

REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR  
RELATIONS COURT AT NAIROBI  
PETITION NUMBER E155 OF 2021

IN THE MATTER OF: THE CONSTITUTION OF KENYA ARTICLES 1,2,10,19,20,21,22,23,24,25[a]  
26, 27,28,29,31,32,41,43,46,47,159,165 [3] [b] & [d], 233,234,258 and  
259;

**AND,**

IN THE MATTER OF: THE PUBLIC SERVICE [VALUES AND PRINCIPLES] ACT 2015;

**AND,**

IN THE MATTER OF: THE LIMITATION OF RIGHTS AND FUNDAMENTAL FREEDOMS;

**AND,**

IN THE MATTER OF: THE RIGHT TO LIFE, EQUALITY AND FREEDOM FROM DISCRIMINATION,  
HUMAN DIGNITY, FREEDOM OF CONSCIENCE, RELIGION, BELIEF,  
OPINION AND RIGHT TO PRIVACY;

**AND,**

IN THE MATTER OF: RIGHT TO FAIR ADMINISTRATIVE ACTION;

**AND,**

IN THE MATTER OF: VIOLATION OF THE RIGHTS TO LIFE, EQUALITY AND FREEDOM FROM  
DISCRIMINATION, HUMAN DIGNITY, PRIVACY, FREEDOM OF  
CONSCIENCE, RELIGION, BELIEF AND OPINION, AND FAIR  
ADMINISTRATIVE ACTION;

**BETWEEN**

1. CLEMENT M. KOIGI
2. KENYA CATHOLIC DOCTORS ASSOCIATION ..... PETITIONERS

**AND**

1. JOSEPH K. KINYUA,  
HEAD OF PUBLIC SERVICE
2. PUBLIC SERVICE COMMISSION

3. MINISTRY OF HEALTH
4. ATTORNEY-GENERAL .....RESPONDENTS

**AND**

1. FEDERATION OF KENYA EMPLOYERS
2. PEOPLE HEALTH MOVEMENT..... INTERESTED PARTIES

**AND**

KENYA LEGAL & ETHICAL ISSUES NETWORK ON HIV AND AIDS  
[KELIN] ..... AMICUS CURIAE

*Rika J*

*Court Assistant: Emmanuel Kiprono*

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*Gordon Ogola, Kipkoech & Company Advocates for the 1<sup>st</sup> Petitioner*

*Kosgei, Muriuki & Koome, Advocates for the 2<sup>nd</sup> Petitioner*

*State Law Office for the 1<sup>st</sup>, 3<sup>rd</sup> and the 4<sup>th</sup> Respondents*

*No appearance for the 2<sup>nd</sup> Respondent*

*No appearance for the 1<sup>st</sup> Interested Party*

*Christine Kung'u & Associates, Advocates for the 2<sup>nd</sup> Interested Party*

*Nyokabi Njogu, Advocate for the Amicus Curiae*

**JUDGMENT**

**Description of the Parties**

1. In the Petition, amended on 18<sup>th</sup> October 2021, the 1<sup>st</sup> Petitioner is described as a Public Interest Litigator. The 2<sup>nd</sup> Petitioner is an Association of Medical Doctors, professing catholic faith. The 1<sup>st</sup> Respondent is Head of Public Service of Kenya. The 2<sup>nd</sup> Respondent is a Commission established under Article 233 [1] of the Constitution, overseeing the Public Service of Kenya.

The 1<sup>st</sup> Interested Party is the national umbrella Employers' body. The 2<sup>nd</sup> Interested Party is a National Health Rights Movement, involved in promotion and realization of the right to health for all, under Article 43 of the Constitution. The Amended Petition refers to a 3<sup>rd</sup> Interested Party, as the Chief Legal Advisor of the Government of Kenya. There is no 3<sup>rd</sup> Interested Party in the Petition, and probably the Petitioners meant to describe the 4<sup>th</sup> Respondent as the Chief Legal Advisor. No description is given to the 3<sup>rd</sup> Respondent, but it can fairly be assumed that the name of the 3<sup>rd</sup> Respondent, is self-descriptive. Lastly the Amicus Curiae, like the 2<sup>nd</sup> Interested Party, is an NGO working to promote and protect health-related human rights in Kenya.

### **Petition.**

2. The Petition revolves around Covid-19 vaccination mandates.
3. In the factual background to the Petition, and the Supporting Affidavit of the 1<sup>st</sup> Petitioner, sworn on 18<sup>th</sup> October 2021, the Petitioners retrace the outbreak of coronavirus, supposedly in Wuhan China, and its spread in Kenya from 13<sup>th</sup> March 2020.
4. They retrace efforts made by the global health community, in coming up with vaccines to counter the virus, and in the rolling out of the first vaccines, including Astra Zeneca.
5. They state that initially, all persons were at liberty to vaccinate. However, on 5<sup>th</sup> August 2021, the 1<sup>st</sup> Respondent issued a memo OP/CAB.1/12A requiring

vaccine mandate for all Public Officers. All Public Officers were required to take a jab, by 23<sup>rd</sup> August 2021. It was further directed by the 1<sup>st</sup> Respondent, that failure to take the jab, would be treated as a disciplinary case, resulting in appropriate disciplinary sanctions.

6. It is against this background that the Petitioners submit, that the 1<sup>st</sup> Respondent's directive, results in vaccination mandate, and is in violation of the constitutional rights and freedoms of Public Officers, invoked in the title to this Petition.
  
7. The Petitioners submit that vaccines are approved for emergency use only; there is no evidence of their effectiveness; the UN Nuremberg Code, demands that informed consent of persons intended to be vaccinated, is obtained before vaccination; the said persons must in addition, be educated on alternatives to vaccines; their right to information must be observed; and that there is ample evidence, showing that alternatives to vaccines, have reduced Covid-19 fatality rates, from 9.1% to 2.5%. They submit that populations should not be forced to take vaccines that are many more times, likely to occasion serious side-effects.
  
8. The directive of the 1<sup>st</sup> Respondent is meant to circumvent the right of the Public Officers, to preserve their dignity and health. Forceful vaccination amounts to compelling medical professionals to intentionally occasion harm. The directive is against the Public Service Code of Conduct, which demands impartiality and refraining from advancement of private and parochial interests.

9. It is submitted by the Petitioners that the directive by the 1<sup>st</sup> Respondent, is not made by law. This limitation of fundamental rights and freedoms is not prescribed by any law. The directive amounts to torture, cruel, inhuman and degrading treatment of Public Officers. Article 26 [1] of the Constitution, asserts that every person has the right to life. The directive would expose Public Officers to deprivation of life. There have been vaccine-related deaths, reported globally. The Respondents have a constitutional obligation to do all they can, to prevent loss of life. They have not conducted any investigations on deaths/ adverse effects resulting from vaccination. The directive endangers the lives of Public Officers who ought to be exempted, because of factors such as allergies. The Respondents have not put in place monitoring and control system.

