



Benjamin v Nakhumicha, Cabinet Secretary, Ministry of Health & 7 others; Siyoi & 7 others (Interested Parties) (Constitutional Petition E077 of 2023) [2024] KEELRC 327 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 327 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E077 OF 2023

B ONGAYA, J

FEBRUARY 23, 2024

IN THE MATTER OF ILLEGAL AND IRREGULAR APPOINTMENT OF DR. FRED SIYOI, AS THE REGISTRAR/ CEO OF THE PHARMACY AND POISONS BOARD (PPB) & REVOCATION OF LEGITIMATE PPB BOARD

AND

IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 27, 28, 41, 43, 47, 73, 159, 162, 232 AND 258 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF RULE 4,10,11,13 OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL FREEDOMS) – HIGH COURT PRACTICE AND PROCEDURE RULES 2013 AND IN THE MATTER OF PUBLIC SERVICE COMMISSION ACT NO. 10 OF 2017 AND IN THE MATTER OF THE PHARMACY AND POISONS ACT CAP 244 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015

BETWEEN

DR. MAGARE GIKENYI J BENJAMIN PETITIONER

AND

HON SUSAN NAKHUMICHA, CABINET SECRETARY, MINISTRY OF HEALTH 1ST RESPONDENT

PHARMACY AND POISONS BOARD 2ND RESPONDENT

DR ISHA ANAND 3RD RESPONDENT

BERNARD KIMUTAI MAIYO 4TH RESPONDENT



DR BEATRICE K M AMUGUNE 5TH RESPONDENT
DR CHARLES GITHUA GITHINJI 6TH RESPONDENT
DR JOSEPHINE MBURU 7TH RESPONDENT
HON ATTORNEY GENERAL (ON BEHALF OF PRESIDENCY) 8TH
RESPONDENT

AND

DR FRED SIYOI INTERESTED PARTY
DR JOHN MUNGUTI KISENGE INTERESTED PARTY
DR PAUL MAGUTU NJARIA INTERESTED PARTY
DORCAS WANJIRU NGECHU INTERESTED PARTY
STEPHEN OGUTU OYAYA INTERESTED PARTY
MIRIAM WAIRIMU NDIRANGU INTERESTED PARTY
DR DIANA MARION INTERESTED PARTY
DR JACINTA WASIKE INTERESTED PARTY

JUDGMENT

1. The petitioner filed the Amended Petition dated 09.11.2023. The petitioner prayed for:
 - a. A declaration that acting appointment is restricted to the existing employees or Staff of the organization, which is temporary conferment upon a public officer, by the 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 and thus the purported appointment of the 1st interested party as such is null and void ab initio.
 - b. A declaration that the appointment of the registrar or CEO of the Pharmacy and Poisons Board must at all material times be in strict compliance with the provisions of section 5 of the Pharmacy and Poisons Board and, conducted and appointed by the board of directors of the 2nd respondent without any interference and/or involvement, whatsoever, by any other authority including the 1st respondent.
 - c. A declaration that it was unconstitutional for the Presidency and or 1st respondent to revoke the appointment of the 2nd to 7th Interested parties for doing their work and without stated reasons of failure to carry out their functions in the national interest, so as to give room for the illegal appointment of another board for purposes of illegal appointment of the 1st interested party as the Registrar/CEO of the Pharmacy and Poisons board.
 - d. A declaration that the appointment by the presidency of replacement board of management to finish the remaining term of the 2nd and 7th Interested parties vide No. 12401 dated 13.09.2023 is null and void ab initio for there was no vacancy to do so.



