



**Kenya Medical Practitioners , Pharmacists and Dentists' Union (KMPDU) & 45 others v Kenya Medical Supplies Authority (KEMSA) & 10 others; Cabinet Secretary, Ministry of Labour and Social Protection & another (Interested Parties) (Petition E173, 174 & 187 of 2021 (Consolidated)) [2022] KEELRC 3868 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3868 (KLR)

**REPUBLIC OF KENYA**

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

**PETITION E173, 174 & 187 OF 2021 (CONSOLIDATED)**

**MA ONYANGO, J**

**MAY 27, 2022**

**IN THE MATTER OF ARTICLES: 1, 2, 10, 22, 23, 24,**

**27, 34, 35, 40, 41, 46, 47, 56, 75, 156, 232, 241**

**AND 258 OF THE CONSTITUTION OF KENYA (2010)**

**-AND- IN THE MATTER OF: KENYA MEDICAL**

**PRACTITIONERS, PHARMACISTS AND DENTISTS'**

**UNION-AND-IN THE MATTER OF: KENYA MEDICAL SUPPLIES**

**AGENCY ACT, 2013**

**-AND-IN THE MATTER OF: EMPLOYMENT ACT, 2007**

**-AND-**

**IN THE MATTER OF: LABOUR RELATIONS ACT,**

**2007**

**-AND-**

**IN THE MATTER OF: FAIR ADMINISTRATIVE**

**ACTION ACT, NO. 4 OF 2015**

**-AND-**

**IN THE MATTER OF THE EMPLOYMENT AND**

**LABOUR RELATIONS COURT ACT, 2011**

**BETWEEN**

**KENYA MEDICAL PRACTITIONERS , PHARMACISTS AND DENTISTS' UNION (KMPDU) ..... PETITIONER**



AND

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

AND

CABINET SECRETARY, MINISTRY OF LABOUR AND SOCIAL  
PROTECTION ..... INTERESTED PARTY

AS CONSOLIDATED WITH  
PETITION 174 OF 2021

BETWEEN

ANTHONY NYUTU CHEGE & 43 OTHERS ..... PETITIONER

AND

KENYA MEDICAL SUPPLIES AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT  
CAPTAIN (RETIRED) LAWRENCE ..... 3<sup>RD</sup> RESPONDENT  
TERRY KIUNGE RAMADHANI ..... 4<sup>TH</sup> RESPONDENT  
ROBERT NYARANGO ..... 5<sup>TH</sup> RESPONDENT  
LINTON NYAGA KINYUA ..... 6<sup>TH</sup> RESPONDENT

AS CONSOLIDATED WITH  
PETITION 187 OF 2021

BETWEEN

DR. MAGARE GIKENYA J. BENJAMIN ..... PETITIONER

AND

KENYA MEDICAL SUPPLIES AGENCY ..... 1<sup>ST</sup> RESPONDENT  
THE BOARD OF DIRECTORS, KENYA MEDICAL SUPPLIES  
AGENCY ..... 2<sup>ND</sup> RESPONDENT  
THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT

AND

THE MINISTRY OF HEALTH ..... INTERESTED PARTY



## JUDGMENT

1. The Kenya Medical Supplies Authority, KEMSA, is a statutory body established under the [Kenya Medical Supplies Authority Act](#) No 20 of 2013 (KEMSA Act). KEMSA's mandate as particularized under Section 4 of the KEMSA Act includes *interalia* the duty to procure, warehouse and distribute drugs and medical supplies and to establish network of storage, packaging and distribution facilities for the provision of drug and medical supplies to health institutions.
2. On the commencement of the outbreak of COVID-19 all over the world as announced by the World Health Organisation (WHO) on or around January 30, 2020, the WHO issued prevention guidelines and mitigation measures to contain the spread of the disease. These included the procurement of various drugs and medical supplies.
3. Naturally, KEMSA being the body mandated to procure drugs and medical supplies for the Country procured items in bulk for this purpose.
4. In or around September 2020, the Auditor General published the "Special Audit Report on Utilization of COVID-19 Funds by Kenya Medical Supplies Authority (KEMSA) for the period March 13 – July 31 2020" (Special Audit Report on Utilization of COVID-19 Funds).
5. The Special Audit Report on Utilization of COVID-19 Funds concluded *interalia* that during the period under review, KEMSA irregularly utilized Universal Health Coverage and Capital Budget to procure COVID-19 related supplies without evidence of approval of the budgets by relevant authorities.
6. The Special Audit Report on Utilization of COVID-19 Funds made various recommendations following this conclusion including the recommendation that further investigations be undertaken by the Directorate of Criminal Investigations (DCI) and the Ethics and Anti-Corruption Commission (EACC). It was also recommended that KEMSA's Board considers overhauling KEMSA's business model and for appropriate action to be taken on those found responsible for any breaches as indicated in the special audit report.
7. The National Assembly also in September 2020, published the "Departmental Committee on Health Inquiry Report on Utilization of COVID-19 Funds in the Ministry of Health with focus on KEMSA" wherein it made various recommendations *interalia* that: -
  - i. Within 30 days of the tabling of the report in the National Assembly, KEMSA's Board be reconstituted in accordance with the KEMSA Act and the [State Corporations Act](#) for failure to effectively discharge its functions as enumerated under the KEMSA Act. Thereafter, that the DCI and EACC undertake investigations into the members of the Board.
  - ii. Within 60 days of tabling the report in the National Assembly, KEMSA establish standard operating procedures (SOPs) to achieve efficiency in procurement and other administrative processes.
  - iii. The DCI and EACC undertake investigations on the role of the Principal Secretary, Ministry of Health on the disputed procurement processes at KEMSA and take appropriate legal action where necessary.



