



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO.2 OF 2019

IN THE MATTER OF: ARTICLES 22 & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1, 10, 27,

47, 73 & 232 OF THE CONSTITUTION OF THE REPUBLIC OF ENYA

AND

IN THE MATTER OF PROVISIONS OF THE PHARMACY AND

POISONS ACT AND THE PUBLIC SERVICE COMMISSION ACT

BETWEEN

WAMBUA MAITHYA.....PETITIONER

VERSUS

PHARMACY AND POISONS BOARD.....RESPONDENT

AND

PHARMACEUTICAL SOCIETY OF KENYA.....1ST INTERESTED PARTY

DR. PIUS WANJALA.....2ND INTERESTED PARTY

DR. KAMAMIA WA MURICHU.....3RD INTERESTED PARTY

JUDGEMENT

The Parties

1. The Petitioner herein, **Wambua Maithya**, describes himself as a businessman based in Machakos County who has also worked in law firms in Machakos and Nairobi Counties and has a medical condition which has necessitated him to use medicines regularly.
2. The Respondent, the Pharmacy and Poisons Board (hereinafter referred to as “the Board”), is described as the National Drug Regulatory Authority State Agency under the Ministry of Health.
3. The 1st Interested party, **the Pharmaceutical Society of Kenya** (hereinafter referred to as “the Society”), is described as the Association of Registered Pharmacists in Kenya which is concerned with the Professional Standards of practice and interests of the Pharmacists in Kenya.

4. The 2nd and 3rd interested parties are members of the 1st interested party.

The Petition

5. According to the petitioner, upon assent into law of the amendments to the **Pharmacy and Poisons Act** (hereinafter referred to as “the Act”) within the **Health Laws (Amendment) Bill 2018** passed by National Assembly on 7th November, 2018, the Pharmacy and Poisons Board was to be re-constituted afresh as per new structure while the current Board membership was to cease forthwith. Pursuant thereto, the Board on 25th January, 2019 ran in the **Daily Newspaper**, an advertisement for 13 days instead of statutory minimum 21 days, a vacancy in the position of the Registrar - Chief Executive Officer with qualifications which rendered the process a predetermined one with a view to imposing the current acting Registrar-Chief Executive Officer as the Registrar. The said advertisement, according to the Petitioner was placed pursuant to section 5(1) of the **Pharmacy and Poisons Act**, Cap 244 Laws of Kenya which provides that:

There shall be a registrar of the Board who shall be the chief executive officer of the Board competitively recruited and appointed by the Board upon such terms and conditions of service as shall be determined by the Board upon the advice of the Salaries and Remuneration Commission.

6. It was pleaded that the above provision of the pre-existing provision that provided that;

There shall be a registrar of the Board who shall be the Chief Pharmacist.

7. According to the petitioner, it is trite law that the ideal desirable qualifications over and above statutorily prescribed basic mandatory qualifications or requirements are important in recruitment of ideal candidate but must remain as added advantages and not must meet Requirements. The Petitioner was of the view that usually, statutory positions have basic mandatory appointment qualifications (prescribed qualifications) provided within the same parent Act or in the attendant Statutory Instrument. According to the Petitioner, the said Chief Pharmacist is a civil service position whose prescribed mandatory appointment qualifications are contained in the Statutory Instrument called **Scheme of Service of Pharmacists** in which one of the prescribed mandatory qualification for appointment is possession of Master’s Degree in Pharmacy. However, following the mandatory retirement of the former Chief Pharmacist/Registrar of the Pharmacy and Poisons Board in March, 2017, the current acting Registrar of the Pharmacy and Poisons Board who does not possess a Master’s Degree in Pharmacy was appointed as the acting Chief Pharmacist/Registrar of the Pharmacy and Poisons Board in contravention of section 34 of the **Public Service Commission Act**.

8. It was disclosed that consequently, the Employment and Labour Relations Court of Nairobi issued orders that stayed the foregoing acting appointment of the current acting Registrar-Chief Executive Officer but the said valid interim Orders have to date been defied by the Board and the said Acting Registrar. The Petitioner therefore believed that the sheer determinations by Board Members of Pharmacy and Poisons Board together with its Acting Registrar to have him remain the Registrar, through innovations or otherwise, is what led to the foregoing amendments being attempts and manoeuvres to circumvent the said court orders. It was pleaded that to date, the Pharmacy and Poisons Board has failed, through expected stewardship, to come up with Statutory Instrument of prescribed mandatory qualification for appointment of the Registrar-Chief Executive Officer and thus there is no statutory provision or legal instrument with prescribed mandatory qualification for the appointment of the Registrar-Chief Executive Officer of the Pharmacy and Poisons Board. The Petitioner therefore contended that in putting up the foregoing advertisement, the Board intended to rely on the prescribed mandatory qualifications in the proposed amendments of the **Pharmacy and Poisons Act** within the **Health Laws (Amendment) Bill 2018** for the appointment of the Registrar-Chief Executive Officer. However, the said **Health Laws (Amendment) Bill 2018** is a National Assembly Omnibus Bill which was passed on 7th November, 2018 but is yet to be assented to into law and the **Pharmacy and Poisons Act** is one of the Acts contained therein. In the proposed amendments, it was averred that the proposed new Section 5(4) of the **Pharmacy and Poisons Act** within the said Bill provides as hereunder:

5 (4) The Board shall through a transparent competitive recruitment process appoint the Registrar, who:-

- (a) is a Kenyan citizen;**
- (b) holds at least a Pharmacy degree and is registered to practice Pharmacy in Kenya;**
- (c) belongs to the professional body of registered pharmacists;**
- (d) has at least ten years of pharmacy practice experience;**
- (e) has served in a senior management position for a period of at least ten years; and**
- (f) meets the requirements of Chapter Six of the Constitution.**

9. In the Petitioner’s view, assuming that the said **Health Laws (Amendment) Bill of 2018** and in particular the proposed new Section 5(4) of the **Pharmacy and Poisons Act**, shall eventually be assented into law and hence apply retrospectively, further assuming that that is constitutional-lawful, then the Pharmacy and Poisons Board having voluntarily elected to rely on the provisions of that Bill, should have stuck to the foregoing prescribed mandatory qualification in the Bill for the appointment of the Registrar-Chief Executive Officer of the Pharmacy and Poisons Board.