- e. A declaration that any decision, including appointment through any form of contract to the 1st interested party as Registrar or CEO in acting or substantive capacity of to any other party by the new board appointment vide gazette notice no. 12401 dated 13.09.2023 is null and void ab initio.
- f. A declaration that the board appointed vide gazette notice no. 12401 dated 13.09.2023 lacks statutory quorum and any decision by the said board is null and void ab initio.
- g. A declaration that the appointment of the 1st interested party on 27.02.2023 as the Registrar or CEO of the 2nd respondent in blatant disregard of the High Court Decree and subsequent ruling of the Court of Appeal; his failure in the appraisal performance by the 2nd to 7th interested parties and the mandatory retirement age of 60 years statutory rule and in the absence of competitive process together with the appointment of Dr. Jacinta Wasike as Acting Registrar or CEO of the 2nd respondent was invalid, null and void ab initio.
- h. A declaration that the decisions contained in both the Gazette Notices No. 636 dated 19.01.2023 and No. 2116 dated 23.02.2023 of revocation of the appointment of the 2nd to 7th Interested parties and appointment of replacement board of management and any subsequent statutory decision by the new board appointed under gazette notices no 2116 dated 23.02.2023 are invalid, null and void ab initio.
- i. An order of certiorari to remove into this court for purposes of being quashed, the purported appointment on or around 27.02.2023 of the 1st interested party as either acting or substantive Registrar or CEO of the 2nd respondent and the twin triple gazette notices no. 636 dated 19.01.2023 gazette notice no. 9129 issued on 11.07.2023 and dated 29.06.2023 and no. 2116 dated 23.02.2023 that purported to respectively revoke the appointment of 2nd to 7th interested parties and subsequent replacement appointments of new board of directors of the pharmacy and poisons board.
- j. An order of certiorari to remove into this court for purposes of being quashed, any purported appointment or extension of the contract of appointment of the 1st interested party or any other person to any time as either acting or substantive Registrar or CEO of the 2nd respondent by the board of management that was appointed vide either gazette notice no 12401 dated 13.09.2023 or no. 2116 dated 23.02.2023.
- k. An order of prohibition do issue prohibiting the 1st interested party from occupying and performing the functions of the office of the Registrar or CEO of the 2nd respondent in any way or manner.
- l. An order of mandamus do issue compelling the 1st interested party to forthwith leave the premises or offices of the 2nd respondent.
- m. An order that the 2nd and 7th interested party do assume their respective positions at the 2nd respondent and discharge their mandate and functions including continuing with the process of appointment of the substantive Registrar or CEO in accordance with the law and without consideration or regard of concurrence from any other authority.
- n. An order of certiorari to remove into this court for purposes of being quashed, the purported appointment on or around 13.01.2023 of Dr. Jacinta Wasike as the Acting Registrar or CEO.
- o. That any other order or modification of petitioner's prayer(s) which the Honourable Court may deem fit so as to achieve objects of justice for majority of Kenyans as a whole.



- p. An order that the costs consequent upon this petition be borne by the 1st and 2nd respondents.
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition. The petitioner's case is as follows:
- a. The 2nd to 7th interested parties were appointed board members of the 2nd respondent for a period of three years vide gazette notice no. 3379 dated 28.02.2022.
 - b. The gazette notice no 636 dated 20.01.2023 published that the 1st respondent had revoked the said appointment of the 2nd to 7th interested parties and subsequently vide another gazette notice no. 2116 dated 23.02.2023 appointed new replacement board of directors triggering the institution of these proceedings whereupon the court on 22.06.2023 delivered a ruling issuing conservatory orders that restored and preserved the 2nd to 7th interested parties into their respective positions as board members of the 2nd respondent pending the hearing and determination of the petition.
 - c. The petitioner states that the said ruling held that once board members of a state corporation are appointed, they must serve for the tenure as appointed and may only be removed by the President under section 7(3) of the *State Corporations Act* upon stated reasons.
 - d. The Presidency attempted to pre-empt the instant proceedings vide his decision contained in gazette notice no 9129 issued on 11.07.2023 and dated 29.06.2023 whereupon he over and above the 1st respondent's impugned revocation of the appointment of the interested parties further revoked the foregoing appointment of the 2nd to 7th interested parties gazette notice no 3379 dated 28.02.2022 as well as gazette notice no 2116 dated 23.02.2023 as board members of the 2nd respondent the foregoing conservatory orders notwithstanding and at the time the 2nd to 7th interested parties had written to the chairperson to convene board meeting.
 - e. The Presidency did not provide any reason for the impugned revocation of the appointment of the 2nd to 7th interested parties.
 - f. By the time the presidency executed the impugned decision of revocation, the 2nd to 7th interested parties were yet to resume office or transact any business upon the conservatory orders, for the Chairperson had not called for any meeting.
 - g. The Presidency appointed the 3rd to 5th respondents vide impugned gazette notice no 12401, dated 13.09.2023 as the new board members of the 2nd respondent to replace the 2nd to 7th interested party and serve their remaining term of office.
 - h. There was no vacancy to warrant the impugned gazette of appointment of replacement of the interested parties.
 - i. The relevant nominating bodies are required to submit to the 1st respondent their respective nominees which was not the case.
 - j. The petitioner maintains that the law does not allow for the piecemeal appointment of board members where there exist vacancies in the entire board even if other than the board Chairperson.
 - k. The Public Service Commission has not yet established an office of Director of Pharmaceutical Services and neither has it appointed any such person either in acting or substantive appointment to sit on the board of management of the 2nd respondent.



