



**Mwalah v Kenya Literature Bureau & 6 others; Public Service Commission  
(Interested Party) (Employment and Labour Relations Petition E063 of 2025)  
[2025] KEELRC 2618 (KLR) (29 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2618 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E063 OF 2025  
HS WASILWA, J  
SEPTEMBER 29, 2025**

**BETWEEN**

**MR. ALEX VIHASI MWALAH ..... PETITIONER**

**AND**

**KENYA LITERATURE BUREAU ..... 1<sup>ST</sup> RESPONDENT**

**THE BOARD OF MANAGEMENT, KENYA LITERATURE  
BUREAU ..... 2<sup>ND</sup> RESPONDENT**

**PRINCIPAL SECRETARY, STATE DEPARTMENT FOR BASIC  
EDUCATION ..... 3<sup>RD</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF EDUCATION . 4<sup>TH</sup> RESPONDENT**

**CHIEF OF STAFF & HEAD OF PUBLIC SERVICE ..... 5<sup>TH</sup> RESPONDENT**

**MR. PAUL KIBET ..... 6<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**AND**

**THE PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**

**JUDGMENT**

1. By a Petition dated 14<sup>th</sup> April 2025, the Petitioner sought for the following reliefs; -
  - a. A declaration that the appointment of Mr. Paul Kibet, the 6<sup>th</sup> Respondent herein as the Acting Managing Director of Kenya Literature Bureau (KLB) was not undertaken through a process that is transparent, accountable, open, participatory, competitive and merit based in



violation of Articles 10(2) (a) and 232(1) (d), (e), (f) and (g) of the Constitution and is therefore unconstitutional, null and void.

- b. A declaration be and is hereby issued that the appointment of Mr. Paul Kibet, the 6<sup>th</sup> Respondent herein, as the Acting Managing Director of Kenya Literature Bureau (KLB) violates chapter 1.1 of the Code of Governance for State Corporations (Mwongozo) and is therefore illegal, null and void.
- c. A declaration that the recruitment process leading to the appointment of Mr Paul Kibet as the Acting Managing Director of Kenya Literature Bureau did not meet the threshold of the public service values and principles of fair competition and affording equal opportunities for appointment to public office.
- d. A declaration that all actions taken and decisions made by the Mr. Paul Kibet, the 6<sup>th</sup> Respondent herein, in discharge of duties as the Acting Managing Director of Kenya Literature Bureau (KLB) is illegal, null and void.
- e. An Order that the Board of Management of Kenya Literature Bureau (KLB) be compelled to produce a letter of communication to the Ministry of Education, with the recommended names of the Board's preferred candidates for appointment to the position of Acting Managing Director of Kenya Literature Bureau (KLB).
- f. A mandatory injunction be and is hereby issued compelling the Principal Secretary, State Department for Basic Education, the Cabinet Secretary Ministry of Education and the Chief of Staff & Head of Public Service, (3<sup>rd</sup> Respondent, 4<sup>th</sup> Respondent and 5<sup>th</sup> Respondents) to appoint an Acting Managing Director according to the law.
- g. An order of Mandamus compelling the public service commission, the interested party herein, to oversee that the appointment of Acting Managing Director of the Kenya Literature Bureau meets the threshold of the public service values and principles of fair competition and affording equal opportunities for appointment to a public office.
- h. Any other orders that the Court may deem just and equitable to grant.
- i. Costs of the Petition.

### **Petitioner's Case**

2. The Petitioner avers that the 1<sup>st</sup> Respondent issued a memo dated 20<sup>th</sup> March 2025 informing its employees of the appointment of Mr. Paul Kibet as the Acting Managing Director for a period of six months with effect from 21<sup>st</sup> March 2025 to 21<sup>st</sup> September 2025.
3. It is the Petitioner's case that the 6<sup>th</sup> Respondent did not qualify for appointment as Acting Managing Director of the 1<sup>st</sup> Respondent in accordance with the Career Guidelines 2018, the Public Service Commission Act and the Public Service Commission Regulations on how to carry out acting position appointments in the public service, thus, the appointment is illegal ab initio and in contravention with the law.
4. The Petitioner avers that pursuant to Circular Ref. No. OP/CAB.9/1A by the Chief of Staff and Head of Public Service dated 1<sup>st</sup> February 2023, non-public officers are not eligible for appointment.
5. It is the Petitioner's case that Section 60 of the Public Service Commission Act requires public officers to vacate office upon attaining the mandatory retirement age set at 60 years. Therefore, the 6<sup>th</sup> Respondent was not a public officer at the time of appointment as he retired from public service on March



- 2024 having attained the mandatory retirement age, thus, he was not eligible for secondment and/or appointment in an acting capacity.
6. Despite this, the 2<sup>nd</sup> Respondent went ahead and confirmed the 6<sup>th</sup> Respondent's appointment who is a retiree who never worked for the 1<sup>st</sup> Respondent.
  7. The Petitioner avers that the 6<sup>th</sup> Respondent's appointment lacked merit and was in violation of the national values and principles of governance provided under Article 10 of *the Constitution* and the values and principles of public service provided under Article 232.
  8. The Petitioner avers that chapter 1.1 of the Code of Governance for State Corporations (Mwongozo) states that board appointments shall be made in line with Article 27 of *the Constitution* and the Board members should be appointed through transparent and formal process governed by the overriding principle of merit. In the instant petition, there was no merit in the 6<sup>th</sup> Respondent's appointment.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Case**

