



**Mwalah v Kenya Literature Bureau & 6 others; Public Service Commission
(Interested Party) (Employment and Labour Relations Petition
E063 of 2025) [2025] KEELRC 2106 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2106 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E063 OF 2025**

**HS WASILWA, J
JULY 17, 2025**

BETWEEN

MR. ALEX VIHASI MWALAH PETITIONER

AND

KENYA LITERATURE BUREAU 1ST RESPONDENT

**THE BOARD OF MANAGEMENT, KENYA LITERATURE
BUREAU 2ND RESPONDENT**

**PRINCIPAL SECRETARY, STATE DEPARTMENT FOR BASIC
EDUCATION 3RD RESPONDENT**

THE CABINET SECRETARY, MINISTRY OF EDUCATION . 4TH RESPONDENT

CHIEF OF STAFF & HEAD OF PUBLIC SERVICE 5TH RESPONDENT

MR. PAUL KIBET 6TH RESPONDENT

THE HON. ATTORNEY GENERAL 7TH RESPONDENT

AND

THE PUBLIC SERVICE COMMISSION INTERESTED PARTY

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 14th April 2025 seeking orders That: -
 1. Spent.



2. pending the hearing and determination of this application inter partes, the Honorable Court be pleased to issue an order suspending and/or staying the appointment of the 6th Respondent herein as Acting Managing Director of Kenya Literature Bureau.
3. pending the hearing and determination of this application inter partes, the Honorable Court be pleased to issue an order of temporary injunction directed at the 6th Respondent herein, Mr. Paul Kibet, restraining him from in any manner whatsoever carrying and/or continuing to carry out and/or performing any duties and/or functions of the office of the Acting Managing Director of Kenya Literature Bureau.
4. pending hearing and determination of this Application, the Court orders the 1st Respondent in consultation with the 4th Respondent to appoint an Acting Managing Director from among the Directors of the Kenya Literature Bureau who qualify for the position.
5. pending the hearing and determination of the Petition herein, the Honorable Court be pleased to issue an order of temporary injunction directed at the 6th Respondent herein, MR. PAUL KIBET, restraining him from in any manner whatsoever carrying and/or continuing to carry out and/or performing any duties and/or functions of the office of the Acting Managing Director of Kenya Literature Bureau.
6. the costs of this application be provided for.
7. any other order that this court deems fit to grant

Petitioner/Applicant's Case

2. The Applicant avers that the 1st Respondent issued a memo dated 20th 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 21st March 2025 to 21st September 2025.
3. It is the Applicant's case that the 6th Respondent did not qualify for appointment as Acting Managing Director of the 1st 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 Applicant avers that pursuant to Circular Ref. No. OP/CAB.9/1A by the Chief of Staff and Head of Public Service dated 1st February 2023, non-public officers are not eligible for appointment. The 6th 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 of 60 years, therefore, he was not eligible for secondment and/or appointment in an acting capacity.
5. It is the Applicant's case that despite this, the 2nd Respondent went ahead and confirmed the 6th Respondent's appointment who is a retiree who never worked for the 1st Respondent.

1st and 2nd Respondents' Case

6. In response to the Application, the 1st and 2nd Respondent filed grounds of opposition dated 23rd April 2025 on grounds:
 1. That the Notice of Motion is fundamentally incompetent, improperly framed, and constitutes an abuse of this Honorable Court's process, as it is premised on a misinterpretation of both law and fact.



2. That the orders sought are final in nature and possess significant implications; they should not be granted at the interim stage without a full hearing of the Petition, allowing all parties to be duly heard.
3. That once the Orders sought in the Notice of Motion are granted, there will be no substantive issues left for determination in the Petition.
4. That the Notice of Motion Application does not satisfy the triple requirements for grant of Interlocutory injunction as in with Court of Appeal decision in *Nguruman Limited Vs Jan Bonde Nielson & 2 Others* [2014] eKLR, where the Court of Appeal expounded on this when it held that; “In an interlocutory injunction application, the applicant has to satisfy the triple requirements to; establishes his case only at a prima facie level, demonstrates irreparable injury if a temporary injunction is not granted, and ally any doubts as to [b] by showing that the balance of convenience is in his favor.”
5. That these are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.
6. That the Notice of Motion Application does not meet the requirements for grant of a temporary injunction as laid down in the celebrated case of *Giella v Cassman Brown & Co. Ltd* [1973] JEA 358.

