

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
PETITION NO. E140 OF 2025

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 23, 27, 41,
47, 73, 232, AND 258 OF THE CONSTITUTION OF KENYA,
2010**

**IN THE MATTER OF CONTRAVENTION AND VIOLATION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLE 10, 27, 41, 47, 73 AND 232 OF THE CONSTITUTION
IN THE MATTER OF THE UNLAWFUL APPOINTMENT
AND RETENTION OF MR. NEHEMIAH NGETICH AS
ACTING CHIEF EXECUTIVE OFFICER OF THE NATIONAL
BIOSAFETY AUTHORITY, CONTRARY TO THE
CONSTITUTION, THE PUBLIC SERVICE COMMISSION
ACT (NO. 13 OF 2017), THE BIOSAFETY ACT (CAP. 321),
AND THE PRINCIPLES OF PUBLIC SERVICE AND GOOD
GOVERNANCE**

-BETWEEN-

CHARLES MAINA MWANGI.....1ST PETITIONER

WILLIAM OTIENO ONYANGO.....2ND PETITIONER

- VERSUS -

NATIONAL BIOSAFETY AUTHORITY.....1ST RESPONDENT

THE BOARD OF DIRECTORS OF THE

NATIONAL BIOSAFETY AUTHORITY.....2ND RESPONDENT

PROF. JENESIO KINYAMARIO.....3RD RESPONDENT

DR. DANIEL NJOROGE.....4TH RESPONDENT

MOHAMED HUSSEIN.....5TH RESPONDENT

ASTERI ANGOLO.....6TH RESPONDENT

ANN MUREITHI.....7TH RESPONDENT

ISABELLAH AYAGAH.....8TH RESPONDENT

SALIM KUTI.....9TH RESPONDENT

DOUGLAS MUTEMI.....10TH RESPONDENT

ELIZABETH WAMAE.....11TH RESPONDENT

NEHEMIAH NGETICH.....12TH RESPONDENT

MOSES SANDE.....13TH RESPONDENT

INSPECTORATE OF STATE

CORPORATIONS.....14TH RESPONDENT

PUBLIC SERVICE COMMISSION.....15TH RESPONDENT

*(Before Hon. Justice Byram Ongaya on Wednesday 17th December,
2025)*

JUDGMENT

1. The petitioners filed the petition dated 15.07.2025 through Wambugu Law Advocates, praying for the following orders:
 - 1) A Declaration that the appointment of Mr. Nehemiah Ngetich as Acting Chief Executive Officer of the National Biosafety Authority is unconstitutional, illegal, and void *ab initio*.
 - 2) An Order of *Certiorari* quashing the appointment of Mr. Nehemiah Ngetich as Acting Chief Executive Officer.
 - 3) A Declaration that the 2nd to 13th respondents failed in their constitutional and statutory duties by facilitating and/or failing to prevent the irregular appointment.
 - 4) An Order directing the 1st respondent to commence a fresh, transparent, merit-based appointment process for the office of Chief Executive Officer in accordance with the law.

- 5) An Order directing the recovery of all public funds paid to Mr. Nehemiah Ngetich in salaries and allowances irregularly drawn in connection with his unlawful appointment.
 - 6) A Declaration that Prof. Jenesio Kinyamario acted in conflict of interest and breached his fiduciary duty.
 - 7) An Order directing the 14th and 15th respondents to initiate disciplinary and administrative action against the 2nd to 13th respondents for breach of public trust and statutory violations.
 - 8) Any other Order this Honourable Court deems just and appropriate to uphold constitutionalism and protect public interest.
 - 9) Costs of the petition be awarded to the petitioners.
2. The petitioners' case was as follows:
- a) The petitioners are Kenyan citizens acting in the public interest to safeguard the principles of accountability, transparency, meritocracy, and constitutionalism in public appointments.
 - b) The National Biosafety Authority (NBA) is a State Corporation established under Section 5 of the Biosafety Act, Cap 320. It plays a critical role in regulating genetically modified

organisms, a matter of both national security and public interest.

- c) On or about August 2012, the NBA (1st respondent) appointed Nehemiah Ngetich (the 12th respondent) as a Biosafety Officer, the entry-level professional grade designated NBA7.
- d) On 21.06.2023, the 12th respondent was appointed as Director for Biosafety Research and Compliance and barely a year later, was appointed Acting Chief Executive Officer on 05.07.2024. At the time of this appointment, the 12th respondent had never held the position of Deputy Director, a prerequisite for elevation to Director and eventually to the CEO position under the applicable career guidelines.
- e) The Authority's Career Progression Guidelines and Human Resource Policy and Procedures Manual provide for a structured career advancement that involves promotion through the intermediate grades, culminating in eligibility for executive roles such as director or CEO after at least 15 years of proven experience, with five years served at senior management level.

- f) The subject appointment of the 12th respondent did not meet the minimum requirements set out in the NBA Career Guidelines, the Human Resource Policy and Procedures Manual (2022), and the Public Service Commission Act. His appointment was made in disregard of merit, seniority and transparent competitive procedures, amounting to an affront of provisions of the Constitution.
- g) The petitioners' investigations revealed that the 12th respondent and the Chairman of the Board, Professor Jenesio Kinyamario (3rd respondent), shared a prior academic relationship, as the latter previously supervised Mr. Ngetich at the University of Nairobi's School of Biological Sciences. The 3rd and 12th respondents also co-authored a research paper published in 2018.
- h) The fiduciary relationship between the 3rd and 12th respondent casts doubts on the integrity and independence of the appointment process. No disclosure or management of conflict of interest has been evidenced in the present case, and the

Board's silence on this glaring impropriety amounts to complicity.