- l. The 2nd respondent has no functional board of management for lack of statutory quorum to transact any business as provided in the [Pharmacy and Poisons Act](#).
 - m. The 8th interested party was transferred out of the 2nd respondent more than three months ago and she consequently lost any claim to the acting position of the registrar or CEO of the 2nd respondent which dissipated on account of the legal requirement that acting appointments are limited to officers in the subject organization.
 3. The 1st & 8th respondents filed grounds of opposition dated 06.12.2023 through the office of the Attorney General and opposed the amended petition on the following grounds:
 - a. The Honourable Court lacks jurisdiction to hear and determine the petition as the dispute does not fall under the ambit of Article 162(2)(a) of [the constitution](#) and section 12 of the [employment and Labour Relations Court Act](#) no 20 of 2011.
 - b. The amended petition is res judicata by dint of the ruling of this court delivered on 22.06.2023 which ruling the Head of State complied in issuing gazette notice no 9129 of 29.06.2023 that revoked gazette notice no. 3379 of 2022 and 2116 of 2023.
 - c. The honourable court is functus officio.
 - d. The amended petition is direct affront to the provisions of Article 132(2)(f) of [the Constitution](#) and section 7(3) of the [State Corporations Act](#).
 - e. The amended petition is contra statute as it seeks to set aside the ruling of the Honourable Court delivered on 22.06.2023.
 - f. The amended petition does not fall within the realm or ambit of Article 22(2) and 258 of [the Constitution](#) or at all.
 - g. The amended petition is scandalous, vexatious and amounts to an abuse of the court process.
 - h. The respondents pray that the amended petition be dismissed with costs.
 4. The 2nd to 6th respondent filed the replying affidavit of Dr. Charles Githua Githinji sworn on 11.12.2023, the Chairperson of the Pharmacy and Poisons Board, through G & A Advocates LLP. It was stated and urged as follows:
 - a. The 1st interested party was substantive office holder prior to his appointment as the acting Registrar or CEO in adherence to section 2 of the [Public Service Commission Act](#) and thus the averment that the 1st interested party was not an existing employee or staff member of the 2nd respondent is wholly untrue.
 - b. The contract of service for the 1st interested party is not subject to mandatory retirement age as supposed by the petitioner for reasons that the terms of service of CEOs of state corporations is contractual and renewable based on performance and business requirements. They are not subjected to the general public service policy on mandatory retirement at 60 or 65 years or limit as to number of terms served.
 - c. The board is undergoing a comprehensive assessment by the World Health Organization (WHO) seeking to upgrade its maturity level from level 2 to 3. The enhanced status is critical for the country in production of vaccines and local manufacturers of health products. The assessment process requires a solid and experienced institutional stewardship in order to satisfy the global benchmarking tool used by WHO.