9. In opposition to the petition, the Respondents further filed a replying affidavit dated 30<sup>th</sup> April 2025 sworn by Dr. Rispah Wepukhulu, the 2<sup>nd</sup> Respondent's Chairperson.
10. The Respondents aver that when the term of the then Ag. Managing Director, Julius Aritho was approaching expiry, the Board Chairperson on behalf of the 2<sup>nd</sup> Respondent consulted the 3<sup>rd</sup> and 4<sup>th</sup> Respondents regarding the position. It was agreed that due to the divisions in the 1<sup>st</sup> Respondent's management, the best option would be to appoint a neutral person, in an acting position, to manage the transitional arrangements of the 1<sup>st</sup> Respondent.
11. The Respondents aver that vide a letter dated 11<sup>th</sup> June 2024, the Interested Party extended the 6<sup>th</sup> Respondent's contract of employment as Director – Education, CSG 5 for two years effective 6<sup>th</sup> June 2024 upon attainment of the mandatory retirement age of 60 years. Effectively, the 6<sup>th</sup> Respondent is a public officer and is eligible for appointment in the capacity he was appointed.
12. It is the Respondent's case that the extension was expressed in clear and unambiguous terms and/or created a legitimate expectation to the effect that the Interested Party made a representation to the general public and particularly the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that Mr. Paul Kibet is a public servant. Therefore, it was reasonable and fair that they adopt Mr. Paul Kibet's appointment while placing reliance to PSC's decision in its letter dated 11<sup>th</sup> June 2024.
13. It is the Respondents' case that having extended the 6<sup>th</sup> Respondent's terms of service as a public servant, the Public Service Commission cannot be allowed to simultaneously approbate and reprobate.
14. The Respondents aver that Section 80 of the *Public Service Commission Act* read together with Regulation 70(6) of the Public Service Commission Regulations, 2020 provides for retention of a public officer after attaining the mandatory age of retirement.
15. It is the Respondents' case that the *Kenya Literature Bureau Act* confers the power to appoint the Managing Director to the Cabinet Secretary of the parent Ministry, therefore, the Board of Directors is not the appointing authority nonetheless, it was consulted throughout the process.
16. The Respondents aver that the 2<sup>nd</sup> Respondent invited members of Senior Management to the meeting after making resolution and briefed them on the appointment of the new Acting Managing Director. They welcomed the Acting Managing Director pledging to support him to succeed during his term. They noted that the Management Team had, over the recent past, become divided and that a quick turnaround strategy was required to enhance teamwork and mutual respect. They expressed



optimism that the new Acting Managing Director would unify the team to create a conducive working environment for the posterity of the institution, since he was neutral.

17. It is the Respondents' case that if the petition is allowed, it will create a lacuna which will very adversely affect the operations of the 1<sup>st</sup> Respondent, especially at this critical time when the 6<sup>th</sup> Respondent is very ably leading the 1<sup>st</sup> Respondent's management team in the process of developing learning material for grade 10 learning areas and literary texts, preparing for activities for the end of the financial year and progression of the necessary Human Resources Instruments, requisite to advance proper staffing and substantive recruitments, including for the Managing Director position.
18. The Respondents aver that the Code of Governance for State Corporation (Mwongozo) is not applicable in the circumstance of the case for reasons that the KLB Act vests the mandate of appointing the Managing Director in the Cabinet Secretary of the parent ministry. Besides, the appointment subject of the suit, is not substantive rather in acting capacity.

### **2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent's Case**

19. In opposition to the petition, the Respondents filed a replying affidavit dated 25<sup>th</sup> May 2025, sworn by Amb. (Prof.) Julius K. Bitok, Ph.D., CBS, MBS, the 3<sup>rd</sup> Respondent herein.
20. The Respondents aver that the Petitioner lacks the requisite locus standi to institute this suit citing constitutional violations of an employer, being the 2<sup>nd</sup> Respondent and the employee as the 6<sup>th</sup> Respondent, Mr. Paul Kibet, in his capacity as a bystander/third party to the same.
21. The Respondents aver that this court lacks jurisdiction to entertain this petition based on the constitutional avoidance doctrine. As per the provisions of Regulation 77 of the Public Service Regulations, 2020, the Petitioner ought to have first lodged a complaint with the Interested Party for its consideration and determination prior to moving this court prematurely.
22. It is the Respondents' case that the Petitioner's failure to exhaust the statutory remedies prescribed by the Public Service Regulations before instituting this Petition renders this Petition fatal due to a procedural defect.
23. The Respondents aver that the Petitioner has failed to comply with and satisfy the requisite standards in institution of constitutional cases as provided for in the case of Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR). The Petition refers this Court to Articles 10,19(1) and (3), 21, 27, 73(2) (a) and 258 of *the Constitution*, however, it provides little or no particulars as to the allegations and the manner of the alleged infringements of the said Articles. This demonstrates the Petitioner has failed to establish a precise, comprehensive and elegant submission on why these articles are in place and their essence with regards to proving violation of rights if any.
24. The Respondents aver that as per Section 80 (2) of the *Public Service Commission Act*, Cap 185 of the Laws of Kenya, one can serve as a Public Officer beyond the retirement age of Sixty (60) years. Therefore, the Interested Party having granted the 6<sup>th</sup> Respondent a valid extension of service through a Local Agreement Terms cannot circumnavigate this decision by claiming that the 6<sup>th</sup> Respondent was not a Public Officer capable of being appointed to his position.
25. It is the Respondents' case that Section 34 of the *Public Service Commission Act* outlines the requirements for the appointment of public officers in acting capacity. This section connotes that the power of appointment of public officers in acting capacity is not restricted only to the Public Service Commission. Additionally, Section 84(2) asserts that the only consideration for appointment in an



- acting capacity of a public officer is whether the person satisfies all the prescribed qualifications for the holding of the said public office.
26. These qualifications have also been set out in Chapter 6 of *the Constitution* as well as in the Mwongozo Code of Governance for State Corporations (Executive Order No. 7 of 2015) or any government circulars issued from time to time by the Head of Public Service.
  27. The Respondents aver that as per Section 5(3) of the *State Corporations Act*, the lawful appointing authority of Chief Executive Officers/Managing Directors is the respective Boards of the State Corporations in consultation with the Parent Ministry.
  28. The Respondents aver that the Chief of Staff and Head of Public Service Circular Ref No. OP/CAB.9.1A provides that the appointment of Acting Chief Executive Officers/ Managing Directors is to be done by the Board of a State Organ in consultation with the Parent Ministry; however, where the Board is unable to source an acting replacement from within its employees, the Chairperson shall consult the respective Cabinet Secretary to select a suitable officer from the line of the Ministry Staff, who shall be seconded, and appointed by the Board.
  29. The Respondents aver that the 4<sup>th</sup> Respondent had appointed Mr. Julius Aritho as the Acting Managing Director of the Bureau for a period of 6 months from 1<sup>st</sup> September, 2024 to 28<sup>th</sup> February, 2025. Upon expiry of this period, the Board extended his appointment for a period of 14 working days to 20<sup>th</sup> March, 2025 pending the recruitment of a substantive Managing Director and direction from the Ministry of Education.
  30. Upon noting that Mr. Julius Aritho's term was coming to an end, the Board resolved to appoint another Acting Managing Director. However, due to the urgency in respect to the matter at the time, and the fact that there was no suitable candidate from the Bureau itself to take up the position, the Board sought for assistance from the 4<sup>th</sup> Respondent for selection of a suitable candidate from the Ministry of Education in line with the Chief of Staff and Head of Public Service Circular Ref No. OP/CAB.9.1A. Thus, the 4<sup>th</sup> Respondent selected the 6<sup>th</sup> Respondent as a suitable candidate for the same, on an acting basis and communicated the same to the 2<sup>nd</sup> Respondent.
  31. The Respondents aver that the 4<sup>th</sup> Respondent convened a Special Meeting on 20<sup>th</sup> March 2025 where the Board seconded and approved the appointment of the 6<sup>th</sup> Respondent as an Acting Managing Director for the Bureau for a period of six months effective, 21<sup>st</sup> March, 2025. The Board also resolved to authorize its Chairperson to issue a letter to the 6<sup>th</sup> Respondent setting out his terms of services as per the Bureau's Policy.
  32. The Respondents aver that the 6<sup>th</sup> Respondent's appointment was within the confines of the law and that the Petitioner has failed to substantiate the unconstitutionality of this process. He failed to prove the alleged contraventions of Articles 73 (2) (a) and Article 232 of *the Constitution* arising either as a result of nepotism, favoritism, improper motives, or corrupt practices that mar the values and principles of the Respondents.
  33. It is the Respondents' case that the 6<sup>th</sup> Respondent underwent a rigorous vetting and appointment process where his qualifications, ethical standing and capacity to discharge the onerous duties of the office of the 1<sup>st</sup> Respondent were thoroughly scrutinized and affirmed prior to his appointment.
  34. The Respondents further aver that their actions were in line with the tenets of Article 43 (1) (f) and 53 (1) (b) and 53 (2) of *the Constitution* noting that the Bureau is a significant player in Kenya's education sector. For the avoidance of doubt, the prayers in this Petition will not only hinder the daily operations and management of the Bureau but also disrupt the best interests of the children in Kenya.