- i) On 24.03.2025, the petitioners, through their advocates on record, issued a formal demand letter to the Chairman of the NBA Board, outlining these statutory violations and calling for corrective action. The letter was copied to all relevant stakeholders, including the Board members and the Ministry of Agriculture.
- j) On 29.04.2025, a further letter was issued to the Inspectorate of State Corporations (14th respondent) seeking immediate intervention pursuant to its mandate under Section 18 of the State Corporations Act. However, no response or remedial action has been undertaken despite the gravity of the issues raised.
- k) The petitioners also wrote to the Commission on Administrative Justice (Office of the Ombudsman) pursuant to Section 14(1) of the Access to Information Act, 2016, seeking a review of the administrative actions and decisions of the NBA Board regarding the continued and extended appointment of the

12th respondent. They urged the Commission to compel the Authority to disclose any documentation relied upon, and to investigate the maladministration, breach of fair administrative action, and unlawful expenditure of public funds occasioned by this prolonged irregular appointment. As of the date of this petition, no substantive response or resolution had been provided by the Commission or the Authority.

- l) The Public Service Commission (PSC) has also failed in its statutory duty to investigate, intervene and rectify the abuse of office by the NBA Board, despite being formally notified. This signals institutional complicity and contributes to the normalization of constitutional violations within public agencies.
- m) The failure by the NBA Board to conduct a competitive and transparent recruitment process, and their refusal to make relevant information publicly available, reflects institutional impunity and maladministration.
- n) The 12th respondent continues to exercise the full authority and draws the full salary and allowances of the office of CEO all

paid from the Consolidated Fund. These disbursements are irregular and unconstitutional since they constitute misuse of public resources.

- o) The respondents' continued failure to address the concerns raised necessitated the instant petition. The petitioners seek appropriate declarations and orders to uphold the rule of law, restore integrity in public appointments and secure recovery of all funds unlawfully paid out under the impugned appointment of the 12th respondent.

3. The petitioners particularized the violation of the Constitution as follows:

- i) The sustained appointment of the 12th respondent, a person demonstrably unqualified to hold the office of CEO of a critical regulatory body, constitutes a deliberate and egregious breach of Article 10. By failing to demonstrate fidelity to public values such as accountability, integrity, transparency, and good governance, the respondents have allowed a public office to be converted into a private preserve.

- ii) By arbitrarily overlooking more experienced and qualified officers within the NBA or the parent Ministry in favour of an individual who does not meet the minimum qualifications, the respondents institutionalized discrimination, contrary to Article 27. This conduct has eroded merit-based progression in the public sector and entrenched favouritism, nepotism and bias.
- iii) The appointment and renewal of the 12th respondent outside lawful parameters have severely undermined the right to fair labour practices protected under Article 41. Eligible employees of the Authority have been denied opportunities for advancement and professional recognition, and a culture of impunity and institutional injustice has been normalized.
- iv) The respondents failed to document the basis of the 12th respondent's appointment, issue any public justification, or record Board resolutions consistent with fair decision-making. This opacity, coupled with the refusal to disclose information upon request, undermines the constitutional right to fair and accountable governance under Article 47.

- v) The appointment of the 12th respondent, who does not satisfy the minimum qualifications set by the Authority's own HR Manual represents a manifest abuse of the trust set out in Article 73. The Board has weaponized its power to favour an insider while excluding the qualified.
- vi) The appointment of the 12th respondent to the office of CEO in disregard of the required five years of service at senior management level set out in the Authority's Career Guidelines, violates Article 232 on values and principles of public service, including fair competition, merit, efficiency, and ethical conduct.
- vii) Despite several formal requests and follow-ups, the Board has failed to produce any Board minutes, legal opinions or resolutions validating the 12th respondent's appointment. This violates the right to access information under Article 35 and undermines public oversight. It also raises legitimate suspicions of a cover-up and administrative bad faith.
- viii) The continued payment of a full salary and executive allowances to the 12th respondent without legal authority,

valid appointment or statutory approval amounts to a direct violation of Article 201(d), which demands prudent, lawful and responsible use of public resources. This conduct constitutes economic injustice and unjust enrichment.

4. The 1st to 13th respondents filed their replying affidavit, sworn by Prof. Jenesio Kinyamiro on 29.08.2025, through the Hon. Attorney General. They averred as follows:

a) The 12th respondent was duly appointed as Acting CEO in a legally constituted 48th Special Board Meeting held on 05.7.2024, following the suspension of the then CEO, to allow for disciplinary proceedings against the former CEO to be concluded.

b) Pursuant to the suspension of the former CEO of NBA, a case challenging his suspension and disciplinary proceedings was filed, being *NRB ELRC Cause E524/2024*, in which the Court issued interim orders on 25.07.2024 suspending the disciplinary proceedings against him. The 12th respondent continued to act as the CEO until the case was determined on

17.06.2025, following a negotiated settlement, and the former CEO left office.

- c) Due to the ongoing government reforms in state corporations where the NBA is earmarked to be merged with Kenya Plant Health Inspectorate Service, a moratorium on recruitment of officers, including CEOs, has been placed on the earmarked agencies. Therefore, the Board, during its 50th Special Board Meeting held on 26.06.2025, renewed the appointment of Mr. Nehemiah Ng'etich as acting CEO for a further six (6) months.
- d) The Board considered both the 12th respondent's relevant working experience before and during his tenure at the Authority. A senior management position starts from job group "P" upwards, which job group the 12th respondent had already attained. Further, an appointment in acting capacity requires neither a competitive recruitment process nor institutional validation as alleged. His appointment was thus in line with the law and existing policies.
- e) The only letter requiring NBA action was the one dated 24.03.2025. There was legitimate apprehension about the

intention of an undisclosed client requesting confidential government documents and information. Nevertheless, on 22.05.2025, when the Inspectorate of State Corporations wrote to the NBA Board of Directors requesting the documents, the same were provided.

