Githongo & another v State Corporations Advisory Committee & another; Public Service Commission & 2 others (Interested Parties) (Petition E303 of 2023) [2024] KEHC 13157 (KLR) (Constitutional and Human Rights) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13157 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E303 OF 2023

LN MUGAMBI, J

OCTOBER 31, 2024

BETWEEN

JOHN GITHONGO ..... 1ST PETITIONER

KATIBA INSTITUTE ..... 2ND PETITIONER

AND

STATE CORPORATIONS ADVISORY COMMITTEE ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY

SALARIES AND REMUNERATION COMMISSION ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

RULING

Introduction

1. By a Notice of Motion application dated 18th August 2023, the Petitioners seek orders that:

    i. Spent.

    ii. Conservatory orders of injunction do issue against the Respondents staying the letters dated 27th July 2023 Ref. No. AG/CONF/2/C/31 Vol VI from the Attorney General and 8th August 2023 Ref. No. OP/SCAC 9/21/2 II/ (31) from the State Corporations Advisory Committee together with all and any advisories and directives contained therein pending the hearing

and determination of the Petition. For avoidance of doubt, the PSC to continue approving Human Resource Instruments of all public offices including State Corporations and Public Universities pending the hearing and determination of the Petition.

iii. Costs of this Application be in the cause.

Petitioners' Case

2. The application is supported by the 1st Petitioner's affidavit who depones that there has been a dispute over the legal mandates of the 1st Respondent and the 1st Interested Party in regard to the management of recruitment and remuneration of staff in State Corporations.

3. He avers that the genesis of this disagreement is traceable to the 2nd Respondent's Advisory Opinion in a letter dated 27th July 2023. The 1st Respondent subsequently issued its directive in a letter dated 8th August 2023 instructing all State Corporations to adhere to the Advisory opinion given by the 2nd Respondent. The Petitioner depones that prior to issuance of the 2nd Respondent's Advisory Opinion, the 1st Interested Party had issued its own directions on the terms of service in State Corporations.

4. Section 7(1) of the *State Corporations Act* provides for the determination of the terms of service for Board Members in State Corporations and is reinforced by the Guidelines enacted in 2004. In order to revise those Guidelines, the Government formed a Technical Committee in which the 1st Respondent and the 1st Interested Party were members.

5. During the meetings, the 1st Interested Party voiced its concern on the issue of jurisdiction over State Corporations of which the 2nd Respondent was requested to render a legal opinion on the matter so as to aid the finalization of the revised Guidelines. That is what led to the impugned Advisory Opinion that is in contention in the present petition.

6. The 2nd Respondent in the said Advisory Opinion stated that there was no express provision conferring power to the 1st Interested Party to make recommendations directly to public bodies on their terms and conditions of service. It thus advised that the State Corporations are vested with the power to manage their Human Resource under the *State Corporations Act*. Accordingly, it advised that the State Corporations should liaise with the 1st Interested Party to ensure consistency and harmony within the public service.

7. It is deponed that the 1st Respondent in its letter dated 8th August 2023 countermanded a letter by the 1st Interested Party issued on the same date. The letter contained directives on the guidelines for development and review of human resource management instruments for State Corporations and Public Universities.

8. The 1st Interested Party was aggrieved by the 2nd Respondent's opinion and thus made a response of 7th August 2023. In the letter, it informed the 2nd Respondent that its opinion had been premised on Section 5(3) of the *State Corporations Act* which had been declared unconstitutional in Manyara Muchui Anthony v Communication Authority & 3 others (2022) eKLR. Further, Sections 5(3) and 27 of *State Corporations Act* was declared to be in conflict with Article 234 of *the Constitution* in Consumer Federation of Kenya (COFEK) v National Social Security Fund Board of Trustees & 2 others (2022) eKLR. Both decisions were rendered by the Employment and Labour Relations Court. It is averred that the 2nd Respondent who was a party in both suits did not prefer any appeal against these decisions.

9. In the letter, the 1st Interested Party further asserted that the 2nd Interested Party is the one charged with the mandate to advise on remuneration and benefits of public officers. Furthermore, that its Advisory

Opinion ought to have been directed to the 1st Interested Party as it is the one charged with the mandate to determine the terms and conditions of public officers in State Corporations.

