



**Mboya v Githinji & another; Pharmacy and Poisons Board (Interested Party) (Constitutional Petition E326 of 2023) [2024] KEHC 13598 (KLR) (Constitutional and Human Rights) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13598 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E326 OF 2023**

**EC MWITA, J  
OCTOBER 30, 2024**

**BETWEEN**

**APOLLO MBOYA ..... PETITIONER**

**AND**

**CHARLES GITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PHARMACY AND POISONS BOARD ..... INTERESTED PARTY**

**The appointment of the chairperson of the Pharmacy and Poisons Board quashed for violating the guiding principles of leadership and integrity and the values and principles of public service**

*The petition challenged the appointment of the 1st respondent as chairperson of Pharmacy and Poisons Board for violating the guiding principles of leadership and integrity and the values and principles of public service. The court noted that the petition was not between an employee and employer. Rather, it questions the failure to adhere to constitutional principles and thus the issues raised fell within its jurisdiction. The court held that article 73(2) of the Constitution did not contemplate someone being picked to a position of public office without subjecting him or her to integrity, competence and suitability review. The court found that the 1st respondent was handpicked and appointed in disregard of the Constitution and the law. In the premises, the impugned appointment violated fundamental tenets of the Constitution and the law on the appointments in the public service.*

Reported by Kakai Toili

**Constitutional Law** – leadership and integrity – appointment of public officers – claim that a person who was convicted by the Kenya Medical Practitioners and Dentist Council (the Board) for gross negligence resulting in the death of a patient was appointed into a public office – claim that the conviction was set aside by a judicial review court - whether the setting aside of the 1<sup>st</sup> respondent’s conviction by a judicial review meant that he was innocent



– whether the appointment of a person into public office after been convicted of medical negligence leading to the death of a patient violated the guiding principles of leadership and integrity under the Constitution - whether a person could be appointed to a public office without being subjected to integrity, competence and suitability review - whether appointment to a public office without; advertisement of the vacancy, affording opportunity for interested persons to apply and conducting interviews for the position violated the values and principles of public service – Constitution of Kenya, articles 73(2) and 232; Public Service (Values and Principles) Act (cap 185A), section 10.

**Jurisdiction** – jurisdiction of the High Court vis a vis the Employment and Labour Relations Court - jurisdiction to determine a petition questioning appointment to a public institution for failure to adhere to constitutional principles - whether the High Court had the jurisdiction to determine a petition questioning appointment to a public institution for failure to adhere to constitutional principles – Constitution of Kenya, articles 162(2) and 165(3), (5) and (6).

### **Brief facts**

The 1<sup>st</sup> respondent was convicted by the Kenya Medical Practitioners and Dentist Council (the Board) for gross negligence that resulted in the death of a patient, and for masquerading as a medical practitioner and ordered to pay Kshs. 27,000. The estate of the deceased sued him at the High Court and was awarded Kshs. 1,050,000 general damages for negligence. On January 20, 2023, the President appointed the 1<sup>st</sup> respondent as chairperson of Pharmacy and Poisons Board (the interested party). Aggrieved, the petitioner filed the instant petition.

The petitioner asserted that the interested party being a critical institution that ensured the safety, efficacy and quality of pharmaceutical products in the public health sector in fulfilment of the right to health, the 1<sup>st</sup> respondent was not the right person to chair it. According to the petitioner, the 1<sup>st</sup> respondent's appointment violated the Constitution, the Public Officers Ethics Act, the Public Service (Values and Principles) Act, the *Mwongozo* Code of Governance for State Corporations and the Board's Code of Ethics in view of the conviction. The petitioner thus sought among other reliefs: an order of *certiorari* be issued quashing the gazette notice appointing the 1<sup>st</sup> respondent as the chairperson of the interested party.

The 1<sup>st</sup> respondent opposed the petition and contended that he challenged the decision by the Board in High Court Judicial Review Application No. 686 of 2009 and that the court held that the decision by the Board was *ultra vires* and quashed the order requiring him to pay Kshs. 27,000.

### **Issues**

- i. Whether the appointment of a person into public office after been convicted of medical negligence leading to the death of a patient violated the guiding principles of leadership and integrity under the Constitution.
- ii. Whether a person could be appointed to a public office without being subjected to integrity, competence and suitability review.
- iii. Whether appointment to a public office without; advertisement of the vacancy, affording opportunity for interested persons to apply and conducting interviews for the position violated the values and principles of public service.
- iv. Whether the setting aside of the conviction of the 1<sup>st</sup> respondent by the Kenya Medical Practitioners and Dentist Council for gross negligence by a judicial review meant that he was innocent.
- v. What was the distinction between the jurisdiction of the High Court and the Employment and Labour Relations Court.
- vi. Whether the High Court had the jurisdiction to determine a petition questioning appointment to a public institution for failure to adhere to constitutional principles.