- f) The 1st, 3rd and 12th respondents deny any direct or perceived conflict because the appointment of the acting CEO happened way after the article publication of 2018. The said publication was a purely scholarly writing, did not confer any personal benefit and had no bearing on the 2nd respondent's collective and merit-based decision. In any event, the 3rd respondent has published many other articles with students he has supervised at both master's and postgraduate levels at the University of Nairobi, which is normal in academic circles. As a long-standing scholar, he has also published widely with colleagues from different countries.
- g) Since the 12th and 13th respondents have no role in the appointment of the CEO of the NBA, their names should be expunged from the proceedings before the court.

h) The petitioners have neither demonstrated any violation of the law nor do they have any justiciable dispute for the determination of the Court. It is in the interest of justice, the interest of the respondents and the greater public interest that this Honourable Court dismisses the entire petition dated 15.07.2025.

5. The PSC (15th respondent) filed its replying affidavit, sworn by Paul Famba on 23.09.2025, through Jacqueline Manani Advocate, and stated as follows:

(i) In view of Section 34(6) of the PSC Act and following the directions of this Court issued on 22.07.2025, PSC sought relevant information from the chairperson of the Board of the NBA. When the Commission received the information, it established that the 12th respondent does not meet the qualifications for appointment to the position of CEO. This is because the 12th respondent has not served for a period of five years in the level of senior management as required by the 2nd respondent's Career Guidelines and as defined by the 2nd respondent's HR Policy and Procedures Manual.

- (ii) Consequently, the Commission resolved to take remedial action as provided in Section 34(6) of the PSC Act and directed the 2nd respondent to terminate the acting appointment of the 12th respondent as the CEO. It further directed that the 2nd respondent be instead called upon to perform the duties of CEO since the 2nd respondent cannot recruit a new CEO following the government moratorium on new recruitments in state corporations that are earmarked for merger or dissolution.
- (iii) In giving the said directions, the Commission invoked its powers in regulation 80 of the PSC Regulations and was also guided by clause C.15(1) of the PSC HR Policies and Procedures Manual. The Commission resolved to give the said directions because it has a constitutional responsibility in Article 234(2) (e) to ensure that the public service is efficient and effective.
- (iv) The Commission noted that it was never contemplated that a situation would arise where there would be a vacancy in the office of a CEO for periods exceeding six months due to

reforms of the nature currently being undertaken by the government. Further, appointing different persons to act as CEO after every six months would create inefficiency and instability at the 2nd respondent during a sensitive transition period. Unlike an acting appointment, being called upon to perform duties of a higher position has no time limit and can therefore be performed by the same officer for a longer period, thereby ensuring stability.

(v) The Commission complied with the court directions issued on 25.07.2025.

6. The petitioners then filed two further affidavits sworn by the 1st petitioner, who averred as follows:

(a) The 3rd respondent was found to have committed perjury in his replying affidavit sworn on 23.10.2024 filed in **Nairobi ELRC Cause E524/2024 – Mugira vs. National Biosafety Authority**, and the Court expunged portions of his affidavit from the record. Having been judicially declared a perjurer, it is untenable for the 3rd respondent to purport to swear affidavits on behalf of the respondents in these proceedings without first

purging the perjury found against him. The integrity of affidavits sworn by the 3rd respondent is gravely impeached and he cannot therefore be trusted to present facts to this Honourable Court.

(b) The 12th respondent's continuation in office beyond 05.01.2025 was unlawful, void *ab initio* and incapable of ratification. The respondents' reliance on a moratorium is misplaced and a ministerial or cabinet circular cannot amend or suspend clear provisions of the PSC Act or the Biosafety Act. Even a contemplated merger with KEPHIS neither licenced the Board to ignore the law nor empowered it to extend an already expired acting tenure contrary to the law. The moratorium itself contemplated a halt in new recruitment and not the indefinite extension of an acting tenure held in violation of statute.

(c) The letter from Mount Kenya University annexed as JK4 is unsigned and cannot be relied upon as proof of experience. Even if it were considered, it would not cumulatively raise the 12th respondent's experience to the statutory threshold of 15 years. The 12th respondent's appointment and promotion letters

in the same annexure demonstrate that he had only 12 years of cumulative service by the time he was appointed Acting CEO in July 2024, and had served for only one (1) year at a senior management level instead of the minimum five (5) years required.

(d) The attempt to redefine “senior management” using a PSC circular dated 13.05.2025 is misleading, as NBA’s HR Policy Manual, 2022 is the applicable internal instrument that defines senior management to be only directors and the CEO.

(e) Since the 12th respondent did not meet the qualifications, his appointment was *ultra vires* regardless of whether it was interim or substantive.

(f) Minute Min/NBA/03/SBM/50/2015 in annexure JK3(c) confirms that the Board was shocked to discover that the 3rd respondent had already renewed the appointment of the 12th respondent as Acting CEO without its knowledge or authority. Although the Board later purported to ratify the irregular reappointment, serious disagreements arose during that session, exposing the inappropriate manner in which the 3rd respondent

handled the matter. This is because the Board of Directors is legally mandated to appoint or renew the appointment of a CEO and not merely ratify an appointment made by its chairman.

(g) The 12th respondent is the direct beneficiary of the impugned appointment while the 13th respondent is the custodian of NBA records and legal advisor who facilitated the process. Both the 12th and 13th respondents are therefore necessary parties in the suit to enable complete adjudication of the dispute.

(h) Instead of the 15th respondent rectifying the breach, it purported to “convert” the illegal acting appointment into a “performance of duties” arrangement under regulation 80 and clause C.15(1) of the PSC HR Manual. The 1st respondent has its own HR Manual and Career Guidelines that guide internal human resource functions at NBA and therefore the PSC cannot purport to apply its own manual to the case at hand. Such conversion is *ultra vires* the Act and the Commission has no power to cure an illegality by re-characterizing it.