- iv. The Ministry of Health in consultation with State Corporations Advisory Committee, in accordance with Section 27 of the [State Corporations Act](#) undertake a review of the structure and organisation of the Kenya Medical Supplies Authority and submit recommendations to the National Assembly on the reorganization of the Authority within 60 days of the tabling of the report.
8. Around the same time, EACC was carrying out investigations and on September 11, 2020 recommended to the Director of Public Prosecutions the prosecution of KEMSA's Chief Executive Officer, Director Procurement, Director Commercial Services, Director Finance and Strategy, Finance Manager and the Personal Assistant to the Chief Executive Officer. The recommendation was for the prosecution of these officials for several offences related to the procurement process for COVID-19 related supplies.
9. Amid these reports, recommendations, and ongoing investigations, KEMSA was also facing financial constraints arising from the bulk procurement of COVID-19 related supplies.
10. KEMSA resolved internally to address the issues surrounding it by setting up the KESMSA Immediate Action Plan & Medium-Term Reforms Working Committee (KIAPRWC). The Committee was constituted to identify the immediate/short term, medium-term and long-term solutions.
11. The KIAPRWC in its report issued in December 2020, recommended *inter alia* that KEMSA should revise its organisational structure to align responsibilities and authority and compliance with the law.
12. In or around October 2020, a multi-agency task force was constituted to provide an independent operating recovery strategy for KEMSA known as the "KEMSA Immediate Action Plan & Medium-Term Reforms Working Committee (KIAPRWC)". It comprised of a panel of local public service administration experts from the Ministry of Health, State Corporation Advisory Committee, Treasury, AMREF, National Youth Service, and Kenya Defence Forces and was backed by international counterparts.
13. The KIAPRWC in its report issued in December 2020, revealed various challenges in critical functions of KEMSA that required to be addressed. It recommended inter alia that KEMSA should revise its organisational structure to align responsibilities and authority and compliance with the law.
14. KEMSA's troubles multiplied exponentially at the start of 2021 with USAID withdrawing funding and having a stand-off with the Government over the use of KEMSA for supply of HIV Drugs on account of mismanagement in KEMSA.
15. In January 2021, the KEMSA Reforms Implementation Committee (KRIC) KRIC was constituted and seized with the duty to work with KEMSA's Board to implement the various recommendations made in KIAPRWC Report of December 2020.
16. Come March 2021, the Senate joined the Report band wagon and published the "Report on the Inquiry into Allegations Regarding Irregularities in the Procurement of Various Pharmaceutical Equipment and Products by the Kenya Medical Supplies Authority (KEMSA)" (the Senate KEMSA Report). Therein, it was recommended amongst others, investigations of KEMSA's Board for possible arising from the procurement of the COVID-19 related supplies.
17. In September 2021, the National Assembly published yet another report, the "Report on Consideration of the Special Audit Report on Utilization of COVID-19 Funds by the Kenya Medical Supplies Authority".