“First the applicant must show a prima facie case with a probability of success at the trial. Secondly, an interlocutory injunction will not be granted unless the applicant would suffer an injury that cannot be compensated in damages. Thirdly, if the court is in doubt, it should decide the application on a balance of convenience. It must be appreciated that an interlocutory injunction is a discretionary equitable remedy and accordingly, the same will not be granted where it is shown that the applicant’s conduct with respect to matters pertinent to the suit does not meet the approval of a court of equity.”
7. That In the High Court of Kenya in the case of *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol. 1 EA 86 where court stated that if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.
8. That In the Court of Appeal decision in *Mbuthia v Jimba Credit Corporation Ltd* [1988] KLR 1, wherein the court stated that it is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party’s cases. The strength of the probability depends on the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought.
9. That similarly, the Orders sought in the Application are final, weighty and contested and we therefore pray that the same be determined and made after hearing of the Petition.



10. That there exists no reasonable or justifiable basis for this Honorable Court to grant the orders sought by the Applicant.
 11. That the application is poorly conceived, arbitrary, and constitutes an abuse of the court process and ought to be dismissed with costs to the Respondents.
 12. That the application is frivolous, vexatious, and an unreasonable invocation of the court's authority.
7. In opposition to the application, the Respondents further filed a replying affidavit dated 30th April 2025 sworn by Dr. Rispah Wepukhulu, the 2nd Respondent's Chairperson.
 8. The Respondents aver that the orders sought are final in nature and will conclude the petition before hearing hence the court should disallow the same.
 9. The Respondents aver that injuncting the 6th Respondent from executing his lawful duties will bring the 1st Respondent to a halt and will effect the basic education calendar across the country for the reason that the Bureau is the government printing press for basic education materials. Additionally, the Bureau cannot engage externally with suppliers, stakeholders or pay salaries to employees or act in any manner as required by the law.
 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 2nd Respondent consulted the 3rd and 4th Respondents regarding the position. It was agreed that due to the divisions in the 1st Respondent's management, the best option would be to appoint a neutral person, in an acting position, to manage the transitional arrangements of the 1st Respondent.
 11. The Respondents aver that the Board held a special meeting on 20th March 2025 to discuss the transitional arrangements and succession plans at Bureau. During the meeting, the 4th Respondent's letter dated 17th March 2025 appointing the 6th Respondent as the 1st Respondent's Acting Managing Director for a period of six months and the Board unanimously resolved to adopt the appointment as provided under Section 8 of the [Kenya Literature Bureau Act](#).
 12. The Respondents aver that vide a letter dated 11th June 2024, the Interested Party extended the 6th Respondent's contract of employment beyond the mandatory retirement age of 60 years. Effectively, the 6th Respondent is a public officer and is eligible for appointment in the capacity he was appointed.

2nd, 3rd and 4th Respondent's Case

13. In opposition to the application, the Respondents' filed grounds of opposition dated 30th April 2025 on the following grounds THAT:
 1. this Honourable Court is devoid of jurisdiction to hear and determine the suit herein as the Petitioner and the Respondents do not have an employer-employee relationship.
 2. it is trite law that the Jurisdiction of this Honourable Court, by virtue of Article 165 of [the Constitution](#) of Kenya, 2010 as read with Section 12 of the [Employment and Labour Relations Court Act](#), is limited to hearing and determining all disputes, arising out of employer-employee relationships as well as disputes between employers and Trade Unions.
 3. on the basis of the foregoing, the Petitioner, therefore, lacks the requisite locus standi to institute the suit herein citing constitutional violations of an employer, being the Board of



Management of the 1st Respondent and the employee as Mr. Paul Kibet, in his capacity as a bystander/third party to the same.

4. further to the above, the Petitioner has not demonstrated with precision before this Honourable Court how his fundamental rights and freedoms under *the Constitution* have been violated or are threatened neither has he tethered any evidence to prove the alleged violations contrary to the principles espoused in the locus classicus decision of Anarita Karimi Njeru v Republic [1979] KECA 12 [KLR].