- (i) Regulation 80 only allows the PSC to issue general instructions where the law is silent. In this case, the law is explicit that acting appointments cannot exceed six months and must be given only to officers who meet the qualifications for the substantive post.
- (j) Clause C.15(1) of the PSC Manual merely allows payment of a temporary special-duty allowance to an officer briefly performing duties of a higher post. It does not authorize indefinite occupation of the higher post or the delegation of statutory powers attached to it. The Commission's reliance on this clause is a deliberate attempt to circumvent statutory and constitutional safeguards on merit, competition and temporal limits for acting appointments.
- (k) The petitioners further rely on Circular No. OP/CAB.9/1A dated 11.03.2020 on Management of State Corporations, Circular No. OP/SCAC.9/73(96) dated 05.08.2016 on Acting Appointments for Posts of CEOs, and Circular No. OP/CAB.9/1A dated 01.02.2023 on Appointment of Acting CEOs and Alternate Representatives to Boards of State

Corporations, all issued by the Chief of Staff and Head of the Public Service and which govern the appointment of acting CEOs of State Corporations.

- (l) The said Circulars expressly provide that where a vacancy exists in the office of CEO of a state corporation, the Board is required to appoint a qualified officer to act in the position; and if the Board is unable to source an acting replacement within the agency, the chairperson shall consult the respective cabinet secretary to select a suitable officer from within the Ministry, who shall be seconded to the state corporation and appointed by the Board.
- (m) The petitioners argue that because the Circulars were binding on the 2nd respondent's Board, the proper legal procedure upon suspension of the substantive CEO was either to appoint a qualified officer from within the Authority to act for a period not exceeding six months, or if none was qualified, to seek the secondment of a qualified officer from the parent Ministry, as expressly directed by the Circulars.

- (n) Further, the Circulars reinforce the principle that an unqualified officer may only be permitted to perform the duties of CEO for a maximum period of six months, renewable once, and even then, only where no qualified officer exists within either the Authority or the parent Ministry. The 12th respondent's continued occupation of the office well beyond this limit is therefore illegal, unconstitutional and void *ab initio*.
- (o) The Commission's own admission that no lawful recruitment process has been conducted due to an alleged moratorium is equally untenable. Its assertion that changing officers every six months would cause "instability" within the Authority disregards constitutional and statutory commands. Institutional efficiency cannot override legality. The Commission's proper "corrective action" under Section 34(6) of the PSC Act should have been to direct the termination of the illegal acting appointment and to advise on a compliant interim arrangement consistent with the statutory framework and the NBA's internal instruments.

(p) This Court must intervene decisively to restore the sanctity of the law, uphold constitutional values of accountability and merit and prevent continued misuse of public office and resources.

7. Replying to the 15th respondent's replying affidavit, the 1st to 13th respondents filed a supplementary affidavit sworn by Prof. Jenesis Kinyamario on 03.11.2025. It was averred that, as evidenced, the respondents acted within the law and the petitioners have neither demonstrated any violation of the law nor justiciable dispute for determination of the Court. That the 15th respondent having taken administrative action and remedies as per its constitutional mandate and the NBA Board having complied with the said directives, there is no pending issue for determination by this Court.
8. The parties filed their written submissions in court. The Court has considered the material on record and returns as follows.
9. The **1st issue** is whether there exist a moratorium that bars the competitive filling of the office of Chief Executive officer of the 1st respondent. The 15th respondent's affidavit at paragraph 15

states that upon receipt of the information about the instant case, it was established as follows:

- a) The 12 respondent herein Mr. Nehemia Ng'etich has been acting as the Chief Executive Officer (CEO) of the 2nd respondent since 05.07.2024.
- b) The Board of the 2nd respondent has continued to renew the acting appointment of the 12th respondent because the 2nd respondent is earmarked to be merged with the Kenya Health Inspectorate Services under the ongoing government reforms for state corporations and there exist a moratorium issued by government preventing any recruitment of officers in the earmarked state corporations including CEOs. The 15th respondent exhibit PF-1 was the Cabinet News of January 21, 2025 at State Lodge, Kakamega reporting about the proceedings of the first Cabinet Meeting of 2025. The Court has perused the exhibit PF-1. While the Cabinet News stated that in line with the commitment to streamline government operations, reduce waste and curb excesses and the Cabinet approved a series of recommendations aimed at reforming

State Corporations, the Court has perused the document and there is nowhere it is stated that there would be a freeze or what the 15th respondent called moratorium on hiring of CEOs or other employees in state corporations identified for merger or other restructuring. The exhibit is an incomplete extract of the Cabinet News of 21.01.2025 but of the exhibited content, nowhere was it stated that the prevailing government circulars and the law on acting appointment of the CEOs of State Corporations would cease to apply or get suspended in view of the series of the recommendations aimed at reforming state corporations contained therein. The Court finds that the alleged moratorium or freeze on making acting appointments or substantive appointments to the office of a CEO of a state corporation such as is in issue in the instant petition has not been established at all.

c) By that finding the Court returns that the prevailing law and government policies and circulars continue to apply to the acting and substantive appointments of CEOs of state corporations even in the face of the on-going

implementations aimed at reforming state corporations as communicated in the Cabinet News of 21.01.2025 and whose completion date, as submitted for the 15th respondent, is unknown or indefinite.

d) Thus, the Court returns that the law and the circulars as submitted for the petitioners continued to apply to acting and substantive appointment of the CEO in dispute in the current petition. Needless to repeat and as found by the 15th respondent's investigations, the same were breached with respect to the unreasonably long and unlawful acting appointment of the 12th respondent as the acting CEO of the 1st and 2nd respondent.

e) To answer the **2nd issue** and as already found by the 15th respondent, the Court has already returned that the 12th respondent's acting appointment was unlawful as was urged and submitted for the petitioners. The acting appointment went beyond the statutory 6 months and further it undermined the appointment of a substantive CEO as

envisaged or contemplated in law and as was provided for in the policy circulars cited for the petitioners.

f) In particular the circular OP/SCAC.9/73A(96) dated 05.08.2016 signed by Felix K. Koskei, Chief of Staff and Head of the Public Service on acting appointments for posts of CEOs and addressed to chairpersons of State Corporations partly stated as follows,

“Concerns have arisen on the manner in which Appointments are made to temporarily fill vacancies of Chief Executive Officers whenever such vacancies arise. Various anomalies have been noted including:-

- i) Officers being appointed from outside the specific State Corporations.
- ii) Boards assigning remuneration packages to such appointed officers without reference to SCAC and the Parent Ministry in terms of sections 5(3) of the State Corporations Act Cap 446.

iii) Due regard not being given to the competencies of the appointed persons vis - avis the person specifications stipulated for the post.

iv) The period of acting appointment is not capped.