### **Held**

1. Whether a court had jurisdiction to hear a matter, was a threshold question to be determined at the earliest opportunity based on the facts of the matter before court. Jurisdiction was the power or authority given to a court to hear and determine a dispute presented before it. Where jurisdiction of the court was challenged, the court has to consider and determine the fundamental question of its



- jurisdiction over the matter. Should the court determine that it had no jurisdiction to hear a particular matter, that must be the end. The court should not take any further step. It had to down its tools. Jurisdiction of a court must flow from the Constitution, statute or both. A court should only exercise jurisdiction as conferred on it by the Constitution or the law. It must not act by assuming jurisdiction it did not have.
2. From article 162(2)(a) of the Constitution read with section 12 of the Employment and Labour Relations Court Act, the core jurisdiction of the Employment and Labour Relations Court (ELRC) was to determine disputes that arose out of employer-employee relationship and related matters. On the other hand, jurisdiction of the instant court was donated by article 165(3) of the Constitution. The court thus had unlimited original jurisdiction in criminal and civil matters. The court also had jurisdiction in terms of article 65(3) (d)(i) to hear any question respecting interpretation of the Constitution, including the determination of the question whether anything said to have been done under the authority of the Constitution or of any law was inconsistent with, or in contravention of, the Constitution.
  3. In its width and breadth, article 165(3) of the Constitution authorised the court to decide all matters other than those reserved for other courts as contemplated by article 162(2) of the Constitution and restricted by article 165(5) and (6). In that regard, the sweep of the constitutional authorisation given to the court should be broadly exercised except as restricted by the Constitution itself. A reading of article 165(3) was clear on the broad nature of the court’s jurisdiction to hear and determine a variety matters brought before it. The question whether the court had jurisdiction to hear and determine the petition must, therefore, be viewed through the prism of article 165(3)(d).
  4. The petition questioned the appointment of the 1<sup>st</sup> respondent as being in violation of the Constitution. The petition was not between an employee and employer. Rather, it questions the failure to adhere to constitutional principles. The issues raised in the petition fell within the jurisdiction of the court.
  5. There was death whose cause was blamed on the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent was investigated by the Board and found culpable. The Board fined the 1<sup>st</sup> respondent Kshs. 27,000. The 1<sup>st</sup> respondent was also sued by the deceased’s estate. The estate was awarded damages for negligence. Meanwhile, the 1<sup>st</sup> respondent challenged the Board’s decision through Judicial Review Application No. 686 of 2009. According to the 1<sup>st</sup> respondent, the Board’s decision was set aside for being *ultra vires* the powers of the Board.
  6. The decision in Judicial Review Application No. 686 of 2009 set aside the Board’s decision that primarily on the basis that the 1<sup>st</sup> respondent was not a medical doctor or dentist and therefore the Board had exceeded its jurisdiction thus, the decision was *ultra vires*. The court did not find anything wrong with the findings of the Board on negligence as the court was not concerned with the merit of the decision other than procedural propriety.
  7. The court in the judicial review case held that the Board exceeded its rightful jurisdiction. The 1<sup>st</sup> respondent further stated that the main ground for why he challenged the Board’s decision was because he was neither a doctor nor a dentist subject to the disciplinary jurisdiction of the Board’s jurisdiction. That meant the truthfulness and merit of what happened was unchallenged. The facts that constituted the Board’s decision were the basis of the civil suit by the deceased’s estate where the 1<sup>st</sup> respondent was found negligent and the estate awarded damages. The fact that the Board’s decision was set aside, did not clear the 1<sup>st</sup> respondent from the issue of negligence he had faced. That would also mean the 1<sup>st</sup> respondent’s integrity was not necessarily cleared.
  8. Article 73(2) of the Constitution provided the guiding principles of leadership and integrity which included, selection on the basis of personal integrity, competence and suitability. The article did not contemplate someone being picked to a position of public office without subjecting him or her to integrity, competence and suitability review. No evidence was placed before the court that the 1<sup>st</sup>



respondent was subjected to such a review in compliance with article 73(2). The interested party was a public body established under section 3(1) of the Pharmacy and Poisons Act (cap 244). The section provided that a chairperson was to be appointed by the President and should be a registered pharmacist of good standing with a degree in pharmacy; and at least ten years' experience in the pharmaceutical sector.