10. Further, Article 27 provides that every person is equal before the law, with equal benefit and protection of the law. The directive discriminates against Public Officers who are not vaccinated. Article 31 confers the right to privacy on all persons. Public Officers should therefore, not be compelled to disclose their vaccination status. Article 32, protects the right to freedom of conscience and belief among others. Vaccine mandate contradicts the rights to freedom of conscience and beliefs of Public Officers. Article 35 requires that vaccination is preceded by proper information. Mandatory vaccination amounts to introduction of new obligation, in the respective Public Officers' contracts of employment, which violates the right to fair labour practice, under Article 41. It is submitted that the Respondents have threatened the Petitioner's economic and social rights, under Article 43, by placing Public Officers who decline vaccination, at the risk of losing their jobs and income. Lastly, the Petitioners invoke Article 47 of the Constitution and Section 5 of

the Fair Administrative Action Act. The directive was not preceded by notice to the Public Officers, or accompanied by written reasons. The Respondents had an obligation to issue a public notice, and invite public participation, before making the decision.

11. They pray for Judgment for: -

- a. Declaration that the decision contained in the 1<sup>st</sup> Respondent's memo dated 5<sup>th</sup> August 2021, referenced OP/CAB.1/12A is unconstitutional and void *ab initio*.
- b. Certiorari to remove into this Court for purpose of being quashed, the decision of the 1<sup>st</sup> Respondent of 5<sup>th</sup> August 2021.
- c. Declaration that requiring any person to disclose to their Employer their Covid-19 vaccination status, violates the right to privacy and fair labour practices.
- d. Declaration that compelling Public Officers or any Employee to be vaccinated, violates the right to life; human dignity; freedom and security of the person; and freedom of conscience, religion, belief and opinion.
- e. The Respondents are compelled to carry out effective investigations into any deaths or adverse effects associated with

Covid-19 vaccinations administered in Kenya, and publicise reports of such investigations.

- f. An order compelling the Respondents to facilitate or first require any Public Officer/ Person, who is to receive Covid-19 vaccination, to first be tested to ascertain whether the vaccine will have any side effects/ contraindication.
- g. An order compelling the Respondents to establish and maintain control and monitoring system that aims to minimize Covid-19 associated side effects, contraindication and deaths, and report to the Public every 14 days.
- h. An order compelling the 3<sup>rd</sup> Respondent, to investigate and publish data after every 7 days, on vaccine breakthrough cases, i.e. data on persons who have received their 1<sup>st</sup> jab of the vaccine and those who have been fully vaccinated, but still contracted Covid-19.
- i. An order compelling the 3<sup>rd</sup> Respondent to investigate and publish data, after every 7 days, of the age bracket and the pre-existing conditions suffered by those who died after contracting Covid-19.
- j. Petitioners be paid costs of the Petition.

12. The 1<sup>st</sup> Petitioner restates the contents of his Pleadings in his Submissions. In support of these Pleadings and Submissions, he relies on **M.V.K & Another**

**v. the Attorney-General & 3 Others [2017] e-KLR**, where it was stated that without dignity, human life is substantially diminished.

13. Other judicial authorities invoked include Samson **Mumo Mutinda v. Inspector- General National Police Service & 4 Others [2014] e-KLR**, [ *the right to privacy protects a person's autonomy*]; **Petition No 122 of 2015, Prof. Tom Ojienda v. The E.A.C.C & others** [ *there is a final untouchable sphere of human freedom that is beyond interference from any public authority*]; and, **Judicial Service Commission v. Mbalu Mutava & another [2015] e-KLR** [ *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 state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights*].

14. The Court has not seen Pleadings or Submissions separately filed by the 2<sup>nd</sup> Petitioner. The Amended Petition describes the 2<sup>nd</sup> Petitioner at paragraph 2. Paragraph 32, 41, and 43 refer to the 'Petitioners,' while paragraph 37, 64 and 64 [j] refers to the 'Petitioner.' The Petitioners are imprecise, on whether they intended to prosecute a joint Petition. The Court has not seen Pleadings or Submissions filed separately by the 2<sup>nd</sup> Petitioner.

15. In its Application for joinder dated 8<sup>th</sup> October 2021, the 2<sup>nd</sup> Petitioner states that it would offer to the Court medical perspective on vaccine mandates, focusing *inter alia*, on typochological dichotomy between vaccine efficacy and vaccine effectiveness, knowing well that for a pandemic like Covid-19, the public policy focus in rolling out mass vaccination, ought to be: the effectiveness in the real world, considering the challenge holistically;



available alternative protocols that would treat Covid-19; the history of vaccines, vaccination and proper medical practice with respect to vaccinations; whether unvaccinated person poses any risk to the vaccinated person; whether there is any reliable data on the efficacy of the vaccine and critical question of approvals at the countries of origin; the imperative on medical professionals to refrain from intentionally occasioning harm; the grave risk – looking to the future – that a forced vaccination poses in the absence of repeated experiments on the externalities of the proposed vaccines, which have been developed and are being used less than a year from the onset of the pandemic; the limitation on liability that vaccine developers enjoy in negligence suits, with respect to Covid-19; and whether the directive of the 1<sup>st</sup> Respondent complies with the Public Service Code of Conduct, which demands impartiality and refraining from advancing private and parochial interests.

16. From the wording of the 2<sup>nd</sup> Petitioner's Application for joinder, it is clear that there is a shared position with the 1<sup>st</sup> Petitioner, and the Pleadings and Submissions of the 1<sup>st</sup> Petitioner, suffice.

### **Response**

17. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed Grounds of Opposition on 25<sup>th</sup> August 2021, and Submissions dated 20<sup>th</sup> June 2022.

18. They state that the impugned directive of the 1<sup>st</sup> Respondent, is not exhibited in the Petition. Certiorari cannot issue against a decision that is not before the Court. Order 53 Rule 7[1] of the Civil Procedure Rules, requires that an

Applicant for an order of certiorari, files a copy of the decision sought to be quashed. The Respondents rely on **Republic v. Mwangi S. Kimenyi *ex-parte* Kenya Institute for Public Policy and Research Analysis [KIPPRA] [2013] e-KLR** and **Republic v. Ruiru District Land Disputes Tribunal & Another *ex parte* Lucia Waithira Muiruri & Another [2014] e-KLR**. The Petitioners' statements about the safety of the vaccines are based on unverified reports. They are not based on research from credible institutions.

19. Public Officers are likely if unvaccinated, to infect the Public or get infected in the course of serving the Public.

20. It is the mandate of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents to ensure Public Officers and the Public are protected. They have the mandate to ensure that, Public Service runs unhindered.

21. The vaccines have been approved by WHO and the Ministry of Health. It is in the interest of the Public, that all Public Officers are vaccinated. Constitutional rights are not absolute and there is need to balance between individual rights, pleaded by the Petitioners, and Community or Public rights.

22. The Respondents submit that the Court lacks jurisdiction, citing Section 12 of the Employment & Labour Relations Court Act, and Article 162 of the Constitution. They cite the Court of Appeal in **Public Service Commission of Kenya & 4 others v. Cheruyiot & 32 others [Consolidated Civil Appeal No. 119 and 139 of 2017], [2022] KECA 15 [KLR] 8<sup>th</sup> February 2022**, in urging the Court to decline jurisdiction.