10. The Petitioners contend that the role of the 1st Respondent is purely advisory as envisaged under Section 5(3) and 27 of the *State Corporations Act*. As such it has no power to issue guidelines to State Corporations on management of human resource as this would be in violation of Articles 2(2) and 234 of *the Constitution*.

11. On this premise, it is asserted that the 2nd Respondent's Advisory Opinion was in violation of Articles 156(6), 232 and 249 of *the Constitution*. For this reason, the Petitioner contends that the communication will create confusion and conflict in the public service and amounts to undermining the 1st Interested Party's constitutional and statutory mandate.

12. It was equally argued that the 1st Respondent's letter dated 8th August 2023 was ultra vires its statutory powers as stipulated under the *State Corporations Act*. The Petitioners considering this aver that it is in the interest of justice that the conservatory orders be issued.

1st Respondent's Case

13. In response, the 1st Respondent through its Secretary, Simon M. Indimuli filed its Replying affidavit dated 18th September 2023. He avers that the 1st Respondent's mandate is anchored in the *State Corporations Act*.

14. He depones that the Terms and Conditions of service for Board Members and staff of State Corporations were formulated by the Government in the 2004 Guidelines which are presently under review. This review encompassed a consultative process aimed at generating draft harmonized guidelines. As a result, a Technical Committee was established vide Circular letter Ref. No. OPCS/SCACADM/1/23 of 24th May 2023. The Committee comprised of various stakeholders including the 1st Respondent and the 1st Interested Party.

15. Reiterating the account of events that followed, he deponed that it is the 2nd Respondent's mandate to issue advisory opinions as the principal legal adviser under Article 156 (4)(a) of *the Constitution*. As a consequence, once it received the 2nd Respondent's Advisory Opinion, it circulated the directives to all government agencies.

16. He avers that as advised, State Corporations are required to operate within the terms and conditions of service for staff in line with Section 5(3) and 27(1)(c) of the *State Corporations Act*. Considering this, it is contended that the 1st Interested Party's assertion that it has the mandate to approve human resource instruments for State Corporations is a usurpation of its mandate and will only create confusion. Furthermore, that there is no law that provides for the 1st Interested Party's assertion.

17. He stresses that the Court in Okiya Omtatah Okoiti v Attorney Gneral & 2 others; Francis K. Muthaura (AMB) & 5 others (Interested Parties) (2019) eKLR held that the *State Corporations Act* is the primary legislation on the establishment and governance of state corporations. For this reason, he argues that the sought orders are untenable. He adds that the Petition is an attempt to mischievously re-write *the Constitution* and the law in this regard.

18. Referring to the cited Employment and Labour Relations Court cases, he contends that the Court did not declare Section 5(3) of the *State Corporations Act* unconstitutional as alleged. He also notes that there is a pending appeal in respect of the COFEK case (supra) (Civil Appeal No.566 of 2022) and the Manayara case(supra) (Civil Appeal No. E549 of 2022) thus the issues therein are sub judice.

19. Nonetheless he argues that the Employment and Labour Relations Court does not have the jurisdiction to determine the constitutionality of a legal provision as the same is vested in the High Court under Article 165 (3)(d) (i) of *the Constitution*. To this end he is certain that the Petition is bad in law and the prayers unmerited.

2nd Respondents' Case

20. The 2nd Respondent filed grounds of opposition dated 8th September 2023 on the basis that:

    i. Rule 24 upon which the application is premised is limited to applications based on claims for contravention of rights or fundamental freedoms as clearly provided in rule 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules,2013 and the provisions of Article 23 (3) (c) of *the Constitution*, therefore to the extent that the Petitioners are neither claiming violation of rights or fundamental freedoms the orders sought have been improperly sought and are unavailable in the circumstances of the case.

    ii. The application is premised on improperly obtained letters which the Petitioner does not disclose how he came into possession thereof rendering the motion bad in law.

    iii. The Petitioner has failed to disclose the source of his information contrary to Order 19 rule 3 of the civil procedure rules.

    iv. The application is premised on newspaper reports which is of no probative value.

    v. The allegation of creation of confusion, anxiety and disruption within State Corporations and Public Universities is a bare allegation not supported by any evidence from any person privy to the said state corporations and public universities.

    vi. Communication between the Attorney-General and client ministries and departments is privileged communication that may not be a basis of any action without leave of disclosure by the client ministry or department.

    vii. Neither the Petitioner nor the Court may substitute it opinion with that of the Attorney-General exercising his constitutionally and statutorily conferred discretion on the content of his legal advisories.