## 6<sup>th</sup> Respondent's Case

35. In opposition to the application, the 6<sup>th</sup> Respondent filed a replying affidavit dated 29<sup>th</sup> August 2025 which reiterated the position of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents' in their replying affidavits.

## Interested Party's Case

36. In opposition to the application, the Interested Party a replying affidavit dated 6<sup>th</sup> May 2025 and further replying affidavit dated 13<sup>th</sup> August 2025 both sworn by its Secretary/CEO, Paul Famba.

37. The Interested Party avers that in exercising its powers and functions in the public service specifically in State Corporations and Public Universities granted under Article 234(2) of *the Constitution*, PSC guides the development of human resource instruments and approves and issues the developed instruments.

38. The Interested Party avers that the 6<sup>th</sup> Respondent's Acting appointment could only be done in line with all the approved Human Resource Instruments as Section 34 of the *Public Service Commission Act* that provides that an acting appointment shall be in favor of a public officer who is duly qualified and competent to perform the duty; and the Commission shall, whenever it comes to its attention that an authorized officer has purportedly made an acting appointment or assignment, in contravention of the provisions of this section, take corrective action.

39. It is the Interested Party's case that the 6<sup>th</sup> Respondent's appointment as the 1<sup>st</sup> Respondent's Acting Managing Director is unlawful as he is not an officer serving at the 1<sup>st</sup> Respondent at the time of his appointment contrary to the law.

40. The Interested Party avers that Section C.14 (1) of the Human Resource Policies and Procedures Manual for the Public Service May, 2016 provides that:

“When an officer is eligible for appointment to a higher post and is called upon to act in that post pending advertisement of the post, he is eligible for payment of acting allowance at the rate of twenty percent (20%) of his substantive basic salary. Acting allowance will not be payable to an officer for more than six (6) months.”

41. The Interested Party avers that at the time of his appointment, the 6<sup>th</sup> Respondent was not a public officer serving at the 1<sup>st</sup> Respondent, therefore, there is no basis for the calculation of the 20% acting allowance to be paid to them to act as the allowance is based on the basic salary of the substantive basic salary to the substantive position, they hold in the public body in which case he does not hold any.

42. The Interested Party avers that vide letter Ref. No. 1992056589 and dated 25<sup>th</sup> April 2024, the 4<sup>th</sup> Respondent requested it to engage the 6<sup>th</sup> Respondent on local agreement terms beyond the mandatory retirement age to the position of Director, Education.

43. Pursuant to Section 80 (2) of the *Public Service Commission Act*, PSC considered the request and through letter Ref. No. PSC/128/3 (46) and dated 5<sup>th</sup> June, 2024 it conveyed its decision to the Principal Secretary on appointment of the 6<sup>th</sup> Respondent on local agreement terms to the position of Director, Education for a period of two (2) years with effect from 6th June, 2024.

44. It is the Interested Party's case that the 6<sup>th</sup> Respondent having retired from the public service and having been appointed on local agreement terms contract for a period of two (2) years, he was not eligible for any other contract appointment, whether substantively or in acting capacity as he had been engaged to undertake specific duties as the Director, Education for the said period.



45. The Interested Party avers that the 6<sup>th</sup> Respondent having already retired from the public service and engaged on local agreement terms by the Public Service Commission and not being an employee of the 1<sup>st</sup> Respondent; his appointment as the 1<sup>st</sup> Respondent's Acting Managing Director goes against the values and principles of the Public Service Commission set out under Article 232 of *the Constitution*, Section 34 of the *Public Service Commission Act* and Section C.14 of the Human Resource Policies and Procedures Manual for the Public Service May, 2016.
46. It is the Interested Party's case that the 2<sup>nd</sup> Respondent has no power to second a staff working at the Ministry of Education, Science and Technology and only the Public Service Commission has such power pursuant to Section 42 (1) of the *Public Service Commission Act* which provides that:
- “The authority to second a public officer shall vest in the Commission and shall be carried out on the request of an authorized officer or a public officer.”
47. The Interested Party avers that the Cabinet Secretary, Ministry of Education, Science and Technology had no power to deploy the 6<sup>th</sup> Respondent to the Kenya Literature Bureau as deployment can only be done within the same public body pursuant to Regulation 36 of the Public Service Commission Regulations, 2020 which provides that:
- “1) Deployment within a public body shall be undertaken by the authorized officer.
- 2) In making a deployment decision, the authorized officer shall take into account the efficiency and effectiveness of public service delivery; promotion of national integration and cohesion; and representation of Kenya's diverse communities' gender, ethnic communities and persons with disabilities.”
48. It is the Interested Party's case that the 6<sup>th</sup> Respondent retired from the Public Service pursuant to Section 80(1) of the Public Service Commission and was re-engaged back into the service pursuant to Section 80(2) on contractual basis, therefore, his permanent and pensionable appointment was never extended.
49. The Interested Party contends that the re-engagement under Section 80(2) is not an extension of the officer's permanent and pensionable service but a fresh appointment on local agreement terms or contract.