10. However, in spite of basing its advertisement on the said provisions of the Bill which is not yet law and which provisions may be reasonable; the Pharmacy and Poisons Board introduced and or included other must meet conditions beyond what the Bill provides that are discriminatory hence paving the way for the imposition of the current Acting Registrar as the Registrar-Chief Executive Officer of the Pharmacy and Poisons Board.

11. It was disclosed that in the impugned Advertisement, the Board listed the following must meet conditions-prescribed mandatory qualifications;

- i. Must be a Kenyan Citizen
- ii. Be a holder of a Pharmacy degree and relevant Master's degree from a recognized University;
- iii. Be registered to practice pharmacy in Kenya, belonging to the professional body of registered pharmacists and holder of a current practicing license;
- iv. Have knowledge, skills and experience of not less than 15 years of pharmacy practice, with at least 5 years served in a senior management or leadership position at the Board or in a similar organization;
- v. Have a Strategic Leadership Development Programme and Corporate Governance Certification from a recognized institution;
- vi. Have a thorough understanding of the local and international trends in the regulation of pharmacy profession, medical products and health technologies
- vii. The Applications to be forwarded to the Chairman of the Pharmacy and Poisons Board at the Pharmacy and Poisons Board Premises located at Lenana Road Nairobi.

12. The Petitioner contended that some of the foregoing unapproved unconstitutional, ultra vires and unfair/unlawful discriminatory additional requirements that go beyond what is provided in the Bill as imposed by members of the Board of the Pharmacy and Poisons Board include: -

- a. Have served for at least 5 years in Senior Management or leadership position at the Board or in a similar organization: This requirement contravenes clear provision at section 5(1) of the **Pharmacy and Poisons Act** which provides for non-discriminative competitive recruitment from the open Labour Market to obtain the best candidate. This decision to narrow down the potential applicants to only those in Senior Management or leadership position at the Pharmacy and Poisons Board (who are about 5 considering the 15 years' requirement as well and since there is no similar organization with Pharmacists, the same is couched to lock out the more than 2000 Pharmacists with suitable experience and qualifications and thus a violation of Articles 10, 27 and 232 of the Constitution;
- b. Have a Strategic Leadership Development Programme: This programme is offered by Government School to existing Public Servants only thus by putting this as a must meet condition, the Board aims to limit the advertisement to Public Servants contrary to the section 5(1) of the **Pharmacy and Poisons Act** that envisages recruitment from open labour market;
- c. Corporate Governance Certification from a recognized institution; This is a certificate of three day workshop attendance organized by State Corporation Advisory Committee as induction training for newly appointed Board of Directors of State Corporations and its Senior Management: The same cannot qualify as a must meet condition for appointment.
- d. Section 5(1) of the **Pharmacy and Poisons Act** does not require the Registrar/CEO to be a Pharmacist: Indeed, perusal of the job descriptions reveal that the holder of the office does not have to be Pharmacist;
- e. A holder of a Pharmacy degree and relevant Master's degree from a recognized University;
- f. While Section B.4 (1) of Public Service Commission Code of Regulations (Human Resource Policies and Procedures Manual for the Public Service May, 2016) provides that Ministries/State Departments will advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty one (21) days before closing the advert: the impugned advertisement allows for only 13 days; from 25th January, 2019 being the date of the advertisement and which closes on the 7th February, 2019.
- g. The Chairman of the Pharmacy and Poisons Board is NOT an executive Chairman hence does NOT have a Secretary and or functional office at the Pharmacy and Poisons Board. Therefore, the Applications will be received by the acting Registrar-Chief Executive Officer who an interested party is being the Chief Applicant.
- h. Failure to disclose the applicable remuneration including salary, allowances and other benefits in contravention of section 37 (4) (e) of the Public Service Commission Act so as to mute the interest of potential Applicants;

13. It was the Petitioner's case that some of the key statutory instruments for recruitment of Chief Executive Officers of State Corporations include the Presidential circulars OP/CAB.9/21/2ALII/23 dated 23rd November, 2004 and that of 5th November 2004, which; *inter alia* states thus;

Chief Executive Officers of State Corporations should be recruited competitively from the open Labour Market by the Boards of Directors in accordance with Section 5 (3) of the State Corporations Act, Cap 446."

In order to attract persons of sound background with the relevant skills and experience which each State Corporation requires to manage its business efficiently and effectively, Boards are advised that henceforth new appointments of Chief Executive Officers should be competitive." The recruitment process should involve a careful preparation of a Job Description and Job Requirements

which include job and person specifications. The short listing and interview process should be transparent based on a verifiable Recruitment Procedure approved by the Board.

14. In light of the foregoing, it was contended that the rule of law and constitutionalism has been overthrown by the Respondents who owe allegiance to the current acting Registrar and have earmarked him for the appointment and the process is therefore a white wash for a predetermined outcome. There were other averments which in my respectful view were not relevant for the purposes of the determination of this Petition.

15. However, the Petitioner asserted that because of the discriminative nature of the impugned advertisement, only one Applicant, **Dr. George Muriithi Mugo**, out of the total number of eight (8) Applicants came from outside the Pharmacy and Poisons Board. It was however noted that in order to feign semblance of an open process, the Respondent shortlisted **Dr. George Muriithi Mugo** among the three candidates for the interview in spite of him lacking some mandatory requirements as per the advert, like Strategic Leadership Development Program (SLDP). In the end, the current acting Registrar/CEO who was one of the other two officers of the Respondent shortlisted by the Respondent, was awarded the highest score in the ensuing interview carried out on or around 26th February, 2019 and was earmarked for appointment.