    viii. The Employment and Labour Relations Court did not issue any declaration that the provisions of Section 5(3) of the *State Corporations Act* is unconstitutional in the case of Consumer Federation of Kenya (COFEK) v National Social Security Fund Board of Trustees and others (2002) eKLR.

    ix. The issue of constitutionality or otherwise of the provisions of Section 5(3) of the *State Corporations Act* was not pleaded as an issue for determination in the case of Consumer Federation of Kenya (COFEK) v National Social Security Fund board of trustees and others (2002) eKLR before the Employment and Labour Relations Court which in any event lacked the jurisdiction to determine the constitutionality or otherwise of the provisions of the said statutory provision that being an issue falling within the jurisdiction of the High Court as expressly provided under Article 165 (3)(d) (i) of *the Constitution*.

    x. Similarly the constitutionality or otherwise of the provisions of Section 5(3) of the *State Corporations Act* was neither pleaded as an issue for determination nor did the Employment and Labour Relations Court issue a declaration that the said section was unconstitutional

in the case of Manyara Muthui Anthony v Communications Authority and 3 others (2022) eKLR.

xi. In the Employment and Labour Relations Court in the case of Okiya Omtatah Okoiti V Attorney-General & 2 others; Francis K. Muthaura (AMB) & 5 others (interested parties) (2019) eKLR it was held by the court that Section 27(c) of the *State Corporations Act* is not unconstitutional and not invalid.

xii. As was held by the Court of Appeal in the case of *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022*) KECA 80 (KLR) (3 February 2023) the Employment and Labour Relations Court is not competent to determine questions on whether any law is inconsistent with or in contravention of *the Constitution* that jurisdiction having been specifically conferred upon the High Court under Article 165 (3) (d) of *the constitution*.

xiii. As admitted in paragraph 10 of the petition, it is the 1st Interested Party's letter of 8th August 2023 that sought to upset the hitherto obtaining status quo, therefore a conservatory order ought not to be issued to perpetuate the intended new status as opposed to the status obtaining since August 2010.

xiv. The Petitioners have not demonstrated any prejudice that they will suffer if the orders sought are not granted.

xv. Further, the Petitioner has not demonstrated how the substratum of the petition will be irretrievably lost if the orders sought are not granted.

1st Interested Party's case

21. The 1st Interested Party's through its Secretary and Chief Executive Officer, Dr. Simon K. Rotich in support of the Petition filed its Replying Affidavit sworn on 29th August 2023.

22. Referring to the contents of the two cited Employment and Labour Relations Court decisions, he contends that the 1st Respondent still went ahead issued the impugned directive in violation of *the Constitution*. He depones that this action has seriously affected service delivery in State Corporations and Public Universities as they are unsure who between the 1st Respondent and the 1st Interested Party possesses the overall management and oversight over the human resource function. As such this necessitates grant of the conservatory orders.

23. He posits that in line with Article 233 and 234 of *the Constitution*, the 1st Interested Party is granted the oversight mandate in public service. In view of this, one of its functions is to guide development of human resource instruments. It also issues other policies and guidelines in public service.

24. He informs as averred by the Petitioners that for a long time there was uncertainty as to whether state corporations and public universities were part of the public service. This was however resolved by the High Courtin Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudhehia Workers) v Salaries and Renumeration Commission [2014] eKLR where it was affirmed that State Corporations are part of the public service.

25. It is alleged that this was further affirmed by the Court of Appeal in *Public Service Commission -vs- Katiba Institute & Others, Nairobi Civil Appeal No. E638 of 2021*. Moreover, the position has also been buttressed in other several authorities. In line with these Court decisions, the 1st Interested Party commenced the process of enforcing its mandate over State Corporations and Public universities.

26. He states that the 1st Interested Party has never delegated its function to the 1st Respondent yet the Committee has continued to unlawfully establish and abolish offices in State Corporations through the approval and issuance of organization structures and staff establishments which is in essence the 1st Interested Party's function.

27. With reference to the 2nd Respondent's Advisory Opinion, he depones that the same was anchored on Section 5(3) of the *State Corporations Act* which was declared unconstitutional in light of its conflict with Article 234 (2) as read with Article 260 of *the Constitution*. Furthermore, the it was faulted for being misleading. In opposition, the 1st Interested Party communicated the same to the 2nd Respondent vide its letter dated 7th August 2023.