### **Petitioner's Submissions**

50. The Petitioner submitted on four issues: whether this court has jurisdiction to entertain this petition; whether the appointment of Mr. Paul Kibet, the 6<sup>th</sup> Respondent herein as the Acting Managing Director of Kenya Literature Bureau (KLB) was proper, lawful, and constitutional; whether the Petitioner is entitled to reliefs sought in this petition; and who should bear the costs of the petition.
51. On the first issue, the Petitioner submitted that Section 12 (1) (a) of the *Employment and Labour Relations Court Act* provides that the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution*. The provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including disputes relating to or arising out of employment between an employer and an employee, therefore, this section does not provide a limit as to who can petition the court in case of such a dispute.



52. The Petitioner submitted that Article 258 of *the Constitution* states that "every person" has the right to institute court proceedings claiming a contravention or threatened contravention of *the Constitution*. Therefore, the petitioner is within his right to commence these proceedings and the court has jurisdiction to hear the petition.
53. The Petitioner cited Sammy Osundu Likaroni – Interested Party (On Behalf of Senior Court Assistants – JSG.7) Formerly (Senior Clerical Officers) and all other affected Judicial Staff v Judicial Service Commission & 3 others [2020] KEELRC 18 (KLR) wherein the court while placing reliance on the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR) and found that the petitioner met the threshold of Article 258 and 22 of *the Constitution*, 2010 and therefore could not be faulted for instituting the proceedings. The court held that the petitioner was within his right to commence the same.
54. On the second issue, the Petitioner placed reliance in Okiya Omtatah Okoiti v Head of Public Service & 5 others [2018] KEELRC 1663 (KLR) wherein the court held:
- “The court however appreciates the watchdog role played by the petitioner by bringing the issue of the 2<sup>nd</sup> and 3<sup>rd</sup> Interested parties, appointment on local service agreement to the attention of the court for adjudication. The principles of Public Service contained under article 232 of *the constitution* must be jealously guarded if the full impact of our progressive constitution is to be realized. The petitioner’s concern that appointment of persons who have attained the retirement age on local service agreement is genuine and must be commended. This window is vulnerable to abuse and could be used to reward loyalties or keep cronies in public service at the expense of equally qualified individuals.”
55. It is the Petitioner’s submission that the 6<sup>th</sup> Respondent having retired from the public service and having been appointed on local agreement terms for a period of two (2) years, he was not eligible for any other contractual appointment, whether substantively or in acting capacity as he had been engaged to undertake specific duties as the Director, Education CSG 5 for the said period.
56. The Petitioner submitted that the 6<sup>th</sup> Respondent’s appointed as the 1<sup>st</sup> Respondent’s Acting Managing Director goes against the values and principles of the Public Service Commission set out under Article 232 of *the Constitution*, Section 34 of the *Public Service Commission Act* and Section C.14 of the Human Resource Policies and Procedures Manual for the Public Service May, 2016.
57. The Petitioner submitted that the Chief of Staff and Head of Public Service Circular Ref. No. OP/CAB.9/1A dated 1<sup>st</sup> February 2023, on the Appointment of Acting Chief Executive Officers and Alternate Representatives to Boards of State Corporations states:
- “(c) For avoidance of doubt, non-public officers, and employees of other state corporations are not eligible for appointment. (d) The Board should source an acting replacement from within the agency.”
58. The Petitioner submitted that the 6<sup>th</sup> Respondent was not an employee of Kenya Literature Bureau thus he did not satisfy all the prescribed qualifications for holding the office of the 1<sup>st</sup> Respondent’s Acting Managing Director. Additionally, the appointment was not sanctioned and/or approved by the Public Service Commission which is the appointing authority for public servants.



59. The Petitioner placed reliance in *Gikenyi B & another v Nakhumicha & 2 others; Amoth & 58 others (Interested Party)* [2023] KEELRC 3222 (KLR) in which the court held:

“..... acting appointment is restricted to the existing employees/staff of the organization, which is a temporary conferment upon a public officer, by the appointing authority, the power to perform duties of a public officer other than the office the officer is substantively appointed to hold, while the public officer continues to hold the substantive appointment and thus the purported appointment of Dr. Peter Shikuku and Dr. Tom Omenge as such is null and void ab initio.”

60. It is the Petitioner’s submission that it is evident that the Respondents by appointing the 6<sup>th</sup> Respondent as the Acting Managing Director contravened and/or violated the provisions of *the Constitution* of Kenya, the Code of Governance for State Corporations (Mwongozo), and the Chief of Staff and Head of Public Service Circular Ref. No. OP/CAB.9/1A dated 1<sup>st</sup> February 2023.

61. On the third issue, the Petitioner submitted that the essence of the orders sought is to remedy the occasioned violation of *the Constitution* and statutes.

62. It is the Petitioner’s submission that the petition is anchored in public interest as it interrogates actions that affront constitutional norms and statutory obligations. Therefore, the public would suffer irreparable prejudice were this court to permit violations of *the Constitution* to go unchecked thus it is in the interest of justice that prayers sought are granted.

63. On costs, the Petitioner cited *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] KEHC 7064 (KLR) wherein the court while quoting *Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd*; held as follows:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

64. The Petitioner submitted that he deserves to be awarded costs of the petition.

### **2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent’s Submissions**

65. The Respondents submitted on two issues: whether this Court should Expunge from the Record the Documents filed by the Petitioner in support of the Petition and consequently Strike out the Petition; and whether this Court should grant the Orders sought in the Petition.

66. On the first issue, the Respondents submitted that Articles 35 and 50(4) of *the Constitution* provides that any evidence obtained in a manner that violates a right or fundamental freedom in the Bill of Rights must be excluded if its admission would render the trial unfair or be detrimental to the administration of justice. This provision ensures that evidence obtained through unjust means, such as the Petitioner’s documents are protected and should not be used against another litigant, in this case, the Respondents.

