



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. E166 OF 2021**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**OKIYA OMTATAH OKOITI..... PETITIONER**

*VERSUS*

**THE PRINCIPAL SECRETARY FOR HEALTH..... 1<sup>ST</sup> RESPONDENT**

**THE BOARD OF DIRECTORS, THE KENYA RESEARCH INSTITUTE...2<sup>ND</sup> RESPONDENT**

**KENYA MEDICAL RESEARCH INSTITUTE..... 3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner is a resident of Nairobi, a public spirited individual and a human right defender.
2. The 1<sup>st</sup> Respondent has been sued for acting *ultra vires* by purporting to form an in-house team to audit staff promotions made by the board of directors of Kenya Medical Research Institute.
3. The 2<sup>nd</sup> Respondent has been sued for accepting to implement *ultra vires* directives given by the Principal Secretary for Health regarding staff promotions.
4. The 3<sup>rd</sup> Respondent has been sued as a state corporation under which the board of directors of Kenya Medical Research Institute operate.
5. The 4<sup>th</sup> Respondent has been sued as the principal legal advisor and representative of the Government of Kenya.
6. The Petitioner is aggrieved that the staff promotions dully implemented by the 2<sup>nd</sup> Respondent have irregularly and unlawfully been set aside by the Principal Secretary for Health who acting *ultra vires* has forced the exercise to be repeated.

7. The Petitioner states that the impugned repeat exercise is tainted with violation of the law including the Constitution and that the same should be called out and be quashed.

8. The Petitioner states that on 26<sup>th</sup> June 2020 the Board of Directors of KEMRI director ran an internal advertisement for various cadres in line with the requirements of the KEMRI Career Guidelines and on the 15<sup>th</sup> and 16<sup>th</sup> December 2020 interviews for promotions were conducted and a resolution passed to promote 30 successful members of staff.

9. The Petitioner states that on 17<sup>th</sup> and 20<sup>th</sup> September 2021 the Board re-advertised the promotions. However, the re-advertisement was based on criteria not recognized by the approved policies for KEMRI. It was inconsistent with the KEMRI Career Guidelines as well as the Human Resource Policy and Procedures Manual.

10. The Petitioner states that the re-advertisement is a nullity in law and the purported audit team was constituted unlawfully as the Principal Secretary for Health has no capacity to appoint auditors to audit Board of management processes of a state corporation.

11. The Petitioner further states that if there were any genuine complaints about the promotion exercise, the aggrieved party should have handled the same in compliance with Clause 12 of the KEMRI Human Resource Policy and Procedures Manual, 2019 which provides a mechanism for handling any grievances, irregularities and errors.

12. Aggrieved, the Petitioner instituted the present suit by a petition dated 26<sup>th</sup> October, 2021 where he seeks the following orders: -

*a).. A declaration be and is hereby issued that KEMRI board of management is bound to strictly adhere to the KEMRI career guidelines and the Human Resource Policy and Procedures Manual while conducting staff promotions and recruitments.*

*b).. A declaration be and is hereby issued that the PS- Health acted ultra vires and in vain in purporting to appoint a team to audit a process of the board of management being the staff promotions which the board approved.*

*c).. A declaration be and is hereby issued that the PS Health was conflicted and acted in bad faith in the purported audit process.*

*d).. A declaration be and is hereby issued that the audit report the PS-MOH submitted to the KEMRI board of management is unlawful and unconstitutional and therefore invalid null and void ab initio*

*e).. A declaration be and is hereby issued that the re-advertisement for promotions as communicated on 17<sup>th</sup> and 20<sup>th</sup> September 2021 by the Director General through corporate communications department are unlawful and unconstitutional and therefore invalid null and void ab initio.*

*f).. A declaration be and is hereby issued that the staff promotions effected by the Board of management on 15<sup>th</sup> and 16<sup>th</sup> December 2020 should be upheld and effected with the letters of promotion being issued to successful candidates.*

*g).. The Honourable court do issue and hereby issues an order compelling the Respondents and their agents howsoever acting to uphold the staff promotions effected by the Board of Management on 15<sup>th</sup> and 16<sup>th</sup> December 2020 and to do so in strict compliance with the letters of promotions being issued to successful candidates as approved.*

*h).. The Honourable court do issue and hereby issues an order of permanent injunction*

*permanently barring the Principal Secretary, Ministry of Health from interfering with staff promotions effected by the board of management on 15<sup>th</sup> and 16<sup>th</sup> December 2020*

*i) The Honourable court do issue and hereby issues an order quashing the audit report the PS MOH submitted*

*to the KEMRI board of management.*

*j)... The Honourable court do issue and hereby issues and order quashing the re-advertisement for promotions of KEMRI staff as communicated on 17<sup>th</sup> and 20<sup>th</sup> September 2021 by the Director General through the corporate communications department being unlawful and therefore, unconstitutional invalid null and void*