28. He depones that the 1st Interested Party further issued its Circular dated 8th August 2023 with guidelines for development and Review of Human Resource Management Instruments for State corporations and public universities. It is alleged that the 1st Respondent in defiance issued its own Circular also dated 8th August 2023 instructing the Chairpersons of Boards of State Corporations to comply with the 2nd Respondent's Advisory Opinion. Additionally, it is deponed that the 2nd Respondent in its response dated 16th August 2023, to the 1st Interested Party's maintained its stance as stipulated in its Advisory Opinion.

29. On this premise, it is contended that the 1st and 2nd Respondent are intent on continuing to violate the dictates of Article 234 of *the Constitution* whilst also disregarding the numerous court decisions in this matter, thus the urgent need to issue the conservatory orders.

2nd Interested Party's case

30. Differing the instant application, the 2nd Interested Party filed its grounds of opposition dated 20th September 2023 on the premise that:

    i. The 2nd Interested Party is a Constitutional Commission established under Article 230 of *the Constitution*, operationalized by the *Salaries and Remuneration Commission Act*.

    ii. It is a well-established principle of law that courts should not grant a mandatory injunction on an interlocutory application except in certain special circumstances.

    iii. The Petitioners have not met the threshold to warrant grant of mandatory reliefs as sought in the Notice of Motion.

    iv. If the Court were to grant the reliefs sought in the Notice of Motion Application at this interlocutory stage, it would amount to grant of a major part of the reliefs sought in the Petition, to wit:

        a. The court does declare that the Public Service Commission has the mandate under Section 234(2)(a), subject to any limiting provisions of *the Constitution* and legislation, to establish and abolish offices within the public service, which offices include offices in State Corporations and Public Universities;

        b. The court declares that State Corporations and Public Universities fall under the umbrella of the public service and are subject to the mandate of the Public Service Commission under Article 234 of *the Constitution*, and under the provisions of the *Public Service Commission Act* and Public Service Commission Regulations.

        c. The court does declare that the Public Service Commission has the mandate to monitor, evaluate, report and investigate personnel activities in the public service.

d. A declaration issues that the Public Service Commission's mandate includes approving Human Resource Instruments (organizational structure, staff establishment, Human Resource Manual and Career progression guidelines) for public offices including in State Corporations and Public Universities; and

e. The court declares that the *Public Service Commission Act*, the Public Service Commission Regulations and the mandate of the Public Service Commission under Article 234 of *the Constitution* binds all State Corporations and Public Universities.

v. It is, therefore, in the best interests of justice that the Court hears and determines the Petition before Court on its merit, after having afforded all the parties an opportunity to be heard.

vi. If the court were to grant the prayers sought in the motion, it would upset the status quo with respect to the approval of Human Resource Instruments for public offices in state corporations and public universities and the exercise of the 2nd Interested Party's mandate to advise on the remuneration and benefits for public officers serving in the state corporations and public universities.

vii. The notice of motion application is therefore scandalous, frivolous, vexatious and abuse of the Court's process.

viii. The notice of motion application is without merit and should therefore be dismissed with costs.

3rd Interested Party's Case

31. The 3rd Interested Party through its, Chief Executive Officer, Florence Wairimu Muturi filed its Replying Affidavit sworn on 29th August 2023. She deponed that the 3rd Interested Party's involvement in this matter is for purposes of assisting the Court on the legal aspects in view of its mandate as stipulated under Section 4 of the Law Society Act.

32. In her view, the dispute revolves around the issues: whether State Corporations are part of the public service and therefore under the regulation of the 1st Interested Party in so far as the exercise of human resource functions is concerned; the interpretation of Article 234 of *the Constitution* on the powers and functions of the Public Service Commission specifically on the issuance of human resource instruments in the public service, specifically in State Corporations; whether the 1st Respondent has the power to develop and approve human resource instruments governing public officers in State Corporations and whether the opinions of the 2nd Respondent, legally wrong or right, are binding.

33. Adding her voice to the contention, she depones that there has been a long-standing debate as to whether State Corporations or parastatals form part of the public service. This is evidenced by the numerous decisions that have been filed in this regard. In particular, the High Court in Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudhehia Workers) v Salaries and Renumeration Commission [2014] eKLR and the Court of Appeal in *Public Service Commission -vs- Katiba Institute & Others, Nairobi Civil Appeal No. E638 of 2021* concluded that employees of State corporations are public servants and subject to all laws governing such persons thus state corporations and parastatals form part of the public service which is largely regulated by the 1st Interested Party.