16. Based on the foregoing facts, the Petitioner avers as follows: -

1) The Respondent herein has contravened the Potential applicant's and Petitioner's rights and freedoms under the Bill of Rights in that or by: -

(a) Unfairly and or unlawful Discriminating against potential Applicants to the vacant position of the Registrar by requiring that Applicants to the advertised position should have served for at least 5 years in Senior Management or leadership position at the Board or in a similar organization, a requirement that contravenes clear provision at section 5 (1) of the **Pharmacy and Poisons Act** which provides for non-discriminative competitive recruitment from the open Labour Market to obtain the best candidate. This decision to narrow down the potential applicants to only those in Senior Management or leadership position at the Pharmacy and Poisons Board (who are about 5 considering the 15 years' requirement as well and since there is no similar organization with Pharmacists, the same is couched to lock out the more than 2000 Pharmacists with suitable experience and qualifications and thus a violation of Articles 10, 27 and 232 of the Constitution;

(b) Unfairly and or unlawful Discriminating against potential Applicants to the vacant position of the Registrar by unreasonably requiring them contrary to section 5(1) of the **Pharmacy and Poisons Act** which envisages recruitment from open labour market; to possess Strategic Leadership Development Programme and which programme is offered by to existing Public Servants by Government School and thus by putting this as a must meet condition, the Respondent aims to unreasonably limit the advertisement to Public Servants

2) Similarly, it is unreasonable and abuse of discretion on the part of the Respondent to require Corporate Governance Certification as a must meet requirement since the said certification is largely issued by State Corporation Advisory Committee upon attendance of three-day workshop as an induction training for newly appointed Board of Directors of State Corporations and its Senior Management: The same is not a statutory requirement and in any case, once the candidate is appointed, the Respondent is obligated to organize for such induction courses.

3) Violation of the principles of Public service under the article 232 and 10 of the constitution and abuse of discretion. The advert is deliberately opaque and or vague to confuse the potential applicants: For instance, what does must meet requirements like "hold relevant Master's degree from a recognized University" and "Similar Organization" mean?

4) Illegality: While Section B.4 (1) of Public Service Commission Code of Regulations (Human Resource Policies and Procedures Manual for the Public Service May, 2016) provides that Ministries/State Departments will advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty one (21) days before closing the advert: the impugned advertisement allows for only 13 days; from 25th January, 2019 being the date of the advertisement and which closes on the 7th February, 2019.

5) Conflict of interest contrary to articles 10 and 232 of the constitution and further violation of the Public Service Commission act. The Chairman of the Pharmacy and Poisons Board is NOT an executive Chairman hence does NOT have a Secretary and or functional office at the Pharmacy and Poisons Board. Therefore, the Applications will be received by the acting Registrar-Chief Executive Officer who an interested party is being the Chief Applicant.

6) Illegality: Failure to disclose the applicable remuneration including salary, allowances and other benefits in contravention of section 37 (4) (e) of the Public Service Commission Act so as to mute the interest of potential Applicants;

7) The Public has an interest in high standards of Constitutionalism and professionalism at the Board which is the National Drug Regulatory authority for regulation of medicines in the Country and the Honourable Court should therefore not permit any transgressions in relation thereto to go unchallenged.

8) In light of the dawn of the 2nd Republic, a new era and Constitutional dispensation in Kenya, this Honourable Court must jealously guard the new path that Kenyans chose and there is high Public Interest in stopping whimsical, arbitrary administrative action by Officers employed in Public Service or the Executive when dealing with professionals and the public by protecting them from arbitrary administrative actions.

17. In support of the submissions the Petitioner relied on Articles 10, 27(1)&(4), 73(2) and 232 of the Constitution *as well as* **Consumer**

Federation of Kenya (COFEK) vs. Attorney General & 2 Others [2012] eKLR, in which the High Court cited with approval the case of **Community Advocacy and Awareness Trust and Others vs. Attorney General Nairobi Petition No 243 of 2011** as well as the dictum of the Court in the case of **Jayne Mati & Another vs. Attorney General & 2 Others [2011] eKLR** and **David Kariuki Muigua vs. Attorney General & Another [2012] eKLR** where the court declined to uphold the appointment of the petitioner as chairperson of the Standards Tribunal notwithstanding a concession by the State that indeed the revocation of his appointment was contrary to the statute.

18. The Petitioner reiterated his position as regards Statutory instruments for recruitment of Chief Executive Officers of State Corporations include Presidential circulars OP/CAB.9/21/2ALII/23 dated 23rd November, 2004 and that of 5th November 2004 and submitted that based on, inter alia, the foregoing principles, the Respondent's decision contained in the impugned advert and any other subsequent decision contravened relevant statutes and the Constitution hence unconstitutional, null and void. In this respect the Petitioner cited **Republic vs. Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & Another [2017] eKLR** and argued that to the extent the Respondent disregarded the foregoing statutory provisions and thus the Constitution, with regard to the impugned advert, this court should to find that the impugned advert was unconstitutional, null and void *ab initio*.

19. According to the Petitioner, the guiding principles of leadership and integrity include Selection on the basis of competence and suitability, objectivity and impartiality in decision making, and ensuring that decisions are not influenced by favouritism and other improper motives and relied on the case of **Okiya Omtatah Okoiti & 3 Others vs. Nairobi City County & 5 others [2014] eKLR** in which the case of **Benson Riitho Mureithi -vs- J.W Wakhungu and 2 Others Pet No. 19 of 2014** was cited with approval.

20. It was therefore submitted that to the extent that the Respondent acted in violation of the requirements of Article 73 of the constitution, the impugned advert and any subsequent decision, including appointment was unconstitutional and should only be declared as such and reliance was placed on the case of **Jared Juma vs. Kenya Broadcasting Corporation & 3 Others [2014] eKLR**.