*k).. The Honourable court be pleased to issue and hereby issues an order ordering the Respondents to bear the Petitioners costs of this petition*

*l)... Consequent to the grant of the prayers above the honourable court be pleased to issue any other or further remedy (directions and orders) that the honourable court shall deem necessary to give effect to the foregoing orders and/or favour the course of justice.*

13. The Petition is brought under the provisions of **Article 3(1), 22, 23, 48, 50(1), 162(2)(a), 165(5), 258, 259, 1, 2, 4(2), 10, 19, 20, 21, 24, 27, 41(1), 47, 73, 75, 129, 153(4)(a), 232 and 259** of the Constitution of Kenya, 2010, the Public Audit Act 2015, The State Corporations Act CAP 446, The KEMRI Career Guideline and the KEMRI Human Resource Policy and Procedures Manual.

14. The Respondent filed a Replying Affidavit sworn by **PROFESSOR SAM KARIUKI**, the Respondent's Acting Director General and Chief Executive Officer, Kenya Medical Research Institute (KEMRI) sworn on 22<sup>nd</sup> November, 2021 in response to the Petitioner's motion dated 26<sup>th</sup> October 2021.

15. The affiant avers that KEMRI Board of Directors in consultations and with approval from the Ministry of Health and State Corporations Advisory Committee approved the institutes human resource instruments.

16. He maintains that the human resource instruments and grading structure starts with the Director General/Chief Executive Officer as KMR-1 and ends at KMR-12

17 . He avers that in December 2019 the KEMRI Board of Directors approved a 5 year Human Resource Management Plan that necessitated promotion of staff to fill the vacant positions in scientific, technical and administrative areas.

18. The affiant further states that following the board's approval and in compliance with the Human Resource Instruments, KEMRI successfully commenced and concluded suitability interviews through an internal advertisement dated 26<sup>th</sup> June 2020 which closed on 13<sup>th</sup> July 2020. Candidates who met the minimum requirements were shortlisted on 9<sup>th</sup> September 2020 and interviewed on 15<sup>th</sup> and 16<sup>th</sup> December 2020.

19. The affiant states that on 21<sup>st</sup> December 2020 the Principal Secretary, Ministry of Health acting in the capacity of an Accounting Officer wrote to KEMRI informing it that complaints had been raised regarding staff promotions and interviews conducted and advised that the process be held in abeyance pending an audit of the process to ascertain the veracity of the complaints and address any other related issue.

20. The affiant states that the Principal Secretary, Ministry of Health in exercise of the ministerial supervisory mandate appointed a team which undertook the audit and submitted its findings. The audit team recommended that the promotion process be reviewed and the positions be re-advertised to ensure

that candidates are given an opportunity while adhering to KEMRI Human Resource Instruments.

21. The affiant states that upon re-advertisement of the positions as advised by the Board, the advertisement had an error in that it required a master's degree for the position of Deputy Director Legal Services which necessitated an immediate clarification by management to all staff as the requirement was against the institutes Career Guidelines.

22. It is the affiant's position that the Petitioner's allegation that staff recruitment and promotion in state corporations such as KEMRI are strictly governed by the human resource instruments and outside the purview of the Ministry of Health and that the Ministry of Health has no oversight role over KEMRI is a misapprehension of government operations.

23. The affiant states that the Petitioner has not demonstrated how his fundamental rights and freedoms under the Constitution have been violated therefore has not satisfied the conditions laid down by the law for this court to exercise its discretion in his favour nor has he proved the grounds relied upon in his prayers to warrant a review.

24. The affiant contends that the Petitioner herein lacks standing to commence the proceedings as the matters are purely matters of private law between employer and employee.

25. The affiant states that this matter is not within the purview of public law and that it should be dismissed and it is of great interest that KEMRI be allowed to conduct transparent interviews and ensure grievances of employees are addressed.

26. The affiant avers that the application and the petition lack merit and is an abuse of the court process and does not warrant issuance of the orders sought and should be dismissed with costs.

27. Attached to the affidavit is a copy of a letter from the Chairman of the Public Service Commission giving the requirement of a master's degree for the position of Director and all positions graded at CSG 5 and above.

### **Petitioner's Submissions**

28. The Petitioner submits he is a private citizen of Kenya who has filed the suit herein in the public interest under Articles 3(1), 22, 23 and 258 of the constitution to challenge the extent to which the constitution has been contravened.

29. The Petitioner relies on the holding in **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others (2014) eKLR** where the court explained the essence of public interest litigation.

30. The Petitioner submits that the Respondents have an obligation to be transparent, accountable and exercise other principles of good governance. He submits that the action by 1<sup>st</sup> and 2<sup>nd</sup> Respondents pertaining to their failure to comply with the article 47 of the Constitution as held in **Republic v Kenya Power and lighting Company Limited & Another (2013) eKLR** "*Discretion must but be exercised reasonably*".