23. It is submitted that a body or organ performing statutory duties, has discretion when handling matters falling within its mandate. Where it has applied its mind to constitutional requirements, Courts should not review that decision. This submission is anchored on **Court of Appeal in Civil Appeal No. 307 OF 2012, Peter Odoyo Ogada & Others v. Independent Electoral and Boundaries Commission & Others**. The Petitioners have not demonstrated that the vaccine mandate directive is unreasonable, irrational or illegal.

24. The 3 Respondents submit that the Petition is not brought in good faith. Citing the Indian Supreme Court decision in **Ashok Kumar Pandey v. State of West Bengal AIR 2004 SC 280**, the 3 Respondents urge the Court to find that the Petition is disguised under the attractive brand name of public interest litigation, but in reality, is a suspicious product of mischief. They pray for dismissal of the Petition with costs.

25. The 2<sup>nd</sup> Respondent has not taken any position in the Petition and neither has the 1<sup>st</sup> Interested Party. It is regrettable that the 1<sup>st</sup> Interested Party did not deem it fit to participate in the Petition, and assist the Court on an issue central to the 1<sup>st</sup> Interested Party's constituency.

### **2<sup>nd</sup> Interested Party's position.**

26. The 2<sup>nd</sup> Interested Party relies on the Affidavit of Dan Owalla, its National Co-ordinator, sworn on 8<sup>th</sup> March 2022.

27.Owalla acknowledges that the 1<sup>st</sup> Respondent issued the impugned memo of 5<sup>th</sup> August 2021. Vaccine mandate is contrary to the guidelines issued by WHO. These guidelines advocate for exhaustion of all other options, before forced vaccination. Vaccines are not an absolute resort, and should only apply when other feasible options to improve vaccination uptake have been exhausted.

28.The 1<sup>st</sup> Respondent, in issuing the directive, did not consider the exceptions of those Public Officers who are medically exempt, thus exposing them to a public health threat. Vaccine mandate should not create undue burdens for any population group, or disproportionately infringe on human rights of any individual.

29.The Government ought to have considered the principle of prior informed consent, and educate the public about the subject of vaccination. It is the obligation of the Medical Service Providers to obtain informed consent, prior to vaccination.

30.The right to health of Public Officers has been violated, since the duty of the Medical Service Providers, to explain the possible side effects of the treatment was not offered. This infringed the Public Officers' right to information, under the Constitution.

31.The 2<sup>nd</sup> Interested Party states that the directive infringes Public Officers' right to equal treatment under the law, enshrined in Article 27 of the Constitution. It infringes Article 31 on the right to privacy. The 2<sup>nd</sup> Interested Party supports the Petition fully, submitting that vaccine mandate must

comply with the principles of legality, proportionality, necessity and non-discrimination.

32. The 2<sup>nd</sup> Interested Party cites a decision from the European Court of Human Rights, **Vavricka v. Czech Republic, Case Number. 116 of 2021**, which set the requirements that justify interference in private life through vaccine mandates. These are: the primary objective must be to protect public health; vaccine mandate must be based on pressing social need, e.g. due to a low rate of spontaneous vaccination against specific disease that could threaten public health; the safety level of vaccines must be carefully evaluated in relation to scientific evidence; relevant and sufficient reasons are needed to impose mandatory vaccination; and the obligation cannot apply to persons with contraindications to the administration of the vaccine.

33. In a capsule, the 2<sup>nd</sup> Interested Party agrees with the Petitioners, that the 1<sup>st</sup> Respondent's directive, violates or threatens to violate, Public Officers' constitutional rights and freedoms, to wit: right to the highest attainable standard of health; right to privacy; right to bodily integrity; right to equal treatment; right to freedom from discrimination; freedom of conscience, religion, belief and opinion; right to fair labour practices; and fair administrative action.

### **Amicus Curiae Brief**

34. The Amicus Curiae states that vaccine mandate is a novel issue. It has not, yet exercised the minds of the Kenyan Judiciary.

35. The right to health is a fundamental human right. It is provided for under Article 43 [1] [a] of the Constitution, and other international instruments, which are part of the laws of Kenya, subject to Article 2[6] of the Constitution.

36. The International Covenant on Economic, Social and Cultural Rights [ICESCR], Article 12 provides that State Parties to the covenant, recognise the right of everyone to the enjoyment of the highest standard of physical and mental health.

37. The International Convention on Elimination of all forms of Racial Discrimination [ICERD], recognises the right to public health, medical care, social security and social services.

38. The African Charter on Human and Peoples' Rights [Banjul Charter], Article 16 recognises that every individual shall have the right to enjoy the best attainable state of physical and mental health.

39. The right to health, includes the right to be free from non-consensual medical treatment. This is a fundamental concept in medical ethics, law and principles. General Comment No. 14 of the ICESCR, states that the right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference including the right to be free from torture, non-consensual medical treatment and experimentation.

40. Vaccine mandate cannot be implemented without informed consent of the vaccine recipient. Failure to have informed consent would amount to

violation of the right to dignity under Article 28 of the Constitution and the right to freedom and security of the person, which includes freedom from torture or inhuman and degrading treatment.

41. The Amicus Curiae acknowledges that regardless of the concept of informed consent, there are instances where contagious disease outbreak, requires immediate and strategic responses. Informed consent may be done away with. It is assumed that the medical intervention in place, will play a vital role, in containing spread of the contagion. Vaccination is a minor procedure, that eliminates the risk of contracting a targeted disease. Success of vaccination has been witnessed with respect to diseases such as measles and tetanus. Small pox was eradicated in the late 20<sup>th</sup> century, through vaccination. Mass vaccination is known to create herd immunity.

42. The Amicus Curiae postulates that the application of mandatory vaccination, has been used to justify promotion of the right to life. If one rejects vaccination during a pandemic, it endangers the lives of others, violating others' right to life. Vaccine mandate becomes a policy to protect other peoples' right to life.

43. Mandatory vaccination may be classified into the following circumstances: -

- a. Mandatory by virtue of being made legally compulsory through law; and,
- b. Mandatory by virtue of any state or non-state policy requiring proof of vaccination, in order to access a venue or enjoy a benefit.

44. Mandatory vaccination should however not be unqualified, and without sufficient reason. The WHO policy, is that vaccine mandates should be a last resort. All other feasible options should be exhausted.

45. There are core human rights obligations, that guide vaccine mandates. The Nuremberg Code promoted the foremost principle of voluntary consent of the human subject. Article 7 of the International Covenant on Civil and Political Rights [ICCPR] indicates that no one shall be subjected to medical or scientific experimentation without his free consent. United Nations Educational, Scientific and Cultural Organisation [UNESCO], Universal Declaration on Bioethics and Human Rights, provides that human dignity, human rights and fundamental freedoms are fully respected and the interests and welfare of the individual, should have priority over the sole interest of science or society. Article 6 of the UNESCO Declaration, states that any preventive, diagnostic and therapeutic medical intervention is only carried out with the prior, free and informed consent of the person concerned. WHO's " Guidance for Managing Ethical Issues in Infectious Disease Outbreaks" provides that the emergency use of medical interventions is justified by the ethical principle for patient autonomy, in other words, the right of individuals to make their own risk-benefits assessments, in light of personal values, goals and health conditions.