In the alternative, and without prejudice to the foregoing, That:

1. the Application does not meet the set criteria for the orders sought and amounts to an abuse of the court process.
2. the Petitioner/Applicant has not demonstrated any contraventions and violations of *the Constitution* and the irregularity alleged in the appointment of the 6th Respondent as Acting Managing Director of the 1st Respondent.
3. contrary to the allegations by the Petitioner, one can serve as a public officer beyond the mandatory retirement age pursuant to Section 80 [2] of the *Public Service Commission Act*.
4. the 6th Respondent is, indeed, a public officer pursuant to Article 260 of *the Constitution* and Section 80 [2] of the *Public Service Commission Act*, since he was appointed as a Director of Education in the Ministry of Education [State Department of Basic Education] on Local Agreement Terms on 11th June, 2024 for a period of two [2] years.
5. Section 34 of the *Public Service Commission Act* provides for criteria to be met for appointments made on acting capacity.
6. in the said provision, 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.
7. Section 34 [1] of the *Public Service Commission Act*, as quoted above, confirms that the appointment of acting managing directors shall be made by the lawful appointing authority, which is the State Corporations' Boards of Management. For the avoidance of doubt, Section 5 [3] of the *State Corporations Act* asserts that the State Corporations by themselves, through their Boards shall appoint/employ the Chief Executive Officers/Managing Directors of the State Corporations.
8. further, according to Attachment [I] of the Mwongozo Code of Governance for State Corporations [Executive *Order No. 7 of 2015*] the appointing authority of Chief Executive Officers/Managing Directors shall be the respective Boards of the State Corporations.
9. moreover, the Chief of Staff and Head of Public Service under Circular Ref No. OP/CAB.9/1A dated 1st February, 2023, as relied upon by the Petitioner at Ground 3 of their Notice of Motion Application, provides for those circumstances under which the Cabinet Secretary upon being consulted by the Chairperson of the respective Board, can select a suitable public officer from the line Ministry, who shall be seconded, and appointed by the Board as an acting Chief Executive Officer/ Managing Director.
10. the 6th Respondent having met the requisite qualifications as per the above provisions was duly appointed by the 2nd Respondent in consultation with the 4th Respondent as the Acting



Managing Director of 1st Respondent with effect from 21st March, 2025 for a period of six [6] months.

11. further, the application does not satisfy the three main principles for the granting of the temporary injunction seeking to stay the appointment of the 6th Respondent as the Acting Managing Director of the 1st Respondent
 12. the Application discloses no prima facie case since the 6th Respondent, being qualified and continuing in service as a public officer pursuant to the Local Agreement Terms of 11th June, 2024, was duly appointed to the position of the Acting Managing Director of the 1st Respondent as per the provisions of Section 34 of the *Public Service Commission Act*, Section 5[3] of the *State Corporations Act*, the Mwongozo Code of Governance for State Corporations [Executive *Order No. 7 of 2015*] and the Chief of Staff and Head of Public Service Circular Ref No. OP/CAB.9.1A.
 13. further, the Petitioner will not suffer any irreparable injury not capable of being remedied by an award of damages if the Orders sought herein are not granted. Further, the Respondents, particularly the 1st and 2nd Respondents as well as the Ministry of Education stand to suffer more herein, should this Honourable Court grant the injunctive Orders sought herein than any inconvenience, if at all, that would be occasioned upon the Petitioner [who is not even an employee of any of the Respondents] if the injunctive Orders are not granted.
 14. moreover, the orders sought in the application are final in nature and have serious prejudicial consequences to the 2nd, 3rd and 4th Respondents hence should only be granted upon hearing the Petition on its merit.
14. The Respondents further filed a replying affidavit dated 14th May 2025, sworn by Amb. [Prof.] Julius K. Bitok, Ph.D, CBS, MBS, the 3rd Respondent herein; which reiterated the content of their grounds of opposition.