21. It was submitted that many Applicants were discriminated on social origin basis and others for not being Pharmacist or working at the Respondent or being Public Servants. Those grounds of discrimination were so grossly unreasonable to amount to discrimination and which decision excluded many worthy applicants from consideration hence unconstitutional, null and void.

22. The Petitioner concluded that it is clear that the country is yet to completely break from the old order, its rearing its ugly head that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of those in power. To uphold the appointment of the impugned appointment of the Registrar would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles. The new constitution ushered in a new regime of appointments to public office. Whereas the past was characterised by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Respondent was unreasonable, irrational and committed illegalities. The Court was therefore urged to find merit and allow the Petition and make further orders as necessary.

23. The Petitioner therefore prayed for the following orders:

(a) A declaration that the Respondent's must meet conditions such that an applicant must have served for at least 5 years in Senior Management or leadership position at the Board or in a similar organization, possess Strategic Leadership Development Programme and others calculated at locking out potential Applicants especially from Private Practice and other public Service Sector as contained in the Respondent's advertisement in the daily Newspaper of 25th January, 2019 violates Articles 10, 27 and 232 of the constitution and the same is unconstitutional, null and void.

(b) Consequently, an order of *Certiorari* to remove to this Honourable Court and quash the Respondent's decision contained in the daily Newspapers of 25th January, 2019 of advertisement for the vacant position of Registrar/CEO of the Pharmacy and Poisons Board; and any other consequent attendant process or decision including final appointment of Registrar/CEO of the Pharmacy and Poisons Board.

(c) An order that in the meantime and or pending the substantive appointment of the Registrar/CEO of the Pharmacy and Poisons Board, the Respondent is henceforth prohibited and restrained from keeping any person, including the current Acting Registrar/CEO, who has acted as Registrar/CEO for at least six (6) Months, as the Acting Registrar/CEO of the Pharmacy and Poisons Board in line with the provisions of Section 34 of the ***Public Service Commission Act***, Laws of Kenya.

(d) An order compelling the Respondent to henceforth and or in the meantime, pending the substantive appointment of the Registrar/CEO of the Pharmacy and Poisons Board appoint an Acting Registrar/CEO of the Pharmacy and Poisons Board who has NOT acted as such for at least six (6) Months as in line with Section 34 of the ***Public Service Commission Act***, Laws of Kenya.

(e) An order prohibiting and or restraining the Respondent whether by itself, its officers, agents and/or servants or employees from putting up an unfair/unlawful discriminative advertisement for the vacancy position of the Registrar/CEO or any other position at the Pharmacy and Poisons Board.

(f) An order that the costs consequent upon this Petition be borne by the Respondents in any event.

(g) All and any such other Orders as this Honourable Court shall deem just.

The 2nd interested party's case

24. In supporting the petition, the interested party relied on **Joy Brenda Masinde vs. Law Society of Kenya & Another [2015] eKLR**, **Githu Muigai & Another vs. Law Society of Kenya & Another [2015] eKLR** where it was held that where a body has been established by

statute (such as the Law Society of Kenya) then that body must act in accordance with the powers conferred upon it and cannot allocate itself powers even when it feels those powers are necessary to enable it perform its functions.

25. Based on section 5 (1) of the *Pharmacy and Poisons Act* the court was urged to declare that the process and subsequent appointment of **Dr. Fred Moin Siyoi** was unconstitutional and hence null and void, and that the court should make necessary orders to require the Public Service Commission to oversight the fresh process because the illegalities committed were deliberate and therefore the respondent would in fresh repeat process merely hide the illegalities to arrive at the same outcome which is an abuse of the process. In this regard the 2nd interested party relied on **David Kariuki Muigua vs. Attorney General & another [2012] eKLR.**

26. According to the 2nd interested party, the position of Director of Medical Services was abolished and replaced by the Director General in September, 2019. Consequently, **Dr. Jackson Kioko**, who was never appointed Director General upon abolishment of the Director of Medical services position ceased to be the Chairman of the Pharmacy and Poisons Board in September of 2017. Consequently, a Stranger in the name of **Dr. Jackson Kioko** to the Respondent chaired the interviewing panel and full Board meetings of the Respondent that appointed **Dr. Fred Siyoi** as the Registrar of the Pharmacy and Poisons Board. In this respect the 2nd interested party relied on the case of **Kisumu County Assembly Service Board & another vs. Kisumu County Assembly Public Service Board & 4 Others [2015] eKLR.**

27. In his conclusion the 2nd interested party urged the court to direct the Public Service Commission to oversight the fresh process to avoid a cleaner repeat of illegalities for pre-determined candidate.

Respondent's Case

28. In opposing the Petition, the Respondent confirmed that on 25th January, 2019, it advertised for the position of Registrar – Chief Executive Officer pursuant to section 5 of the Pharmacy and Poisons Act. According to the Respondent, the key qualifications for the said position were that one must be a Kenyan Citizen; be a holder of a Pharmacy degree and relevant Master's degree from a recognised university; be registered to practice pharmacy in Kenya and belong to the professional body of registered pharmacists and holder of a current practicing licence; have knowledge, skills and experience of not less than 5 years of pharmacy practice, with at least served in Senior management or leadership position at the Board or in a similar organisation; have Strategic Leadership Development Programme and Corporate Governance Certification from a recognised institution; have a thorough understanding of the local and international trends in the regulation of pharmacy profession, medical products and health technologies; and that the applications to be forwarded to the Chairman of the Pharmacy and Poisons Board premises located along Lenana Road.