46. The Siracusa Principles on the Limitation of Derogation Principles of the ICCPR, are a foundation that builds a State's restrictions of rights in emergencies. They underscore that limitation of rights and fundamental freedoms must be prescribed by law, be legitimate and proportionate, and justifiable in an open and democratic society. Therefore, vaccine mandate



must be: expressly prescribed under the law and that law should be reasonably clear, foreseeable and accessible to all persons who are subject to the law; directed toward a legitimate objective of general interest, with the objective clearly defined; strictly necessary in a democratic society; least intrusive and restrictive; based on scientific evidence; neither arbitrary nor discriminatory in application; and respectful to human dignity.

47. Necessary infrastructure must be put in place, before rollout of vaccine mandate. The Government must ensure that the vaccine is safe and effective, and has superior benefit compared to other means of pandemic control. Safety includes the isolation of persons who may be affected by side-effects. There should be a system to identify such persons, with a view to exempting them from vaccine mandates.

48. The Amicus Curiae submits that other measures ought to have been put in place, including public education; imposition of curfew and restriction of movement; social distancing; and regular washing of hands. It must be shown that vaccine mandate will result in benefits these other measures cannot provide.

49. Vaccines must be readily available. The Health Workers must be well-trained and motivated. There should be in place detailed disease monitoring.

50. The Amicus Curiae restates the need for publicizing of information on vaccination for easy access by the citizenry. This obligation is imposed by Article 35[1][a] of the Constitution, Section 8 of the Access to Information Act, Article 19[2] of the ICCPR, Article 19 of the Universal Declaration of

Human Rights [UDHR], and UN Committee on Economic, Social and Cultural Rights.

51. Failure to provide information leads to violation of other rights, including the right to health, right to life and freedom of expression, as held in **Katiba Institute v. President's Delivery Unit & 3 Others [2017] e-KLR**. Human rights are inalienable, interconnected and indivisible. Public bodies have an obligation to disclose information, and every member of the public has a corresponding right to receive information, as pronounced in **Trusted Society of Human Rights Alliance & 3 Others v. Judicial Service Commission [2016] e-KLR**.

52. On labour rights, the Amicus Curiae proposes that every person has the right to work, including the opportunity to freely choose an occupation and a right to safe and healthy working condition. This proposition is anchored on Articles 6 and 7 [b] of the International Covenant on Economic, Social and Cultural Rights.

53. Mandatory vaccination policies are now in place, in different parts of the world, enforced through Governments or the Private Sector Employers. They impose some restrictions on labour rights, and must be proportionate, and used as a last resort.

54. The Amicus Curiae submits that in light of the restriction and the right to fair labour practice, Employers ought to consider the following measures: -

- a. Conduct risk assessment of Employees, to identify those who must be vaccinated, and those who must be exempted.
- b. Provide Employees all necessary information, to enable them make informed choice.
- c. Facilitate registration of vaccine uptake by Employees and give Employees time off to get vaccinated.
- d. Inform Employees due for mandatory vaccination, and advise on their right to object to such vaccination on medical or constitutional grounds.

55. Mandatory vaccination requirements may come up with penal consequences if there is no compliance, but the consequences must be proportionate to the main objective. An Employee who declines to be vaccinated must be heard before being punished.

56. The Amicus Curiae offers to the Court, a number of foreign decisions, on vaccine mandates which include: **Jacobson v. Massachusetts, 197 U.S. 11 [1905]**, relating to smallpox vaccination, where the Court upheld vaccine mandate, holding that the State had police power to protect the public health of its citizens. In **US Supreme Court decision 21A240 Biden v. Missouri [01/13/22]** the Supreme Court blocked new Occupational Safety and Health Administration mandate rules, that would require most Federal Employees, and Employees of companies with more than 100 Employees, to be vaccinated. The Court blocked the directive to companies with more than 100 Employees, while leaving a narrower mandate requiring Health Workers at facilities requiring federal funds, to be vaccinated. The Amicus Curiae also cites Awards of Arbitrators on the subject, from other jurisdictions, which the

Court does not think are useful comparative jurisprudence, owing to the private nature of arbitration.

57. In conclusion, the Amicus Curiae submits that: vaccine mandate should be undertaken with sufficient reason; it should be based on closely regulated public law, guided by principles of democratic accountability; vaccination information ought to be broadly dispersed to the public; and the State should be required by the Court to report on the progress made in implementation of a rights-based approach, in vaccination.

58. The issues are: whether the Court has jurisdiction; whether the directive issued by the 1<sup>st</sup> Respondent on 5<sup>th</sup> August 2021 amounts to a requirement for mandatory vaccination of all Public Officers; whether the directive violates the constitutional rights of Public Officers; and whether the remedies pleaded are merited.

### **The Court Finds: -**

59. **Jurisdiction.** As shown in the record, this matter originated from the High Court at Nakuru. It was transferred through a Ruling delivered by Hon. Justice [Prof.] Joel Ngugi, on 8<sup>th</sup> September 2021, declining jurisdiction. The Respondents were represented at the High Court. If the High Court declined jurisdiction, where would the Respondents have the Petitioners prosecute their Petition?

60. It was indeed the Attorney-General, who raised preliminary objection on the jurisdiction of the High Court to hear and determine the Petition, at the High

Court, arguing that jurisdiction lies with the E&LRC. The High Court agreed with the Attorney-General, and transferred the Petition. Why does the Attorney-General then contest the jurisdiction of this Court? This is the apex of absurdity.

61. The Court is satisfied that it has jurisdiction, relying on a long chain of decisions of Superior Courts, including **United States International University v. Attorney-General [2012] e-KLR; Daniel Mugendi v. Kenyatta University & 3 Others [2013] e-KLR; and ELRC Petition 101 of 2020, Okiya Omtata Okoiti v. The Attorney- General & Another.**

62. The Court assumes jurisdiction, for the same reasons that the High Court declined jurisdiction, and transferred the Petition to this Court.

63. The Respondents submit that the directive of the 1<sup>st</sup> respondent, is not exhibited in the Petition, and cannot therefore be quashed through an order of certiorari. The Respondents rely on Order 53 Rule 7 of the Civil Procedure Rules.

64. The Court rejects this submission. The proceedings herein are not presented pursuant to the Civil Procedure Rules. They are presented pursuant to The Constitution of Kenya [Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution] Practice and Procedure Rules, 2012. Rule 11 of these Rules, states that if a Party wishes to rely on any document, the document may be annexed to the Supporting Affidavit, or the Petition where there is no Supporting Affidavit. The Rules do not make it mandatory for Petitioners to annex documents, or to file Supporting Affidavits. Rule 9

permits Petitioners to present oral applications, letters or other informal documentations, which disclose denial, violation, infringement or threat to a right. The applicable procedural regime is the Constitution of Kenya [Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution] Practice and Procedure Rules, 2012, and not the Civil Procedure Rules. The former is a more liberal procedural regime on filing of documents and supporting affidavits, and the order of certiorari cannot be denied only on the ground that the letter communicating the impugned directive, is not annexed to the Petition.