9. The 1<sup>st</sup> respondent's appointment was made through a gazette notice. The respondents did not show that the vacancy was advertised; that qualified and interested persons were given an opportunity to apply and that interviews were conducted to get the suitable person for that position. In other words, the 1<sup>st</sup> respondent's appointment did not comply with the constitutional requirements of open, transparent, competitive and merit as required by article 232 of the Constitution.
10. The provisions under which the impugned appointment was made were enacted prior to the Constitution. However, section 7 of the Sixth Schedule to the Constitution required that all law in force immediately before the effective date, (August 27, 2010) continued in force and be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. For the impugned appointment to be valid, it had to comply with the principles in article 232 of the Constitution as read with section 10 of the Public Service (Values and Principles) Act. However, that was not the case in the instant matter. The 1<sup>st</sup> respondent was handpicked and appointed in disregard of the Constitution and the law. In the premises, the impugned appointment violated fundamental tenets of the Constitution and the law on the appointments in the public service.

*Petition allowed.*

#### **Orders**

- i. *A declaration was issued that the appointment of the 1<sup>st</sup> respondent as chairperson of the interested party was contrary to the guiding principles of leadership and integrity in article 73(2)(a) of the Constitution that required selection on the basis of personal integrity, competence and suitability.*
- ii. *A declaration was issued that the appointment of the 1<sup>st</sup> respondent as chairperson of the interested party was contrary to and violation of constitutional principles in article 232 of the Constitution read with section 10 of the Public Service (Values Principles) Act of high standards of professional ethics; fair competition and merit as the basis of appointments and promotions.*
- iii. *An order of certiorari was issued quashing the Kenya Gazette Notice No. 630 contained in Vol. CXXV- No. 15 dated January 20, 2023 appointing the 1<sup>st</sup> respondent as the chairperson of the interested party.*
- iv. *No order on costs.*

#### **Citations**

##### **Cases**

1. Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) (Constitutional Petition 2 of 2020; [2020] KEHC 2971 (KLR)) — Mentioned
2. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)) — Mentioned
3. Apex International Ltd & another v Kenya Anti-Corruption Commission (Judicial Review 64 of 2011; [2012] KEHC 2044 (KLR)) — Mentioned
4. Benson Riitho Mureithi (Suing On His Behalf and on Behalf of the General Public v J. W. Wakhungu & 2 others (Petition 19 of 2014; [2014] KEHC 7650 (KLR)) — Mentioned
5. Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) (Civil Case E007 of 2021; [2022] KEHC 2227 (KLR)) — Mentioned
6. In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011; [2011] KESC 1 (KLR)) — Explained
7. Katiba Institute & another v Attorney General & another (Constitutional Reference 331 of 2016; [2020] KEHC 1213 (KLR)) — Mentioned



8. Katiba Institute & another v Attorney General & another; Julius Waweru Karanja & 128 others (Interested Parties) (Petition 236 of 2018; [2021] KEHC 6781 (KLR)) — Explained
9. LWW (Suing as the Administrator of the estate of BMN) deceased v Charles Githinji (Civil Case 34 of 2012; [2019] KEHC 5061 (KLR)) — Mentioned
10. Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011; [2012] KESC 8 (KLR)) — Explained
11. Matemvu v Trusted Society of Human Rights Alliance & 5 others (Civil Application 29 of 2014; [2014] KESC 6 (KLR)) — Mentioned
12. Michael Maina Nderitu v Kenya Power And Lighting Co. Ltd & another (Cause 34 of 2010; [2013] KEELRC 84 (KLR)) — Mentioned
13. Okiya Omtatah Okoiti v Parliamentary Service Commission & another (Petition E062 of 2021; [2021] KEELRC 1471 (KLR)) — Mentioned
14. Owners Of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] KECA 48 (KLR)) — Mentioned
15. Owners Of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] KECA 48 (KLR)) — Explained
16. Peter Gichuki King’ara v Independent Electoral and Boundaries Commission & 2 others (Election Petition 3 of 2013; [2013] KEHC 3342 (KLR)) — Mentioned
17. Susan Rokih v Joyce Kandie & 6 others (Civil Case 34 of 2017; [2018] KEHC 1222 (KLR)) — Mentioned

#### Statutes

1. Constitution of Kenya — article 19- 22, 43(1)(a); 73(2); 162 (2); 165(3); 232; 260 — Cited
2. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules — rule 4(2) (iii) — Cited
3. Employment And Labour Relations Court Act (cap 8E) — section 12 — Cited
4. Interpretation And General Provisions Act (cap 2) — section 51(1) — Cited
5. Pharmacy And Poisons Act (cap 244) — section 3(1)(a) — Cited
6. Public Officers Ethics Act (cap 185B) — Cited
7. Public Service (Values And Principles) Act (cap 185A) — section 10 — Cited

#### Advocates

None mentioned

## JUDGMENT

### Introduction

1. The 1<sup>st</sup> respondent was convicted by the Kenya Medical Practitioners and Dentist Council (KMPDC) for gross negligence that resulted in the death of a patient, and for masquerading as a medical practitioner. He was ordered to pay Kshs 27,000.
2. The estate of the deceased also sued the 1<sup>st</sup> respondent in *LWW (suing as administrator of the estate of BMN) v Charles Githinji* [2019] eKLR, and on 29<sup>th</sup> May 2019, the High Court awarded the estate Kshs 1,050,000 general damages against the 1<sup>st</sup> respondent for negligence.
3. On 20<sup>th</sup> January 2023, the President appointed the 1<sup>st</sup> respondent as Chairperson of Pharmacy and Poisons Board (the interested party) through Gazette Notice No 630. The President exercised powers conferred by section 3(1)(a) of the *Pharmacy and Poisons Act* read with section 51(1) of the *Interpretation and General Provisions Act*.