6th Respondent's Case

15. In opposition to the application, the 6th Respondent filed a replying affidavit dated 23rd April 2025.
16. It is the 6th Respondent's case that he is a civil servant under the employment of the Public Service Commission [PSC] as evidenced by the Interested Party's letter dated 5th June 2024 to the 3rd Respondent that conveyed the information that he has been appointed on local agreement terms for 2 years upon attainment of the mandatory retirement age of 60 years. Subsequently, the 3rd Respondent formally appointed him on local agreement terms vide a letter dated 11th June 2024.
17. The 6th Respondent avers that his appointment as the Acting Managing Director of 1st Respondent vide a letter dated 17th March 2025 was lawful and consistent with Section 8 of the Kenya Literature Bureau [KLB] Act which enables the Cabinet Secretary [CS] to appoint a Managing Director.
18. The 6th Respondent avers that the Applicant's prayer that this court orders for the appointment of someone working at the 1st Respondent would amount to taking away the 3rd Respondent's discretion given by law under Section 8 of the KLB Act, the PSC Regulations and the Career Guidelines. These legal provisions, grant the CS powers to appoint anyone the whole Ministry of Education, including its directors, departments and institutions.



19. It is the 6th Respondent's case that he is eligible to be appointed as Managing Director in any capacity at the CS's discretion. He is qualified and suitable, being an employee of the Ministry of Education and his contract as a civil servant was extended up to 6th June 2026.
20. The 6th Respondent avers that the CS exercised his discretion to appoint him within the law and this cannot be impeached and has been challenged solely on the mistaken premise he is not a civil servant.
21. The 6th Respondent avers that in *Okiya Omtatah v Joseph Kinyua & another* [2018] KEELRC 1657 [KLR] the court ruled that since MDs/CEOs of parastatals like the 1st Respondent are hired on fixed contract terms, they cannot be subject to a mandatory retirement age as follows: "Whereas the Public Service Act talks of mandatory retirement age, the setting thereof has been left to circulars issued from time to time by the Head of Public Service. The court however notes that CEOs of State Corporations are usually hired on fixed term contracts and in some cases have been hired when they are past the mandatory retirement age for public servants. The fact that they are hired on local service agreement and for a fixed period without being pensionable therefore makes it logical that they cannot be subject to the mandatory retirement age."
22. The 6th Respondent avers that the Applicant has not demonstrated any suffering or prejudice if the orders sought are not granted.
23. Further, the Applicant failed to demonstrate any direct legal interest in the subject matter of the petition hence he lacks locus standi to institute this suit.
24. The 6th Respondent reiterates that the extension of his term in civil service was done within the law; it was not and is not challenged; and it is not on trial or in issue elsewhere.

Interested Party's Case

25. In opposition to the application, the Interested Party filed grounds of opposition dated 23rd April 2025 on the following grounds THAT:
 1. the Public Service Commission is established under Article 233 of *the Constitution* and its functions and powers are provided for in Article 234[2] and [5] of *the Constitution*.
 2. pursuant to Article 234[2][j] as read with Article 252[1][d] of *the Constitution*, Parliament gave effect to the Commission's constitutional mandate by enacting the *Public Service Commission Act*, No.10 of 2017.
 3. State Corporations being part of the public service are regulated by the Public Service Commission through the development and approval of their human resource instruments and they have to be managed while observing the principles of the public service under Article 232 of *the Constitution*.
 4. Section 34 of the *Public Service Commission Act* provides that:

Acting appointments

 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.
 5. the appointment of the 6th Respondent as the Acting Managing Director of the 1st Respondent is unlawful as he is not an officer serving at the 1st 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 [Interested Party] [Petition E134 & E124 of 2023 [Consolidated]] [2023] KEELRC 3222 [KLR] where the Honourable Court found and made a declaration that: “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.”
 6. 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.
 7. the 6th Respondent having retired from the public service, 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.
 8. the appointment of the 6th Respondent a person who has already retired from the public service as the Acting Managing Director of the 1st Respondent 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.
 9. the notice of motion application dated 14th April, 2025 should be allowed to allow the Public Service Commission to take corrective action pursuant to Section 34 [6] of the *Public Service Commission Act*.



26. The Interested Party further filed a replying affidavit dated 6th May 2025 sworn by its Secretary/CEO which reiterated the contents of its grounds of opposition.