34. Equally, these sentiments were also echoed in the two cited Employment and Labour Relations Court authorities that stressed that the 1st Respondent does not have the constitutional and legal mandate to approve and issue human resource instruments for State Corporations as in doing so without the

power being delegated to it by the 1st Interested Party, it usurps the constitutional powers and functions of the 1st Interested Party.

35. According to her, these decisions present a holistic interpretation of *the Constitution*. That is, it is within the constitutional mandate of 1st Interested Party to approve human resource instruments for state corporations and issue guidelines to the public service and state corporations on the general issues affecting the public service. Consequently, she contends that the circulars issued by the 1st Respondent clearly countermand the constitutional mandate of the 1st Interested Party.

36. For this reason, it is asserted that whilst it is the 2nd Respondent's mandate to be the principal legal adviser to the Government, this mandate should be exercised within constitutional principles. Moreover, its advisory opinions should be unbiased and principled legal guidance, that ensure government's actions and decisions adhere to the rule of law and constitutional principles. This is whilst avoiding fueling of discord and confusion in this case, in the public service.

Parties Submissions

Petitioner's Submissions

37. Behan and Okero Advocates for the 1st Petitioner filed submissions dated 28th September 2023. Referring to the 1st Respondent's and 1st Interested Party's responses, Counsel submitted that it was clear that there was considerable confusion in the matter of the development of human resource instruments for state corporations and public universities. This is notwithstanding the clarity of the provisions of Article 234(2) of *the Constitution* and the binding decisions of the superior courts in Manyara Muchui Anthony(supra) and the COFEK case(supra). This circumstance was argued to be a threat to the existence of the public service and thus the pressing need for issuance of the sought orders.

38. Counsel further submitted that the Respondents arguments were premised on a challenge to the validity and authority of the cited decisions. These arguments were stated to be deliberate misconstructions of legal principles.

39. Counsel argued that 2nd Respondent's objection to the form of the Petitioner's application citing Article 23(3)(c) was an objection of technicality that can be cured by Article 159(2)(d) of *the Constitution*. It was also noted that the impugned letters which the 2nd Respondent opposed their introduction by the Petitioner were rightfully adduced by the 1st Interested Party in its affidavit.

40. In support of its case for issuance of the orders, Counsel cited the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR where the Supreme Court held that:

> " Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

Respondents' Submissions

41. The Respondents' filed joint submissions dated 19th October 2023 where Counsel noted that the only issue of for determination was whether the Petitioner had met the threshold for grant of conservatory

orders. To ascertain this, reliance was placed in Muslims For Human Rights (Muhuri) & 2 Others v Attorney General & 2 Others (2011) eKLR where it was held that:

> " In an application for interim orders of the nature of Conservatory Orders or even one for an injunction, the court is not hearing and/or being called upon to determine the main Petition. The Constitutional court is being called upon to preserve the status quo pending the hearing of the Constitutional Petition or motion. The court does not have to take and hear all the evidence and delve into the entire case on its merits. The hearing of the Petition and determination of all issues and questions in dispute will be done at the "trial" and upon completion thereof when a final judgment is to be delivered.
>
> As a result, at this stage I am not obligated to go into all the evidence and even consideration of all the matters of law. My function is to have a reasonable overview to enable me decide on the criteria or principles applicable when considering an application for a Conservatory Order and to what extent and principles are applicable to the facts and circumstances of this case."

42. Like dependence was placed in Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others (2015) eKLR.

43. To begin with Counsel submitted that the Petitioner's case was premised on impugned letters whose source was not disclosed and how the same were obtained. It was thus argued the same was obtained illegally. Equally, these letters are claimed to be privileged and confidential communication and information was not obtained in line with the dictates of the *Access to Information Act*.

44. Counsel relied in Mue & another v Chairperson of *Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition 4 of 2017*) (2017) KESC 45 (KLR) (Elections Petitions) (11 December 2017) where it was held that:

> " Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person 'unlawfully' or 'improperly' obtains any information held by an entity? can a court of law admit such evidence?...the use of such information before the Court, accessed without following the requisite procedures not only renders it inadmissible but also impacts on the probative value of such information."

45. Similar reliance was placed in Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) and Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others (2020) eKLR.