As you are aware stewardship of a State Corporation requires much skill and therefore appointments to the office of Chief Executive Officer, albeit temporarily, cannot be left to chance. Accordingly, it is now required that Boards be firmly incharge of making any respective Acting appointments while ensuring that:-

- a) the appointed staff meet all the requirements for substantive filling of the post;
- b) the terms of service for any such Acting appointments are approved by the Cabinet Secretary (of the Ministry responsible) in consultation with SCAC, in terms of section 5(3) of the Act;
- c) Once a person is appointed in an acting capacity measures be taken immediately to fill the position within six (6) months;

- d) The Boards of the State Corporations should subsequently hasten the process of recruitment of a substantive Chief Executive Officer, as guided in Circular OP/CAB.9/1A dated 11th March 2020 (Part F2 (c), (d) and (e).
- e) Boards of State Corporations must begin building the practice of identifying and selecting talent to succeed incumbents in the corporations' critical roles and oversee the development of a diverse pipeline for succession.”
- g) The further circular ref. No. OP/CAB.9/1A dated 01.02.2023 referred to the circular OP/SCAC.9/73A(96) dated 05.08.2016 and the circular OP/CAB.9/1A dated 11th March 2020 and proceeded to state in part as follows,
- “For the avoidance of doubt, where a vacancy exists in the office of the Chief Executive Officer arising from criminal prosecution, retirement, resignation, end of term and other circumstances:

- a) An Acting Chief Executive officer is to be appointed by the Board in consultation with the parent Ministry within 7 days thereof.
- b) Where a 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 ministry staff, who shall be seconded, and appointed by the Board or as specified in enabling legislation.
- c) For the avoidance of doubt, non-public officers, and employees of other state corporations are not to be considered in this regard.
- d) It is not expected that the Ministry would lack suitable senior officers to second to the state corporation on an interim basis. However, in the event that the Ministry is similarly unable to secure competent staff as above, the respective Cabinet Secretary should refer the to this office for guidance.” This particular circular was signed by N.S. Waita, Deputy Head of Staff and Deputy to Head of the Public Service.”

e) The Court has found that the circulars applied and the statutory provision on tenure of 6 months for acting appointments had been breached. The 12th respondent was appointed to act beyond the statutory six months.

10. While making that finding, the Court has seen the circular OP/CAB.9/1 dated 16.05.2025 dated 16.05.2025 signed by the Head of Staff and Head of the Public Service and addressed to the Solicitor General, All Principal Secretaries/Authorised Officers, and, Chairpersons and CEOs of State Corporations. The circular was titled suspension of renewal of contracts for officers serving in state corporations earmarked for reforms. The circular stated that the Cabinet had considered the proposed reforms for state corporations as submitted by the National treasury and sanctioned varied reforms for implementation within the current financial year. Further, as part of the framework established to facilitate the implementation of the reforms, Cabinet had issued a moratorium prohibiting any changes to staff organization, salary structures, or roll out of any new capital projects in the affected state corporations. In that regard and furtherance of the decision by

Cabinet, it was thereby directed that the following measures shall be undertaken in the state corporations identified for reform:

- i) A moratorium was issued on recruitment and renewal of contracts for Chief Executive Officers or any other officers serving on contract terms, at the lapse of their current tenure.
- ii) That any ongoing recruitment processes of staff in any cadre was halted forthwith.
- iii) Any implementation or approval of new human resource policies, personnel emoluments and benefits of any kind, staff organization, salary structure, or roll out of any new capital projects was thereby suspended.

11. The Court has considered the terms of the circular and as submitted for the petitioners, nowhere did the circular suspend the law and policy on acting or substantive appointments. In particular, nowhere did the circular on moratorium state that the statutory provisions on tenure of an acting appointment would change. Further, the circular never suspended the requirement of previous circulars that acting CEOs must possess requisite and prescribed qualifications. The circular also never set aside the

regime in the earlier circulars on default procedures to appoint an acting CEO particularly where a qualified officer serving within the state corporation was unavailable so that the Parent Ministry could be requested to second a qualified officer; and, as well, if the Parent Ministry lacked such qualified officer, the regime to consult the Chief of Staff and Head of the Public Service had not been suspended.

12. The Court therefore finds that the moratorium circular did not aid the respondents' case to justify the appointment of the unqualified 12th respondent as a CEO and for a tenure beyond the prescribed 6 months for acting appointments. Needless to state, it should also be disturbing to observe that while trying to justify the breaches based on the moratorium circular of 16.05.2025 or the Cabinet News of 21.01.2025, the impugned and offensive acting appointment had been initially made on 05.07.2025 and extended on 24.01.2025.

13. The acting appointment has therefore been found to have been unconstitutional, unlawful, and contrary to government policies as found and as was urged, pleaded and submitted for the petitioners.

The 12th respondent lacked qualifications and in particular the 1st respondent's Human Resource Policies and Procedure Manual defined "Senior Management" to mean the CEO and Heads of Directorates yet the 12th respondent was appointed Director and Head of Biosafety Research and Compliance on 21.06.2023. Further, as found by the 15th respondent and which is not rebutted, as at appointment as acting CEO the 12th respondent had served an aggregate of 12.5 years and served as Head of Directorate for a period of one year. The acting appointment had been renewed for the first time on 30.01.2025 and for the 2nd time in July 2025. Throughout the acting appointments as CEO, the 12th respondent did not have the 15 years' relevant experience and of which, 5 years had to be in "senior management" as prescribed in the 1st respondent's career guidelines. Thus sections 34(2) and (3) of the Public Service Commission Act, 2017 was breached and which provide,

"(2) A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.