31. The Petitioner also relies on the holding in **Republic v National Police Service commission ex-parte Daniel Chacha [2016] eKLR** where the court adopted the holding in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** in which the Court of Appeal held

*"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of the state organ and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to a fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other*

*administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than the doctrine of ultra vires from which administrative law under common law is developed”*

32. The Petitioner submits that the Doctrine of *ultra vires* and Articles 10(2) and 47 of the constitution protect the public interest by ensuring that public bodies and officers act strictly within and according to the law to prevent abuse of power.

33. The Petitioner relies in the holding in **Okiya Omtatah Okoiti & 3 others v Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others [2021] eKLR** where the court held

*“An act of ultra vires when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principles renders the decision made laced with illegality.”*

34.. The Petitioner submits that that the Principal Secretary, Ministry of Health has absolutely no capacity to act outside the law and when she does her actions are *ultra vires*, *null* and *void ab initio*.

35. The Petitioner further submits that the Principal Secretary, Ministry of Health does not cite any law authorizing her to audit the process of the board hence the audit is a nullity.

36. The Petitioner submits that the purported audit team was constituted unlawfully since the Principal Secretary has no capacity to appoint auditors, thus he did not act within the purview of the constitution, the law, internal processes of KEMRI and the greater public good but in fact acted in breach of the constitution.

37. The Petitioner states that Section 51(1) of the State Corporations Act provides that a board of management of a state corporation is responsible for proper management of the affairs of a state corporation and it is accountable for the moneys the financial business and management of the state corporation.

38..... The Petitioner submits that the Principal Secretary, Ministry of Health acted *ultra vires* in purporting to form an in-house team to audit the promotions of staff by the board of KEMRI and as such the audit report is unlawful, unconstitutional therefore invalid.

39. The Petitioner further submits that Sections 14(1) and 15(1)(a) of the Kenya Medical Research Institute Order, 2021 provide that:

***14(1) The board may appoint such number of professional, technical and administrative staff for the institute as it may consider necessary.***

***15. Policies The board may make policies for the carrying into effect the provisions of this order and in particular but without prejudice to the foregoing make policies-***

***a) With respect to the procedure for the appointment of all members of staff or officers of the institute***

40. It is the Petitioner submission that the Principal Secretary, Ministry of Health cannot overrule the board on promotion of the institutes staff and urges the court to declare that KEMRI Board of management should be bound by the Career Guidelines and human resource policies and procedures, that the re-advertisement for the promotions as communicated on 17<sup>th</sup> and 20<sup>th</sup> September 2021 should be declared unconstitutional and therefore invalid null and void *ab initio*. That the staff promotions effected by the board of management on 15<sup>th</sup> and 16<sup>th</sup> December 2020 should be upheld and the successful candidates be issued with letters of promotion.

41. The Petitioner submits that the act of nullifying the promotion exposure by the Principal Secretary,

Ministry of Health leads to wastage of public resources which violates Article 201(d) of the Constitution of Kenya, 2010 which requires public money to be used in a prudent and responsible way.

42. The Petitioner submits that the Principal Secretary, Ministry of Health acted in excess of her powers irregularly, unreasonably, illegally and unlawfully by purporting to audit the promotion process and thus violated the principle of legitimate expectations.

43. The Petitioner relies on the principle of award of costs in constitutional litigation between a private party and the state and urges that the private party who is successful should have the costs and relied on the holding in **Kenya Human Rights Commission v Communications Authority of Kenya and 4 others [2018] eKLR**.

44. The Petitioner further submits that should the suit fail, he should not be condemned to pay costs of the suit for the reason that this matter was filed in public interest under Articles 22 and 258 of the Constitution of Kenya 2010.

45. The Petitioner prays for the reliefs sought in the petition and any other appropriate reliefs that will enhance the protection of the constitution and uphold the rule of law as well as constitutionalism

### **Respondents' Submissions**

46. The Respondents submit that the Petitioner commenced the proceedings by reliance on privileged public documents which he obtained without authority. It is submitted that the Petitioner did not request for the information from the government office and has no evidence to demonstrate he lawfully obtained the documents.

47. The Respondents further submit the Petitioner has come to court with unclean hands and the documents ought to be expunged from the court record. Reliance is made on the holding in **Nairobi Law Monthly & Another v Kengen [2013] eKLR** where the Judge while expunging documents that were unlawfully obtained by the Petitioner held that the Petitioner has an obligation to request for information and the state has an obligation to disclose the information unless there is sufficient reasons for non-disclosure. The use of clandestine means in the face of clear constitutional means is unwarranted. Reliance is also made on the decision in **Okiya Omutata & 2 others v The Attorney General & 4 others [2020] eKLR** where the Court of Appeal reinforced this position and expunged documents obtained from government by the appellants illegally.