29. According to the respondent, section 5 of the Act did not prescribe the key qualifications and competencies for the position of Registrar/CEO other than prescribe that the recruitment has to be done competitively. Accordingly, the same were prescribed by the Board in line with its authority and mandate under the Act to recruit the CEO/Registrar. However, the Board did not apply the prescribed qualifications for the same position in the *Health Laws (Amendment) Act, 2009* because at the time of the recruitment, the same had not become law.

30. It was the Respondent's case that though there is no uniform criteria developed by the courts on what amounts to competitive recruitment process, the Boards are required to ensure that they recruit competitively which process has to be transparent and based on merit. The Respondent however contended that since Article 73 of the Constitution provides that one of the guiding principles for leadership and integrity is selection on the basis of personal integrity, competence and suitability, competencies and qualifications that aim to recruit the best qualified persons are in line with the Constitution. The Respondent also relied on Article 232 of the Constitution which provides for values and principles of public service which include fair competition and merit as the basis of appointments and promotions.

31. The Respondent maintained that the recruitment process by the Board was transparent and based on evaluation on the basis of merit where the best candidates were shortlisted, interviewed and recruited based on the scores. It was its position that the two requirements challenged by the Petitioner are not in any way illegitimate and have been required not only by the Board in this instance but also by other government agencies and departments when recruiting for positions of CEO. It was averred that though the 2nd interested party had the certificate of strategic leadership and other qualifications/competencies, he did not apply for the said position hence it was not possible for the Board to evaluate his qualifications and competencies alongside the 2000 potential applicants who did not also apply for the position.

32. The Respondent's position was that since in arriving at the preferred qualifications for the ideal candidate the same is based on job specifications and/or performance taking into account the inherent requirements of the functions and duties of the office, the averment that the requirement of 5 years in Senior Management at the Board or in a similar organisation is discriminatory is unfounded. Since there are no specific legislative or policy standards of what constitutes transparency, public participation, accountability and good governance in matters of public appointments, the Respondent contended that the appointing authority, the Board herein, has discretion to put into place mechanisms and or set standards to facilitate what would be rational and would suit the requirements of the Act or law that gives it the mandate to appoint.

33. The Respondent refuted the claims by the Petitioner and the 2nd interested party that they did not understand the meaning of the word 'similar organisation' and denied that Strategic Leadership Development Programme at the Kenya School of Government is only offered to public servants. In its view, the same is available to employees of both the National and County Governments, the private sector as well as those from the Non-Governmental Organisations. However, since one of the duties and responsibilities in the advertisement for the Registrar/CEO is to provide strategic leadership to all functional areas of the Board and execute directions of the Board, it is imperative for the holder of the office to have qualifications in Strategic Leadership Development Programme.

34. It was the Respondent's case that the requirement for placing an advertisement for at least 21 days under the Public Service Commission Code of Regulations (Human Resource Policies and Procedures Manual for Public Service) is not applicable in this instance as the Board's operations specifically as relates to the recruitment of the Registrar/Chief Executive Officer is guided by section 5(1) of the Act which is the primary statute and any other rule/regulation can only be read in consonance with the Act. Similarly, the requirement to disclose the

applicable remuneration under section 37(4) of the **Public Service Commission Act** is context specific and entails public officers recruited directly by the Public Service Commission in this instance the recruitment is pursuant to the Act and the remuneration is determined by the Board after advice from the Salaries and Remuneration Commission.

35. It was the Respondent's position that the applications were addressed and received by the Board Chairman who has an office together with attendant staff and the same were not received by the Acting CEO as alluded to by the Petitioner.

36. In support of its case the Respondent relied on **Githu Muigai & Another vs. Law Society of Kenya & Another [2015] eKLR**, **Anne Wangui Ngugi & 2,222 Others vs. Edward Odundo, CEO Retirement Benefits Authority [2015] eKLR**, **Jared Juma vs. Kenya Broadcasting Corporation & 3 Others [2014] eKLR** and **Commissioner for Human Rights & Justice vs. Kenya Maritime Authority [2018] KLR** and submitted that the criteria prescribed by the Board is not prohibited by statute and the Constitution.

37. As regards the allegation of discrimination, the Respondent relied on **International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (No. 111)**, **Peter K. Waweru vs. Republic [2006] eKLR**, **Joy Brenda Masinde vs. Law Society of Kenya & Another [2015] KLR** and submitted that the two impugned qualifications together with the other qualifications only serve to ensure that the Respondent recruits the most qualified person in a competitive process. It was therefore contended that the set qualifications and competencies are not discriminative in any way.

38. As regards the apparent inconsistency between the parent Act and the other rules and regulations, the Respondent relied on **MJVNK & Another [2017] eKLR**.

39. It was therefore the Respondent's position that the petitioner has not pointed to any prejudice he or anyone else stands to suffer by the established criteria and prayed that the petition be dismissed with costs.

3rd Interested Party's Case

40. On its part the 3rd interested party relied on the following grounds of opposition:

1) That the petition filed herein is bad in law, misconceived, incompetent, unwarranted ill-advised, and frivolous and should be dismissed in *limine*.

2) Pursuant to Section 5 (1) of the Pharmacy and Poison Act ("the Act"), the Pharmacy and Poisonous Board ("the Board") is mandated to competitively recruit and appoint the Chief Executive Officer are formulated by the Board pursuant to Section 5 (1) of the Act. This power is discretionary in nature.

3) That the policies on job grading, job and person specification for the particular post of Chief Executive Officer are formulated by the Board pursuant to Section 5(1) of the Act. This power is discretionary in nature.

4) That pursuant to the Act, the Board has the discretion and mandate to recruit and appoint the Chief Executive Officer applying its independent judgment and mandate in deciding the recruitments and person specifications required. That the specifications specified in the advertisement dated 25-1-2019 are proper and not discriminatory as alleged or at all.

5) That the petitioner's claim that the Board acted beyond its powers in setting out the specific qualifications in the advertisement is untrue as such powers are given to the Board under Section 5(1) of the Act.

