiring all its staff to provide personal and confidential information by **close of business Monday 22nd November, 2021** for vetting purposes.

17. The Respondent maintains that it did follow due procedure and notified the Petitioner herein through its letter dated 19th November, 2021 of the intended exercise and requested for its support in the exercise.

18. The Respondent argues that the intended vetting exercise does not in any way infringe the right to privacy of its employees as contended as the information was to be provided in sealed envelopes given that they are public officers and are therefore subject to public scrutiny.

19. The Respondent further argued that the vetting exercise to be conducted is in the nature of an enquiry with an aim of facilitating the fight against corruption and should not be viewed as a disciplinary exercise.

20. The Respondent avers that the information required is similar to what is submitted periodically under Section 26 of the Public Officer Ethics Act and will be submitted under Article 73(2)(c) of the Constitution of Kenya; further that the proposed vetting is legal and justified and will be carried out within applicable laws as read with the Respondent's Human Resource Staff Regulations and Code of Conduct and Ethics.

21. The Respondent maintains that the petition and application are premature and pre-emptive, based on mere speculations and are in fact an abuse to the Court process as there is no evidence of any infringement of any rights of its staff.

22. The Respondent urges this Court to find both the application and petition devoid of merit and to dismiss the same with costs to the Respondent.

23. In response to the replying affidavit the Petitioner filed a further affidavit deposed by ERNEST NADOME, its General Secretary on 18th January, 2022 in which he maintains that the union is not opposed to the fight against corruption as initiated by His Excellency President Uhuru Kenyatta as well as the initiative to reduce the cost of electricity but is aggrieved with the manner in which the Respondent intends to carry out the exercise of vetting of its employees who are members of the Petitioner.

24. The Petitioner argues that the process ought to be done within the confines of the law and that its members rights must be protected at all costs.

25. The Petitioner further contends that the Respondent's actions are in gross violation of the existing Recognition Agreement and the Collective Bargaining Agreement as the Respondent failed to engage it prior to the issuance of the impugned circular.

26. The Petitioner avers that the contention by the Respondent that all information submitted shall be kept confidential by having them handed over in sealed envelopes does not guarantee that such information will remain private and confidential.

27. The Petitioner maintains that its members, being Public Officers have always been open to public scrutiny as they have been filing the wealth declaration forms as provided under the Public Officer Ethics Act.

28. The Petitioner argues that the Respondent ought to use the same information existing in its database to vet its members rather than going over and above what is provided under law; which exercise the Petitioner terms as totally unnecessary.

29. The Petitioner argues that the assertion that most of its members have complied with the impugned circular does not in any way legalize it. It maintains that the Respondent being a Public Utility Company must always endeavour to uphold and **operate within the confines of the law**.

30. It maintained that it is highly likely that its members who have already complied with the impugned circular did so out of fear of disciplinary action being taken against them for non-compliance, loss of job and/or victimization by the Respondent.

31. The Petitioner holds that it ought not be bulldozed into accepting an exercise that clearly violates the interests and rights of its members

as it is mandated to protect the very rights of its membership.

32. It urged this Court not to sanctify a flawed process simply because it would be seen as hampering the fight against corruption. It argued that the fight against corruption must be undertaken within the existing parameters of the law.

33. In conclusion the Petitioner urged this Court to find merit in both the application and petition and allow it as prayed.

Petitioner's Submissions

34. The Petitioner submits that the proposed vetting is a threat to the right to privacy of its members as protected under Article 31 of the Constitution of Kenya, 2010 as read with Article 17 of the International Convention on Civil and Political Rights (ICCPR) and Article 12 of the Universal Declaration of Human Rights (UDHR), both of which have been ratified by Kenya; which provisions inhibit the arbitrary or unlawful interference with ones' privacy, family, home or correspondence and further offers protection from unlawful attacks on the honour and reputation of such persons.

35. For emphasis the Petitioner relied on the cases of **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 Others (2015) eKLR** and **Kenya Human Rights Commission v Commissions Authority of Kenya & 4 Others (2018) eKLR** where the Court emphasised on the need to uphold the right to privacy as protected under Article 31 of the Constitution of Kenya, 2010.

36. The Petitioner urged this to find that the call for private and confidential information of employees and their family members is in breach of the provisions of Article 31 of the Constitution of Kenya, 2010.

37. It is further submitted that the Respondent cannot purport to

claim that the information required is similar to that contained in Section 26 of the Public Officers Ethics Act as the latter is structured and elaborate. It further argued that the information requested by the Respondent has been made in unstructured and reckless manner and the Respondent should therefore not be allowed to proceed with the same.