48. The Respondent submits that the Petitioner herein is notorious in obtaining government documents without authority and submits that the said documents should be expunged and the entire petition struck out with costs.

49. The Respondents also submit that the Petitioner lacks standing to commence these proceedings in accordance to Articles 22 and 258 of the Constitution of Kenya 2010 which states that the Petitioner needs to demonstrate that he has an interest and that this being an employment matter, he must show the parties affected by the said decision cannot act by themselves.

50. The Respondents further submit the Petitioner has not defined whose interest he is promoting in the matter as such and rely on the holding in **Humphrey Makokha Nyongesa & Another v Communications Authority of Kenya & 2 others [2018] eKLR** where the Court stated that a person who wishes to enforce the constitution must fit into one of the categories set out in the two articles and must specify the capacity in which they have come to court under either of the two constitutional provisions.

51. The Respondents contend that the petition has been filed the contrary to the express provisions of Section 12 of the Employment and Labour Relations Court Act that prescribes the jurisdiction of this court.

52. It is further submitted that the Petitioner has not set out the specific rights violated and how they are violated and the extent to which they are violated. The holding in **Kiambu County Tenants Welfare Association v Attorney General and Another [2017] eKLR** is relied upon where the Court observed that:

*“Courts have over the years established that for a party to prove violation of their right under the various provisions of the Bill of rights they must not only state the provisions of the constitution allegedly infringed in relation to them but also the manner of the infringement and the nature and extent of infringement and the nature of the extent of the injury suffered ...”*

53. The Respondent submits the Petitioner does not meet the threshold for a constitutional petition as it is not enough to merely cite constitutional provisions without setting out particulars of the alleged infringement. They further urge that the promotion process was found to be flawed necessitating a repeat to ensure a fair, open, transparent process and equal opportunity to all deserving staff.

54. It is the Respondent’s submission that the Petitioner has not placed material facts before the Court identifying the person(s) whose rights have been violated or evidence of violation of any provision of the Constitution of Kenya.

55. The Respondents contend that the orders sought would be tantamount to violating the constitutional rights and provisions as there is clear evidence that the process the Petitioner seeks to protect and promote was marred by irregularities. Reliance is made on the holding in **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR** where the Court observed that:

*“The public interest litigation was designed to serve the purpose of protecting the rights of the public at large through vigilant action by public spirited persons and swift justice. But the profound need of this tool has been plagued with misuses by persons who file public interest litigations just for publicity and those with vested political interests.”*

56. The Respondents urge that the petition is not a public interest matter as the re-advertisement affects employees and not general public. The decision in **Communication Workers Union & Another v Communication Authority of Kenya [2015] eKLR** is relied upon to underscore the position that employment is a matter of private law. They submit that the Petitioner is not seeking to enforce public law rights in a context of private contractual rights.

57. The Respondents urges that Section 4 of the State Corporations Act mandates the president to assign ministerial responsibility for any state corporation and in this case the President assigned the ministerial responsibility of KEMRI to the Cabinet Secretary, Ministry of Health and the Ministry has the mandate to oversee the management of the affairs of KEMRI.

58. It is further submitted that the Public Finance Management Act 2012 designates principal secretaries as accounting officers representing the National Treasury and have the responsibility of ensuring resources of respective entities are used in a way that is lawful, effective, efficient economical and transparent.

59. It is the Respondents’ submission that the Principal Secretary, Ministry of Health did not act ultra vires but was discharging a public mandate to ensure that KEMRI acted in accord with its procedures with regard to staff promotions.

60. The Respondents finally submit that KEMRI is a state corporation, a body corporate governed under the provisions of the State Corporations Act.

61. It is the Respondent’s submission that upon receipt of the Audit Report from the Principal Secretary, the Board of KEMRI deliberated on the contents and adopted it whereupon it ceased to be the decision of the Principal Secretary and became a decision of the Board of KEMRI.

62. The Respondents conclude by urging the court to dismiss the petition as:
- a) *The Petitioner has used public documents obtained contrary to the law*
  - b) *Petitioner has no locus standi to commence the proceedings*
  - c) *The Petitioner has not demonstrated how his fundamental rights and freedoms have been violated*
  - d) *The action of the Respondents did not infringe rights of employees and the same was meant to ensure a transparent process*
  - e) *The matter is not within the purview of public law*
  - f) *The Principal Secretary discharged her legal mandate*
  - g) *The conduct of the KEMRI board was within the law.*
63. Finally, the Respondents submit that the Petitioner's application is an abuse of the court process and prays that the same be dismissed with costs.