6) That there is nowhere throughout the petition that the petitioner has indicated that he was one of the Applicants who submitted their applications to the Respondent for consideration. As such the Petitioner's allegations that it was the acting Registrar who received the applications is clearly a deliberate attempt to mislead this honourable court.

7) That the recruitment process was conducted in accordance with the Constitution, taking into consideration the principles of openness, transparency, accountability and competitiveness.

8) That the petitioner has not presented incontrovertible. Cogent and credible evidence establishing a prima facie case, what irreparable damage he stands to suffer and the balance of convenience does not tilt in his favour.

9) That the Petitioner has not specifically pointed out any right that has been infringed, threatened and/or denied as an application is couched in general terms.

10) That the petition before this honourable court is without merit and ought to be struck out at the outset.

Determination

41. I have considered the issues raised in this petition

42. The gist of the petition is that the advertisement for the position of the Registrar/CEO of the Pharmacy and Poisons Board was unlawful and unconstitutional. It was contended that the requirements stipulated therein were not provided for and were in fact meant to favour the Acting Registrar to the detriment of other potential applicants.

43. In this petition, the parties are agreed that at the time of the advertisement, the provisions dealing with the recruitment of the Registrar/CEO of the Board was section 5 of the **Pharmacy and Poisons Act**. The said advertisement, according to the Petitioner was placed pursuant to section 5(1) of the **Pharmacy and Poisons Act**, Cap 244 Laws of Kenya which provides that:

There shall be a registrar of the Board who shall be the chief executive officer of the Board competitively recruited and appointed by the Board upon such terms and conditions of service as shall be determined by the Board upon the advice of the Salaries and Remuneration Commission.

44. It also agreed that the law then did not prescribe the qualifications and competencies of the holder of the said office and that the only requirement was that the recruitment be competitive. That notwithstanding, the said recruitment ought to have complied with the provisions of the Constitution. Article 73(2)(a) of the Constitution provides that the guiding principles of leadership and integrity include selection on the basis of personal integrity, competence and suitability, or election in free and fair elections. The Constitution however does not describe what amounts to competence and suitability. Article 232 of the Constitution which provides for values and principles of public service states, on the other hand, that:

(1) The values and principles of public service include—

(a) High standards of professional ethics;

(e) Accountability for administrative acts;

(f) Transparency and provision to the public of timely, accurate information;

(g) Subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) Representation of Kenya's diverse communities; and

(i) Affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service.

45. Therefore, in carrying out recruitment to public offices, the appointing authority is required, *inter alia*, to adhere to the twin principles of fair competition and merit. Again the Constitution does not define what amounts to fair competition which is the crux of this petition. However, the spirit of these provisions was well articulated in Consumer Federation of Kenya (COFEK) vs. Attorney General & 2 Others [2012] eKLR, in which the High Court cited with approval the case of Community Advocacy and Awareness Trust and Others vs. Attorney General Nairobi Petition No 243 of 2011, where the Court in relation to public appointments stated:

“[73] 27th August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterised by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies that the end of ‘jobs for the boys’ era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments.”

46. The justification for the constitutional threshold was explained in the case of Okiya Omtatah Okoiti & 3 Others vs. Nairobi City County & 5 others [2014] eKLR in which the High Court cited, approvingly, the case of Benson Riitho Mureithi -vs- J.W Wakhungu and 2 Others Pet No. 19 of 2014, where it was stated that:

“[84] It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution.”

47. In order to meet the expectation of Kenyans as enacted in the Constitution, it was therefore appreciated in the case of David Kariuki Muigua vs. Attorney General & Another [2012] eKLR that:

“There is no evidence that there was a competitive process that would enable public participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles.”

48. Article 10 of the Constitution, on the other hand provides that:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.

49. No doubt in carrying out the recruitment process, the Board was applying section 5 of the *Pharmacy and Poisons Act*. It was therefore obliged to adhere to the national values and principles of governance in Article 10.

50. However, the apparent lacuna in the Constitution to define what constitutes competence and suitability, fair competition and merit is by design and not by coincidence. As was appreciated in the case of *Community Advocacy and Awareness Trust and Others vs. Attorney General Nairobi Petition No 243 of 2011*:

“...it has never been the intention of the Constitution to subject decision making to the “tyranny of tabulated legalism” (per Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319). There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself.”

51. In this case therefore what is required of the court is to determine is not whether or not the Board had discretion to prescribe what is required of the applicants in order for them to meet the constitutional threshold of recruitment to the position of the Registrar/CEO of the Board, but whether its prescription was rational or not. What then amounts to irrationality? *De Smith’s Judicial Review* (sixth edition) at Page 559 states that:

“Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic...Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision.”

52. Sedley, J’s in *R vs. Parliamentary Commissioner for Administration, ex parte Balchin and Another* [1998] 1 PLR 1, at page 11 states that:

“What the not very apposite term “irrationality” generally means in this branch of the law is a decision which does not add up-in which, in other words, there is an error of reasoning which robs the decision of logic.”

53. As regards unreasonableness in *Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation* [1948] 1 KB 223, Lord Greene it was stated (at page 229) that:

“It must always be remembered that the Court is not a court of appeal. The law recognizes certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion [of the decision-making public body] is an absolute one and cannot be questioned in any court of law. What, then, are those principles? They are perfectly well understood. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities came to be considered relating to the sort of thing that may give rise to interference by the Court. Bad faith, dishonesty....unreasonableness, attention given to extraneous circumstances, disregard of public policy...have all been referred to as matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word ‘unreasonable’. It is true the discretion must be exercised reasonably. What does that mean?...Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself

properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in [Short vs. Poole Corporation](#) [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

54. What then did the Respondent prescribe as the requirements to be met for one to be considered for recruitment as the Registrar/CEO of the Board? According to the Respondent, on 25th January, 2019, it advertised for the position of Registrar – Chief Executive Officer pursuant to section 5 of the **Pharmacy and Poisons Act** and in the said advertisement the key qualifications for the said position were that one must be a Kenyan Citizen; be a holder of a Pharmacy degree and relevant Master's degree from a recognised university; be registered to practice pharmacy in Kenya and belong to the professional body of registered pharmacists and holder of a current practicing licence; Have knowledge, skills and experience of not less than 15 years of pharmacy practice, with at least 5 years served in a senior management or leadership position at the Board or in a similar organization; have Strategic Leadership Development Programme and Corporate Governance Certification from a recognised institution; have a thorough understanding of the local and international trends in the regulation of pharmacy profession, medical products and health technologies; and that the applications to be forwarded to the Chairman of the Pharmacy and Poisons Board premises located along Lenana Road, Nairobi.