46. Owing to these arguments Counsel submitted that this Court should not rely on these documents as would be offensive to Articles 31 and 35 of *the Constitution* as well as Section 80 of the *Evidence Act*. On this premise Counsel said that the Petitioner had failed to establish a prima facie case.

47. Counsel further contended that the Petitioner's prayer to have the 1st Interested Party continue approving human resource instruments of all public officers was misplaced and misleading as the Party was not been approving the same prior to the issuance of the 2nd Respondent's advisory opinion.

48. It was also contended that the order sought was mandatory in nature and as such should not be issued at an interlocutory stage. Reliance was placed in Muhuri & 2 others (supra) where it was held that:

> " ...There must be compelling and exceptional circumstances to warrant such drastic and final orders of the kind sought herein before the hearing and determination of the Petition...if such a prayer is appropriately and expressively pleaded and a foundation laid for it,it ought to be considere to be granted at the end-trail of a fully and fairly concluded proceedings where all the evidence has been considered."

49. Counsel in sum submitted that the application had not met the threshold for grant of the sought orders and so should be dismissed.

1st Interested Parties Submissions

50. The 1st Interested Party's Counsel Jacqueline Manani filed submissions dated 2nd October 2023.Buttressing the Respondents submission that the Petitioner's documents were illegally obtained, she noted that the impugned documents had later on been lawfully adduced by the 1st Interested Party in its replying affidavit thus now properly before the Court.

51. Additionally it was submitted that the impugned letters were also in the public domain and even reported on by the media, so the Respondents arguments could not hold water. Counsel also relied in Article 50(4) of *the Constitution* to buttress this point and the case of *Njenga v Dib Bank Kenya Limited (Cause E400 of 2020)* [2023] KEELRC 1549 (KLR) (15 June 2023) (Ruling) where it was held that:

> " My understanding of this constitutional edict is that it circumscribes rather than prohibits the use of irregularly obtained evidence. The provision does not so to speak constitute an absolute bar to the use of such evidence. What it does is to bar the admissibility of this evidence if it is demonstrated that its admission will prejudice the fair trial of the cause or will otherwise be detrimental to the administration of justice...The court emphasized that with the promulgation of *the Constitution* of Kenya 2010, the adage that all relevant evidence was admissible irrespective of how it was obtained was no longer reflective of the legal position on the matter in Kenya. Such evidence should be excluded if it is shown to be prejudicial to a fair trial or detrimental to the administration of justice."

52. Speaking to the issue of conservatory orders, Counsel also relied in Gatirau Peter Munya (supra) that highlights the principles that should be satisfied before grant of these orders. Like dependence was also placed in Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR, *Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012* and Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR.

53. According to Counsel the obtaining status quo in his matter is that courts of competent jurisdiction have adjudicated on the constitutional mandate of the 1st Interested Party on management of human resource in State Corporations in Manyara Muchui Anthony(supra) and the COFEK case (supra). Additionally, the cases of Mombasa ELRC Judicial Review Application No. E001 of 2022, Republic –v- Kenya Ports Authority Board of Directors & 2 Others and Public Service Commission as Interested Party Ex Parte Commission for Human Rights Justice and Nairobi ELRC Petition No. E149 of 2022, Enos Namasaka & Others –vs-KEMSA & Others.

54. It was stressed that these cases have not been stayed or set aside by the Court of Appeal. Counsel in view of this submitted that before the issuance of the impugned Advisory Opinion by the 2nd Respondent and the impugned circulars by the 1st Respondent, the 1st Interested Party had been exercising its functions and powers over State Corporations and Public Universities including approval and issuance of human resource instruments and continues to do so to date.

55. Relying in Isaiah Luyara Odando & another v Kenya Revenue Authority & 6 others; Nairobi Branch Law Society of Kenya (Interested party) [2022] eKLR Counsel submitted that the 1st Interested Party had established a prima facie case owing to the threat and contravention of *the Constitution* by the Respondents.

56. On whether the Petition would be rendered nugatory if the orders are not issued, Counsel answered in the affirmative. This is because this would result in the continued confusion and anxiety in State Corporations and Public Universities. It would as well result in the actualization of the subtle misguided threats issued by the 1st Respondent. Additionally, it would nullify all human resource instruments that have so far been approved by the 1st Interested Party, for use in State Corporations and Public Universities and have utilized considerable public resources.

57. In the end should the Petition be allowed, State Corporations would further be thrown into confusion as they would have to revert to the policy directions and Guidelines that had already been issued by the 1st Interested Party. For this reason, Counsel submitted that public interest is in favour of grant of these Orders.