## Petitioner's case

4. Following the appointment, the petitioner filed this petition challenging the 1<sup>st</sup> respondent's appointment on grounds that the appointment did not comply with the article 232 of the [Constitution](#), the Public Officers Ethics Act and [Public Service \(Values and Principles\) Act](#). The petition is supported by affidavits and written submissions.
5. The petitioner stated that by virtue of article 73(2) of the [Constitution](#), the President, as the appointing authority, was obligated to inquire into the integrity, competence and suitability of the 1<sup>st</sup> respondent as a public officer before his appointment.
6. The petitioner asserted that the appointment placed the 1<sup>st</sup> respondent in charge of the interested party, a key institution that regulates the practice of pharmacy, manufacture and trade in drugs and poisons, including eliminating unqualified individuals from the pharmaceutical field thus, safeguarding the integrity of the profession and protecting the public from potential harm.
7. The petitioner asserted that the interested party being a critical institution that ensures the safety, efficacy and quality of pharmaceutical products in the public health sector in fulfilment of the right to health under article 43(1)(a) of the [Constitution](#), the 1<sup>st</sup> respondent was not the right person to chair it.
8. The petitioner argued that as chairperson of the interested party, the 1<sup>st</sup> respondent is required to provide overall leadership to the board, play a key role in setting the agenda for the board meetings and guide the board's decision-making process. The petitioner further argued, that it is contradictory that as chairperson of the interested party, the petitioner has been convicted for gross negligence resulting in the death of a patient as well as masquerading as a medical practitioner.
9. The petitioner took the position, therefore, that in view of the conviction, the 1<sup>st</sup> respondent's appointment violated the [Constitution](#), the [Public Officers Ethics Act](#), the [Public Service \(Values and Principles\) Act](#), the Mwongozo Code of Governance for State Corporations and the KMPDC Code of Ethics. The appointment did not also meet the procedural test.
10. The petitioner argued that the decision in the Judicial Review case did not absolve the 1<sup>st</sup> respondent from the negligence that led to the death of a patient since the decision in that case was allowed on grounds that KMPDC lacked jurisdiction.
11. The petitioner posited that by dint of articles 19, 20 21 and 22 of the [Constitution](#), and rule 4(2) (iii) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 (Mutunga Rules), he had the right to institute and maintain court proceedings for violation of the [Constitution](#) on behalf of the public.
12. The petitioner maintained that he had locus standi to lodge this petition and relied on articles 19, 20, 21, 22 and 260 of the [Constitution](#). The petitioner also relied on [Mumo Matemu v Trusted society of Human Rights alliance & 5 others](#) [2014] eKLR.
13. On the joinder of the interested party, the petitioner maintained that the interested party was properly joined in the proceedings as the 1<sup>st</sup> respondent is its chairperson.
14. The petitioner relied on various articles of the [Constitution](#) to advance his case. He also relied on Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] eKLR and [Samuel Kamau Macharia v Kenya Commercial Bank and 2 others](#) (Civ. Appl. No. 2 of 2011) [2012] eKLR, for the argument that this court has the jurisdiction to hear and determine this petition.



15. The petitioner contended that in view of the High Court decision in *LWW (suing as administrator of the estate of BMN) v Charles Gitthinji* (*supra*), the appointment violated articles 10, 43(1)(a), 73 and 232 of the *constitution*, the Public Officers Ethics Act, *Public Service (Values and Principles) Act*, Clause 1.4 of the Mwongozo Code of Governance for State Corporations and the KMPDC Code of Medical Ethics. The petitioner again relied on *Benson Riitho Mureithi v JW Wakhungu & 2 others* [2014] eKLR to support his arguments.
16. Based on the above arguments, the petitioner sought the following reliefs:
- i. A declaration be and is hereby issued that the appointment of the 1<sup>st</sup> respondent to a public office as chairperson of the Pharmacy and Poisons Board (PPB) is contrary to the guiding principles of leadership and integrity in article 73(2)(a) of the *Constitution* that require selection on the basis of personal integrity, competence and suitability.
  - ii. A declaration be and is hereby issued that the appointing authority failed to consider vital information that was available about the 1<sup>st</sup> respondent herein and hence failed the procedural test in appointing the 1<sup>st</sup> respondent to a public office as chairperson of the Pharmacy and Poisons Board (PPB).
  - iii. A declaration be and is hereby issued that the 1<sup>st</sup> respondent is unsuitable to be appointed in a public office as chairperson of the Pharmacy and Poisons Board (PPB) on account of having been convicted by the Kenya Medical Practitioners and Dentist Council (KMPDC) for gross negligence, for acting beyond his calling as a pharmacist that contributed to the death of a patient and for masquerading as a medical practitioner.
  - iv. An order of certiorari be and is hereby issued removing into this court and quashing the Kenya Gazette Notice No 630 contained in Vol CXXV-No. 15 dated January 20, 2023 appointing the 1<sup>st</sup> respondent as the chairperson of Pharmacy and Poisons Board (PPB).
  - v. Any other relief and/ or orders the honourable court deems appropriate, just and fit to grant.
  - vi. The costs of the petition be provided.