55. The Petitioner however took issue with these requirements. According to him, the requirement that one should have served for at least 5 years in Senior Management or leadership position at the Board or in a similar organization contravenes clear provisions of section 5(1) of the **Pharmacy and Poisons Act** which provides for non-discriminative competitive recruitment from the open Labour Market to obtain the best candidate. This requirement, in his view, narrows down the potential applicants to only those in Senior Management or leadership position at the Pharmacy and Poisons Board (who are about 5 considering the 15 years' requirement as well and since there is no similar organization with Pharmacists, the same is couched to lock out the more than 2000 Pharmacists with suitable experience and qualifications and thus a violation of Articles 10, 27 and 232 of the Constitution. As regards the requirement that one must have a Strategic Leadership Development Programme, it was contended that this programme is offered by Government School to existing Public Servants only thus by putting this as a must meet condition, the Board aims to limit the advertisement to Public Servants contrary to the section 5(1) of the **Pharmacy and Poisons Act** that envisages recruitment from open labour market. Regarding the requirement of Corporate Governance Certification from a recognized institution, it was contended that this is a certificate of three-day workshop attendance organized by State Corporation Advisory Committee as induction training for newly appointed Board of Directors of State Corporations and its Senior Management hence the same cannot qualify as a must meet condition for appointment. It was further contended that section 5(1) of the **Pharmacy and Poisons Act** does not require the Registrar/CEO to be a Pharmacist and that a perusal of the job descriptions reveal that the holder of the office does not have to be Pharmacist. The Petitioner also wondered what the relevance of a Master's degree from a recognized University. It was also his position that while Section B.4 (1) of Public Service Commission Code of Regulations (Human Resource Policies and Procedures Manual for the Public Service May, 2016) provides that Ministries/State Departments will advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty one (21) days before closing the advert: the impugned advertisement allows for only 13 days; from 25th January, 2019 being the date of the advertisement and which closes on the 7th February, 2019.

56. There were other grounds which I am not convinced were really substantial.

57. In my view, it is clear that the prescriptions by the Board were so onerous as to permit only a few persons to apply for the vacant position. One does not understand why it was necessary to prescribe that an applicant must have a Master's degree when the parent legislation did not provide for the same. While such qualification may be considered at the stage of interview and in determining the suitability of the candidates, it is my view that imposing such a requirement at inception is inimical to the requirement that the recruitment be competitive as it amounts to locking out prospective applicants and granting the opening to only a few individuals. It is clearly a prescription that may be abused to pre-determine a person to recruit for the position. My view seems to resonate with the position adopted in [Joy Brenda Masinde vs. Law Society of Kenya & Another](#) [2015] eKLR, where the court stated that:

"Contrary to the submissions by the 1st respondent this additional qualification was not expressed to be merely as an ideal qualification in the way that an advanced degree was expressed to be an added advantage. Rather this additional CPS qualification was stated as a mandatory minimum requirement for consideration for the post advertised. Thus a person not in possession of a CPS of five years standing was deemed not eligible to apply. It was therefore a requirement that determined whether or not a person would apply for the position."

58. I therefore associate myself with the position adopted in the case of [Githu Muigai & Another vs. Law Society of Kenya & Another](#) [2015] eKLR where it was held that:

"The 1st respondent did not have the power under the Act to determine the minimum qualifications for secretary/CEO or to set out the threshold of competence or eligibility. It was submitted that a CPS was an essential qualification for the Secretary/CEO of the Law Society. It was argued that the person holding this position would be required to file and submit returns on behalf of the society amongst other duties. This may well be the case. However, if it was intended that a CPS be a mandatory requirement for the holder of that position, then nothing would have been easier than to have this specifically stated in Section 26(4). The minimum qualifications were clearly set out in statute. In selecting the ideal candidate out of the pool of interested applicants all of whom possess the minimum statutory qualifications the 1st respondent are however, at liberty to take into consideration any additional qualification that may give one candidate an edge over the other candidates and proceed to appoint a suitable candidate on the basis of that additional qualification. This I believe would maintain the spirit of the Act and Article 73(2)(a) of the Constitution which provides for selection on the basis of personal integrity, competence and suitability as one of the guiding principles of leadership and integrity. Accordingly, I find that in making it a mandatory requirement for appointment as Secretary/CEO, that an applicant must in addition to the requirements set out in Section 26(4) be a CPS of not less than five years standing the 1st respondent acted outside of its statutory mandate. This

additional requirement was made ultra vires their powers and must be quashed.”