65. Furthermore, the position of the Respondents is factually incorrect, and their challenge misplaced. The letter of the 1<sup>st</sup> Respondent, dated 5<sup>th</sup> August 2021, is annexed to the Supporting Affidavit of the 1<sup>st</sup> Petitioner, sworn on 18<sup>th</sup> August 2021. [paragraph 19 of the Affidavit]. The Attorney-General ought not to have submitted on a non-issue, the decision of the 1<sup>st</sup> Respondent, having been exhibited in the Petition.

**Whether the directive amounts to vaccine mandate.**

66. The letter of 5<sup>th</sup> August 2021 from the 1<sup>st</sup> Respondent is addressed to all Principal Secretaries and Accounting Officers.

67. The 1<sup>st</sup> Respondent is the Head of the Public Service. He states that there is a low uptake of Covid-19 vaccines in the Public Service, despite the Government having availed sufficient supplies. He states that some Public Officers have deliberately avoided being vaccinated, so as to keep away from Office, and perpetuate the guise of working at home. He directs that all Public

officers receive their 1<sup>st</sup> jab, by 23<sup>rd</sup> August 2021, in default they be taken through disciplinary processes. The 1<sup>st</sup> Respondent directs Principal Secretaries to implement the directive.

68. The Principal Secretaries took steps, to implement the directive, as captured in the Memo of Mary W. Kimonye, Principal Secretary Ministry of Public Service and Gender, State Department of Public Service, dated 18<sup>th</sup> August 2021, addressed to all staff.

69. Kimonye repeats the assertions of the 1<sup>st</sup> Respondent, that there is low uptake of Covid-19 vaccines by Public Officers, with some deliberately avoiding vaccination, so that they can stay away from work. She directs all Public Officers to get vaccinated, failing which disciplinary action, including denial of access to Offices; stoppage of salary; and withdrawal of benefits, would be imposed.

70. The directive fits the description of mandatory vaccination, given by the Amicus Curiae at paragraph 14 of its Brief. Vaccination as directed by the 1<sup>st</sup> Respondent, became mandatory in the Public Service by virtue of policy, which requires Public Officers to be vaccinated to continue accessing Offices, earning their salaries and other benefits. Public Officers were threatened with disciplinary sanctions, if they did not submit to the jab.

71. Vaccine mandates require people to be vaccinated, to be allowed to do certain things, such as working or travelling. Vaccination is compelled, by direct or indirect threats of imposition of restrictions, in cases of non-compliance.

72.The WHO in its Policy Brief of 13<sup>th</sup> April 2021, “ Covid-19 and Mandatory Vaccinations: Ethical Considerations and Caveats,” as cited by the Petitioners, states that contemporary forms of mandatory vaccination, compel vaccination by direct or indirect threats of imposing restrictions in cases of non-compliance. Krasser A. in “Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR ICL Journal, “ defines mandatory vaccination in the following terms: “ considering that medical interventions are only to be carried out with the free and informed consent of the person concerned, it seems appropriate to define every vaccination system that mandates any negative consequence as a result of refusing to carry out a vaccination, as compulsory vaccination.”

73.The directive by the 1<sup>st</sup> Respondent, and the consequential communication by the Principal Secretaries to Public Officers, amount to vaccine mandate.

**Is the directive violative of the Constitution, or offensive to the principles of individual liberty?**

74.The Petition raises fundamental issues, on the coercive powers of the State, and the constitutionally protected rights and freedoms of the Individual.

**Coercive powers of the state.**

75.Those such as the Respondents, who justify vaccine mandates, argue that the Constitution does not import an absolute right in each person, to be at all times and in all circumstances, wholly freed from restraint.



76.Their position is justified on Millian grounds. John Stuart Mills, in “Mill J. On Liberty, Cambridge Library- Philosophy Cambridge University Press, 2011,” explains that the sole ground for the use of state coercion, and restriction on liberty, is when one individual risks harming others.

77.Parties appreciate that vaccine mandate, is a novel legal subject in Kenya. They have relied heavily on comparative jurisprudence from overseas, in particular the US, where Courts have dealt with the subject, from as early as 1905, and as late as this year.

78.The earliest decision is cited by the Amicus Curiae, **Jacobson v Commonwealth of Massachusetts US. 11. 1905.** A town in the grip of smallpox outbreak, exercised State delegated powers, by imposing vaccine mandate. Jacobson, expressing his right to individual liberty, opposed mandatory vaccination in Court. He averred that mandatory vaccination invaded his liberty, when the State subjected him to a fine or imprisonment for refusing to submit to vaccination. He submitted, like the Petitioners herein, that compulsory vaccination was unreasonable, arbitrary and oppressive, and therefore hostile to the inherent right to every freeman, to care for his own body and health.

79.Justice Harlan answered him, stating: -

“ The liberty secured by the Constitution of the United States to every person within its jurisdiction, does not import an absolute right in each person, to be at all times and in all circumstances, wholly freed from restraint.

There are manifold restraints to which every person, is necessarily subject, for the common good. On any other basis, organized society could not exist with safety to its members, based on the rule that each one is a law unto himself.” The Judge found that society would soon be confronted with disorder and anarchy.

80.The Court expounded that persons and property are subject to all kinds of restraints and burdens, to secure the general comfort, health and prosperity of the State. Liberty is freedom from restraint under conditions essential to the equal enjoyment of the same right by others. Those who had no faith in vaccination, as a means of preventing the spread of smallpox, put in peril the health of the persons who were vaccinated.

81.The Jacobson decision advances the principle of social compact. The principle requires that the whole people covenants with each citizen, and each citizen with the whole people, that each shall be governed by certain laws for the common good. Vaccine resistance need not be tolerated, when it allows disease to spread.

82.The decision, and its progeny, underscore that mandatory vaccination is entirely constitutional.

83.In **South Bay United Pentecostal Church v. Newsom 140 SCt. 1613 14 [2020]**, the Court gave a ringing endorsement to Jacobson. US Chief Justice Roberts stated:

“ Our Constitution principally entrusts the safety and health of the People to the politically accountable officials, to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. Where those broad limits are not exceeded, they should not be subjected to second-guessing by unelected Judiciary.”

84. In **Bruesewitz v. Wyeth LLC 562 US. 225 [2011]**, Justice Antonin Scalia held that, the elimination of disease through vaccination, became one of the greatest achievements of public health in the 20<sup>th</sup> century. The US Supreme Court, in **Zucht v. King 260 U.S, 174 [1922]** examined whether the school district of San Antonio, Texas, could constitutionally exclude unvaccinated students from attending the schools in the district. The Court reaffirmed that vaccination ordinances “ confer not arbitrary power, but only that broad discretion required, for the protection of the public health.”

85. In **Prince v. Massachusetts 321 U.S. 158 [1944]**, it was held that the Government has broad authority, to regulate the actions and treatment relating to Children. Parental responsibility was found not to be absolute and could be restricted, if doing so was in the interest of the Child. Sarah Prince had challenged a law that prohibited boys younger than 12, and girls younger than 18, from selling newspapers in the streets and other public places. She was convicted after taking her 9-year old niece, to sell Jehovah’s Witnesses literature. She challenged the restrictive law, invoking her religious rights, her rights as a guardian and equal protection of the law.