38. The Petitioner further submits that the Respondent's actions further violate the provisions of Sections 25 and 26 of the Data Protection Act that guarantees the right of protection of personal data.

39. The Petitioner submitted that the impugned circular issued by the Respondent on 18th November, 2021 is non-compliant with the above provisions of the law and as a result its implementation ought to be halted by this Court.

40. The Petitioner further submitted that the Respondent has failed to give a guarantee that the private data and information received in the vetting exercise will be protected save for mentioning that the information would be kept in sealed envelopes which is not a guarantee of privacy. To buttress this argument the Petitioner relied on the case of **Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others (2017) eKLR**.

41. The Petitioner further submitted that the right to privacy of its members, though not absolute, can only be limited in the prescribed manner under Article 24 of the Constitution of Kenya, 2010. To fortify this argument the Petitioner relied on the Court findings in the case of **Kenya Human Rights Commission v Communications Authority of Kenya & 4 Others (2018) eKLR**.

42. The Petitioner further submits that the Respondent is not justified to extend its vetting to its employees spouses and family members and that the particular information it requires constitutes sensitive information which is highly confidential that should not be given to third parties.

43. The Petitioner urged this Court to find that there is no reason or justification to support the Respondent's decision to call for the private and confidential information including bank statements, social media accounts, stocks and shares, property ownership among others which violates the rights of its members and should therefore be stopped.

44. The Petitioner further submits that the Respondent ought to have subjected the proposed vetting exercise for public participation and in particular discussed in a consultative forum with the Petitioner on the manner in which the vetting exercise should be conducted. For emphasis the Petitioner cited the case of **Mui Coal Basin Local Community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others (2015) eKLR** where the Court emphasised on the importance of public participation.

45. The Petitioner submitted that Respondent is in gross violation of the law and breach of constitutional rights and that it would be prejudicial to allow it carry on with the intended vetting exercise in the circumstances. The Petitioner submitted that its Petition is therefore meritorious and therefore urged this Court to allow it as prayed.

Respondent's Submissions

46. The Respondent on the other hand submitted that the intended vetting exercise is lawful and justified and shall be done within the confines of the law.

47. The Respondent further submitted that the vetting process is not a fishing expedition but rather the information it intends to collect is meant to assess the suitability of its employees to hold public office in line with the provisions of Section 26 of the Public Officers Ethics Act, 2003 as read with Article 73(2)(c) of the Constitution of Kenya, 2010.

48. The Respondent argues that its decision to conduct the vetting exercise was birthed from the Circular Ref. No. OP/CAB. 39/1A of 4th June, 2018 that was signed by the Head of Public Service whose constitutionality was upheld in case of **Okiya Omutata Okiiti v Joseph Kinyua, Public Service Commission & Attorney General (2018) eKLR**.

49. The Respondent maintains that the vetting exercise is pegged on the new Constitutional dispensation that upholds integrity, transparency, accountability and code of values for public conduct for Public Officers as provided under Articles 10 and Chapter 6 of the Constitution of Kenya, 2010.

50. The Respondent further submitted that the right to privacy is limited by dint of the provisions of Article 24 of the Constitution of Kenya, 2010. It further argues that in this case the right is limited for purposes of upholding the integrity and dignity of the Republic of Kenya and in dictating the manner

in which public resources are being put to use.

51. The Respondent submits that it is justified to seek the information from the Petitioner's members for purposes of vetting their suitability to hold public office.

52. In conclusion the Respondent urged this Court to find that the vetting exercise is properly anchored in law and is justified. It therefore submitted that the petition as filed lacks merit and should be dismissed with costs to the Respondent.

Analysis and determination

53. Having considered the application, affidavits, petition, submissions filed by the parties and the authorities cited therein. The following are the issues for determination: -

- (i) Whether the vetting exercise is unconstitutional;
- (ii) Whether the Petitioner's member's rights have been violated;
- (iii) Whether the Petitioner is entitled to the reliefs sought.

Whether the vetting exercise is unconstitutional

54. The Respondent in a view to comply with the recommendation of the Presidential Taskforce on Review of Power Purchase Agreements set out to conduct vetting of its members of staff, some of whom are members of the Petitioner herein.

55. The Respondent's impugned vetting memo reference number KP1/5A/1/1.1/7/CKU//fmc dated 18th November 2021 reads as follows:

*“From: **GENERAL MANAGER, HUMAN RESOURCE & ADMINISTRATION***

*To: **LIST 'C' & NOTICE BOARDS***

18 November 2021

VETTING Of EMPLOYEES

Reference is made to the Task Force recommendation on KPLC Reforms. We hereby wish to inform you that the Government has constituted a Vetting Cluster Team to vet all KPLC staff members.