18. Public pressure was mounting due to the media coverage of the procurement scandal and the standoff and withdrawal of aid by USAID.
19. On November 4, 2021, a virtual meeting was convened by KEMSA's Acting Chief Executive Officer – Edward Njoroge N, at which time all staff were respectively issued with a “General Notice of Potential Redundancy” (General Notice(s)) dated November 4, 2021.
20. In the said general notices, the staff were informed of the contemplated organisational restructuring and overhaul which exercise may lead to some or all positions as presently constituted being rendered redundant. The general notices indicated that the same would serve as an official one month's notice that their (the staff's) position may be affected and made redundant.
21. The general notices further indicated that during the one-month period, KEMSA's Board would through its authorised officers, engage staff members in consultations and thereafter make informed decisions before authorising any necessary changes to be implemented in the proposed restructuring. That when identifying positions and employees that will be affected, seniority, skills and competences, merit, ability and reliability would be factored into the decision.
22. The General Notices concluded with a directive that all staff unless otherwise deemed as essential staff would work from home effective November 5, 2021.
23. A comprehensive Press Statement was issued on the same day by the Chairman of the Board detailing the contents of the general notices as part of KEMSA's internal reforms.
24. Aggrieved by the general notices and the subsequent press statement released to the media, the respective Petitioners moved this Court in the now consolidated petitions.
25. The Kenya Medical Practitioners, Pharmacists and Dentists Union (KPMDFU) filed a Petition dated November 5, 2021 on November 8, 2021 in NRB *ELRC PETITION No 173 OF 2021: KPMDFU VS KEMSA & 3 OTHERS*. The prayers sought in the Petition are as follows: -
  - a. A Declaration that the 1<sup>st</sup> Respondent's letters dated November 2, 2021 and November 4, 2021 purporting to render its members of staff and the Petitioner's members who are Medical Doctors, redundant are unlawful, illegal and unconstitutional and the same is hereby declared illegal, unconstitutional thus null and void and the same are quashed forthwith.
  - b. A Declaration that the Respondents' decision to enlist members of Kenya Defence Forces (KDF) as the employees of the 1st Respondent, in the absence of situations of situations of emergency or disaster, contravenes the provisions of Article 241(2)(a) & (b) which provide that persons enlisted in the Kenya Defence Forces are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic; and shall assist and cooperate with other authorities in situations of emergency or disaster, and report to the to the National Assembly whenever deployed in such circumstances, thus illegal, unconstitutional, null and void.
  - c. A Declaration that the Respondents' decision to enlist members of Kenya Defence Forces (KDF) and National Youth Services (NYS) as the employees of the 1st Respondent contravenes the provisions of Article 24(5)(d) of the *Constitution* which expressly limits the rights and fundamental freedoms in the Bill of Rights of persons serving in the Kenya Defence Forces or the National Police Service in respect of Labour relations under Article 41 of the *Constitution*.



- d. An order of Prohibition restraining the Respondents from enlisting members of Kenya Defence Forces (KDF) and the National Youth Services (NYS) as the employees of the 1st Respondent.
  - e. A Permanent injunction restraining the Respondents from implementing their decision and intention to declare the members of staff redundant without following due legal process.
  - f. General Damages to be paid by the Respondents to the Petitioner's members and other staff who have been working for the 1<sup>st</sup> Respondent.
  - g. This Honourable Court be pleased to issue any other or further remedy that this Honourable Court shall deem fit to grant.
  - h. An order that the Respondents do pay the costs of this Petition.
26. Anthony Nyutu Chege & 43 Others being KEMSA staff members filed a Petition dated November 9, 2021 on even date in NRB ELRC PET No E174 OF 2021: Anthony Nyutu Chege & 43 Others vs KEMSA, The Attorney General & 4 Others. The prayers sought in this Petition are as follows: -
- a. A declaration be and is hereby made that the appointment of Captain (Retired) Lawrence Wahome; Robert Nyarango; Terry Kiunge Ramadhani; and Linton Nyaga to the Board of the Kenya Medical Supplies Authority by the Cabinet Secretary, Ministry of Health, was done without prior competitive recruitment, was not based upon competence and suitability, did not afford adequate and equal opportunity on account of gender, ethnicity or regional balance, contravenes and violates Articles 10, 27(8), 73(2), 153 and 232 of the Constitution of Kenya together with Section 5(1)(e) (ea), (4) and (7) of the Kenya Medical Supplies Authority Act No. 20 of 2013 and is therefore, null and void *ab initio*.
  - b. An order of *certiorari* be and is hereby issued calling into this Court and quashing the decision made by the Cabinet Secretary, Ministry of Health and contained in Gazette Notice No. 4011 dated April 28, 2021 for the appointment of Captain (Retired) Lawrence Wahome; Robert Nyarango; Terry Kiunge Ramadhani; and Linton Nyaga to the Board of the Kenya Medical Supplies Authority.
  - c. A declaration be and is hereby made that each of the General Notices of Potential Redundancy dated November 4, 2021 and issued to the Petitioners by the Acting Chief Executive Officer of the Kenya Medical Supplies Authority amount to an act of unfair termination of the Petitioners' individual contracts of service with the Kenya Medical Supplies Authority, contravene and violate Articles 10, 24, 27(1) and (2), 47, 50(1), 73(1) and (2) and 232 of the Constitution of Kenya together with Sections 40, 43 and 45 of the Employment Act No 11 of 2007 and is therefore, null and void *ab initio*.
  - d. An order of *certiorari* be and is hereby issued calling into this Court and quashing the decisions made by the Acting Chief Executive Officer of the Kenya Medical Supplies Authority as contained in each of the General Notices of Potential Redundancy dated 4th November 2021 and issued to the Petitioners.
  - e. A declaration be and is hereby made that the deployment of officers from the Kenya Defence Forces and the National Youth Services to the premises of the Kenya Medical Supplies Authority and the takeover by Kenya Defence Forces and the National Youth Services of the functions of the Kenya Medical Supplies Authority and/or of its employees, including but not limited to the duties of the Petitioners contravene and violate Articles 10, 73(1) and (2),



94, 153(4)(b), 232 and 241 of the Constitution of Kenya together with Section 8 of the Kenya Defence Forces Act No 25 of 2012, Sections 5 to 8 of the National Youth Service Act No. 17 of 2018 and Sections 4 to 6 of the Kenya Medical Supplies Authority Act No. 20 of 2013 and is therefore, null and void *ab initio*.