86. Justice Wiley B. Rutledge, citing laws that required compulsory vaccination, held that while the Courts recognized the rights and freedoms of parents and children to exercise religion, such rights and freedoms were not absolute. The right to practice religion, does not include liberty to expose the community, or the child to communicable disease, ill-health and death.

87. The US Courts have established that when disease is prevalent, the Court would usurp the functions of another branch of the Government, if it adjudged the mode adopted by the State, to protect the population at large, to be arbitrary and not justified by the necessities of the case. Vaccine pessimists as held in *Jacobson*, must give way to modern consensus that vaccines work. The Judiciary ought not to overturn vaccine mandate which was accepted as early as 1905.

88. Article 24 [1] of the Constitution, permits reasonable curtailment of fundamental rights and freedoms, where among other instances, the exercise of rights and freedoms, impedes the rights and fundamental freedoms of others. The Amicus Curiae recognizes that vaccine mandates have been argued to justify the right to life. If someone rejects vaccination during a pandemic, it endangers the lives of others, violating their right to life. Exercise of police powers of the state becomes justifiable, and limitation of individual rights and freedoms becomes justifiable, in an open and democratic society.

89. The Respondents' position, that it is in the mandate of the Government to ensure that Public Officers and the Public in general are protected from Covid-19, appears well ground in this Millian philosophy, and major decisions of the US Courts on the subject of vaccine mandates, discussed above. The

Courts have underscored that when it comes to Covid-19 and other pandemics, it is the 'liberty' of the pathogen that is the greatest threat to humanity, and hence, exercise of police powers of the State, becomes justifiable.

### **The flipside and liberty of the individual.**

90.The Petition is premised on the concept of the rule of law. When Governments adopt vaccine mandates, they in effect are seen to have excessively interfered with the life and liberty of their citizens.

91.The Respondents have, according to the Petitioners, imposed extra-constitutional measures that undermine the principles of equality before the law and the right of citizens to choose whether to be vaccinated or not.

92.The Petitioners cite a multiplicity of Articles of the Constitution, which have been violated, and which in the view of the Court, may collectively be seen, as a violation of the rule of law.

93.They submit that Government must be limited, and individual rights and freedoms extolled. Their argument is based on the premise that once Government is established, it must be so arranged that opportunity to tyrannize is minimized, and its power tempered, that it cannot tyrannize. They affirm that there are limits to what the Government can rightly do. They submit that the Government is bound by the Constitution in its dealings with the People, and its power must be limited by individual rights of the People. Vaccination must be left to the discretion of Public Officers and the Public.

94. In addition to the Constitution of Kenya, they invoke International Laws, which advance the principle of the rule of law, individual rights and freedoms. Among the International Laws invoked is the United Nations Universal Declaration of Human Rights, which states that “ whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

95. The Amicus Curiae acknowledges that during extraordinary circumstances, Governments may put in place emergency powers that limit ordinary rule of law protections. The limitation however, does not extend to non-derogable rights and freedoms. It is submitted that preservation of these individual rights and freedoms is recognised under various international human rights laws.

96. The Siracusa Principles on the Limitation and Derogation Provisions of the International Covenant on Civil and Political Rights, state that “ No State Party shall, even in time of emergency threatening the life of the Nation, derogate from the Covenant’s guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude...the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable, under any conditions, even for the asserted purpose of preserving the life of the Nation.”

97. The Petitioners and the Amicus Curiae invoke the Nuremberg Code [1947].

The Code originated from the Judgment by the War Crimes Tribunal at Nuremberg, and laid down 10 standards, which physicians must conform, when carrying out experiments on human subjects. The Code enunciates the requirement of voluntary informed consent of the human subject. The principle protects the right of the individual to control his own body. The subject should have the legal capacity to give consent, and should exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, overreaching or other ulterior form of constraint or coercion. The subject should have sufficient knowledge and comprehension of the elements involved, so as to enable him make an understanding and enlightened decision. Before the acceptance by the experimental subject, there should be made known to him the nature, duration and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon the health or person of the subject, which may possibly come from his participation in the experiment. The Code recognizes that the risk must be weighed against the expected benefit, and that unnecessary pain and suffering must be avoided. Doctors must avoid actions that injure human patients.

98. The principles in this Code have been extended to general Codes of medical ethics. Section 9 of the Health Act No. 21 of 2017 requires that no specified health service may be provided to a patient, without the patient's informed consent.

99. The Petitioners and Amicus Curiae submit that the Respondents ought to have taken into account these international medico-legal and ethical standards, in rolling out mandatory vaccination in the Public Service.

100. The Petitioners and the Amicus Curiae adopt Article 6[1] of the UNESCO's Universal Declaration on Bioethics and Human Rights 2005 which states: -

“ Any preventive, diagnostic and therapeutic medical intervention, is only carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time, and for any reason, without disadvantage or prejudice.”

101. The Petitioners hold that the directive by the 1<sup>st</sup> Respondent issued without adequate testing and analysis of risks and benefits of vaccination, which violates the principal of informed consent, and is in violation of the Public Officers' Constitutional right to information, and further in violation of Kenya's obligations under the specified international laws. The directive is not only constitutionally invalid, but transgresses Kenya's obligations under public international law, the Petitioners submit.

102. The Petitioners and the Amicus Curiae, have directed the mind of the Court to various decisions of the Kenyan Courts in support of their positions, including: **Petition No. 122 of 2015, Prof. Tom Ojienda v. The EACC and 5 Others [2016] e-KLR** [a very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions, and there is a final untouchable sphere of human freedom that is beyond interference from any public authority]; and **MWK & Another**



**v. The Attorney-General & 3 Others [2017] e-KLR**, [human dignity is a founding value of the Constitution, without which, human life is substantially diminished]. On access to information, the Amicus Curiae has availed 2 decisions, **Katiba Institute v. President’s Delivery & 3 Others [2017] e-KLR** and **Trusted Society of Human Rights Alliance & 3 Others v. Judicial Service Commission [2016] e-KLR** [the right to access information is a foundational human right, upon which other rights flow].

103. These rights and freedoms are therefore non-derogable, and the Respondents exercised the police powers of the State wrongfully. The Court is called upon to protect Public Officers from imposed vaccination, by quashing the directive of the 1<sup>st</sup> Respondent.

#### **The Court’s view and conclusion.**

104. Litigation relating to vaccine mandates is uncommon in Kenya, as submitted by the Parties, and there is a dearth of decided cases, specifically relating to the subject.

105. There is however a rich body of comparative jurisprudence particularly from the US, and from other jurisdictions, as cited by the Parties. There are similarly, multiple international law instruments, which apply to the subject, as invoked mainly by the Amicus Curiae in this Petition.

106. The Court has doubt on the Petitioners’ and Amicus Curiae’s equation of vaccine mandates to human experimentation, subject matter of the Nuremberg Code.