2nd Interested Party's Submissions

58. Manyonge Wanyama and Associates LLP filed submissions dated 25th October 2023 in support of the 2nd Interested Party's case. According to Counsel the Petitioner has not satisfied the threshold set for grant of conservatory orders as guided by the principles in Gatirau Peter Munya(supra) and Kenya Association of Manufacturers & 2 Others versus Cabinet Secretary, Ministry of Environment and Resources & 3 Others [2017] eKLR.

59. To begin with, it was stated that a prima facie case had not been established. Counsel submitted that the assertion that the impugned letters had caused confusion, anxiety and disruption within state corporations and public universities cannot amount to a prima facie case. Counsel citing Mrao Ltd v First American Bank of Kenya Ltd& 2 others [2003] eKLR submitted that a prima facie case is one that makes a Court conclude that there exists a right which has been infringed.

60. Consequently, Counsel argued that grant of the conservatory orders would create more confusion as the same would be premised on cases which are currently on appeal. Furthermore, Counsel urged the Court to appreciate that the Orders are primarily asking the Court to curtail the Parties constitutional mandates which it should refrain from. Considering this, the Application is deemed to be misconceived.

61. Counsel further argued that the Petitioners would not be prejudiced if the orders are not issued. This is because the subject matter of both the application and Petition herein relates to the mandate of public on the determination of State Corporations' Human Resource Instruments and the exercise of the 2nd Interested Party's mandate to directly advise on the remuneration and benefits for public officers

in state corporations. Reliance was placed in Centre for Rights Education & Awareness (CREAW) & another v Speaker of the National Assembly & 2 others [2017] eKLR where it was held that:

> " A party who moves the Court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation, are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending cause or petition."

62. Further, Counsel submitted that public interest was not in favour of granting these Orders. This is because as it stands, there are two pending appeals at the Court of Appeal which the Petitioner failed to disclose. Thus, grant of these orders is likely to cause confusion and disrupt the functioning of the state corporations and public universities. Reliance was placed in Patrick Musimba v National Land Commission & 4 others [2015] eKLR where it was held that:

> " We started our discussion by reference to the Supreme Court's observations on the importance of considering conservatory orders vis-à-vis public interest. We would like to end there too but not before we point out that in such matters as this, the court must take into account the principle of proportionality and see where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice."

63. Counsel further stated that it is a well-established principle of law that courts shouldnot grant a mandatory injunction on an interlocutory application except in special and clear circumstances. It was argued that the Petitioners had not met the threshold for grant of the mandatory relief as sought in this application. Reliance was placed in Kenya Breweries Limited & Another versus Washington O.Okeyo [2002] eKLR where the Court of Appeal held that:

> " The test of whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948 which reads:
>
> > "A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ..... a mandatory injunction will be granted on an interlocutory application".

3rd Interested Parties Submissions

64. This Party's submissions are not in the Court file and the Court online platform (CTS).

Analysis and Determination

65. From the pleadings and submissions of the parties, the only issue for determination in the instant Petition is:

Whether the conservatory order should be granted.

66. The law on issuance of conservatory orders in constitutional petitions is anchored on Article 23(2)(c) of *the Constitution* and buttressed further by Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which reads as follows:

Conservatory or interim orders.

1. Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.

2. Service of the application in sub rule (1) may be dispensed with, with leave of the Court.

3. The orders issued in sub rule (1) shall be personally served on the respondent or the advocate on record or with leave of the Court, by substituted service within such time as may be limited by the Court.

67. The Court explained the purpose and the meaning of a conservatory order in the case of Invesco Assurance Co v MW (Minor suing thro' next friend and mother (HW) [2016] eKLR as follows:

> " A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter."

68. In Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition (2016) eKLR the Court summarized the three main principles for consideration when dealing with such applications as follows:

a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.

b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

c. The public interest must be considered before grant of a conservatory order.

69. Likewise, in Board of Management of Uhuru Secondary School (supra) it was stated that:

> " 25. Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....
>
> 26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis....
>
> 28. Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights....

29. Thirdly, flowing from the first two principles, is whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....

30. The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

31. Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless."

70. Correspondingly, the Court in Centre for Rights Education and Awareness (CREAW) & another(supra) noted as follows:

> "A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition."