Applicant Submissions

27. The Applicant relied on the guiding principles for the grant of a temporary injunction set out in *Giella v Cassman Brown* [1973] EA 358 and reiterated in *Nguruman Limited versus Jan Bonde Nielsen & 2 others* [CA No.77 of 2012](#) [2014] eKLR where the Court of Appeal held that: “In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a), establishes his case only at a prima facie level, b) demonstrates irreparable injury if a temporary injunction is not granted and c) ally any doubts as to [b] by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”
28. On establishment of a prima facie case, the Applicant submitted that the 6th Respondent does not qualify for appointment as Acting Managing Director of Kenya Literature Bureau in accordance with The Career Guidelines 2018, the PSC Act and the PSC Regulations on how to carry out acting position appointments in the public service. The 6th Respondent was not a public officer at the time of appointment as he had retired from the public service on or around March, 2024, having attained the mandatory retirement age of sixty years, therefore, not eligible for secondment and/or appointment in an acting capacity.
29. The Applicant submitted that by confirming the 6th Respondent’s appointment, the 2nd Respondent violated Regulation 70[1][a] of the PSC Regulations read together with Section 80 [1] of the PSC Act which provides that where a public officer has attained the mandatory retirement age of sixty years, the officer shall retire from service effective from the date of attaining mandatory retirement age. Additionally, Section 34 of the PSC Act provides that an acting appointment shall be made in favour of a public officer who is duly qualified and competent to perform the duty.
30. The Applicant further submitted that the irregular and unlawful appointment of the 6th Respondent amounts to a contravention of the national values and principles of governance and the guiding principles of leadership and integrity enshrined under Article 10 and 73 of [the Constitution](#).
31. It is the Applicant’s submission that he has demonstrated a prima facie case, as it is evident that the appointment of the 6th Respondent is in breach of the provisions of [the Constitution](#), the [Public Service Commission Act](#), the Public Service Commission Regulations and the Career Progression Guidelines, 2018.
32. On irreparable injury, it is the Applicant’s submission that allowing the 6th Respondent to continue holding office as the 1st Respondent’s Acting Managing Director will be similar to allowing and/or excusing a blatant violation of [the Constitution](#) of Kenya. Constitutional contraventions are irreparable and this court is obligated to respect, uphold and defend [the Constitution](#).
33. On balance of convenience, the Applicant submitted that to cure the mischief and/or inconvenience that would be caused by court granting prayers [b], [c] and [e] , he has requested the court through prayer [d] to direct the 1st Respondent in consultation with the 4th Respondent to appoint an Acting Managing Director among the 1st Respondent’s directors who qualify for the position. Therefore, the Respondents will not suffer any harm if the prayers sought herein are granted, therefore, the balance of convenience tilts in favour of the Applicant.



34. The Applicants submitted that courts have in various occasions made orders to defend *the constitution* and to cure such mischief. He relied in the case of *Barasa v Public Service Board County Government of Trans-Nzoia & 4 others* [2024] KEELRC 13399 [KLR] whereby the court issued orders directing the Public Service Commission to immediately send a suitable officer to fill the position of The Secretary, County Public Service Board, Trans-Nzoia County in acting capacity and to take steps in conjunction with the 1st, 2nd, 4th and 5th Respondents to substantively fill the position within the next 6 months.

1st and 2nd Respondent's Submissions

35. The Respondents submitted on four issues: whether the Petitioner has established a prima facie case with a likelihood of success; whether the 6th Respondent was a public officer at the time of appointment; whether the appointment of the 6th Respondent was improper; and whether it is in the public interest to grant the orders sought.
36. On the first issue, the Respondents submitted that the application has not established a prima facie case to warrant issuing of interim orders as elaborated in the Court of Appeal decision in *Nguruman Limited Vs Jan Bonde Nielson & 2 Others* [supra].
37. It is the Respondents' case that party seeking an interlocutory injunction must establish a prima facie case, demonstrate irreparable harm, and show that the balance of convenience favours the issuance of the injunction. Additionally, the applicant must show that they will suffer irreparable harm if the injunction is not granted; this harm must be of a nature that cannot be adequately compensated by monetary damages or other remedies after the fact. Therefore, the applicant ought to articulate the specific ways in which they will be adversely affected, proving that the injury inflicted would be profound and lasting, rather than minor or temporary.
38. The Respondents further submitted that balance of convenience involves analysis of the circumstances surrounding the case; the court will weigh the respective harms and consider which party stands to suffer more if the injunction is granted or denied. In essence, the court seeks to determine which party is more likely to endure undue hardship without the injunction, thereby guiding its decision in line with the interests of justice.
39. It is the Respondents' submission that the Petitioner has not demonstrated a prima facie case with a probability of success that warrants interim orders. They therefore contend that the application should be dismissed since adhering to this legal standard is crucial for upholding the integrity of the judicial process.
40. On the second issue, the Respondents submitted that Section 2 of the *Public Officer Ethics Act* defines a public officer to mean any officer, employee or member, including an unpaid, part-time or temporary office, employee or member of any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law. Further, section 80[2] of the PSC Act provides that the Commission or other appointing authority may engage the public officer for service after the retirement upon such terms of contract as may be agreed if the public officer possesses rare knowledge, skills and competencies for the time being required in the service.
41. It is the Respondents' submission that by virtue of an extension of the terms of contract by the Public Service Commission beyond the mandatory age of retirement, this had the effect of rendering the 6th Respondent a public officer.