### **1<sup>st</sup> Respondent's Case**

17. The 1<sup>st</sup> respondent opposed the petition through a replying affidavit and written submissions. The 1<sup>st</sup> respondent contended that he challenged the decision by KMPDC in High Court Judicial Review Application No 686 of 2009. The court held that the decision by KMPDU was ultra vires and quashed the order requiring him to pay Kshs 27,000.
18. The 1<sup>st</sup> respondent asserted, therefore, that decision by KMPDU having been nullified, the cause of action in the petition diminished. The 1<sup>st</sup> respondent further asserted that regarding *LWW (suing as administrator of the estate of BMN) vs Charles Gitthinji* (*supra*), the claim was one for compensation for alleged negligence. The court did not investigate and determine his professional suitability. The 1<sup>st</sup> respondent maintained that there is a distinction between professional negligence and professional misconduct.
19. The 1<sup>st</sup> respondent argued, therefore, that in view of the decision in the JR case, the petition does not meet the constitutional threshold. The 1<sup>st</sup> respondent relied on the decisions in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR, among others for the argument that the petition failed the test set in those decisions.



20. The 1<sup>st</sup> respondent posited that the petitioner failed to demonstrate that proper procedure was not followed in his appointment, or that the appointing authority failed to consider relevant information on him.
21. According to the 1<sup>st</sup> respondent, the petitioner merely mentioned articles of the *Constitution* without showing how they were violated. Reliance was placed on the decisions in *Anarita Karimi Njeru v Republic* (*supra*) and the *Mumo Matemu case* (*supra*). He urged that the petition be dismissed with costs.

## 2<sup>nd</sup> Respondent's Case

22. The 2<sup>nd</sup> respondent informed the court that they had filed a preliminary objection challenging the jurisdiction of this court to hear and determine the petition. However, there are no grounds of opposition or notice of preliminary objection on the CTS. There are only written submissions on the CTS portal.
23. In the written submissions, the 2<sup>nd</sup> respondent argued that since the petition challenges the appointment of the 1<sup>st</sup> respondent, it falls within the jurisdiction of the Employment and Labour Relations Court (ELRC). For that reason, this court has no jurisdiction to hear the petition and grant the reliefs sought. It cannot also transfer the petition in the event it lacks jurisdiction, but should strike out the petition.
24. The 2<sup>nd</sup> respondent relied on article 162(2)(a) of the *Constitution*, sections 12 of the *Employment and Labour Relations Court Act* and decisions in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (*supra*) and *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR.
25. The 2<sup>nd</sup> respondent again relied on *Okiya Omtatah Okiiti v Parliamentary Service Commission & another* [2021] eKLR; *Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties)* [2020] eKLR and *Michael Maina Nderitu v Kenya Power and Lighting Co Ltd & another* [2013] eKLR among others.

## Interested Party's Case

26. The interested party opposed the petition through grounds of opposition and written submissions. It is the interested party's case, that it has been wrongly joined into the proceedings as the petition does not disclose a reasonable cause of action against it. The interested party did not play any role in the 1<sup>st</sup> respondent's appointment.
27. The 1<sup>st</sup> interested party relied on the decisions in *Gladys Nduku Nthuki v Letsbeo Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR; *Apex International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission* (2012) eKLR and *Susan Rokih v Joyce Kandie & 6 others* [2018] eKLR.
28. The interested party contended that the petition lacks specificity on the alleged violation of the *constitution*. The petition thus, offends the principles set out in *Anarita Karimi Njeru v Republic* (*supra*) and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (*supra*).
29. The interested party further contended that the petitioner misapprehended its board's mandate in the attainment of the right to health under article 43(1)(a) of the *Constitution*. It is the 1<sup>st</sup> interested party's position, that it is properly constituted and its decisions have never been challenged as violating article 43.