71. Furthermore, in Kevin K Mwiti & others v Kenya School of Law & others [2015] eKLR the Court offered the following caution when dealing with such applications:

> "51. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petitions/Application."

72. Consequently, in deciding whether to grant or deny the motion for conservatory order, I must consider and weigh the constitutional issues that the Petitioners bring forth. Does it raise serious prima facie constitutional issue as opposed to what is merely arguable for anything may attract an opposite view?

73. The matter that this Petition concerns is who between the 2nd Respondent and the 1st Interested Party has the mandate over the management and oversight of human resource matters within State Corporations and Public Universities. The 1st Respondent asserts that it has statutory authority donated by the *State Corporations Act* which position is buttressed by the advisory opinion that the 2nd Respondent who is the national government principal legal adviser issued. On the other hand, the 1st Interested Party hinges its stance on the constitutional mandate under Article 234.

74. Section 27 of the State Corporation's Act which prescribes the mandate of the 1st Respondent and provides as follows:

> Functions of the Committee
>
> The Committee shall advise on the matters and perform any functions it is required by this Act to perform and in addition shall—
>
> a. with the assistance of experts where necessary, review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary;
>
> b. in consultation with the Attorney-General and the National Treasury, advise the President on the establishment, reorganization or dissolution of state corporations;
>
> c. where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;
>
> d. examine any management or consultancy agreement made or proposed to be made by a state corporation with any other party or person and advise thereon;
>
> e. examine proposals by state corporations to acquire interests in any business or to enter into joint ventures with other bodies or persons or to undertake new business or otherwise expand the scope of the activities and advise thereon.

75. The 2nd Respondent's mandate on the other hand is provided under Article 156 (4) (a) of *the Constitution*:

> The Attorney-General--
>
> a. is the principal legal adviser to the Government;

76. The 1st Interested Party's function is stipulated under Article 234 (2) (a) of *the Constitution* as follows:

> The Commission shall--
>
> a. subject to this Constitution and legislation––
>
> i. establish and abolish offices in the public service; and
>
> (ii) appoint persons to hold or act in those offices, and to confirm appointments.

77. The Petition raises a pertinent constitutional question relating to whether what was done by Attorney General is inconsistent with, or in contravention of *the Constitution* a matter that falls under Article 165 (3) (d) (ii) of *the Constitution*. I have considered two fundamental points in arriving at my assessment. The fact that there exists some superior court decision cited before me that have upheld the predominant role of the 1st Interested Party vis-à-vis the 1st Respondent touching on the matter in question cannot be overlooked even though they are now the subject of the appeal. The second point

is that while the mandate of the 1st Respondent is purely based on a Statute that was enacted before *the Constitution* of Kenya, 2010 was promulgated; the Interested Party's mandate is anchored both in *the Constitution* and the PSC Act. In my view, the quality and intensity of the Petitioners argument the 1st Interested Party supports demonstrates there is a prima facie case touching on a serious Constitutional matter.

78. I consider that prior to determining this petition a conservatory order will ensure there is a clear and definite reference point in issuance of directions affecting the human resource function in public service to ensure orderliness. A Constitution is meant to ensure there is order in governance Institutions and this Court will be failing if it is going to let a situation of anarchy to prevail without any form of intervention pending the determination of the petition.

79. Accordingly, it is my considered opinion that public interest favours granting the conservatory order. I am guided by the Supreme Court case of Gatirau Peter Munya where it was laid emphatically that conservatory orders should be granted on the inherent merit of the case, public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

80. For these reasons, it is my finding that the Petitioners have satisfied me that there is merit in granting the conservatory order. I thus make orders as follows:

    1. That Pending the hearing and determination of this Petition, a conservatory order is hereby issued suspending/staying the 1st and 2nd Respondents letters, namely: letter dated 27th July 2023 Ref. No. AG/CONF/2/C/31 VOL VI from the Attorney General and, the letter dated 8th August 2023 Ref. No. OP/SCAC 9/21/2 II/ (31) from the State Corporations Advisory Committee in respect of the advisory given by the 2nd Respondent and the directions to implement the said advisory that were subsequently issued by the 1st Respondent respectively.

    2. That for avoidance of doubt, the 1st Interested Party – (that is, Public Service Commission) shall, pending the determination of this Petition, continue to be the focal point for approving Human Resource Instruments of all public offices including State Corporations and Public Universities.

    3. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

.....

L N MUGAMBI

JUDGE