### **Analysis and Determination**

64. The petition is expressed to be brought for alleged violation of rights under Articles 1,2, 3, 4(2), 10, 19, 20, 21, 22, 27, 41(1), 47, 73, 75, 129, 153(4)(a), 232 and 259 of the Constitution of Kenya, 2010. Articles 19 – 23 of the Constitution set out the general provisions of the Bill of Rights including *locus standi* and Articles 258 and 259 embody general provisions too. Whereas the latter addresses standing the latter deals with interpretation of the Constitution.
65. The Petitioner also alleges violations of Articles 1, 2, 3 and 4(2) which deal with the sovereignty of the people and the Constitution and defence of the Constitution. Article 4(2) underscores the ethos of multiparty democracy and principles of governance in Article 10, whereas Article 41(1) addresses fair labour practices in employment, Article 47 deals with fair administrative action. Articles 73 and 75 address responsibilities of leadership and conduct of state officers including conflict of interest. Whereas Article 129 addresses principles of executive authority. Article 153(4) specifically deals with how Cabinet Secretaries ought to act namely, in accordance with the Constitution and report to Parliament regularly. This is not in contest. Article 232 deals with values and principles of public service. Article 232(1)(b) deals with efficient, effective and economic use of resources.
66. After careful consideration of the petition and supporting affidavit, Respondent's replying affidavit, submissions by the parties and the law, the issues for determination are whether:
- (i) The Petitioner has demonstrated that his rights and/or fundamental freedoms or provisions of the Constitution have been violated;
  - (ii) The petition qualifies as public interest litigation;
  - (iii) The Principal Secretary, Ministry of Health acted within the law.
67. Principal among the issues identified by the Respondents is that the Petitioner obtained public documents contrary to the law. The Petitioner attached several documents to the petition, namely:
- i) *Internal memo from the Acting Director General to all staff dated 31<sup>st</sup> August 2021.*
  - ii) *Letter from the Principal Secretary, Ministry of Health to the Director General of KEMRI dated 21<sup>st</sup> December 2020.*

- iii) *Letter from the Director General, KEMRI to the Principal Secretary, Ministry of Health dated 26<sup>th</sup> January 2021.*
- iv) *Letter from Principal Secretary, Ministry of Health to the Acting Director General, KEMRI dated 31<sup>st</sup> March 2021 appointing a three member audit team and requesting the managing of KEMRI to accord the team the necessary support.*
- v) *Internal memo from the Director General to all staff dated 6<sup>th</sup> January 2020.*
- vi) *Internal advertisement for technical and administrative positions in Job Groups KMR-3, 4 and 5 dated 26<sup>th</sup> June 2020.*
- vii) *Re-advertisement for promotions communicated by the Director General on 17<sup>th</sup> and 20<sup>th</sup> September 2021.*
- viii) *KEMRI Human Resources and Procedures Manual.*
- ix) *KEMRI Career Guidelines.*

68. It is not in dispute that the 3<sup>rd</sup> Respondent is state corporation regulated by the State Corporations Act, Constitution of Kenya, 2010, other relevant statutes, the Kenya Medical Research Institute Order, 2021, other relevant regulations and government circulars.

69. It is also not in contest that the Ministry of Health under which the Principal Secretary, Ministry of Health, the 1<sup>st</sup> Respondent falls is the mother ministry for purposes of budget and other government frameworks.

70. The Respondents submit that the memo dated 31<sup>st</sup> August 2021, letter dated 21<sup>st</sup> December 2020, letter dated 26<sup>th</sup> January 2021, letter dated 31<sup>st</sup> March 2021 and an internal memo dated 6<sup>th</sup> January 2020 and other documents annexed to the petition were all obtained contrary to the law. It is the Respondent's case that the letters, memos and though public documents are privileged communication and could only be obtained with authority and the Petitioner did not request for them as required by law and tendered no evidence to show that they were lawfully obtained. It is the Respondent's submission that the information relied upon by the Petitioner was obtained contrary to the provisions of Article 35 of the Constitution of Kenya, 2010 and Section 80 of the Evidence Act and should be expunged from the record.

71. The Petitioner did not address the issue of how the information relied upon was obtained.

72. I will now address the law on the issue. Article 35 of the Constitution of Kenya, 2010 states that:

**(1) Every citizen has the right of access to—**

**(a) information held by the State; and**

**(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**

73. Section 3 of the Access to Information Act 2016 provides that:

**The object and purpose of this Act is to—**

**(a) give effect to the right of access to information by citizens as provided under Article 35 of the Constitution;**

74. In **Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR**, the Supreme Court expressed itself as follows on the right of access to information:

*“Article 35(1)(a) and (b) of the Constitution, read with Section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the IEBC”*

75. Similar sentiments had been expressed in **Rev. Timothy Njoya v Attorney General & Another [2014] eKLR**, where the Court stated *inter alia* –