59. Dealing with a not too dissimilar circumstances, **Wasilwa, J** in **Henry Mutundu vs. Chairperson, Independent Electoral and Boundaries Commission & Another; Attorney General (Interested Party) [2019] eKLR** expressed herself as follows:

“[84]. Indeed the law is clear that the Respondent cannot couch an advertisement outside the legislative scope and their mandate. The Respondents however have a mandate to carry out their function within the law which function also includes hiring the best manpower to carry out their functions. [85]. Section 10 of the Independent Electoral and Boundaries Commission (IEBC) Act, does not provide the minimum years of general work experience that the Chief Executive Officer (CEO) must have but this does not preclude the Respondent from making a decision on how best to carry out the recruitment process within its scope of work and the functionality of the office bearer. In carrying out this work, the Respondent must however work within the law. [86]. I do not wish to belabour on this issue since I have already pronounced myself on the same in my ruling alluded to herein. [87]. In determining this petition, I agree that the Respondent couched the advertisement for the position of the Independent Electoral and Boundaries Commission (IEBC) Chief Executive Officer (CEO) outside the provisions of the Independent Electoral and Boundaries Commission (IEBC) Act and the same cannot be sustained as is worded.”

60. As regards the requirement that one should have served for at least 5 years in Senior Management or leadership position at the Board or in a similar organization, it is clear that what amounts to a similar organisation is not defined. According to the Petitioner, that requirement narrows down the potential applicants to only those in Senior Management or leadership position at the Pharmacy and Poisons Board (who are about 5) considering the 15 years’ requirement as well and since there is no similar organization with Pharmacists. The contention that there is no similar organisation at the Pharmacy and Poisons Board has not been refuted. Nor has the Respondent given examples of the organisations which in its opinion are similar to the Board. In my view to couch a requirement in such a broad and vague terms can only be termed as an irrational requirement. Such a requirement therefore fails to meet the provisions of Article 10 of the Constitution that such a decision passes the test of non-discrimination, transparency and accountability, among others. It also fails to satisfy the provisions of Articles 27 and 232 of the Constitution. My position reflects the view taken in the case of **Jared Juma vs. Kenya Broadcasting Corporation & 3 Others [2014] eKLR** where the court stated that:

“It is the Court’s considered view that the Board of KCB, properly directing itself on the relevant law (especially on the retirement age of public servants in Kenya) and acting reasonably could not have reached the decision that a Managing Director of public parastatal should not be more than forty five (45) years old. The decision was therefore grossly unreasonable as to amount to discrimination on grounds of age contrary to Article 27(4) of the Constitution of Kenya 2010. The decision necessary excluded many worthy applicants from being considered on merit to occupy the position of Managing Director of KBC. The decision negated the minimum core content of the right provided under Article 27(4).”

61. There was also the issue of the period limited for the applicants to put forward their application. It is not in doubt that public participation is one of the national values and principles of governance that must be adhered to. As this Court held in **Robert N. Gakuru & Others vs. Governor, Kiambu County [2014] eKLR**:

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that.”

62. In my view in prescribing conditions which ought to be complied with in order to meet the constitutional guidelines where such guidelines are not expressly prescribed the appointing authority ought to take into account the policies expressed in the relevant instruments. Accordingly it was unreasonable for the Respondent to ignore the provisions of section B.4 (1) of **Public Service Commission Code of Regulations (Human Resource Policies and Procedures Manual for the Public Service May, 2016)** which provides that Ministries/State Departments will advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty one (21) days before closing the advert: It is clear that the impugned advertisement allowed for only 13 days from 25th January, 2019 till 7th February, 2019. In this regard I associate myself with the decision in **Consumer Federation of Kenya (COFEK) vs. Attorney General & 2 Others** (supra) where the Court stated that:

“[57] Secondly, the shortlisted candidates were also advertised. This meets the object of public participation and transparency. On one part, the public is entitled to know who has been shortlisted. The public participates by being able to send any reports or objections on any of the persons who have been selected. Those who have not been shortlisted are given an opportunity to make inquiries as to why they have not been shortlisted.”

63. That, in my understanding, was the basis upon which **Ongaya, J** in **Okiya Omtatah Okoiti vs. Attorney General & 2 others; Francis K. Muthaura (AMB) & 5 Others (Interested Parties) [2019] eKLR** made the following order:

“A declaration that normal appointments (meaning appointments not being pursuant to section 7(3) of the State Corporations Act) made under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) shall

comply with the criteria for appointment as prescribed in Articles 232, 73, and 10 of the Constitution and for that purpose, unless the Parliament enacts specific procedures for open, competitive, transparent, inclusive, accountable and meritorious recruitment and appointment to boards of state corporations, the provisions of the Public Service Commission Act, 2017 on criteria for appointments and advertisement of vacancies shall apply to the normal or regular appointments made to boards of state corporations such as those that may be made under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469).”

64. Based on my findings hereinabove, I hereby hold that the process of recruitment of the Registrar/CEO of the Pharmacy and Poisons Board failed to meet the constitutional threshold. What order should this court in the circumstances issue? As was held in Resley vs. The City Council of Nairobi [2006] 2 EA 311:

“In this case there is an apparent disregard of statutory provisions by the respondent, which are of fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...The purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent’s statements that the Court’s role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The Court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...If a local authority does not fulfil the requirements of law, the Court will see that it does fulfil them and it will not listen readily to suggestions of “chaos” and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty’s subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place.”

65. In the premises decline to entertain extraneous issues in order to deny the petitioner an otherwise merited relief. I do not see any likely chaos which will result if the Respondent commences the process of the recruitment of the Registrar/CEO of the Pharmacy and Poisons Board afresh in compliance with the law after all, the said appointment is not for life.

Orders

66. In the premises I grant the following orders:

(1) An order of certiorari is hereby issued removing into this court and quashing the Respondent’s decision contained in the daily Newspapers of 25th January, 2019 of advertisement for the vacant position of Registrar/CEO of the Pharmacy and Poisons Board; and any other consequent attendant process or decision including final appointment of Registrar/CEO of the Pharmacy and Poisons Board.

(2) The costs of this petition are awarded to the Petitioner and 2nd Interested Party.

67. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 26th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Mwangi for Mr Kinyanjui for the Petitioner

Mr Kipkoge for the Respondent

Dr Wanjala the 2nd interested party

Miss Mbilo for Mr Omiti for the 3rd interested party

CA Geoffrey