67. The Respondents submitted that the documents relied upon by the Petitioner are internal documents/ communication between the Respondents. The Petitioner as a private citizen has not explained how he got access to the documents and there is no evidence placed before this Court to show that he requested



- for the documents in the manner prescribed in the law. As such, the documents were obtained illegally and irregularly.
68. The Respondents submitted that documents being privileged, cannot be produced in Court by the Petitioner as doing so offends the evidentiary rules on admissibility, thus, the Court should expunge them from the record.
69. On jurisdiction, the Respondents submitted that this Court's Jurisdiction is only limited to hearing and determining all disputes, arising out of employer - employee relationships or disputes between employers and Trade Unions. As a result, constitutional questions brought before this Court need to be framed in a manner confined within the stipulation of disputes arising out of employer - employee relationships.
70. The Respondents submitted that the petition revolves around the appointment of the 6<sup>th</sup> Respondent as the Managing Director in the Bureau. This issue does not fall within the ambits of Section 12 (1) of the *Employment and Labour Relations Court Act* since no employer-employee relationship exists between the Petitioner and the Bureau or any of the Respondents.
71. It is the Respondents' submission that the Petitioner lacks the requisite locus standi to institute the suit citing constitutional validity of the appointment process done in an institution he does not work for. Additionally, the jurisdiction of this court does not extend to the issue of appointments in public offices as alleged by the Petitioner. They cited Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] KECA 30 (KLR).
72. The Respondents submitted that the threshold required for one to be issued orders sought in a constitutional petition, were well settled in Anarita Karimi Njeru v Republic [1979] KEHC 30 (KLR) as follows:
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”
73. It is the Respondents' submission that the Petitioner has failed to adhere to the principle of precision as he has failed to establish a precise, comprehensive and elegant submission on why these articles are in place and their essence with regards to proving violation of rights if any. The Petition refers to Articles 10, 19(1) and (3), 21, 27, 73(2) (a) and 258 of *the Constitution* in its title, however, it provides little or no particulars as to the allegations and the manner of the alleged infringements of the said Articles.
74. On constitutional avoidance, the Respondents submitted that it is trite law that *the constitution* should not be invoked to resolve ordinary disputes whose remedies are available either under the statutes or other applicable legal principles as observed in Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega ( Interested party) [2022] KEELC 1072 (KLR).
75. The Respondents submitted that as per provisions of Regulation 77 of the Public Service Regulations, 2020, the Petitioner ought to have first lodged his complaint or grievances with the Interested Party for its consideration, before approaching the Court prematurely. The failure on the part of the Petitioner to exhaust the statutory remedies specifically prescribed by the Public Service Regulations renders the Petition herein fatally defective.



76. On the second issue, the Respondents submitted that the Petitioner's claim that one cannot be a public officer beyond the mandatory retirement age are unfounded, unjustified and baseless. They submit that the position of Chief Executive Officers/Managing Directors of state organizations are ones whose appointment is on fixed term contractual basis and as such, they are not bound by retirement age or by age limit.
77. The Respondents submitted that pursuant to Regulation 75 of the Public Service Regulations, 2020, a retirement decision may be reviewed by the Commission in accordance with the provisions of section 80 and 84 of the *Public Service Commission Act*. In view of these legal provisions, the 6<sup>th</sup> Respondent's prospective retirement was reviewed and as such, he continued working as a Public Officer. In fact, as at the time of his appointment, the 6<sup>th</sup> Respondent was working with the Ministry of Education as a Director-Education (CSG 5 - Job Group 5).
78. The Respondents submitted that the 6<sup>th</sup> Respondent's appointment was made on Local Agreement Terms of Service and it was to be for a period of two (2) years with effect from 6<sup>th</sup> June, 2024 upon attainment of the mandatory retirement age of sixty years. The 6<sup>th</sup> Respondent was seconded and confirmed by the Interested Party and the same was conveyed to the 3<sup>rd</sup> Respondent, therefore, it is shocking that the Interested Party can raise allegations refuting the status of the 6<sup>th</sup> Respondent as a Public Officer, despite having approved the extension of his service.
79. The Respondents submitted that Section 34 (1) of the *Public Service Commission Act* provides that acting appointment shall be made by the lawful appointing authority; and subject to the prescribed regulations and procedures which apply to appointments. Thus, the power of appointment of Public Officers in acting capacity is not restricted only to the Interested Party. Additionally, Section 84(2) asserts that the only consideration for appointment in an acting capacity of a Public Officer is whether the person satisfies all the prescribed qualifications for the holding of the said public office.
80. It is the Respondents' submission that the requisite appointing body for the position of Chief Executive Officers/ Managing Directors is the respective Boards of the State Corporations themselves as confirmed under Section 5 (3) of the *State Corporations Act* and that the Board of the said State Corporations make the appointments in consultation with the Parent Ministry. This was reiterated in Mwongozo Code of Governance for State Corporations (Executive Order No. 7 of 2015), which the Petitioners have by themselves relied upon.
81. They placed reliance in *Okoiti v The Board, Export Processing Zones Authority & 3 others; Otieno (Interested Party)* [2022] KEELRC 3771 (KLR) where the Court held that:
- “There have been various legal interpretations of the law on who, between the Cabinet Secretary and the Board of a State Corporation, appoints the CEO. The Code of Governance for State Corporations, christened ‘Mwongozo,’ is clear on who retains the power to appoint the CEO of a State corporation. Clause 1.2 1[k] of the Code, states that the Board should “hire the CEO on such terms and conditions of service, as may be approved by the relevant government organs, and approve appointment of senior management staff.” Clause 1.18 1 restates that the Board, should appoint and remove the CEO; and ensure the CEO is recruited through a competitive process.”
82. The Respondents submitted that a scrutiny of the Chief of Staff and Head of Public Service Circular Ref No. OP/CAB.9.1A confirms that: The appointment of Acting Chief Executive Officers/ Managing Directors is to be done by the Board in consultation with the Parent Ministry; and however, where the Board is unable to source an acting replacement from within the Agency, the Chairperson



shall consult the respective Cabinet Secretary to select a suitable officer from the line of the Ministry Staff, who shall be seconded, and appointed by the Board.

83. It is the Respondents' submission that the Board complied with the circular. They assert that the 4<sup>th</sup> Respondent had previously selected Mr. Julius Aritho to serve as the 1<sup>st</sup> Respondent's Acting Managing Director and the selection was confirmed and seconded by the Board. Upon expiry of his term, the Board resolved to appoint another Acting Managing Director, but in the meantime, extended the appointment of Mr. Aritho for 14 working days. Thereafter, due to the urgency in respect to the matter at the time, and the fact that there was no suitable candidate from the Bureau itself to take up the position, the Board sought for assistance from the 4<sup>th</sup> Respondent for selection of a suitable candidate from the Ministry of Education in line with the Chief of Staff and Head of Public Service Circular Ref No. OP/CAB.9.1A.
84. The Respondents submitted that 4<sup>th</sup> Respondent noting the significance and urgency, selected the 6<sup>th</sup> Respondent as a suitable candidate on an acting basis and communicated the same to the Bureau. The Board, thereafter, held a special meeting on 20<sup>th</sup> March, 2025, wherein it seconded and approved the appointment of the 6<sup>th</sup> Respondent for a period of six months effective, 21<sup>st</sup> March, 2025. The Board also resolved to authorize its Chairperson to issue a letter to the 6<sup>th</sup> Respondent setting out his terms of services as per the Bureau's Policy.
85. It is the Respondents' case that the Petitioner has failed to precisely establish his complaint, the violations made as a result and the alleged infringement as they have established that the appointment of the 6<sup>th</sup> Respondent was within the Constitutional confines.