- f. An order of prohibition be and is hereby issued and directed at the Chief of the Kenya Defence Forces and the Director-General of the National Youth Services acting through themselves and/or any of their officers, restraining them from entering and remaining upon the premises of the Kenya Medical Supplies Services wheresoever situated in the Republic of Kenya, and further, restraining them from taking over and performing the functions of the Kenya Medical Supplies Authority and/or duties of its employees, including but not limited to the duties of the Petitioners.
  - g. Pending the hearing and determination of this Petition, a conservatory order be and is hereby issued suspending the implementation and enforcement of each of the General Notices of Potential Redundancy dated November 4, 2021 and issued to the Petitioners by the Acting Chief Executive Officer of the Kenya Medical Supplies Authority.
  - h. Pending the hearing and determination of this Petition, a conservatory order be and is hereby issued and directed at the Chief of the Kenya Defence Forces and the Director-General of the National Youth Services acting through themselves and/or any of their officers, restraining them from entering and remaining upon the premises of the Kenya Medical Supplies Authority wheresoever situated in the Republic of Kenya, and further, restraining them from taking over and performing the functions of the Kenya Medical Supplies Services and/or duties of its employees, including but not limited to duties of the Petitioners.
  - i. Pending the hearing and determination of this Petition, a conservatory order be and is hereby issued and directed at the Kenya Medical Supplies Authority to grant and permit the Petitioners unlimited and unrestricted access to their respective offices and to the ICT platform of the Kenya Medical Supplies Authority for purposes of performing their duties under their respective contracts of service.
  - j. Pending the hearing and determination of this Petition, a conservatory order be and is hereby issued and directed at the Kenya Medical Supplies Authority to continue paying salaries, allowances and all benefits due to the Petitioners under their respective contracts of service with Kenya Medical Supplies Authority.
  - k. Any other relief and/ or order(s) the Honourable Court deems appropriate, just and/or fit to grant.
  - l. The costs of this Petition be provided for.
27. Dr Magare Gikenyi J Benjamin filed a Petition in the Constitutional and Human Rights Division dated 5 November 2021 on even date in NRB HCCCHRPET E471 OF 2021: Dr Magare Gikenyi J Benjamin vs KEMSA, The AG & 2 Others. The Petitioner's prayers are as follows: -
- a. A declaration that the action of the respondents of undertaking the alleged restructuring exercise at the 1<sup>st</sup> Respondent institution (KEMSA) as announced by the respondents on November 4, 2021 which inter alia involved notice of general redundancy is unconstitutional, *ultra vires* and therefore, invalid, null and void *ab initio*.



- b. An order of judicial review by way of *certiorari* to bring to the high court respondent's decision as announced on November 4, 2021 which *inter alia* involved notice of general redundancy for purposes of being quashed.
  - c. A DECLARATION that the respondents' Action of utilizing staff from other agencies including the military (Kenya Defense Forces- KDF), the National Youth Services (NYS) and any other staff other than staff members of the 1st respondent in its operations and the day to day running of the institution (KEMSA) redundancy is unconstitutional, *ultra vires* and therefore, invalid, null and void ab initio.
  - d. An order of judicial review by way of mandamus, compelling the respondents to involve all stakeholders and staff members and perform proper public participation in all future decisions involving restructuring of the first respondent.
  - e. An order of judicial review by way of prohibition, prohibiting the respondents, their agents and assigns of unilaterally making decisions on issue of restructuring without stakeholder's engagements and public participation.
  - f. An order of judicial review by way of mandamus, compelling the respondents and other state agencies including but not limited to EACC, ODPP, NPS, DCI to probe officials and companies (state and non-state actors) which may be involved in plundering of public resources or in any way involved in graft with the view of bringing them to justice for purposes of safe guarding public resources at the 1st respondent.
  - g. Any other order or/and modification of petitioner's prayer(s) which this honourable court may deem fit so as to a achieve objects of justice for majority of Kenyans.
  - h. Costs of this Petition to be borne by respondents.
28. Pursuant to the directions of J A Makau J of November 5, 2021, the file was transferred to this Court and titled NRB ELRC PETITION NO 187 OF 2021: Dr Magare Gikenyi J Benjamin vs KEMSA, The AG & 2 Others.
  29. Contemporaneously with the filing of all the Petitions, the respective Petitioners filed applications under certificate of urgency seeking conservatory orders to stay the operation of the general notices.
  30. Conservatory Orders were issued in ELRC Petitions E173 and E174 by Ocharo J on November 8,2021 and November 9, 2021 respectively. The orders issued effectively stopped the implementation of the general notices. The Court further stopped any deployment of active members of the KDF or NYS from taking up any position held by any of the Petitioners as prayed in Petition E173 of 2021.
  31. KEMSA being the common 1<sup>st</sup> Respondent in all the Petitions responded to all the Petitions respectively by way of Replying Affidavit.
  32. The Petitions were consolidated on November 23, 2021, pursuant to directions by Rutto J and on that date, parties also took directions on disposal of the matter by way of written submissions.
  33. The Petitioner in this case has indicated that it is a registered trade union representing the welfare of medical doctors, pharmacists and dentist in Kenya. It filed the Petition on behalf of its members who are employed by KEMSA – the 1<sup>st</sup> Respondent.
  34. It is KPMDU's contention that KEMSA has purported to conduct a mass sacking of all staff and proceeded to enlist the services of personnel of KDF and NYS to take over and manage the operation of