(3) an officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.”

14. The Court holds that the government is a constitutional and statutory employer and not a mere player in the labour market. Public or state officers or bodies vested with human resource powers and functions in the public and state services exercise and discharge their mandate on behalf of the sovereign, the people, as declared in Articles 1 and 2 of the Constitution of Kenya, 2010. Thus, the powers and functions must be exercised and discharged with utmost fairness, dignity, integrity, rationality, reasonableness in the decision making and in the government employment and labour relations practices’

15. The Court considers that financial constraints and considerations for better economy, science and technology are important factors that can justify government restructuring and reorganization. However, they cannot be invoked so as to adjourn, override or disregard the constitutional and statutory rules, procedures, processes, instruments, standards and principles that apply to

exercise and discharge of the human resource powers and functions in the state and public service.

16. In other words, the Court has the authority to restructure for better economy and delivery and to issue relevant policies in that respects but that authority cannot be invoked to arbitrarily adjourn or cancel public service and state employment and labour relations laws with an impact constituting injustice, want of proportionality, disregard of accrued rights and obligations, violation of the Bill of Rights or generally as to defeat application of relevant provisions of the Constitution and statutes. Accordingly, in exercising the authority to restructure or reorganise and making policies in that regards, the government is expected to uphold public interest as safeguarded in the constitution and the law, as well as, recognise and respect the established rights and the legitimate expectations of the employees or potential employees.

17. In **Dharam Singh & Other –Versus- State of U.P & Another Civil Appeal No. 8558 of 2018** the Supreme Court of India held that when public institutions depend, day after day, on the same hands to perform permanent tasks, equity demands that those tasks

are placed on sanctioned posts, and those workers are treated with fairness and dignity. The Court held that financial considerations and the restructuring, in the subsequent intervening period, could not operate to defeat the accrued rights of low cadre government employees who as daily wagers for a long time had by that misclassification deprived the workers of the dignity, security, and benefits that regular employees are entitled to, despite performing identical tasks. Justice Vikram Nath stated and held as follows,

“17. Before concluding, we think it necessary to recall that the State (here referring to both the Union and the State governments) is not a mere market participant but a constitutional employer. It cannot balance budgets on the backs of those who perform the most basic and recurring public functions. Where work recurs day after day and year after year, the establishment must reflect that reality in its sanctioned strength and engagement practices. The long-term extraction of regular labour under temporary labels corrodes confidence in public administration and offends the promise of equal protection. Financial stringency certainly has a

place in public policy, but it is not a talisman that overrides fairness, reason and the duty to organise work on lawful lines.

18. Moreover, it must necessarily be noted that “ad-hocism” thrives where administration is opaque. The State Departments must keep and produce accurate establishment registers, muster rolls and outsourcing arrangements, and they must explain, with evidence, why they prefer precarious engagement over sanctioned posts where the work is perennial. If “constraint” is invoked, the record should show what alternatives were considered, why similarly placed workers were treated differently, and how the chosen course aligns with [Articles 14, 16](#) and [21](#) of the Constitution of India. Sensitivity to the human consequences of prolonged insecurity is not sentimentality. It is a constitutional discipline that should inform every decision affecting those who keep public offices running.”

18. The Court therefore considers that restructuring in the instant case cannot be the reason why the law on acting and substantive appointments is adjourned. It is also the Court’s considered view that endless acting appointment of a CEO in circumstances that it

is prohibited by the law not only undermines the rights, dignity and stability of the person appointed to so act but also, is seriously prejudicial to the proper delivery of public service in absence of the substantive office holder.

19. To answer the 3rd issue, the Court finds that the 15th respondent's advisory that the 12th respondent performs the duties of the higher office of CEO despite not possessing the prescribed qualifications as already found was an unconstitutional and unlawful decision as was as well contrary to the prevailing government policies per the cited circulars on acting appointments of CEOs of state corporations. The 15th respondent in making that decision relied upon Clause C.15(1) of the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service which states,

“C.15(1) When an officer is called upon to perform duties of a higher post but does not possess the necessary qualifications for appointment to that post, he shall be paid a special duty allowance at the rate of fifteen percent (15%) of the officer's basic salary.

The payment of special duty allowance will be subject to

recommendations of the Human Resource Management Advisory Committee and approval by the Authorised Officer.” The Court specifically finds as follows:

a) Considering of that decision on performance of by the unqualified 12th respondent of the higher duties of CEO was unconstitutional as it was not anchored upon any known law or constitutional provision as was contrary to the statutory regime in section 34(2) and (3) of the Public Service Commission Act, 2017. It appears that it was not open for the 15th respondent to pass such policy provision that lacked basis in law and was ultra vires the express statutory provision and design whereby only an acting officer appointed in accordance with the statutory provisions could perform duties in higher or other office for which one had not been appointed to substantively. Section 34 of the Public Service Commission Act, 2017 provides thus:

(1) Acting appointments shall be—

(a) made by the lawful appointing authority; and,

(b) subject to the prescribed regulations and procedures which apply to appointments.

(2)A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.

(3)An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.

(4)A public officer may be assigned to perform duties vested in another public officer during a temporary absence of the other public officer.

(5)An acting appointment under subsection (4) shall—

(a)be in favour of a public officer who is duly qualified and competent to perform the duty; and,

(b)not undermine the expeditious appointment or deployment of a competent person to the public office concerned.