42. On the third issue, the Respondents submitted that pursuant to the Circular Ref No. OP/CAB.9/1A dated 1st February, 2023, 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 ministry staff who shall be seconded and appointed by the Board.
43. It is the Respondents' submission that the 2nd Respondent's Board Chairperson consulted with the 3rd and 4th Respondent as regards the vacant position of the Managing Director of the 1st Respondent. A resolution was thereupon met that owing to the divisions in the management of the 1st Respondent, the most viable option would be to appoint a neutral person in acting capacity to manage the transitional arrangements of the 1st Respondent.
44. The Respondents submitted that the Board subsequently resolved unanimously to adopt the appointment of the 6th Respondent as the acting managing director for a period of six months. The Petitioner cannot therefore allege that the process was improper by dint of an illegality.
45. On the final issue, the Respondents submitted that it is not in the public interest to grant the orders sought as the nature of the orders are of a final nature thus would render the hearing of the main suit nugatory.

2nd, 3rd and 4th Respondent's Submissions

46. The Respondents submitted on two issues: whether this court has jurisdiction to hear and determine this Application and the Petition in general; and whether the Petitioner/Applicant is entitled to the conservatory orders sought.
47. On the first issue, the Respondents submitted that it is a well settled position in law that a court of law can only exercise jurisdiction to the extent given to it by law and that once the court establishes that it lacks jurisdiction to handle a matter, it has to down its tools and proceed no more as articulated by Justice Nyarangi in the locus classicus case of Owners of the Motor Vessel "Lillian S" v Caltex Oil [Kenya] Ltd 11989] KLR 1.
48. The Respondents submitted that this court lacks jurisdiction to entertain this petition and application as it draws its jurisdiction from Article 162 [2] of *the Constitution* as read together with Section 12 [1] of the *Employment and Labour Relations Court Act*. These provisions make it trite 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.
49. The Respondents submitted that the matter herein revolves around the appointment of the 6th Respondent as the 1st Respondent's Managing Director. The same does not raise reference or capacity of an employer-employee relationship, and as a result, this court is not the right forum to address them.
50. The Respondents submitted that the Petitioner lacks the requisite locus standi to institute the suit herein citing constitutional violations of an employer, being the Board and the employee as the 6th Respondent, in his capacity as a bystander/ third party to the same. The Petitioner does not serve, in an employee capacity of either the Bureau or the Board and, as such, he is not in any way whatsoever directly affected by the decisions of the Board or the Bureau. With no employer-employee relationship in existence between the Petitioner and either of the Respondents, this court cannot purport to exercise its jurisdiction to hear and determine this petition.
51. On the second issue, the Respondents submitted that the Petitioner has not met the threshold for the grant for conservatory orders as the Petitioner has not demonstrated a prima facie case that warrants the intervention of this court since this court is devoid of proper jurisdiction; the Petitioner lacks the



requisite locus standi to file the petition and that the 6th Respondent being a public officer as per the local agreement terms of 11th June 2024 was procedurally and legally appointed to the position of Acting Managing Director of the Bureau.

52. The Respondents submitted that the petition would not be rendered nugatory if the court allows the petition, the decision can be easily effected with a direct replacement of the 6th Respondent.
53. It is the Respondents' submission that the effects of the orders sought will render the operations of the Bureau as well as the Ministry of Education oblique which will in turn affect the right to education of the children in Kenya.