- KEMSA. That it would be unfair, unlawful, irrational and illegal to declare almost 900 staff redundant and proceed to enlist KDF and NYS personnel to take over their roles.
35. It is contended that the Respondents in the matter have breached the provisions of Articles 241(2)(a) and (b). Specifically, that persons enlisted in the Kenya Defence Forces are responsible for the defence and protection of the sovereignty and territorial integrity of the Republic and can only cooperate with other authorities in situations of emergency or disaster and KEMSA is not facing any emergency.
  36. KPMDU contends that it was not consulted and did not approve the issuance of the General Notices by KEMSA. That many of its members were categorised as non-core staff, which is factually wrong, unfair and unjust.
  37. It is KPMDU's contention that the Respondents have not conducted any stakeholders and/or public participation prior to implementing a new structure. Further, that KEMSA did not give staff sufficient notices and grounds for the said action.
  38. KPMDU avers that KEMSA intends to enlist the services of KDF and NYS to manage its Medical Commodities Program (MCP), Sales and Marketing and Customers which are funded through Global Fund and the Government of Kenya. That further, it is reliably informed that the Cabinet Secretary for the Ministry of Health – the 2<sup>nd</sup> Respondent herein, wrote to KDF requesting for technical personnel who are scheduled to report at the 1<sup>st</sup> Respondent's premises effective 8 November 2021.
  39. In response, KEMSA as the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by Edward Njoroge Njuguna – The Acting Chief Executive Officer sworn on November 15, 2021.
  40. Therein, it was deposed that KEMSA according to the Auditor General's report for the financial year 2018/2019, KEMSA had more employees than the staffers it was approved to hire, pushing the agency's staff budget with certain services being superfluous within KEMSA.
  41. It was also deposed that the proposed reforms were necessary for introduction of global best practices at KEMSA which include compounding related functions for strengthened accountability and a re-determination of optimal staffing level and norms. That the reforms were in line with the statutory instruments and are pursuant to widespread consultation made with the various multi-agency stakeholders.
  42. It was deposed further that the necessary interventions were put in place through the caretaker management team of core staff which would be in charge of the day to day running of KEMSA.
  43. The 2<sup>nd</sup> Respondent also filed a Replying Affidavit sworn by Mutahi Kagwe – Cabinet Secretary, Ministry of Health on November 19, 2021. It is deposed therein that it is the role of the Ministry to issue policy direction and it does not interfere with the Management of State Corporations. That following the numerous reports issued with respect to KEMSA's operations, the Ministry took various measures to institute far reaching policy reforms to address the weaknesses raised in the said reports.
  44. The Cabinet Secretary deposed that the allegations of improper appointment of the 3<sup>rd</sup> to 6<sup>th</sup> Respondents to the KEMSA Board are without specificity, not particularized and in any event a misjoinder of action. That, in any event this Court does not have jurisdiction to determine appointments of Board members.
  45. The Petitioner herein filed written submissions dated December 7 2021. Therein the Petitioner relied on the submissions filed by the Petitioners in ELRC PETITION E174 OF 2021 and ELRC PETITION E187 OF 2021.



46. It was the Petitioner's submission that the Petition herein was not premature and that the provisions of Article 22 of the the Constitution give a party the right to claim for a threatened violation of a fundamental right or freedom.
47. That the KEMSA Board's announcement that KEMSA's operations will be managed by a few members of staff and other government agencies was illegal.
48. KPMDU re-iterated by way of submissions, the illegality of the occupation of the staff roles by KDF and NYS personnel and relied on the decision in Law Society of Kenya v Office of the Attorney General & Another [2021] eKLR.
49. It further cited the cases of Thomas De La Rue (K) Limited v David Opondo Omutelema [2013] eKLR on redundancy notifications; Re McBride's Application [1999] NI 299 on public law and public interest; Rwanyarare & Others v Attorney General [2003] 2 EA 664 with respect to sovereign power of the people; and East African Cables Limited v The Public Procurement Complaints, Review & Appeals Board & Another [2007] eKLR on greater good considerations in the making of Court.
50. Having considered the pleadings and submissions of the parties to this Petition, the issues for determination are: -
  - i. Whether there was a redundancy and if so, whether the process was flawed;
  - ii. Whether the Petitioner is entitled to the prayers sought.