*"The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest ... this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the state to 'publish and publicise any important information affecting the nation, but also to provide open access to such specific information as people may require from the state."*

76. However, the right of access to information is qualified. In **Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (supra)** the Supreme Court stated that:

*“This right to access to information is, however, not absolute and there may be circumstances in which a person may be denied particular information. Specifically, procedures are provided in a law on how a person ought to access information held by another person and particularly a state organ or entity ... Section 8 of the Access to Information Act in the above context thus provides that a person may apply in writing, or where one is unable to write, may apply orally to an information officer who shall then put the request in written form and any such request for information must be processed within 21 days.”*

77. This far, it is evident that as submitted by the Respondents, the Petitioner obtained copies of memos and letters without compliance with the procedure prescribed by law. The documents were obtained unlawfully or improperly. Question is whether such evidence is admissible. Article 50(4) of the Constitution of Kenya, 2010 states that:

**Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.**

78. In **David Ogolla Okoth v Chief Magistrate Court Kibera & 2 others [2010] eKLR** the Court stated as follows:

*“I do not however agree with the position adopted by the Petitioner which is seemingly an unqualified one that all evidence not properly obtained lead to some form of prejudice and therefore the automatic termination of a criminal trial. Such an approach negates and dilutes, invariably, the words of the Constitution emphasized above. There has to be established that a right in the Bill of rights was unjustifiably violated whilst obtaining the evidence in question. Secondly, there must then be shown that the admission of such evidence would render the trial unfair or be detrimental to the administration of justice.”*

79. This construction of Article 50(4) of the Constitution of Kenya was affirmed by the Supreme Court in **Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (supra)** the where the Court pronounced itself as follows:

*“... We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information*

*should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information.*

*Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process.”*

80. The Court is bound by these sentiments.

81. I will now proceed to apply the law to the facts of the instant petition.

82. It is not contested, the petition herein is supported by letters, documents and memos obtained from the 3<sup>rd</sup> Respondent clandestinely including copies of letters from the Principal Secretary, Ministry of Health. The copies on record are not certified and the affidavit sworn by the Petitioner on 26<sup>th</sup> October 2021 does not disclose the sources of the documents and as a mentioned elsewhere in this judgment the Petitioner did not address the issue.

83. The memos, letters and other documents annexed to the petition belong to the Board of Directors of the 3<sup>rd</sup> Respondent and privileged information which the Petitioner would have obtained by invocation of the prescribed procedure which he did not. A request for information would probably have elicited more information than annexed by the Petitioner to enable him appreciate the circumstances the 3<sup>rd</sup> Respondent was in, in its entirety including the role of the Board of Directors which is elemental in matters recruitment and promotion of staff.

84. The Respondents are faced with a petition supported by their internal communication and documents which they may have wished to rely on to demonstrate their positions. Article 31 of the Constitution of Kenya 2010 guarantees the right to privacy. The Article provides that:

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

**(a) ...;**

**(b) ...;**

**(c) ...**

**(d) the privacy of their communications infringed.**

85. By obtaining copies of letters, documents and memos in violation of the prescribed procedure, the Petitioner unjustifiably violated the Respondents right to privacy. Relatedly, reliance on the irregularly obtained copies of letters, memos and documents in support of the petition renders the proceedings unfair to the Respondents.

86. For the foregoing reasons, the Court is satisfied that the Respondents have on a balance of probabilities established that admission of the evidence relied upon by the Petitioner would violate the fundamental principles of the freedom of access to information under the Constitution of Kenya, 2010 and other laws.

87. The unorthodox ways in which the Petitioner obtained the documents, letters and memos was uncalled for in the presence of a prescribed procedure and would be detrimental to the administration of justice.

88. In light of the above findings, the following documents are expunged from the record:

(a) *Internal advertisement for technical and administrative positions in job groups KMR-3, KMR-4 and KMR-5 dated 26<sup>th</sup> June 2020 annexed to Exhibit 000-1 pages 28 – 96.*

(b) *Internal memo from the Acting Director General to all staff updating staff on medical insurance, promotions and research funding annexed to Exhibit 000-1 pages 97– 98.*

(c) *Letter dated 21<sup>st</sup> December 2020 from the Principal Secretary, Ministry of Health annexed to Exhibit 000-1 page 99.*

(d) *Letter dated 26<sup>th</sup> January 2021 from the Director General, KEMRI to the Principal Secretary, Ministry of Health annexed to Exhibit 000-1 on page 100.*

(e) *Letter dated 31<sup>st</sup> March 2021 from Principal Secretary, Ministry of Health annexed to Exhibit 000-1 on page 101.*

(f) *Re-advertisement for dated 17<sup>th</sup> and 20<sup>th</sup> September 2021 promotions communicated by the Director General on to all staff annexed to Exhibit 000-1 on pages 102 to 154.*

(g) *KEMRI Human Resources and Procedures Manual dated January 2019 annexed to Exhibit 000-1 on pages 155 to 365.*

(h) *KEMRI Career Guidelines dated January 2019 annexed to Exhibit 000-1 on pages 366 to 742.*

89. Expunction of the foregoing documents renders the petition herein destitute of the requisite substratum or legs to stand on.