*To this end, all staff members are hereby notified and urgently required to provide the information listed herein below in sealed envelopes addressed “**Head of KPLC Vetting Team**”. The envelope shall also indicate the name and staff number of the employee, to be received at the 6th Floor, Stima Plaza, by Close at Business, Monday, 22nd November 2021. The staff members based in the Regions shall submit the information to their respective Regional Human Resource Office, on or before the date indicated above. Staff members assured that the provided information will be treated with utmost confidentiality and in due regard to everyone's constitutional right.*

(i) Employment particulars of the officer (Full Names, Identity Card Number, Passport Number, Pin Number: Driving License Number; Mobile Telephone number; Daytime Telephone Number; Email)

(ii) Residential address (es) of the officer and spouse for the last 5 years; ownership status of current residence;

(iii) Power/water meter numbers; any other utility account numbers;

(iv) Current posting of the officer; Employment: Job Group/Grade; list of previous deployments and number of years served per deployment; history of disciplinary cases; promotions received;

(v) Full names and Identity card numbers of immediate family members (spouse, children, dependants, parents, siblings); business associates; agents; or associations where the officer has a direct and indirect pecuniary (financial) or non-pecuniary (financial) interest;

(vi) List of Known companies and businesses owned or controlled by the officer or immediate family members that have had commercial dealings with KPLC

(vii) List of moveable and immovable assets owned/partly owned by the officer or the immediate family members, business associates or agents including data on average, location, and status (e.g. whether charged to financial institutions, joint ownership, allotment etc) including dates of acquisition;

(viii) Machinery, vehicles and other assets where the officer has a beneficial interest;

(ix) Stocks, shares and Partnerships including investment groups of which the officer and spouse are members;

(x) Certified copies of bank statements of the officer and the spouse for the last 6 months;

(xi) Certified copies of mobile money statements of the officer and spouse for the last 6 months.

(xii) Kenya Revenue Authority Income Tax Returns for the officer and the Officer's companies/businesses for the last 3 years;

(xiii) Club membership(s)

(xiv) Social media accounts/handles (Facebook, Twitter,

Instagram) etc

(xv) List of liabilities (including loans, mortgages, chattels, guarantees, school fees and school accounts; cumulative insurance policies; holidays)

Please note that the above list is not conclusive and that you may be required to present additional information as may be deemed necessary

(Signed)

Cecilia Kalangu – Uvyu”

56. Chapter 12.3.1 of the report of the Presidential Task Force on Review of Power Agreements (PPA) reads as follows –

“12.3.1 Recommendations:

The Taskforce observed that the proposed changes in the organisational structure will, if implemented fully, enable the company to focus on the customer and improve efficiency that will help deliver KPLC's mandate. The Taskforce however recommends the following additional actions:

a. The establishment of critical offices:

i. An IPP office, responsible for all aspects of PPAs including procurement, management, monitoring, record keeping, risk management. This office would be the PPP node for KPLC, and should report to the Managing Director's office comprising officers with skills in finance, legal, technical and economics. This would incorporate the contract management team and framework as recommended in Chapter 7.

ii. The establishment of a meteorological office. In light of KPLC's reliance on renewable energy sources that are dependent on weather patterns, and whose impact on intermittency are high, KPLC should establish capabilities to monitor weather trends and make appropriate dispatch decisions based on weather patterns and climatic changes. Linkages should be made to acquire data and capabilities from the national metrological offices.

iii. Demand Planning and Forecasting division to assure preparation of relevant LCPDP projections, as well as one year and five year forecasts.

b. While noting the comprehensive restructuring of the organisation's departments that should be fully enforced, KPLC should nevertheless undertake a comprehensive business process review of its operations, focusing on automating critical citizen centric services such as billing, metering and payments, and outsourcing of functions that

are not critical to core mandate.

c. Focus on a performance based framework supported by a balance scorecard system aligned to the strategic plan, to assure performance management objectives at organisational, departmental and individual level.

d. Specific metrics to be established to ensure fast track outstanding connection applications with a prescribed timeline for completion.

e. Undertake a suitability vetting of staff, assuring itself of the qualifications, competencies and integrity of officers and staff working in the organization. Use of wealth declarations to verify unexplained wealth should be initiated through the Ethics and Anti-Corruption Commission to secure assurance of this value ideal.

f. Introduce a shift system and rationalise staff numbers.

g. To enhance specialised skills within the company, such as structuring and negotiation of international transactions (legal), Financial Modelling, Treasury operations, new innovations, talent management, etc., KPLC to outsource and secure external experts, from both local and international segments.”