107. The Nuremberg Code involved human medical experimentation. The Court does not think that mandatory vaccination, amounts to human medical experimentation. Medical experimentation refers to testing and evaluation of a new drug, or procedure on a human person, in order to gain knowledge that can be used for various purposes.
108. The Code originated from the trial of Nazi Doctors in **United States of America v. Karl Brandt et al [1946-47]**. Nazi Doctors were charged with counts of forcible medical human experimentations conducted on concentration camp prisoners; euthanasia programs carried out on mentally sick patients; and killing of camp inmates for the express purpose of collecting skeletons for medical research.
109. The principle of informed consent arose from these extremities. Experimentation relating to vaccines subject matter of the 1<sup>st</sup> Respondent's directive, must have taken place during their clinical trials. The vaccines are approved for use by WHO. They do not reach the global markets before they receive WHO's Emergency Use Listing [EUL]. The vaccines go through various phases of experimentation. It is during these phases that medical human experimentation is involved. There are persons who consent to have vaccines for experimentation purposes.
110. The Health Act, while requiring that health service providers obtain the patient's informed consent, has various exceptions to this rule. Provision of health service is allowed without informed consent if the patient is unable to give consent; if an applicable law or order of the court allows; if the patient is being treated in an emergency situation; if failure to treat the user or group

of people which includes the user, will result in serious risk to public health; or if any delay in provision of the health service might result in the user's death or user's irreversible damage to health.

111. The Covid-19 situation is a medical emergency. The Health Act defines 'medical emergency,' under Section 2, as "an acute situation of injury or illness that poses an immediate risk to life or health of a person, or has potential for deterioration in the health of a person or if not managed timely, would lead to adverse consequences in the person's well-being."

112. The Covid-19 vaccination should not be limited by the concept of informed consent, as it is being administered in a globally acknowledged emergency situation. Failure to vaccinate will result in serious risk to public health. Delay in vaccination might result in death or irreversible damage to health. The Health Act does not therefore require that informed consent is obtained from the patient, at all times.

113. Public Officers have not been directed by the 1<sup>st</sup> Respondent to have mandatory medical human experimentation; they have been directed to have vaccines, which have gone through the experimentation phase, and been approved for use by the manufacturers' regulators such as US Food & Drug Administration, and globally by WHO. Human experimentation took place when the vaccine manufacturers, carried out their clinical trials.

114. Section 66 of the Health Act regulates the standards of medicine, vaccine or other health product and technology, intended for use by the Kenyan Public. Licensing is only granted, if after due assessment, the vaccine is found to achieve the intended effect it claims to possess, which may reasonably be

attributed to it; it is sufficiently safe under normal conditions of use; and is made and packaged according to satisfactory standards. Vaccines in use in Kenya must have gone through this licensing process.

115. The Petitioners and the Amicus Curiae fail to make a clear distinction between mandatory vaccine, and human medical experimentation. They also do not adequately recognize the presence of the Health Act, in vaccination quality assurance and administration.

116. Once it is accepted that vaccination is not human medical experimentation, it is the view of the Court that the exercise of police power of the State, does not violate individual rights and freedoms.

117. The Court is aware that in conducting vaccination, the 3<sup>rd</sup> Respondent has protocols, which would not allow a person with allergies, contraindications and underlying conditions, which would have an adverse reaction to vaccination, to be voluntarily or mandatorily vaccinated. Our medical personnel conducting vaccination are not proceeding from a position of ignorance. They act in accordance with their oath of calling and in accordance with the Health Act. Every person receiving vaccination is taken through these protocols and signs a form, indicating consent. The allusion to compelled vaccination, is overstated. There are protocols, and consent is sought before vaccination. The Amicus Curiae submits correctly, that vaccination is a minor medical procedure that reduces or eliminates the risk of contracting a targeted disease. "The success of vaccination as a medical intervention in pandemic responses has indeed been witnessed. For instance, broad vaccination coverage is largely responsible for the

widespread of immunity to measles and tetanus, and it also led to the eradication of smallpox in the late 20<sup>th</sup> century,” opines the Amicus Curiae.

118. This Court finds persuasion in the chain of decisions on Covid-19 discussed above, right from **Jacobson v. Commonwealth of Massachusetts 197 U.S. 11. [1905]**. Individual liberties and rights secured by the Constitution of Kenya, do not import an absolute right in each person to be at all times and in all circumstances, wholly freed from restraint, to paraphrase Justice Harlan in **Jacobson**.

119. The directive by the 1<sup>st</sup> Respondent, is for the common good of the Public Officers and the general consumers of public service. It is meant to protect them from Covid-19 infections and prevent cross – infections. Public Officers are an integral aspect of the community, and when they are vaccinated, it minimizes community spread.

120. The directive is to be seen against other measures put place by the 3<sup>rd</sup> Respondent, in conjunction with WHO and US FDA, in ensuring that the vaccines are safe for human use.

121. The Court is wholly convinced that mandatory vaccination is necessary and justified, under the principle of social compact. Our common good, overrides our personal spaces. A community has the right to protect itself against a pandemic, which threatens the safety of its members.

122. It is a correct exposition of the law, that the Court would be usurping the functions of another branch of government, if it adjudged that vaccine

mandate is unjustified. Vaccine pessimism such as expressed by the Petitioners, must give way to the global consensus, that vaccines work.

123. Recent decisions of the Courts upholding **Jacobson**, include **Maniscalco v. New York City Department of Education, 2021 WL 4344267, at 3 E.D.N.Y. Sept. 23, 2021** [public school teacher mandatory vaccination, represents a rational policy decision surrounding how best to protect children during a global pandemic]; **Harris v. University of Massachusetts, Lowell 2021 WL 3848012, at 7 [1] Mass. Aug 27 2021** [a state university is under no obligation to offer a religious exemption to its vaccine requirement]; **Norris v. Stanley, 2021 WL 3891615, at 1 [W.D] Mich. Aug. 31, 2021** [a mandatory vaccination is a state's valid exercise of its police powers to protect the health and safety of its citizens]; and **In re City of Newark, 2021 WL 4398457 at 4 [N.J. Super: Ct. App. Div. September 27<sup>th</sup> 2021** [ Public Employee Vaccine Mandate was upheld. The Court opined that when a public health emergency exists, governmental entities, including local authorities, have a right, to require vaccinations].

124. In **Beckerich v. St. Elizabeth Med. Ctr., 2021 WL 4398027 at 9 [E.D. Ky. September 24, 2021**, the Court adopted a radical approach, and was emphatic in its rejection of vaccine pessimism, stating that, " if an Employee believes that his or her individual liberties are more important than legally permissible conditions on his or her employment, that Employee can and should choose to exercise another individual liberty, no less significant – the right to seek other employment. "

125. Article 24 [1] [d] recognizes the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the

rights and freedoms of others. The Constitution upholds the principle of social compact, where the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for common good.

126. The Amicus Curiae submits that it has been argued, that mandatory vaccines promote the right to life. If someone rejects vaccination in a pandemic situation, it endangers the lives of others, thus violating the right to life of others. Vaccine mandate becomes a means of protecting others' right to life. Vaccinated Public Officers not only protect their own lives; they protect the lives of the Public. The State cannot be a bystander while Covid-19 ravages the community, and while Article 43 of the Constitution mandates that every person has the right to highest attainable standards of health. Article 21 [2] of the Constitution mandates the State to take legislative policy and other measures including the setting of standards to achieve the progressive rights guaranteed under Article 43 [including right to the highest attainable standards of health].