90. Granted that the foregoing is determinative of the petition herein, would the Petitioner have succeeded if the documents obtained contrary to the prescribed procedure were admitted as evidence?

91. Since this is a constitution petition premised on various provisions of the Constitution allegedly violated, it behoves the Petitioner to establish with sufficient clarity and precision the provisions of the Constitution allegedly violated with regard to the Petitioner, the manner or nature of the violation and the extent of the alleged violation as enunciated in **Anarita Karimi Njeru v Republic [1979] eKLR** as well as **Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] eKLR**. In the former Trevelyan and Hancox JJ.stated as follows:

*“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”*

92. See **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR** where the Court expressed itself as follows:

*“Courts have over the years established that for a party to prove violation of their rights under the various provisions of the Bill of Rights they must not only state the provisions of the Constitution allegedly infringed in relation to them, but also the manner of infringement and the nature and extent of that infringement and the nature and extent of the injury.”*

93. The Petitioner cites Articles 1(1), 2, 3(1), 4(2), 10 and 47 to urge that the rule of law was violated

without setting out the actual particulars of the specific allegations of how a repeat exercise of an activity violated the law. On Articles 10 and 47, it is alleged that the 3<sup>rd</sup> Respondent's Career Guidelines and the Human Resources Policy and Procedures Manual were violated but again the specific nature of the alleged violation is unclear.

94. As regards Article 41(1), the allegation that some members of staff were denied hard earned promotions is amorphous and lacking in particulars. Who were the employee? What were the qualifications vis a vis the promotion criteria? The allegation lacks specificity.

95. On alleged *ultra vires* actions of the Principal Secretary, Ministry of Health, reliance is made on Section 7(2) and 9(1)(a) of the Public Audit Act, 2015 on powers of the Auditor General on investigations to urge that only the Auditor General has the mandate to audit public entities. Section 18(3) of the State Corporations Act is relied upon to highlight the powers of the State Corporation Advisory Committee, Controller and Auditor General to require the Inspector General (Corporation) to conduct special investigations of any state corporations on their behalf and report to them. No specific Article of the Constitution is relied upon to urge this submission.

96. It is opportune at this stage to dispose of the issue of whether the Principal Secretary, Ministry of Health acted *ultra vires*. *Ultra vires* literally means beyond the powers according to Black's Law Dictionary 10<sup>th</sup> Edition, 2014.

97. The alleged *ultra vires* action is that by a letter dated 21<sup>st</sup> December 2020, the Principal Secretary, Ministry of Health suspended the staff promotion at KEMRI following complaints regarding the promotions following interviews conducted on 15<sup>th</sup> and 16<sup>th</sup> December 2020. The Principal Secretary requested the Director General of KEMRI to hold the promotions in abeyance pending an audit of the process "*to ascertain the veracity of the complaints and address any other related challenges*".

98. The letter from the Principal Secretary, Ministry of Health does not indicate who was to carry out the audit, whether it was her office or KEMRI. However, by letter dated 26<sup>th</sup> January 2021, the Director General of KEMRI wrote to the Principal Secretary, Ministry of Health requesting for audit of the promotion process. The records are unclear whether the Board of Directors of KEMRI deliberate the issue. They are presumed to have been aware of the Principal Secretary's letter and therefore authorised the Director General to write to the Principal Secretary who obliged by letter dated 31<sup>st</sup> March 2021. The Petitioner has not alleged that the Board of Directors of KEMRI contested the decision of the Principal Secretary or the basis of the alleged action.

99. This is further confirmed by the Board's adoption of the report of the audit team. The Board was therefore in agreement with the decision of and recommendations of the audit team. The impugned actions of the Principal Secretary, Ministry of Health took place before the formal establishment of the 3<sup>rd</sup> Respondent as a body corporate under the Kenya Medical Research Institute Order, 2021 dated 1<sup>st</sup> March 2021.

100. In sum, although the Principal Secretary, Ministry of Health is not the Accounting Officer for KEMRI according to Section 67 of the Public Finance Management Act and thus had no mandate to suspend the promotion exercise, she did so with the acquiescence and authority of the Board of Directors who not only requested for the appointment of the audit team but adopted and implemented the team's report. Adoption of the report by the Board's decision was a mere formality

101. On the allegation that the Principal Secretary, Ministry of Health is a member of the KEMRI Board of Directors and thus conflicted by virtue of Article 73 of the Constitution, the Court is not satisfied that the Principal Secretary, Ministry of Health was conflicted. Article 73 addresses the responsibilities of leadership including respect for the people, honour to the nation, dignity to the office, public confidence, integrity and selection on the basis of personal integrity, competence and suitability, objectivity, impartiality, honesty in execution of public duties, declaration of personal interest that may conflict with public duties accountability at the public for decision and actions as well as discipline and commitment in

service to the people. The Petitioner has not identified which of these principles or value were violated. It is not alleged or suggested that the Principal Secretary, Ministry of Health had a personal interest to declare and did not.