[Emphasis added]

57. The Terms of Reference of the Taskforce as set out in Gazette Notice No. 3076 of 29th March 2021 which appointed the Taskforce is set out below –

1. The Terms of Reference of the Taskforce shall be to—

(a) undertake a comprehensive review and analysis of the terms of all Power Purchase Agreements (PPAs) entered into by the Kenya Power and Lighting Company Limited (KPLC);

(b) probe the compliance of the PPAs and all associated agreements with Government policies, legislation and regulations and identify what appropriate actions should be

(b) taken, including the termination or renegotiation of the PPAs;

(c) review the sustainability and viability of all independent power generation projects that have been proposed, are under implementation, or in operation, and make appropriate recommendations;

(d) review the allocation of risk between the independent power producers and KPLC under the PPAs, and make appropriate recommendations;

(e) review the Take-or-Pay approach applied under the PPA

(f) structure and recommend a viable Pay-when-Taken (merchant plant) approach, or any other viable payment structure, for use in independent power generation projects;

(g) develop a suitable strategy for engagement with the independent power producers and lenders, in order to achieve relief for electricity consumers and ensure the long-term viability and sustainability of the energy sector;

(h) review the current methods for sourcing of independent power producers and recommend appropriate alternative sourcing frameworks, including energy auctions;

(i) recommend legislative, regulatory, policy or administrative interventions for the implementation of the recommendations and strategies of the Taskforce;

(j) develop a detailed action plan for implementing the recommendations made by the Taskforce; and

(k) perform any other function or tasks as the Taskforce

may find necessary in order to deliver on its mandate.

2. In the performance of its mandate, the Taskforce shall—

(a) report to and be accountable to H.E. President through the Cabinet Sub-committee on Kenya Power and Lighting Company;

(b) consult with stakeholders in the electrical energy sub-sector including industry players, large electricity consumers,

(b) associations and lobby groups, regulators and Government

(c) agencies, and any other person or entity as the Taskforce shall deem necessary;

(d) hold such number of meetings, consultative sessions, public events and engagements as the Taskforce shall consider necessary for the purposes of receiving information or views in furtherance of its terms of reference;

(e) co-opt any person as it may consider necessary or expedient for the proper performance of its functions and the effective discharge of its mandate;

(f) have such powers as may be necessary or expedient

for the proper execution of its functions;

(g) regulate its own procedure;

(h) create committees or sub-committees for the efficient and expedited discharge of its mandate;

(i) may consider and use the reports of any past or ongoing

(j) initiatives as the Taskforce may deem relevant to its mandate; and

(k) request and receive any information or document that may be relevant to the discharge of its mandate.

3. The Taskforce will serve for a period of six (6) months with effect from the 29th March, 2021, or for such longer period as may be specified by notice in the Gazette.

4. During the tenure of the Taskforce—

(a) a moratorium is hereby placed on all PPAs not concluded as at the date of this notice, including any related letters of support and legal opinions pending issuance by the Attorney-General; and

(b) a moratorium is hereby placed on the renewal of

any PPA whose renewal would occur during the pendency of the Taskforce, with the exception of those that shall receive approval by the Board of Directors of the Kenya Power and Lighting Company Limited for the purposes of renegotiation but, at all times, subject to ratification by the Cabinet Subcommittee on KPLC.

5. The Secretariat of the Taskforce shall be based at Harambee House, 3rd Floor, P.O. Box 30510-00100, Nairobi.

58. The Petitioner's position is that the circular by the Respondent is unconstitutional as it contravenes several provisions of the Constitution including Articles 10(2)(b), 31 and 41 and is ultra vires.

59. Article 10(2)(b) provides for principles of governance including human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.

60. Article 31 provides for the right to privacy as follows: –

31. Privacy

Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

(b) their possessions seized;

(c) information relating to their family or private affairs unnecessarily required or revealed; or

(d) the privacy of their communications infringed.

61. Article 41 provides for labour rights including fair labour practices and the right to form, join and participate in affairs of trade unions.

62. The impugned circular requires employees to give information which includes information of residential addresses for an officer and spouse for five years, including ownership status of current residence, utility accounts, history of disciplinary cases and promotions, names and identity cards of immediate family members including spouse, children, dependants, parents and siblings, business associates, agents, or associations where the officer has a direct and indirect pecuniary (financial) or non-pecuniary (non-financial) interest, social media accounts/handles (Facebook, twitter, Instagram) etc, among other information.