30. The interested party asserts that the 1<sup>st</sup> respondent's appointment did not affect the integrity of the board's decision-making process because the 1<sup>st</sup> respondent does not make unilateral decisions on behalf of the board. Reliance is placed sections 3A, 3B, 4 and 4(4) of the Act.

### Determination

31. Upon considering the petition, responses and arguments by parties, I have identified two issues for determination, namely; whether this court has jurisdiction and whether the 1<sup>st</sup> respondent's appointment violated the *Constitution* and the law.
32. Although the 2<sup>nd</sup> respondent informed the court that it had filed a preliminary objection on the jurisdiction of this court to hear and determine this petition, none was traced on the CTS. That argument is however also in the written submissions. That notwithstanding, the court is aware that the issue of jurisdiction can be raised at any stage of proceeding. It is thus, properly raised for consideration.

### Jurisdiction

33. The 2<sup>nd</sup> respondent argued that this court has no jurisdiction to determine this petition because the issue involves appointment of the 1<sup>st</sup> respondent. In the 2<sup>nd</sup> respondent's view, the petition could only be heard and determined by the ELRC. The petitioner maintained that the court has jurisdiction to hear the petition.
34. Whether a court has jurisdiction to hear a matter, is a threshold question to be determined at the earliest opportunity based on the facts of the matter before court. Jurisdiction is the power or authority given to a court to hear and determine a dispute presented before it. Where jurisdiction of the court is challenge, the court has to consider and determine the fundamental question of its jurisdiction over the matter.
35. Should the court determine that it has no jurisdiction to hear a particular matter, that must be the end. The court should not take any further step. It has to down its tools. (See *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR).
36. In *Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, the Supreme Court stated on jurisdiction:
- (68) A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... without jurisdiction, the Court cannot entertain any proceedings... Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.
37. *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011; [2011] eKLR, after referring to *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (supra)*, the Supreme Court again stated:
30. The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.



38. Jurisdiction of a court must flow from the Constitution, statute or both. A court should only exercise jurisdiction as conferred on it by the Constitution or the law. It must not act by assuming jurisdiction it does not have.
39. Article 162(2)(a) required Parliament to establish courts of equal status to the High Court to hear and determine disputes relating to Employment and Labour Relations (ELRC) and Environment and Land Court (ELC). The Employment and Labour Relations Court Act No 20 of 2011, established the ELRC- (s 4). Section 12 of the Act, provides for the jurisdiction of that court. The court has exclusive, original and appellate jurisdiction to determine all disputes referred to it in accordance with article 162(2) of the Constitution, the provisions of the Act, and any other written law that extends jurisdiction to that court.
40. Under section 12 of the Act, jurisdiction of the ELRC is on disputes relating to, or arising out of employment between an employer and an employee; an employer and a trade union; an employers' organisation and a trade union's organisation; between trade unions; between employer organisations; an employers' organisation and a trade union; a trade union an employer's organisation or a federation and a member thereof; concerning registration and election of trade union officials; and disputes relating to the registration and enforcement of collective agreements.
41. Article 162(2)(a) of the Constitution read with section 12 of the ELRC Act, reveal that the core jurisdiction of the ELRC is to determine disputes that arise out of employer-employee relationship and related matters.
42. On the other hand, jurisdiction of this court is donated by article 165(3) of the Constitution. This court has unlimited original jurisdiction in criminal and civil matters. The court also has jurisdiction in terms of article 65(3)(d)(i) to hear any question respecting interpretation of the Constitution, including the determination of –(d)(ii) “the question whether anything said to have been done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, this Constitution.”
43. It is, therefore, clear that in its width and breadth, article 165(3) authorises this court to decide all matters other than those reserved for other courts as contemplated by article 162(2) and restricted by article 165(5) and (6). In that regard, the sweep of the constitutional authorisation given to this court should be broadly exercised except as restricted by the Constitution itself. A reading of article 165(3) is clear on the broad nature of this court's jurisdiction to hear and determine a variety matters brought before it. The question whether this court has jurisdiction to hear and determine this petition must, therefore, be viewed through the prism of article 165(3)(d).
44. This petition challenges the suitability of the 1<sup>st</sup> respondent to be appointed as chairperson of the interested party. The petitioner argued that the 1<sup>st</sup> respondent's suitability was diminished by the fact of his conviction by KMPDC for negligence and professional misconduct that led to the death of a patient. The petitioner also argued that the 1<sup>st</sup> respondent's appointment did not comply with constitutional principles; Public Officers Ethics Act and Public Service (Values and Principles) Act. In short, the petitioner's argument is that the 1<sup>st</sup> respondent's appointment did not only fail to comply with the Constitution, but also the law as it did not meet the procedural test.
45. That this petition questions the appointment as being in violation of the Constitution, is not in doubt. The petition is not between an employee and employer. Rather, it questions the failure to adhere to constitutional principles. I, therefore, find and hold, that the issues raised in this petition fall within the jurisdiction of this court.