6th Respondent's Submissions

54. The 6th Respondent submitted on five issues: whether the appointment of the 6th Respondent was unlawful or irregular; whether the 6th Respondent is eligible to hold office despite reaching the retirement age; whether the Public Service Commission [PSC] and Petitioner have locus or valid legal basis to challenge the appointment; whether the Petition and application meet the threshold for grant of conservatory orders; and whether public interest supports the continued service of the 6th Respondent.
55. 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 1st Respondent, therefore, the suggestion that only internal candidates may be appointed is inconsistent.
56. The 6th 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 1st 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.
57. The 6th 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.
58. The 6th 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 5th June and 11th June 2024, extending his service to 6th 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.
59. The 6th 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."
60. The 6th 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 1st Respondent is a critical institution within the education sector.

61. It is the 6th 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.
62. On the second issue, the 6th Respondent submitted that he remains a civil servant up to around 6th 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 5th June 2024, for a period of two years, effective 6th June 2024.
63. The 6th 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 6th Respondent meets all these conditions, and no limitation was placed on the functions he could undertake.
64. The 6th 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.
65. The 6th 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 1st Respondent.
66. On the third issue, the 6th 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.
67. It is the 6th Respondent's submission that the Petitioner has not demonstrated any personal stake, legal injury, or direct relationship with the 1st Respondent, the Ministry of Education, or the 6th Respondent. He is neither an employee, board member, shareholder, parent ministry officer, nor a directly aggrieved party.
68. The 6th Respondent submitted that the Petitioner seeks orders compelling the Board of the 1st 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.
69. The 6th 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.

70. The 6th Respondent further submitted that PSC is estopped from contradicting its own prior actions. Having expressly extended the 6th 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."
71. On the fourth issue, the 6th 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.
72. The 6th 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.
73. The 6th 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.
74. The 6th 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 1st 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.
75. The 6th Respondent submitted that conservatory orders must serve the larger public interest, not the narrow interest of the Applicant. The 1st Respondent is a critical institution in the education sector, with responsibility for publishing and distributing learning materials nationwide. Therefore, displacing the 6th 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.
76. It is therefore the 6th 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.
77. On the final issue, the 6th Respondent submitted that he is currently implementing court-ordered stakeholder engagement and public participation measures aimed at ensuring compliance with those judgments. Removing him midstream would create administrative instability, potentially lead to non-compliance with existing court orders, and frustrate the institutional reform process.



78. The 6th Respondent submitted that the appointment is for a transitional six-month term whereby three months have already lapsed. Therefore, public interest favours allowing the 6th Respondent to complete his mandate and hand over in an orderly manner once the legal, procedural, and HR processes are concluded.
79. I have examined all the averments and submissions of the parties herein. The applicants herein seek orders to suspend the appointment of the 6th respondent as acting MD of the 1st respondent.
80. This being an application for grant of a temporary injunction, the duty of this court is to establish if the principles for the grant of the injunctive reliefs have been satisfied. The principles as established by the Court of Appeal in *Giella vs Cassman Brown* is that a prima facie case with a likelihood of success must be established; demonstrate irreparable harm/damage if the injunction is not granted; the balance of convenience lies in the grant of the said orders.
81. The applicant herein submitted that they have established that they have a prima facie case to warrant issuance of the injunctive reliefs.
82. The 2nd, 3rd and 4th respondents have submitted that this court has no jurisdiction to grant the orders sought. The 1st and 2nd respondents aver that the application is flawed and an abuse of the court process. The interested parties were in support of the appointment and aver that the 6th respondent is not a fit person for application in the acting capacity.
83. I note that the 6th respondent was appointed in this acting position for 6 months with effect from 20th March 2025. The 6 months are set to lapse by 20th September 2025. I also note that the orders sought in the application are similar to those being sought in the main petition.
84. In view of the fact that the 1st respondent is a public entity where their mandate relates to the lives of school children and given the need to avoid a lacuna in its management in order to render its series, I find that the balance of convenience will tilt in favour of not allowing the application at this stage so that the court considers the petition in its entirety. I will therefore not grant any orders as prayed and I direct the parties to proceed and conclude the entire petition. Costs in the petition.

Dated, Signed and Delivered Virtually At Nairobi This 17th Day Of JULY 2025.

HELLEN WASILWA

JUDGE