63. The law in Kenya does not provide for vetting of employees, except as provided for in the Public Officer's Ethics Act in the manner provided therein. The wealth declaration form under the Act sets out the nature of information that an employee is required to disclose.
64. It is obvious that what the Respondent requires from its employees is much more than what is provided for in the wealth declaration form, which limits information required from the employee to self, spouse and dependent children.
65. In the instant case, the employees are required to give information that relates to other persons such as parents, adult children, dependants, siblings, business associates, agents, associations where the officer has a direct and indirect financial interest, including list of assets of such persons/bodies.
66. In the first place, this is obviously information that would not be in possession of the employee. It is information that is in possession of parties whom the employee would have to seek the information from. This is information that would infringe on the rights of privacy of the said persons who are not parties to the employment relationship between the Respondent and its employees.
67. Secondly, the Respondent has not stated what it requires this information for, or what it intends to do with such information, whether the information is to be adversely used against the employee and the persons whose information the employee is required to produce. It has not been stated what options are available for employees should these third parties refuse to divulge the information to the employees.
68. In the history of Kenya, there have been two vetting processes, for the Judges and judicial officers, and for police officers. In both cases the vetting was anchored on the law with regulations that set out the objectives of the vetting, the principles, the powers of the vetting boards, the appointment criteria for the boards, the documentation to be submitted by officers, standards of vetting and the rights of employees to opt out of the vetting as well as the consequences of not presenting themselves for vetting.
69. In the instant case, the Taskforce which recommended the vetting does not have any legal framework under which to undertake the vetting. It does not even have the power to carry out vetting under its Terms of Reference. The employees have not been informed of the objectives of the vetting and the procedure thereof, or the intended purpose, or consequences.
70. I have carefully perused the authority from the Office of the President in the form of a Press Release annexed as annexure DM3 of the replying affidavit of DAVID MONANDI at page 11 of the Respondent's bundle as read with the Gazette Notice No. 10723 dated 8th October 2021. The same does not give the taskforce power to vet the employees of the Respondent.
71. Article 24 provides for instances when a right or fundamental freedom in the Bill of Rights may be justifiable. The same must be by law, and only to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all factors including –
- (a) *the nature of the right or fundamental freedom;*
 - (b) *the importance of the purpose of the limitation;*
 - (c) *the nature and extent of the limitation;*
 - (d) *the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
 - (e) *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*
72. I find that the intended vetting by the Respondent is an infringement of the right to privacy under Article 31 of the Constitution for requiring the employees of the Respondent to provide information that is protected under the said Article.
73. It is further a violation of Article 41 as it subjects the said employees to unfair labour practice by requiring them to submit themselves for vetting to a body that has no authority to carry out the vetting and whose objectives, procedure and consequences are not defined.
74. The impugned vetting also violates the rights of all the persons whose information the employees of the Respondent are required to produce without their authority.
75. I further find that the vetting is ultra vires the terms of reference of the Taskforce on Review of Power Purchase Agreements as gazetted under Gazette Notice No. 3076 as well as the Steering Committee on the Implementation of the Report of the Presidential Taskforce on Review of Power Purchase Agreements as gazetted in Gazette Notice No. 10723 of 8th October 2021.
76. I further find that the Petitioner whose members were to be vetted by virtue of the impugned memo was not consulted on a matter that was likely to adversely affect its members, in violation of the provisions of the parties' recognition agreement and collective bargaining agreement. The letter referred to in the replying affidavit of DAVID MONANDI dated 19th November 2021 which he states was notification to the Petitioner was issued after the vetting memo and cannot constitute consultation.
77. For the foregoing reasons, I find merit in the petition and make the following orders –

(i) A declaration be and is hereby issued that the vetting of employees by the Respondent as per the circular issued on 18th

November, 2021 and the call for the confidential information are unconstitutional and of no legal effect for breach of the Constitution.

(ii) A Declaration be and is hereby issued that the members of the Petitioner have a constitutional right to privacy.

(iii) A permanent injunction be and is hereby issued against the Respondent whether by themselves, their servants and or agents or whomsoever is acting on their behalf from conducting a vetting exercise on its employees who are members of the Petitioner in the manner set out in the circular dated 18th November 2021.

(iv) The Respondent is however at liberty to vet the employees within the provisions of the law and their terms of service and to require the employees to submit wealth declaration forms as set out in the law.

(v) The Respondents bears the costs of this petition be provided for.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF FEBRUARY 2022

MAUREEN ONYANGO

JUDGE

ORDER

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

MAUREEN ONYANGO

JUDGE