- d. CEOs of state corporations are hired on local service agreement and for a fixed period without being pensionable therefore they are not subject to the mandatory retirement age.
 - e. The appointment by gazette notice no 630 of 20.01.2023 and the subsequent appointment of the 3rd to 5th respondents as members of the board by gazette notice no 12401 of 13.09.2023 was lawful and in accordance with Article 232 section 3 and 6 of the [Pharmacy and Poisons Act](#). These appointments were done on merit considering their skills, qualifications and competencies.
 - f. The allegation at paragraph 56 of the petition that there was no vacancy prior to the publication of gazette notice no 12401 is baseless as gazette notice 9129 of the 11.07.2023 had revoked the board appointments vide gazette notices no. 3379 of 2022 and 2116 of 2023.
 - g. The revocation of appointment of the 2nd and 7th interested parties was effected in accordance with section 7 (3) of the [State Corporations Act](#).
5. The 1st interested party, Dr Fred Moin Siyoi, the CEO or Registrar of the Pharmacy and Poisons Board, filed his replying affidavit sworn on 06.12.2023 through Chimei & Malenya Co. Advocates. It was stated and urged as follows:
- a. The amended petition is lacking in precision as it neither states exactly what provisions of [the Constitution](#) are alleged to have been violated nor does it disclose the manner in which the said provisions have been violated by the respondents and interested parties. It is largely based on hearsay and rumours wherein the petitioner alludes to actions of ghosts whose description or identity has not been disclosed.
 - b. The petition is based on a misapprehension that the 1st interested party's appointment to office was voided by dint of the decision delivered in Machakos High Court Petition No. 2 of 2019 Wambua Maithya vs. Pharmacy & Poisons Board [2019] eKLR (herein after referred to as "the Machakos petition") which concerned the process leading to the recruitment of the Registrar or CEO of the Board.
 - c. While the petitioner has annexed a copy of the judgment delivered in the Machakos petition, he has deliberately elected not to supply subsequent rulings delivered by the same court including a ruling on contempt application delivered on 17.06.2020 and subsequent ruling on the review of the contempt ruling delivered on 22.02.2021. Both applications were dismissed by the court.
 - d. In the contempt ruling referred to aforesaid, the 1st interested party states that the High Court clarified his position or tenure with the 2nd respondent and stated thus,

“ ..Dr Fred Moin Siyoi was the acting CEO of the Pharmacy and Poisons Board. After the decision of this court it would follow that unless his appointment in the said acting position was revoked, he reverted to the same status...”
 - e. The 1st interested party first term as CEO or Registrar of the 2nd respondent was in place at material times because of a court order in Dr Fred Siyoi v The Pharmacy & Poisons Board Nairobi ELRC 186 of 2019 and which order has never been challenged, varied, or set aside. The petitioner is inviting this court to sit on appeal on an order of a court of concurrent jurisdiction.
 - f. The 1st interested party's first term as CEO expired at the beginning of the year 2023. Following the expiry of the first term, he was appointed for a period of 6 months as the Ag CEO or Registrar of the 2nd respondent from 28.02.2023 to 28.08.2023 and his position confirmed



by the court vide its ruling delivered on 22.06.2023. The petitioner in challenging his acting appointment is inviting this court to sit on appeal on its own decision.

- g. Prior to the expiry of his first term, the 1st interested party expressed interest to have his term renewed in accordance with the provisions of section 5 of the *Pharmacy and Poisons Act*, which provides for renewal of the term of the CEO once, subject to performance. This expression of interest was made six months to the date of expiry of his first term, 25.08.2022 but the then board declined the request on 13.01.2023.
 - h. Thereafter the 1st interested party sought a review of the decision by the board made on 13.01.2023 primarily on grounds that his performance had not been appraised.
 - i. A new board was appointed and acted on the review application of the 1st interested party and the 1st interested party was to act for a period of 6 months to allow the board time to consider his application before a decision of his re-appointment could be made.
 - j. The question regarding the 1st interested party's status and renewal of his contract was reserved to the board by the court in the ruling of 22.06.2023. The board upon evaluation of his performance, re-appointed him as substantive CEO/registrars of the 2nd respondent for a further term of 4 years.
 - k. The 1st interested party maintains that his re-appointment is based on section 5 of the Pharmacy & Poisons Act subject to his appraisal and his good performance. The 2nd respondent's board which appointed him in acting capacity and subsequently re-appointed him is a legitimate sitting board.
 - l. The question of a CEO serving beyond the age of 60 years was settled in Circular Ref No. OP/CAB.9/1A dated 27.02.2018 with regard to terms of service for state corporations' chief executive officers which provides in part as follows:

“RE: Terms of Service for State Corporations Chief Executive Officers

For avoidance of doubt, the terms of service for state corporation chief executive officers is contractual and renewable based on performance and business requirements. They are not subject to the general public service policy on mandatory retirement at 60 or 65 years or limit as to number of terms served.”
 - m. The legality or otherwise of the circular was upheld in the case of *Okiya Omtatah v Joseph Kinyua & Anor* [2018] e-KLR.
 - n. The mandate of appointing members of the 2nd respondent's board is stipulated under section 3 of the Pharmacy & Poisons Act and there exists no complaint or communication from any of the relevant bodies on appointees to the 2nd respondent's board.
 - o. The Presidency enjoys the discretion to revoke the appointment of any board members in parastatals and state agencies and departments pursuant to section 7(3) of the *state corporations act* in which case the president exercises discretion.
 - p. The 8th interested party is an employee of the ministry of health and after her appointment was revoked she has since been redeployed within the ministry.
6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.