#### **Petition No. E174 OF 2021**

51. In this matter, the Petitioners aver that Section 5(1) (e) of the KEMSA Act requires that three persons be recruited and appointed by the Cabinet Secretary, Ministry of Health to KEMSA'S Board based on the criteria set out therein.
52. That pursuant to Section 5(1)(e) of the KEMSA Act one person be recruited by the Council of Governors and appointed by the Cabinet Secretary, Ministry of Health to KEMSA's Board from the criteria provided in the section.
  - i. Further, that Section 5(4) of the KEMSA Act requires that one person be recruited and appointed to KEMSA's Board who is either a procurement or supply chain management specialist; a pharmacist experienced in drug and medical supplies management; and one person with knowledge and experience in Finance and Commerce.
53. The Petitioners aver that the appointments of the 3<sup>rd</sup> to 6<sup>th</sup> Respondent were contrary to the provisions of the KEMSA Act as well as Article 10 of the Constitution of Kenya. That the appointees do not meet the academic and professional qualifications as required under the KEMSA Act and that they were in any event appointed without the requisite transparency and through a competitive process as required by the Constitution of Kenya, 2010. That as such, the KEMSA Board is improperly constituted.
54. The Petitioners also contend that KEMSA by the issuance of the General Notices acted in contravention of various cited provisions of the Constitution and the Employment Act. That KEMSA initiated termination of the contracts of service of the Petitioners in circumstances which do not justify the declaration of redundancy of the Petitioners.
55. In response, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondent filed a Replying Affidavit sworn by Edward Njoroge Njuguna -The Acting Chief Executive Officer of KEMSA – the 1<sup>st</sup> Respondent in the Petitions.



56. It is deposed that the General Notices were indeed issued with a proviso that there would be consultative meetings held before any determinations are made with respect to the redundancies.
57. That the Petition is premature as the process of redundancy has not yet been completed so that the Petitioners can claim that it is unfair, illegal or invalid.
58. That there was no deployment of KDF and NYS to take over the functions of the Petitioners as alleged in any of the Petitions.
59. The 2<sup>nd</sup> Respondent also filed a replying affidavit sworn by Mutahi Kagwe – the Cabinet Secretary, Ministry of Health.
60. It is deposed therein that it is the role of the Ministry to issue policy direction and it does not interfere with the Management of State Corporations. That following the numerous reports issued with respect to KEMSA's operations, the Ministry took various measures to institute far reaching policy reforms to address the weaknesses raised in the said reports.
61. The Cabinet Secretary deposed that the allegations of improper appointment of the 3<sup>rd</sup> to 6<sup>th</sup> Respondents to the KEMSA Board are without specificity, not particularized and in event a misjoinder of action. That, in any event this Court does not have jurisdiction to determine appointments of Board Members to State Corporations as they are not employees.
62. The issues for determination in this Petition are: -
  - i. Whether the KEMSA Board was properly constituted at the time the General Notices were issued.
  - ii. Whether the General Notices of Intended Redundancy were validly issued; and
  - iii. Whether the Kenya Defence Forces and the National Youth Services have taken over the functions of KEMSA staff without authority of the law.

#### **ELRC PETITION NO. E187 OF 2021**

63. The Petitioner in this matter is a Consultant Trauma and General Surgeon working for the County Government of Nakuru at Nakuru Level 5 Hospital. He is a medic by profession and considers himself a law-abiding citizen, a public-spirited individual and a defender of human rights.
64. The Petitioner aggrieved by the actions of KEMSA culminating in the General Notices issued on 4 November 2021 avers that the proposed restructuring exercise was done without proper stakeholder engagement and without due consideration of the consequences of the decision.
65. That if implemented, the General Notices will cause a disruption of KEMSA's crucial services and endanger the health and well-being of Kenyans contrary to Article 43 of the Constitution.
66. That the militarization of state corporations is neither legal nor a good idea in a country governed by constitutionalism and the rule of law.
67. In response, KEMSA filed a Replying Affidavit sworn by Edward Njoroge Njuguna – Acting Chief Executive Officer on November 15 2021. Therein it was deposed that the restructuring was at a very formative stage and as such it is premature to determine its propriety.
68. That since the implementation of the directive contained in the General Notices, KEMSA has been operating on a lean staff of about 140 which workforces has ensured timely and efficient operations.



69. That the relevant stakeholders have been engaged and would be engaged throughout the process.
70. The singular issue for determination is whether the Petitioner is entitled to the orders sought.