#### **6<sup>th</sup> Respondent's Submissions**

86. The 6<sup>th</sup> Respondent submitted on five issues: whether the appointment of the 6<sup>th</sup> Respondent was unlawful; whether the 6<sup>th</sup> Respondent is eligible to hold office; whether the Public Service Commission (PSC) and Petitioner have locus or valid legal basis to challenge the 6<sup>th</sup> Respondent's appointment; whether the petition meets the threshold for grant of conservatory orders; and whether public interest supports the continued service of the 6<sup>th</sup> Respondent.
87. On the first issue, the Respondents submitted that his appointment was lawful, valid, procedurally proper and in accordance to Section 8 of the *Kenya Literature Bureau Act* which vests the power of appointing the Managing Director in the Cabinet Secretary for Education, in consultation with the Board. This statutory provision does not restrict such appointments to persons currently employed within the 1<sup>st</sup> Respondent, therefore, the suggestion that only internal candidates may be appointed is inconsistent.
88. The 6<sup>th</sup> Respondent submitted that appointment followed the guidelines set out in the binding circular issued by the Head of Public Service under Ref. OP/CAB.9.1A dated 1<sup>st</sup> February 2023; which provides that where a Board is unable to identify a suitable acting Managing Director from within the organization, the Cabinet Secretary may, upon consultation with the Board, appoint a suitable officer from the line Ministry for secondment.
89. The 6<sup>th</sup> Respondent submitted that he meets the criteria in the circular as he is a civil servant; he was seconded from the line Ministry; he was appointed after consultation between the CS and the Board and, his appointment is for only six months, a reasonable interim period.
90. The 6<sup>th</sup> Respondent submitted that he is validly employed as a civil servant on grounds that he is serving under a lawful extension granted by the Public Service Commission through letters dated 5<sup>th</sup> June and



- 11<sup>th</sup> June 2024, extending his service to 6<sup>th</sup> June 2026. This extension is consistent with Section 80(2) of the *Public Service Commission Act*, which permits the re-engagement of officers' post-retirement on contract terms, where the officer possesses unique skills and competencies required by the service.
91. The 6<sup>th</sup> Respondent relied in *Okiya Omtatah v Joseph Kinyua & Another* [2018] KEELRC 1657, where the court held that: "CEOs of State Corporations.....hired on fixed term contracts... cannot be subject to the mandatory retirement age." Similarly, in *Okiya Omtatah v KRA Board & Others* [2018] KEELRC 1689, the court held that: "Fixed term contract employees are not pensionable hence not subject to the 60-year retirement age rule."
  92. The 6<sup>th</sup> Respondent submitted that the same logic applies to acting appointments, which are inherently temporary, performance-based, and governed by different rules from standard employment. Further, public interest supports his appointment as the 1<sup>st</sup> Respondent is a critical institution within the education sector.
  93. It is the 6<sup>th</sup> Respondent's submission that his appointment is not only lawful under the *Kenya Literature Bureau Act*, the *Public Service Commission Act*, and *the Constitution*, but is also necessary for institutional stability. Therefore, the Petitioner's motivation to enthrone a preferred candidate does not serve public interest and should be rejected by this Court.
  94. On the second issue, the 6<sup>th</sup> Respondent submitted that he remains a civil servant up to around 6<sup>th</sup> June 2026 as it not in dispute that he attained the mandatory retirement age. However, it is also not in dispute that his term of service was lawfully extended by the PSC through a letter dated 5<sup>th</sup> June 2024, for a period of two years, effective 6<sup>th</sup> June 2024.
  95. The 6<sup>th</sup> Respondent submitted that the extension was granted pursuant to Section 80(2) of the PSC Act which outlines the criteria for such extensions: (a) possession of rare skills or competencies; (b) willingness to serve on contract; and (c) capacity to perform. The 6<sup>th</sup> Respondent meets all these conditions, and no limitation was placed on the functions he could undertake.
  96. The 6<sup>th</sup> Respondent submitted that the law does not downgrade or restrict the responsibilities a civil servant on contract. Section 34 of the *Public Service Commission Act* provides for acting appointments in favour of a public officer who is duly qualified and competent to perform the duty. It does not distinguish between officers in regular service and those serving under a lawful extension.
  97. The 6<sup>th</sup> Respondent submitted that he remains a fully-fledged civil servant, is not barred by age or contract status, and is lawfully eligible to hold the position of Acting Managing Director of the 1<sup>st</sup> Respondent.
  98. On the third issue, the 6<sup>th</sup> Respondent submitted that the doctrine of locus standi exists to prevent the judicial process from being abused by parties without genuine grievances; it ensures that only parties with a direct, personal, and legal interest in the outcome of proceedings are permitted to institute or sustain legal action. Further, Article 258(1) of *the Constitution* permits any person to institute proceedings claiming contravention of *the Constitution*, but this does not mean courts must entertain every suit brought under the pretext of public interest. *The Constitution* protects courts from misuse by requiring that litigants act in good faith, and that there exists a demonstrable nexus between the petitioners' standing and the harm alleged.
  99. It is the 6<sup>th</sup> Respondent's submission that the Petitioner has not demonstrated any personal stake, legal injury, or direct relationship with the 1<sup>st</sup> Respondent, the Ministry of Education, or the 6<sup>th</sup> Respondent. He is neither an employee, board member, shareholder, parent ministry officer, nor a directly aggrieved party.