## Suitability for Appointment

46. The petitioner argued that the 1<sup>st</sup> respondent was convicted by KMPDC for gross negligence resulting into death of a patient, and for masquerading as a medical practitioner and fined Kshs 27,000. He was also sued by the deceased's estate leading to an award of general damages of Kshs. 1,050,000 for negligence.
47. The petitioner argued that the 1<sup>st</sup> respondent's appointment placed him as the head of a key institution that regulates the practice of pharmacy, manufacture and trade in drugs and poisons, including eliminating unqualified individuals from the pharmaceutical field thus, safeguarding the integrity of the profession and protecting the public from potential harm.
48. The petitioner took the view, that the interested party being a critical institution that ensures the safety, efficacy and quality of pharmaceutical products in the public health sector in fulfilment of the right to health under article 43(1)(a) of the Constitution, the 1<sup>st</sup> respondent was not the right person to chair it.
49. The petitioner asserted, therefore, that in view of that conviction, the 1<sup>st</sup> respondent's appointment violated the Constitution, Public Officers Ethics Act, Public Service (Values and Principles) Act; Mwongozo, Code of Governance for State Corporations and the KMPDC Code of Ethics.
50. The 1<sup>st</sup> respondent argued that he challenged KMPDC's decision in Judicial Review Application No 686 of 2009 and the court upheld that challenge on grounds that the KMPDC's decision was *ultra vires*. The order requiring him to pay Kshs 27,000 was also quashed.
51. The 1<sup>st</sup> respondent asserted, therefore, that the decision by KMPDC having been nullified, the cause of action in the petition diminished. The 1<sup>st</sup> respondent also argued that the claim by the deceased's estate in LWW (suing as administrator of the estate of BMN) v Charles Gitbinji (supra), was for compensation for alleged negligence. The court did not investigate and determine his professional suitability.
52. The 1<sup>st</sup> respondent's arguments were supported by the 2<sup>nd</sup> respondent and the interested party.
53. I have considered the arguments by parties on this issue. There is no denial that there was death whose cause was blamed on the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent was investigated by KMPDC and found culpable. KMPDC fined the 1<sup>st</sup> respondent Kshs 27,000. The 1<sup>st</sup> respondent was also sued by the deceased's estate. The estate was awarded damages for negligence.
54. Meanwhile, the 1<sup>st</sup> respondent challenged the Board's decision through Judicial Review Application No 686 of 2009. According to the 1<sup>st</sup> respondent, the Board's decision was set aside for being ultra vires the powers of the Board.
55. I have read the decision in Judicial Review Application No 686 of 2009. The court set aside that decision primarily on the basis that the 1<sup>st</sup> respondent was not a medical doctor or dentist and therefore the Board had exceeded its jurisdiction thus, the decision was ultra vires. The court did not find anything wrong with the findings of Board on negligence as the court was not concerned with the merit of the decision other than procedural propriety.
56. The 1<sup>st</sup> respondent has stated as much in his replying affidavit, that the court in the judicial review case held that the Board exceeded its rightful jurisdiction. The 1<sup>st</sup> respondent further stated that the main ground for why he challenged the Board's decision was because he was "neither a doctor nor a dentist subject to the disciplinary jurisdiction of the KMPD Board's jurisdiction." That means the truthfulness and merit of what happened was unchallenged.



57. The facts that constituted the Board’s decision were the basis of the civil suit by the deceased’s estate where the 1<sup>st</sup> respondent was found negligent and the estate awarded damages. The fact that the Board’s decision was set aside, did not in my respectful view, clear the 1<sup>st</sup> respondent from the issue of negligence he had faced. That would also mean the 1<sup>st</sup> respondent’s integrity was not necessarily cleared.
58. Article 73(2) provides the guiding principles of leadership and integrity which include, selection on the basis of personal integrity, competence and suitability. The article does not contemplate someone being picked to a position of public office without subjecting him or her to integrity, competence and suitability review. No evidence was placed before this court that the 1<sup>st</sup> respondent was subjected to such a review in compliance with article 73(2) of the *Constitution*.