(6)The Commission shall, whenever it comes to its attention that an authorised officer has purportedly made an acting

appointment or assignment, in contravention of the provisions of this section, take corrective action.

b) Section 2 of the Act states that “**acting appointment**” means temporary conferment upon a public officer, by the Commission or the relevant appointing authority, the power to perform duties of a public office other than the office the officer is substantively appointed to hold, while the public officer continues to hold the substantive appointment.

c) The foregoing being the express statutory provisions, the Court finds the design of Clause C.15 (1) of the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service is ultra vires and calculated to directly defeat the express provisions of the statute and therefore the constitution as Manual provision falls for expunging and amendment to that extent it is unlawful and unconstitutional as found. In making that finding, the Court has considered section 92(1) of the Act which provides thus, “(1)The Commission may make

regulations prescribing anything required by this Act to be prescribed generally for the better carrying into effect the provisions of this Act.” The Court finds that there is no provision of the Act which requires the 15th respondent or any other authority to require unqualified public officers without due qualifications for a higher office to perform functions of such higher office and be paid for such untenable and purported performance of duty. Further section 4 of the Act provides on the guiding principles provides thus, “The Commission shall in fulfilling its mandate, be guided by the national values and principles of governance in Article 10 of the Constitution and the values and principles of public service in Article 232 of the Constitution.” Article 232 (1) (h) provides for fair competition and merit as the basis of appointments and promotions. Article 249 (2) of the Constitution also provides thus, “(2) The commissions and the holders of independent offices— (a) are subject only to this Constitution and the law; and, (b) are independent and not subject to direction or

control by any person or authority.” The Court has found that in passing or issuing and publishing and then purporting to implement and apply Clause C.15 (1) of the Public Service Commission Human Resource Policies and Procedures Manual for the Public Service as done in the instant case, the 15th respondent was not keeping to the express statutory and constitutional provisions and the clause is liable to being struck out from the Manual as found as unlawful and unconstitutional

d) It was urged and submitted for the 15th respondent that its decision for the 12th respondent to perform the higher functions while he had no due qualifications amounted to a new cause of action outside the scope of the instant petition. However, the decision letter ref. no. PSC/LEG/019/25/092 (19) dated 18.09.2025 and as submitted for the 15th respondent, the decision was pursuant to the Court’s order herein and matters about satisfaction of the order can only properly be entertained and determined in the instant suit and filing a separate suit in that respect would obviously amount

to an abuse of Court process or such new suit would be trapped by the principle of *res judicata*.

- e) While the Manual provisions would apply to the whole public service within the 15th respondent's constitutional mandate as was held by the Court of Appeal in **National Management Authority –Versus- Wabwoto & 3 others; Law Society of Kenya & 2 others (Interested Party) [2025] KECA 276 (KLR)**, in the instant case , the issue is not whether the Manual provision could apply on account of the 15th respondent's authority to issue the Manual, but, whether the clause in issue was inherently lawful and constitutional and whether it was capable of being applied lawfully and constitutionally in the circumstances of this case. The Court has found it was inherently unconstitutional and unlawful in so far as it prescribed that unqualified persons could be paid an allowance for performing duties of a higher office, and, in the circumstances that they did not hold the higher office either in acting or substantive capacity.

f) The Court further finds that there was no way the 12th respondent could perform duties of the higher office of CEO without holding that office either by way of an acting or substantive appointment. It is that the design of the Clause is imaginary as is unconceivable that something can stand on nothingness. Even vacuums would have walls to define their province. Thus section 43 of the Interpretation and General Provisions Act, Cap 2 provides, “Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.” Section 45 of the Act thereof states, “In this Act and in any other written law, instrument, warrant or process of any kind, a reference to a person holding an office shall include a reference to any person for the time being lawfully discharging the functions of that office.” The Court has found that the 12th respondent could not lawfully perform the higher duties of the CEO for want of due qualifications and as was prescribed in the

statute. Further, he could not validly and lawfully perform the duties of the CEO unless he had been lawfully appointed to act or substantively hold the office of CEO. The Biosafety Act Cap 320 creates the office of CEO in section 12 to hold office for four years renewable once subject to satisfactory performance as evaluated by the 2nd respondent. The functions of the CEO are provided for in section 13 of the Act. Accordingly, the provisions of the Interpretation and General Provisions Act as cited fully applied. Needless to state, the matters in dispute and the emerging situations about the office of the CEO were elaborately covered and expressly provided for in the cited statutory provisions so that there was no lacuna for the 15th respondent to decide imposition of performance of CEO's duties by the 12th respondent as was purportedly urged in reliance upon regulation 80 of the Public Service Commission Regulations which states, "Any matter not addressed by these regulations shall be dealt with in accordance with such special or general instructions issued by the Commission." The matter being

expressly provided for in the statutes and the constitution, the regulation cannot be said to have been validly invoked because in the circumstances, it amounted to an *ultra vires* application as found herein.

20. To answer the **4th issue**, the Court returns that the petitioners have not established the alleged conflict of interest on account that the 12th respondent who was appointed to act was a co-author and student of the chairperson of the 2nd respondent. As submitted for the respondents, the chairman, the 3rd respondent was not the only person and member of the Board involved in making the impugned acting appointment. The Court also considers that relationships arising solely on account of professional or academic transactions and relationships do not constitute a conflict of interest. The Court considers that the Chairman as a teacher has always held a higher relational rank and as part of the decision maker in the instant case he could not be impaired because his former student, the 12th respondent, in that appointment process held the inferior relational position. The appointment decision was

also outside academic undertaking so that the alleged conflict, in the opinion of the Court, was a remote lamentation on the part of the petitioners. It also appears to the Court that in view of the findings already made herein, the determination herein does not in any event turn upon the petitioners' lamentation about the alleged conflict of interest.

21. Section 12 of the Public Officer Ethics Act, 2003 (in force at the material time but now repealed by the Conflict of Interest Act, 2025) provided thus,

“12. (1) A public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties.

(2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties.