100. The 6<sup>th</sup> Respondent submitted that the Petitioner seeks orders compelling the Board of the 1<sup>st</sup> Respondent to produce communication recommending alternative candidates for the position of Acting Managing Director. This amounts to a thinly veiled attempt to promote a preferred individual to the said office a matter which cannot be the subject of a constitutional petition or conservatory relief. It confirms that this petition is an instrument of surrogate litigation and an abuse of court process.
101. The 6<sup>th</sup> Respondent submitted that PSC has failed to exhaust internal consultative mechanisms, has ignored the statutory structure of representation, and has brought itself into conflict with other government organs namely the Ministry of Education and the Office of the Attorney General. This renders its intervention legally unsustainable and constitutionally impermissible. Moreover, the was made under Section 8 of the [Kenya Literature Bureau Act](#), which empowers the Cabinet Secretary, Ministry of Education not the PSC to make the appointment. Therefore, PSC has no appointing authority, no statutory power to reverse or contest that appointment, and no basis to be heard as an objector in these proceedings.
102. The 6<sup>th</sup> Respondent further submitted that PSC is estopped from contradicting its own prior actions. Having expressly extended the 6<sup>th</sup> Respondent's service as a civil servant until 2026, it cannot now argue that he is disqualified or ineligible for appointment in the civil service. This is a violation of the principle in Halsbury's Laws of England, which states:
- “Where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards revert.”
103. On the fourth issue, the 6<sup>th</sup> Respondent submitted that the Petitioner has failed to establish a prima facie case. A prima facie case is not merely a claim with some chance of success it must be grounded in law, fact, and capable of succeeding on merit.
104. The 6<sup>th</sup> Respondent submitted that the Applicant has not produced a single binding legal provision or authority that bars a civil servant on lawful extension from holding an acting position in a parastatal. To the contrary, precedent supports such appointments. Additionally, the petition does not raise any genuine constitutional controversy, the vague invocation of Articles 10, 19, 21, 27, and 73 of [the Constitution](#) is unsubstantiated and specific right or freedom of the Petitioner has been infringed.
105. The 6<sup>th</sup> Respondent further submitted that the Petitioner has failed to challenge the legality of the appointment procedure or challenged the power of the Cabinet Secretary to appoint under the enabling statute. These fatal omissions deprive the petition of the necessary legal foundation for interim relief.
106. The 6<sup>th</sup> Respondent submitted that the Applicant has not shown what irreparable damage he personally or institutionally stands to suffer if he continues to serve for the limited six-month acting period. On the contrary, the Petitioner is not an employee or official of the 1<sup>st</sup> Respondent; the appointment was for a defined, limited term of six months, expiring in September 2025; and if the Petition ultimately succeeds, appropriate orders can be granted at that time, including quashing of the appointment or fresh recruitment.
107. The 6<sup>th</sup> Respondent submitted that conservatory orders must serve the larger public interest, not the narrow interest of the Applicant. The 1<sup>st</sup> Respondent is a critical institution in the education sector, with responsibility for publishing and distributing learning materials nationwide. Therefore, displacing the 6<sup>th</sup> Respondent would not only destabilize operations, but also interfere with an ongoing



process of organizational restructuring and court-ordered human resource reforms, which he is actively implementing.

108. It is therefore the 6<sup>th</sup> Respondent's submissions that: no prima facie case has been established; no irreparable harm has been shown; public interest favours the maintenance of status quo; and the Petition is premature, procedurally flawed, and driven by ulterior motives. Thus, the application fails the legal test for conservatory relief and should be dismissed with costs.
109. On the final issue, the 6<sup>th</sup> Respondent submitted that the public interest overwhelmingly favors the continuation of his service as Acting Managing Director of the 1<sup>st</sup> Respondent, until the expiry of the six-month term granted under the appointment dated 17<sup>th</sup> March 2025.
110. The 6<sup>th</sup> Respondent submitted that the doctrine of public interest is now a cornerstone of constitutional adjudication. Courts are increasingly guided not just by individual rights, but by broader societal outcomes particularly where the dispute touches on governance, delivery of public services, and stability in public institutions.
111. The 6<sup>th</sup> Respondent submitted that the 1<sup>st</sup> Respondent is a state corporation established under the *Kenya Literature Bureau Act*, Cap. 209, mandated with the publication, printing, and distribution of educational materials for basic and secondary education. As such, it plays a vital and strategic role in Kenya's education sector, directly supporting the delivery of the national curriculum and implementation of Ministry of Education policies, including the Competency-Based Curriculum (CBC).
112. The 6<sup>th</sup> Respondent further submitted that the office of the Managing Director is central to ensuring that this role is discharged effectively; and any disruption or leadership vacuum in that office risks interrupting educational supply chains, delaying publication schedules, and hampering sectoral policy implementation. Therefore, 1<sup>st</sup> Respondent's Board and the Ministry of Education consciously appointed the 6<sup>th</sup> Respondent as Acting Managing Director from outside the organization to restore neutrality, enhance staff morale, and unify factions that had reportedly emerged during the preceding management term.
113. It is the 6<sup>th</sup> Respondent's submission that there are existing court orders issued suspending implementation of the new Human Resource Instruments and recruitment for the position of Managing Director in: ELRC Petition No. E099 of 2024 Catherine Wanjiru Njuguna v KLB & 2 others, and Court of Appeal Civil Application No. E683 of 2024 KLB v Catherine Wanjiru Kerubo & PSC. Therefore, he was implementing court-ordered stakeholder engagement and public participation measures aimed at ensuring compliance with these judgments.
114. The 6<sup>th</sup> Respondent submitted that removing him midstream would create administrative instability, potentially lead to non-compliance with existing court orders, and frustrate the Ministry of Education roll out and maintenance of CBC programme, and the Kenya Literature Bureau institutional reform process.
115. The 6<sup>th</sup> Respondent submitted that his appointment is for a transitional six-month term, from 21<sup>st</sup> March 2025 to 21<sup>st</sup> September 2025 and three months have already lapsed. The short tenure, limited mandate, and transitional nature of the appointment all militate against judicial intervention, therefore, public interest favors allowing the 6<sup>th</sup> Respondent to complete his mandate and hand over in an orderly manner once the legal, procedural, and HR processes are concluded.
116. It is the 6<sup>th</sup> Respondent's submission that the Petitioner has not demonstrated a legitimate public concern. Instead, this is an attempt to influence or manipulate the process in favor of a specific



candidate, reportedly the outgoing Managing Director. This is not public interest, but private interest masked in litigation.