### Procedural Test

59. The second issue is whether the appointment met the procedural test. The petitioner argued that the 1<sup>st</sup> respondent’s appointment violated the *Constitution*, *Public Officers Ethics Act*, *Public Service (Values and Principles) Act*, KMPD Code of Ethics thus, did not meet the procedural test.
60. The Pharmacy and Poisons Board is a public body established under section 3(1) of the *Pharmacy and Poisons Act* (cap 244). The section provides that a Chairperson is to be appointed by the President and should be a registered pharmacist of good standing with a degree in pharmacy; and at least ten years’ experience in the pharmaceutical sector.
- e. The other members include the Director of pharmaceutical services; the Principal Secretary in the ministry for the time being responsible for matters relating to finance or his or her representative; two persons representing the pharmacy training institutions, of which one should be a pharmacist and one shall be a pharmaceutical technologist among others. as stated in that section.
61. On January 19, 2023, the President appointed the 1<sup>st</sup> respondent through Gazette Notice No 630 published on January 20, 2023 as the Chairperson of the Pharmacy and Poisons Board, for a period of 3 years. The appointment of Dr James Mandere Rogers Atebe as the Chairperson, was revoked in the same Gazette Notice.
62. Article 232 of the *Constitution* contains values and principles of public service which include: (a) high standards of professional ethics; fair competition and merit as the basis of appointments and promotions. Sub article (2) provides that the values and principles of public service apply to public service in—(a) all State organs in both levels of government; and (b) all State corporations.
63. Section 10(1) of the *Public Service (Values and Principles) Act*, an Act that was to give effect to article 232 of the *Constitution*, provides that;
- The public service, a public institution or an authorised officer shall ensure that public officers are appointed and promoted on the basis of fair competition, promotions and merit.
- It is worth noting, that the marginal note in the section reads “Fair competition and merit as the basis of appointments and promotions” thus, emphasizing the importance of complying with these constitutional principles whenever making appointments to public offices.
64. In *Katiba Institute & another v Attorney General & another; Julius Waweru Karanja & 128 others (Interested Parties)* [2021] eKLR, one of the issues in that petition was whether appointments of persons to boards of parastatals should be open, transparent and merit based. The court held that these appointments must comply with the requirements of open, transparent, competitive and merit, taking



into account; gender, ethnicity, diverse communities of Kenya and persons with disabilities as required by article 232. Short of that, the court added, any appointments made in disregard of articles 232 and 10 would run afoul of the Constitution. (see also Katiba Institute & Another v Attorney General & Another, (Nairobi High Court Petition No. 331 of 2016) [2020] eKLR.)

65. The 1<sup>st</sup> respondent's appointment was made through a gazette notice. The respondents did not show that the vacancy was advertised; that qualified and interested persons were given an opportunity to apply and that interviews were conducted to get the suitable person for that position. In other words, the respondents did not demonstrate that 1<sup>st</sup> respondent's appointment complied with the constitutional requirements of open, transparent, competitive and merit as required by article 232.
66. The provisions under which the appointment was made were obviously enacted prior to the 2010 Constitution. However, section 7 of the sixth schedule to the Constitution requires that all law in force immediately before the effective date, (August 27, 2010) continues in force and be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.
67. It follows, that for the impugned appointment to be valid, it had to comply with the principles in article 232 of the Constitution as read with section 10 of the Public Service (Values and Principles) Act. However, that is not the case here. The 1<sup>st</sup> respondent was handpicked and appointed in disregard of the Constitution and the law. In the premises, the impugned appointment violated fundamental tenets of the Constitution and the law on the appointments in the public service.

## Conclusion

68. Having considered the pleadings, arguments by parties and the decisions relied on as well as the Constitution and the law, I come to the following conclusions:

First, the court has jurisdiction to hear and determine this petition. The issue before the court is primarily whether the appointment met fundamental principles of the Constitution and the law.

Second, the petitioner has demonstrated that the 1<sup>st</sup> respondent did not show that his integrity and suitability was above reproach. The decision of the court in Judicial Review Application No 686 of 2009 did not clear the petitioner from the accusations he faced. The Board's decision was set aside due to procedural impropriety and not the merit of that decision. The appointment failed the test in article 73(2) of the Constitution.

Third, the appointment violated article 232 as read with section 10 of Public Service (Values and Principles) Act. The 1<sup>st</sup> respondent's appointment was not open, transparent, competitive and merit based, a contravention of articles 10 and 232 of the Constitution.

## Disposal

69. Based on the above conclusions, the court make the following declarations and orders which I consider appropriate:
  1. A declaration is hereby issued that the appointment of Dr Charles Githinji as Chairperson of the Pharmacy and Poisons Board is contrary to the guiding principles of leadership and integrity in article 73(2) (a) of the Constitution that require selection on the basis of personal integrity, competence and suitability.
  2. A declaration is hereby issued that the appointment of Dr Charles Githinji as chairperson of the Pharmacy and Poisons Board is contrary to and violation of constitutional principles in



article 232 of the Constitution read with section 10 of the Public Service (Values Principles) Act of high standards of professional ethics; fair competition and merit as the basis of appointments and promotions.

3. An order of *certiorari* is hereby issued quashing the Kenya Gazette Notice No 630 contained in Vol CXXV-No 15 dated January 20, 2023 appointing Dr Charles Githinji as the Chairperson of the Pharmacy and Poisons Board.
4. This being a public interest litigation, I make no order on costs.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER 2024.**

**E C MWITA**

**JUDGE**