(3) A public officer whose personal interests conflict with his official duties shall-

(a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and,

(b) refrain from participating in any deliberations with respect to the matter.

(4) Notwithstanding any directions to the contrary under subsection (3) (a), a public officer shall not award a contract, or influence the award of a contract, to-

(a) himself;

(b) a spouse or relative;

(c) a business associate; or,

(d) a corporation, partnership or other body in which the officer has an interest.

(5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section. (6) In this section, “personal interest”

includes the interest of a spouse, relative or business associate.”

22. Pursuant to subsection 12 (5) above, regulation 11 of the Public Officer Ethics Regulations, 2003, (and still in force) provides thus,

“11.The personal interests of a public officer do not conflict with the official duties with respect to a matter, for purposes of section 12 of the Act, if the following are satisfied –

a) the personal interests of the public officer are not specific to the public officer but arise from the public officer being a member of a class of persons who all have personal interests in the matter;

b) it would be impractical for the public officer and all other public officers who have personal interests in the matter to refrain from participating in deliberations with respect to the matter; and,

c) either the personal interests of the public officer are obvious or the public officer declares his personal interests to his superior or other appropriate body or person.”

23. The Court returns that the petitioners have not identified the 3rd respondent's personal that was in conflict with the making of the acting appointment or extending the acting appointment and now as impugned herein. It would appear that within section 12 of the Act the petitioners has failed to establish the conflict of interest. It also appears that the co-authorship and teacher student relationship were obvious public information and not requiring declaration or being obvious, id not constitute conflict of interest as alleged. It is not shown that the 3rd respondent had any specific or general private interest in the making of the impugned acting appointment and the extension thereof.

24. To answer the 5th **issue**, the Court finds that the dispute herein was not moot but was alive and kicking especially in view of the earlier findings in this judgment. It was submitted that after the investigations pursuant to the court order herein, the 15th respondent had made findings, issued a rectification or correction decision and thereby rendered the dispute moot as overtaken and stale or late as falling for determination by the

Court. However the Court has found that the 15th respondent while purporting to determine the dispute pursuant to the satisfaction of the Court order made in the petition, the dispute did not only mutate within the continuum of the initial cause of action but also remained alive for determination.

25. The Court further considers that the dispute was not merely about the impugned appointment of the 12th respondent as acting CEO. The dispute was as well about the constitutional, statutory and government policy swirling imperatives. It would amount to a serious misdirection for the Court to fail to fully hear and determine the live issues in the instant petition and whose outcome specifically imposes a profound impact on the parties and generally to the future making of human resource decisions, policies and practices in the state and public services.

26. The **6th issue** is on remedies. The Court returns as follows:
a) The Court finds that the petitioners are entitled to the declaration that the appointment of Mr. Nehemiah Ngetich as Acting Chief Executive Officer of the National Biosafety

Authority is unconstitutional, illegal, and void *ab initio* as found herein.

b) The petitioners are entitled to an Order of *Certiorari* quashing the appointment of Mr. Nehemiah Ngetich as Acting Chief Executive Officer. In any event, the 15th respondent had found as much.

c) The petitioners prayed for a declaration that the 2nd to 13th respondents failed in their constitutional and statutory duties by facilitating and/or failing to prevent the irregular appointment.

It appears that the two respondents acted throughout in good faith. No bad faith has been shown as against the cited respondents. Section 16 of the Biosafety Act provides thus,

“16. Protection from personal liability

No matter or thing done by a member of the Board or by any officer, member of staff, or agent of the Authority shall, if the matter or thing is done *bona fide* for executing the functions, powers or duties of the Authority under this Act, render the member, officer, employee or agent or any person acting on their directions personally liable to any action, claim or demand

whatsoever.” The petitioners have not shown breach of the section and the prayer is declined.

- d) The petitioners are entitled to an order directing the 1st respondent to commence a fresh, transparent, merit-based appointment process for the office of Chief Executive Officer in accordance with the law.
- e) By reason of the cited section 16 of the Biosafety Act, the petitioners are not entitled to an Order directing the recovery of all public funds paid to Mr. Nehemiah Ngetich in salaries and allowances irregularly drawn in connection with his unlawful appointment. In making that finding, it appears to the Court that he was appointed to act, albeit unlawfully as it has turned out, and, he worked as duly appointed. It is not shown that he was not bona fides in his actions and work. The prayer will be declined.
- f) The Court has found no conflict of interest has been established and the petitioners are not entitled to a declaration that Prof. Jenesio Kinyamario acted in conflict of interest and breached his fiduciary duty.

g) The petitioners have not shown that the 14th and 15th respondents are directly vested with the statutory or contractual power of disciplinary control over the 2nd to 13th respondents and the petitioners are not entitled to an order directing the 14th and 15th respondents to initiate disciplinary and administrative action against the 2nd to 13th respondents for breach of public trust and statutory violations. In any event such compelling order would only issue if it is shown that the 14th and 15th respondents are vested with such public or statutory duty and despite demand, they have failed to act as expected.

h) This being a public interest litigation, each party to bear own costs.

In conclusion judgment is hereby entered for the respondents for orders:

1) The declaration that the impugned appointment of Mr. Nehemiah Ngetich as Acting Chief Executive Officer of the National Biosafety Authority is unconstitutional, illegal, and void *ab initio* as found herein.

- 2) The judicial review Order of *Certiorari* hereby issued quashing the impugned appointment of Mr. Nehemiah Ngetich as Acting Chief Executive Officer as challenged herein.
- 3) The order hereby issued directing the 1st respondent to commence forthwith within not more than 15 days from today a fresh, open, transparent, merit-based appointment process for the office of Chief Executive Officer in accordance with the law and in strict compliance with the relevant applicable constitutional and statutory provisions.
- 4) Each party to bear own costs of the petition.

**Signed, dated and delivered by video-link and in court at Nairobi
this Wednesday 17th December, 2025.**

BYRAM ONGAYA, PRINCIPAL JUDGE