127. The fight against Covid-19 and combating of pathogens through vaccination, is in line with Article 21 and 43 of the Constitution of Kenya. It is not correct to equate the 1<sup>st</sup> Respondent's directive, as amounting to torture, cruel, inhuman and degrading treatment of the Public Officers. Vaccine mandates, [and mask mandates] are necessary and constitutionally valid. Vaccine mandates have support from decisions of the Courts, from as early as 1905.

128. The 1<sup>st</sup> Respondent issued his directive as Head of Public Service. The 1<sup>st</sup> Petitioner submits on the powers of the President under the National

Government Coordination Act 2013 and Article 132 [3] of the Constitution, arguing that none of these laws allows the President, through his delegate, the Head of Public Service, to impose vaccination on Public Officers. The Petitioners did not think of the Government as an Employer, with certain statutory obligations, on safety and health, in Public Offices. The Occupational Safety and Health Act 2007, describes 'Occupier' to include an 'Employer.' The Act is intended to secure the safety, health and welfare of persons at work; and protect persons other than persons at work, against risks to safety and health arising out of, or in connection with, the activities of the persons at work. The Act recognizes the principle of social compact. Section 6[1] mandates Occupiers / Employers to ensure the safety, health and welfare at work of all persons working in their workplaces. The duty of the Employers includes ensuring that every person employed, participates in the application and review of safety and health measures. Employees are required under Section 13 [1] of the Act to ensure their own safety and health, and that of other persons who may be affected by their acts or omissions at the workplace. They have an obligation to comply with safety and health procedures, requirements and instructions given by a person having authority over them, for their own and other persons' health and safety. The Court would view the directive by the 1<sup>st</sup> Respondent, as such instructions, given by an Employer to his Employees.

129. The directive by the 1<sup>st</sup> Respondent, in the view of the Court is Constitutionally justified, and well-founded in Occupational Safety and Health Act, 2007. By requiring Public Officers to be vaccinated, the Head of Public Service fulfilled an obligation imposed on Employers by the Act, and acted in accordance with the Constitution. Public Officers have a



responsibility to submit to these safety and health requirements, by being vaccinated.

130. The Health Act similarly makes it clear that it is the role of the State to ensure every person enjoys the highest achievable standards of health. Section 4 states that, it is the fundamental duty of the State, to observe, respect, protect, promote and fulfil the right to the highest attainable standard of health, including reproductive healthcare and emergency medical treatment. This includes development of policies, laws and other measures necessary to protect, promote and improve and maintain the health and well-being of every person. Section 15 [1] [i] of the Health Act, makes it the duty of the National Government to put in place policy intervention measures, to reduce the burden of communicable and non-communicable diseases, emerging and re-emerging diseases and neglected diseases.

131. The Health Act does not view mandatory vaccines as a novelty. Section 5 [3] obligates the National and County Governments to ensure the provision of free and compulsory vaccination for Children under 5 years of age. Most Kenyans encountered vaccine mandates from the time of their birth. There is absolutely nothing unconstitutional or illegal about them having mandatory vaccination, in their adulthood, while faced with emerging and deadly pathogens.

132. The proposal in the directive, to have Public Officers who were not compliant being subjected to disciplinary proceedings, appears to this Court within the norm of a carrot and stick policy, to ensure as many Public Officers as possible, submit to vaccination. Denial of access to office, for the

unvaccinated is a common method of encouraging compliance among Public Officers and the Public. Stoppage of salary and withdrawal of salary and other benefits, in a situation where Public Officers are found to have deliberately avoided vaccine and opted to stay or 'work' at home, could be justified under Section 19 of the Employment Act. The Court does not see the directive as being in violation of fair labour practice, or fair administrative actions, rights. Disciplinary proceedings in individual cases, would still have to meet the standards of fairness under the Employment Act.

133. The Court is satisfied that the circumstances in which the 1<sup>st</sup> Respondent's directive issued, warranted the application of police powers of the State. As stated by US Chief Justice Roberts in **South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 14 [2020]**, when State Officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad. The directive issued alongside other measures undertaken by the 3<sup>rd</sup> Respondent, which include: public education; imposition of curfews and general restriction of movement; social distancing; and face masking. The Amicus Curiae submits that vaccine mandate must be compared with other alternatives. The Government of Kenya adopted vaccine mandate in the Public Service, alongside other measures. One does not mask up, socially distance, or sanitize, as an alternative to being vaccinated against Covid-19. The Court does not think other measures are alternatives; the measures, in a pandemic situation, are complementary.

134. The Court agrees with the Respondents that the mandated vaccines have been approved by Institutions such as WHO. They have been licensed by the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent has guidelines in the administration of

vaccines and is governed by the Health Act in this undertaking. The vaccines go through clinical trials and approvals in their countries of origin. Vaccination is not medical human experimentation. The U.S. Food and Drug Administration, and other regulators in the vaccines' countries of origin, do not permit vaccines to leave the laboratories, without strict quality assurance. There are multiple clinical trials.

135. It is also clear to the Court that the anti-vaccination literature exhibited by the 1<sup>st</sup> Petitioner in his Supporting Affidavit, is downloaded from google and does not constitute probative medical evidence. The literature is generated by vaccine pessimists and is not evidence this Court can act on. The Court finds declaratory and compelling orders sought by the Petitioners, to have no merit. Certiorari order sought would amount to the Court unreasonably infringing the sphere of another arm of Government, in ensuring safety and health for all.

136. The prayers seeking the Court to have the 3<sup>rd</sup> Respondent maintain a control and monitoring system that aims to minimize Covid-19 related side effects, contraindications and deaths, is not based on medical evidence availed to the Court. Orders compelling the 3<sup>rd</sup> Respondent to investigate and publish data every 7 days, on persons who have been vaccinated and still contracted Covid-19, and publication of data on those with pre-existing conditions who died from Covid-19, are not necessary. The Petitioners have not laid a basis for such compulsion. Furthermore, Section 100 of the Health Act obligates the 3<sup>rd</sup> Respondent to facilitate the establishment and maintenance of a comprehensive integrated health information system. There is no point in ordering the 3<sup>rd</sup> Respondent to do what the Health Act, already obligates the 3<sup>rd</sup> Respondent to do. If the 3<sup>rd</sup> Respondent has not

complied with Section 100 of the Act, it is open to the Petitioners to seek enforcement under the Health Act. Ultimately, the State must have a broad latitude in vaccination of the masses, and the Judiciary must not interfere with the police powers of the State, in the fight against Covid-19 pandemic.

**IT IS ORDERED: -**

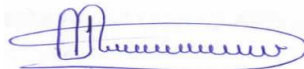
***a. The Petition is declined.***

***b. No order on the costs.***

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 29<sup>th</sup> day of September 2022

James Rika

Judge

A handwritten signature in blue ink, consisting of a stylized 'J' followed by a series of loops and a horizontal line at the end.