102. For the foregoing reasons, the Court is satisfied that the Petitioner has not on a balance of probabilities established the requirements of **Anarita Karimi Njeru v Republic (supra)**.

103. The Petitioner furnished no evidence on who would be affected by the alleged violations, in what manner and extent and the extent of the injury, if the impugned procedure is repeated with a view to getting it right since the Petitioner is personally not affected.

104. In a nutshell, the Petitioner furnished no evidence or proof of any employee of KEMRI who would suffer prejudice if the promotion interviews were repeated.

105. As regards the allegation that public resources would not be applied efficiently or effectively or prudently as ordained by Article 232(1)(b), the Petitioner provided no particulars in support of what the financial impact of the repeat exercise would be, not even an estimate. As a consequence, the allegation that public resources would not be used efficiently, effectively or prudently is unproven.

106. As to whether the petition qualifies as public interest litigation, while the Petitioner submits that the petition falls within the precepts of public interest litigation, the Respondents submit otherwise. The Petitioner relies on Articles 3(1), 22, 23 and 258 of the Constitution of Kenya as well as several decisions to submit that public interest litigation is a tool for crusaders of constitutionalism, good governance and probity in public affairs. The Respondents on the other hand contend that the issue before the Court is in the arena of private law namely re-advertisement of staff promotions to ensure fairness, that the public stands to benefit by correcting any perceived wrongs in the earlier exercise. Case law is also relied upon for exemplification of the submission.

107. The Court is in agreement with the Petitioner that Articles 22 and 258 of the Constitution of Kenya confer upon every person *locus standi* to sue for the protection of rights and fundamental freedoms and protection of the Constitution. In addition, public interest is intended to benefit the public at large.

108. In **Mumo Matemu v Trusted Society of Human Rights Alliance, & 5 Others (supra)** the Supreme Court of Kenya pronounced itself as follows:

*“Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.”*

109. Similarly, in **Albert Ruturi & J.K. Wanywela on behalf of Kenya Bankers Association & The Minister for Finance & The Attorney-General & The Central Bank of Kenya** Mbaluto and Kuloba JJ stated that

*“In constitutional questions, human rights cases, public interest litigation and class actions ... any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation ...”*

110. Finally, in **John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR** the

Court stated inter alia:

*“The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms ...”*

111. The Court is in agreement with these sentiments.

112. Cumulatively, the decisions and additional literature relied upon by the Petitioner demonstrate that public interest litigation is indelibly ingrained in our constitutional and human rights jurisprudence and in particular where the beneficiary is the public at large or the poor, downtrodden and vulnerable sections of society.

113. However as guided by the Supreme Court in **Mumo Matemu v Trusted Society of Human Rights Alliance, & 5 Others (supra)**, the Court has discretion to evaluate the public nature of the matter vis a vis the parties and make a determination on a case by case basis as commanded by Article 159(1) of the Constitution of Kenya.

114. From the documents on record, affidavits and the submissions, it is apparent that the substratum of the Petitioner is an employment issue. Specifically, promotion of staff at KEMRI. Other than a copy of a letter dated 29<sup>th</sup> September 2021 by Margaret Nyaboke Rigoro, Senior Legal Officer at KEMRI to the Acting Director General, KEMRI annexed to the Respondent’s replying affidavit sworn on 22<sup>nd</sup> November 2021, there is no other indication that there were complaints or concerns by employees of KEMRI.

115. The Petitioner tendered no evidence of any complaint or grievance by any person and has not indicated who the beneficiaries of the petition are including why the affected individuals, if any, could not file an employment claim against the employer.

116. Having failed to establish that the public at large stand to suffer any loss or detriment if the promotion interviews at KEMRI are repeated, the petition before the Court is bereft of the public interest, a critical ingredient of public interest litigation.

117. In the upshot, the Court is satisfied that the Petitioner has not on a balance of probabilities demonstrated that the petition herein qualifies as public interest litigation.

## **Conclusion**

118. Having found that the Petitioner obtained the documents relied upon as evidence in contravention of the procedure prescribed by law, coupled with the finding that admission of the documents would render the proceedings unfair or detrimental to the administration of justice, the petition is dismissed in its entirety.

119. Parties to bear their own costs.

120. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF MARCH 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

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

**DR. JACOB GAKERI**

**JUDGE**