7. The 1st issue for determination is whether the revocation of appointment of the 2nd to 6th interested parties, and appointment of 3rd, 4th and 5th respondents, as the 2nd respondent board members was unlawful and unconstitutional as urged for the petitioner. The Court has to consider the applicable law and consider the evidence before the Court.
8. The *Pharmacy and Poisons Act* Cap. 244 at section 3 provides for establishment of the Board and appointment of Board members as follows:
 - (1) The Minister shall appoint a Board to be known as the Pharmacy and Poisons Board which shall consist of the following persons—
 - (a) the Director of Medical Services who shall be the chairman;
 - (b) the Chief Pharmacist;
 - (c) the Director of Veterinary Services or a veterinary surgeon, nominated by him;
 - (d) four Pharmacists appointed by the Minister from a panel of names submitted by the Pharmaceutical Society of Kenya of whom—
 - (i) one shall be from the Civil Service;
 - (ii) one shall be from the community pharmacy; and
 - (iii) one from the pharmaceutical industry;
 - (e) one representative of the Department of Pharmacy of the University of Nairobi nominated by the Faculty Board; and
 - (f) one pharmaceutical technologist appointed by the Minister from a panel of names submitted by the Kenya Pharmaceutical Association.
 - (2) Those members of the Board appointed under paragraphs (d), (e) and (f) of subsection (1)—
 - (a) shall hold office for a period of three years but shall be eligible for re-appointment;
 - (b) may at any time resign by instrument in writing addressed to the Chairman.
 - (3) Notwithstanding the provisions of subsection (2), the Minister may, if at any time it appears to him that a member of the Board has failed to carry out his functions under this Act, revoke the appointment of that person and shall appoint another person under subsection (1) in place of that member for the remainder of the period of office of that member, and if that member is nominated or elected by any other authority or body, his nomination or election shall be deemed to have been annulled on account of the revocation of his appointment to the Board.
 - (4) The Minister may appoint an appropriately qualified person to act temporarily in the place of any member of the Board other than the Chairman in the case of death, illness, resignation or absence from Kenya.
 - (5) The appointment, removal, death, resignation of any member shall be notified in the Gazette.
 - (6) The Board shall be a body corporate with perpetual succession and a common seal, and shall be capable in its corporate name, of—
 - (a) suing and being sued;
 - (b) acquiring, holding and disposing of property;
 - (c) borrowing and lending money.



9. By gazette notice no. 636 dated 19.01.2023 and published on 20.01.2023, the 1st respondent revoked the appointment of the 2nd to 7th interested parties as members of the 2nd respondent Board.
10. By gazette notice no. 2116 dated 23.02.2023 and published on 24.02.2023 the 1st respondent appointed the 3rd and 4th respondents under section 3(1) (d) and the 5th respondent under section 3(1) (e) (i) of the Act. There is nothing before the Court to show that the Pharmaceutical Society of Kenya and the University of Nairobi submitted the names of the persons that were appointed as published in the said gazette notice no. 2116.
11. It is true that as submitted for the petitioner, the 1st respondent could revoke the appointments of the 2nd to 7th respondents only if the board member had failed to carry out the functions under the Act. The Court has considered the replying affidavit of Dr. John Munguti Kisengi for the 2nd to 6th interested parties sworn on 03.05.2023. He has stated as follows:
 - a. At paragraph 3, that the 2nd to 7th interested parties were appointed board members of the 2nd respondent by gazette notice no. 3379 dated 28.02.2022 for a term of 3 years effective 04.03.2022 per section 3 of the Act. Thus, the Court observes that the term was lapsing on or about 05.03.2025.
 - b. Their appointment was revoked by the 1st respondent's gazette notice no. 636 dated 19.01.2023, as per paragraph 24 of the affidavit.
 - c. Per paragraph 26 of the affidavit, after the revocation, then 2nd to 7th interested parties have not been given letters detailing the grounds for revocation by the 1st respondent.
 - d. Per paragraph 27, the revocation of the appointments without cause violated their constitutional right against the discrimination, basic principles of natural justice, and right to fair administrative action.
 - e. Per paragraph 28, their reputation suffered following the revocation and they reserve the right to seek appropriate legal redress.
 - f. The 2nd to 7th interested parties are ready to continue serving as the 2nd respondent board members.
12. The 1st respondent has failed by way of replying affidavit to rebut the 2nd to 7th interested parties' foregoing case that nothing against them has been communicated to explain or justify the revocation. The Court finds that the petitioner's case that the revocation of the appointment of the 2nd to 7th interested parties as board members of the 2nd respondent did not pass the safeguards in section 3 of the Act. First, they were mandatorily entitled to serve for 3 years and second, their appointments could be revoked only if the 1st respondent showed that each had failed to carry out his functions under the Act. The Court finds that the revocation by gazette notice no. 636 dated 19.01.2023 violated the 2nd to 7th interested parties' constitutional right against discrimination under Article 27, the basic principles of natural justice per Article 50, and right to fair administrative action per Article 47 of *the Constitution*.
13. Turning to gazette notice no. 2116 dated 23.02.2023 and published on 24.02.2023, by which the 1st respondent appointed, the 3rd and 4th respondents under section 3(1) (d) and the 5th respondent under section 3(1) (e) (i) of the Act, the Court returns that the appointments were null and void ab initio as they were illegal for want of a valid vacancy in that regard. While section 3 of the Act conferred the 1st respondent power to appoint, the power was not exercised as contemplated under the section in view that the mandatory tenure of the 2nd to 7th interested parties had not lapsed or the revocation had not been shown to be within the statutory contemplation that the 2nd to 7th respondents had failed