### **Interested Party's Submissions**

117. The Interested Party submitted on two issues: whether the deployment/secondment of the 6th Respondent and subsequent appointment to the position of Acting Managing Director of the Kenya Literature Bureau was un-procedural and therefore unlawful; and whether the Petitioner is entitled to the orders sought.
118. On the first issue, the Interested Party submitted that the 6<sup>th</sup> Respondent retired from the Public Service pursuant to Section 80 (1) (a) of the *Public Service Commission Act* upon attaining the mandatory retirement age and was re-engaged back into the service pursuant to Section 80(2) on contractual basis and therefore his permanent and pensionable appointment was never extended.
119. It further submitted that the re-engagement is not an extension of the officer's permanent and pensionable service but a fresh appointment on local agreement terms beyond the mandatory retirement age to undertake specific duties as the Director Education which could not be undertaken by any other officer as the Principal Secretary at the time indicated that the officer had a critical and sensitive role in the following initiatives: implementation of junior school policies; placement of grade 9 to grade 10 transition; drafting of bills; and guidelines for senior school implementation.
120. It is the Interested Party's submission that having been appointed on local agreement terms to undertake specific duties, the 6<sup>th</sup> Respondent was not eligible for appointment to undertake other roles and responsibilities outside those that were the basis for appointment on local agreement terms beyond the mandatory retirement age. By deploying him/seconding him to the position of Acting Managing Director, the Cabinet Secretary and Authorized Officer were in breach of the Local Agreement Contract and the same violated Regulation 37 (2) of the Public Service Regulations, 2020 which provides that secondment shall be restricted to officers on permanent and pensionable terms of service.
121. The Interested Party submitted that the Board of the Kenya Literature Bureau has no power to second a staff working at the Ministry of Education, Science and Technology and only the Public Service Commission has such power pursuant to Section 42 (1) of the *Public Service Commission Act* which provides that: "The authority to second a public officer shall vest in the Commission and shall be carried out on the request of an authorized officer or a public officer." No such request was made to the Public Service Commission in this case.
122. The Interested Party submitted that deployment/ secondment of the 6<sup>th</sup> Respondent was in breach of the Commission's circular dated 20<sup>th</sup> February 2025 on deployments, secondments, leave of absence and transfer in the public service guiding on the same and stopped deployments, secondments, leave of absence and transfer that were being done in various ministries, departments and agencies under its mandate, which revoked all other circulars on the issue including those relied upon by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents in their affidavits and submissions.
123. The Interested Party submitted that the 6<sup>th</sup> Respondent at the time of his appointment to act as a Managing Director was not a public officer serving at the 1<sup>st</sup> Respondent and there was no basis for the calculation of the 20% acting allowance to be paid to them to act as the allowance is based on the basic salary of the substantive basic salary to the substantive position, they hold in the public body in which case he was not holding any position at the Kenya Literature Bureau. This was in breach of Section C.14 (1) of the Human Resource Policies and Procedures Manual for the Public Service May, 2016.



124. The Interested Party submitted that the 1<sup>st</sup> Respondent is in breach of Section C.14 (4) of the Human Resource Policies and Procedures Manual for the Public Service May, 2016 which provides that all recommendations for acting appointments in Job Group ‘Q’ and above shall be accompanied by a draft indent for advertisement of the vacancy and shall be forwarded to the Public Service Commission. The 1<sup>st</sup> Respondent has not advertised for the position of Managing Director as required and continues to fail to do so as the letter dated 17<sup>th</sup> March, 2025 indicates that, the term of the previous Acting Managing Director, Mr. Julius Aritho was coming to an end on 20<sup>th</sup> March, 2025.
125. It is the Interested Party’s submission that the appointment of the 6<sup>th</sup> Respondent as the Acting Managing Director was unlawful as he was not an officer serving at the 1<sup>st</sup> Respondent at the time of his appointment contrary to the law and the findings in the case of Gikenyi B & another v Nakhumicha & 2 others; Amoth & 58 others (supra).
126. On the final issue, the Interested Party submitted that 1<sup>st</sup> Respondent’s board should be directed by the court to advertise for the position of Managing Director in accordance with Article 232(1) (g) of *the Constitution* and Section 36 and 37 of the *Public Service Commission Act* and appoint a substantive holder of the position to enable the entity undertake its mandate.
127. I have examined all the averments and submissions of the parties herein. It is evident from the pleadings herein that Mr Paul Kibet, the 6<sup>th</sup> respondent was an officer who previously worked for the 3<sup>rd</sup> respondent but who retired from employment on 30/3/2024 upon attaining the mandatory retirement age.
128. The respondents have submitted that the petitioner has no locus to institute this petition because he is neither an employee or employer. On this issue I wish to place reliance on article 22 of *the constitution* which provides as follows:

22.

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - (a) a person acting on behalf of another person who cannot act in their own name;
  - (b) a person acting as a member of, or in the interest of, a group or class of persons;
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members.
- (3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—
  - (a) the rights of standing provided for in clause (2) are fully facilitated; (
  - b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
  - (c) no fee may be charged for commencing the proceedings;



- (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
  - (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.
- (4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.
129. The petitioner being in the category of ‘any person’ is therefore has locus to institute this petition. It also follows that this court has jurisdiction to handle this petition. As indicated above, the petitioner retired from public service in March 2024. It has been submitted by the respondents that upon his retirement however, the 6<sup>th</sup> respondent was appointed as 1<sup>st</sup> respondent’s acting MD for 6 months. That vide a letter of 11/6/2024 the 6<sup>th</sup> respondent contract was also extended as director Education CSG5 for 2 years effective 6/6/2024.
130. The 1<sup>st</sup> and 2<sup>nd</sup> respondents therefore aver that the 6<sup>th</sup> respondent was a public servant at the time of his acting appointment. Indeed the 6<sup>th</sup> respondent having been appointed on a local agreement contract by the Ministry of education or recommendation of the PSC, was a public servant from 11/6/2024 though having previously retired.
131. The respondents have also averred that the board is not the appointing authority of the CEO of the 1<sup>st</sup> respondent but the Cabinet Secretary of the parent ministry. The respondents also cited the circular from the Chief of Staff and head of Public Service ref no 0P/CAB.9.1A which provide that the appointment of an acting CEO/MD is to be done by the board of a state organ in consultation with the parent ministry.
132. It is clear that the acting CEO was appointed by the board with concurrence from the parent ministry, the appointment was only for 6 months with effect from 21<sup>st</sup> March 2025 to 21<sup>st</sup> September 2025. The appointment having already taken place and having lapsed on 21/9/2025 it is the position of this court that any orders on the expired appointment are superfluous.
133. In the circumstance of this case, the only prudent order is to order a substantive competitive recruitment of the 1<sup>st</sup> respondents CEO whilst following due process by the relevant authorities. There shall be no order of costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**HELLEN WASILWA  
JUDGE**