### **Analysis and Determination**

71. It is clear that the Petitions have some similar issues for determination which I shall proceed to address as below.

### **Whether the KEMSA Board was properly constituted**

72. The Petitioners in ELRC PET 174 OF 2021 have challenged the appointment of the 3<sup>rd</sup> to 6<sup>th</sup> Respondents in the said petition to the KEMSA Board and the constitution of the KEMSA Board.
73. They submitted that there was no competitive recruitment of the said appointees and that the said appointees did not have the necessary qualifications.
74. KEMSA is established pursuant to Section 3 of the KEMSA Act and whose management vests in the KEMSA Board pursuant to Section 5 of the KEMSA Act. Section 5 states as follows: -
  1. The management of the Authority shall vest in a Board of Directors which shall comprise of
    - a. A non-executive chairperson appointed in accordance with subsection (2);
    - b. The principal secretary of the ministry for the time being responsible for health or a representative designated in writing by the principal secretary;
    - c. The principal secretary, of the ministry for the time being responsible for finance or a representative designated in writing by the principal secretary;
    - d. The principal secretary for the time being responsible for matters related to devolved government or a representative designated in writing by the principal secretary;
    - e. Four other persons appointed in accordance with subsection (3);
    - f. The chief executive officer of the authority who shall be an ex-officio member.
  2. The chairperson shall be competitively recruited and appointed by the President from amongst persons who—
    - a. Have at least a university degree in a relevant discipline;
    - b. Have at least fifteen years' experience in matters relating to healthcare or business management;
    - c. Satisfy the requirements of chapter six of the constitution.
  3. The persons referred to in subsection (1)(e) shall be competitively recruited and appointed by the Cabinet Secretary from amongst persons who-



- a. have at least a university degree in a relevant discipline;
  - b. have at least ten years experience in management or in the health sector; and
  - c. satisfy the requirements of chapter six of the *Constitution*.
4. In making the recruitment and appointment under subsection (3), the Cabinet Secretary shall ensure that the appointments fulfil the requirements of the gender and regional balance as enshrined in the *Constitution* and that at least one person is appointed from each of the following categories—
- a. a procurement or supply chain management specialist;
  - b. a pharmacist experienced in drug and medical supplies management; and
  - c. one person with knowledge and experience in finance or commerce.

75. The 3<sup>rd</sup> to 6<sup>th</sup> Respondents were appointed to KEMSA's Board through Gazette Notice No 4011 dated April 28, 2021. I have seen the Gazette Notice which I reproduce as below: -

THE *STATE CORPORATIONS ACT* (Cap. 446)

THE *KENYA MEDICAL SUPPLIES AUTHORITY ACT* (No. 20 of 2013)

APPOINTMENT IN EXERCISE of the powers conferred by section 5 (1) of the *Kenya Medical Supplies Authority Act*, the Cabinet Secretary for Health appoints— Under Section 5 (1) (e)

Capt. (Rtd) Lawrence Wahome

Robert Nyarango

Terry Kiunge Ramadhani

Under Section 5 (1) (ea)

Linton Nyaga Kinyua

as Members of the Board of Directors of the Kenya Medical Supplies Authority, for a period of three (3) years, with effect from the 30<sup>th</sup> April, 2021.

The appointments of Timothy Mwololo Waema, Bibiana K. Njue, Joel Onsare Gesuka and Dorothy Atieno Aywak are revoked.

Dated the 28<sup>th</sup> April, 2021.

MUTAHI KAGWE, Cabinet Secretary for Health.

76. It is apparent that the appointments were made pursuant to Section 5(1) of the KEMSA Act. The provisions of the Section set out the criteria and qualifications of the members. The Respondents have not rebutted the Petitioners' challenge by submitting any documentation or proof that the said appointees met the criteria set out in the Act. The Respondents have instead opted to claim this Court lacks the jurisdiction to determine the legality of appointees to a State Corporation.
77. The provisions of Section 5 of the KEMSA Act as enumerated above are clear and set out in mandatory terms. The evidence of the qualifications and the process of appointment would only be in the custody



of the Respondents. The Respondents only claimed that the claims of the Petitioner were not properly particularized but did not in any way tender any evidence to controvert the allegations of the Petitioner.

78. I thus find that the appointment of the 3<sup>rd</sup> to 6<sup>th</sup> Respondents was contrary to the provisions of Section 5 of the KEMSA Act, the Constitution of Kenya in so far as the process was not transparent, competitive nor observant of the gender and minorities considerations.
79. I thus allow prayers (a) and (b) of the Petition in ELRC PET 174 OF 2021.

**Whether there was a redundancy and if so, whether it was lawful?**

80. The decision of whether or not to carry out a redundancy is a prerogative of an employer, the only restrictions are those set out in the Employment Act with respect to notice, the procedure and the benefits payable. In this case, at the point when the matter came to Court the employer had only issued a general notice. 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.
81. The prayers related to the intended redundancy in PETITION E173 are as follows:
- a. A Declaration that the 1<sup>st</sup> Respondent's letters dated November 2, 2021 and November 4, 2021 purporting to render its members of staff and the Petitioner's members who are Medical Doctors, redundant are unlawful, illegal and unconstitutional and the same is hereby declared illegal, unconstitutional thus null and void and the same are quashed forthwith.
  - e. A Permanent injunction restraining the Respondents from implementing their decision and intention to declare the members of staff redundant without following due legal process.
82. It is apparent that the orders sought are pre-emptive of a redundancy process that has not taken place. The General Notices are simply an indication of an intended redundancy. None of the Petitioner's members has been declared redundant or specifically identified for intended redundancy. The due legal process under Section 40 of the Employment Act has not been breached and there is thus no remedy available to the Petitioner.
83. While on the subject of the said Petitioner – KPMDU – I note that the Petitioner has not submitted any proof that it indeed has members who are employees of KEMSA. They have not pleaded that if at all it has members that KEMSA remits dues to it on behalf of the said members. It has not given any names or a list of members.
84. It has only indicated in its Petition that it has “about ten members” employed by KEMSA. It is not clear whether the numbers are sufficient enough to grant it the relevant locus to be representative of the said Members. They certainly have not pleaded that there is an existing collective bargaining agreement with KEMSA. In that case, even if this Court was minded to recommend the consultation of KPMDU by KEMSA, on what basis would it do so when it has not placed anything before this Court to show that it has the requisite legal standing.
85. It therefore goes without saying that the remainder of the prayers in PET. E173 OF 2021 are dismissed as this Court finds that the Petitioner failed to show its *locus standi* to lodge the petition.
86. The Petitioners in PET. E174 OF 2021 have prayed for a declaration that each of the notices served upon the Petitioners amounted to unfair termination of their individual contracts. This prayer has not been proved as none of the Petitioners' contracts has been terminated. The incidental prayers on quashing the notices fails as does the prayer for General Damages as there has been no proof on any injury or suffering by the Petitioners.



87. The same fate befalls prayers (a) and (b) in PETITION NO. 187 OF 2021 where the Petitioner seeks a declaration that the actions of the Respondents in undertaking the restructuring is unconstitutional, ultra vires and void ab initio and the quashing of the said decision. I find that this prayer is crafted in a manner that the Court is injected to interfere with the prerogative of KEMSA as the employer to restructure the same as it sees fit.

### **Whether there has been a takeover of KEMSA staff roles by KDF or NYS personnel**

88. The Petitioners in all the Petitions have sought declaratory orders and restraining orders against the deployment of KDF and NYS officers in the premises of KEMSA and the takeover by the said officers of the functions of KEMSA employees.

89. I find that none of the Petitioners have proved that there has been any takeover or deployment of KDF and NYS officers to KEMSA. In the absence of such proof, the incidental prayers in the petitions fail.

90. The foregoing notwithstanding, the mass sending home of almost all employees, even if on full salary, is not provided for by any law. Even though the various investigative reports disclosed serious mismanagement of KEMSA that required radical administrative intervention, the Respondents have not justified any cause for sending all the affected employees to work from home. Section 7 of the State Corporations Act provides sufficient powers to the President to address the situation. The Section provides as follows –

7. Power to issue directions and to remove Board

1. The President may give directions of a general or specific nature to a Board with regard to the better exercise and performance of the functions of the state corporation and the Board shall give effect to those directions.
2. Notwithstanding subsection (1), directions under this section may require that the memorandum and articles or any other documents establishing a state corporation, be amended to conform with any requirement of this Act where the same is inconsistent therewith.
3. Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board, the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine.

91. The President in consultation with the State Corporation Advisory Committee has sufficient powers under the Act to address the issues at KEMSA within the provisions of the law. The issue of staff can be dealt with administratively. I therefore cannot find any justification in sending home all the employees of the Respondent to work from home and none has been presented to the Court by the Respondents.

### **Final Orders**

1. Petition E173 of 2021 is dismissed in its entirety.
2. Petition E174 of 2021 is allowed only in the following terms: -
  - i. A declaration be and is hereby made that the appointment of Captain (Retired) Lawrence Wahome; Robert Nyarango; Terry Kiunge Ramadhani;



and Linton Nyaga to the Board of the Kenya Medical Supplies Authority by the Cabinet Secretary, Ministry of Health, was done without prior competitive recruitment, was not based upon competence and suitability, did not afford adequate and equal opportunity on account of gender, ethnicity or regional balance, contravenes and violates Articles 10, 27 (8), 73 (2), 153 and 232 of the Constitution of Kenya together with Section 5 (1) (e) (ea), (4) and (7) of the Kenya Medical Supplies Authority Act No 20 of 2013 and is therefore, null and void ab initio.

- ii. An order of certiorari be and is hereby issued calling into this Court and quashing the decision made by the Cabinet Secretary, Ministry of Health and contained in Gazette Notice No 4011 dated 28th April 2021 for the appointment of Captain (Retired) Lawrence Wahome; Robert Nyarango; Terry Kiunge Ramadhani; and Linton Nyaga to the Board of the Kenya Medical Supplies Authority

3. Petition E187 of 2021 is dismissed in its entirety.

4. There shall be no orders as to Costs

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF MAY 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 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.

**MAUREEN ONYANGO**

**JUDGE**