to carry out the functions under the Act. Further, even if the revocation had been lawful but already found to have been unlawful, the 1st respondent could appoint qualified persons in place of the 2nd to 7th interested parties only for the unexpired tenure thereof per section 3(3) of the Act. However, the impugned gazettee notice no. 2116 dated 23.02.2023 made an appointment for the full-contemplated tenure of 3 years instead of the statutory unexpired tenure of the 2nd to 7th respondents. The Court returns that the appointment under gazettee notice no. 2116 dated 23.02.2023 was therefore, in the circumstances, ultra vires section 3 of the Act under which it was purportedly made. Thus, gazettee notice no. 2116-dated 23.02.2023 was unlawful, null and void for breach of the enabling section 3 of the Act.

14. By gazettee notice no. 9129 dated 29.06.2023 published on 11.07.2023, the President revoked the appointment of the 2nd to 7th interested parties as members of the 2nd respondent's board. The revocation was pursuant to section 7(3) of the [State Corporations Act](#). Further, by gazettee notice no. 12401 dated 13.09.2023 and published on 15.09.2023 appointed the 3rd, 4th and 5th respondents as board members of the 2nd respondent from 15.09.2023 to 05.03.2025.
15. The issue before Court for determination is whether the revocation in gazette notice no. 9129 dated 29.06.2023 and the appointments in gazettee notice no. 12401 dated 13.09.2023 were unlawful and unconstitutional as urged for the petitioner. Section 7(3) of the [State Corporations Act](#) provides thus, "7(3) Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board, the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine."
16. In *Ronoh Sitienei & 4 others v Pharmacy & Poisons Board, Attorney General & 4 others, Interested Party* [2019] eKLR, the Court held thus, "The maxim is generalia specialibus non derogant meaning "general things do not derogate from specific things." (See Black's Law Dictionary 10th Edition) For good order of running of state corporations in the national interest, section 7(3) of the [State Corporations Act](#) was enacted complete on remedial measures where the tenure of a member of the Board of Management of a state corporation was to be cut short prior to lapsing of the prescribed tenure. Thus, section 7(3) of the [State Corporations Act](#) gives the President discretionary powers in the national interest (and within the safeguards in the section), to revoke the appointment of any member and appoint another member for the remainder of the term or constitute a new board for a period to be determined in consultation with the State Corporations Advisory Committee. The court finds that section 7(3) of the [State Corporations Act](#), is the legitimate and the specific manner of dealing with a situation whereby the tenure of a member of a board of State Corporation is to be aborted on account of unsatisfactory performance. The Court considers that section 7(3) [State Corporations Act](#) is carefully drafted to ensure that Boards of State Corporations remain in place and a member's appointment thereto is revocable only by the President and within the confines of that provision's safeguards."
17. The Court has examined the record. The 2nd to 7th respondents have not offered any evidence or challenge that the President revoked their appointment within the safeguards of section 7(3) of the [State Corporations Act](#). It was for the 2nd to 7th respondents to show that the revocation was unfair and not on account of their failure to carry out their functions in the national interest as provided for in the section. It is noteworthy that after filing of the amended petition, the 2nd to 7th respondents thereafter failed to file an affidavit to show how they had been aggrieved by the President's revocation of their appointment under the said section 7(3) of the Act. Thus the petitioner and the 2nd to 7th interested parties have failed to show that the revocation was unfair in terms of section 47 (5) of the [Employment Act](#) which states, " (5) For any complaint of unfair termination of employment or



wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.” The petitioner or 2nd to 7th interested parties have not shown that the termination by the Presidential revocation under the said section 7(3) failed to meet the statutory safeguards and the issue of existence of the statutory reason under the section, failure to perform functions in the national interest, does not begin to arise. In any event, establishing and discharging the envisaged evidential burdens by the parties would require an in-depth inquiry of testing each party’s allegations and evidence. In the instant petition, that burden has not been discharged, and, the impugned Presidential revocation and appointments would not be amenable to being disturbed by the Court as urged for by the petitioner.

18. While making that finding, the Court considers that in making the Presidential appointments in issue, care was taken to make appointments only for the unexpired tenure of the 2nd to 7th respondents and as contemplated in section 3 of the *Pharmacy and Poisons Act*. The Court has also considered if section 3 of the *Pharmacy and Poisons Act* chained Presidential action under section 7(3) of the *State Corporations Act* and returns that section 7(3) applies (per its wording) notwithstanding provisions of any other written law. In the instant case, it has not been shown that the Presidential revocation and then appointments of the new board members for a temporal tenure offended any of the safeguards in section 7(3) of the Act.
19. While finding for the petitioner that revocations and appointments under section 7(3) of the *State Corporations Act* must be per the safeguards of due process under the section and the relevant constitutional provisions such as Article 10 on National Values and Principles of Governance; Article 232 on Values and Principles of Public Service; Article 236 on protection of public officers and, Chapter 6 of Leadership and Integrity, all of *the Constitution* of Kenya, it is upon the petitioner to establish threatened or actual violation of the provisions. The Court has found that in the instant case the petitioner has failed to establish actual or threatened violation with respect to the impugned Presidential revocation of appointment and new appointments as were made.
20. The Court follows its opinion in *Okiya Okioti v Attorney General & 2 others; Francis K. Muthaura (AMB) & 5 others (Interested Parties)* [2019] eKLR, thus, “Fourth, the Court therefore returns that the Parliament was entitled to enact Section 7(3) of the *State Corporations Act*. The section empowers the President to revoke appointment of a board of state corporation and to appoint another board in that regard. The Parliament has effectively transferred to the President and from the Public Service Commission the power to initiate appointment in that regard by way of “nominating” the candidate by himself and as envisaged in Article 234(2) (a) that the Commission’s function and power to appoint can be subject to legislation. The petitioner challenged the President’s power to revoke appointment of the chairperson or member of the board under the section on account that it would not be subject to due process. However the Court has revisited the section and it clearly chains the exercise of Presidential powers thereunder by stating thus, “...the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest...” Accordingly the Court holds that the reason for revocation of the appointment of the chairperson or member of the board under the section must be the statutory reason, namely failure to carry out functions in the national interest. There was no allegation or evidence before the Court to show that in revoking the appointments in issue, the statutory test or circumstance had not accrued. To that extent the Court returns that the section is within the provisions of Article 47 on fair administrative action and Article 236 on protection of public officers from being victimised or discriminated against for having performed the functions of office in accordance with *the Constitution* or any other law; or dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”



21. It was submitted by the petitioner that the Presidential revocation and appointments were made to pre-empt the instant petition. However, there was no Court order stopping the parties from taking such steps as would be constitutional and lawful to remedy any wrongdoing or improper action subject of the dispute in the petition.
22. The petitioner has urged that as at the time of the Presidential revocation and appointments there were no valid vacancies. However, it is undisputed that by the ruling delivered in the instant petition on 22.06.2023, gazette notices no. 637 dated 19.01.2023 and no. 2116 dated 23.02.2023 were stayed with the consequence that the 2nd to 7th interested parties reverted back as the 2nd respondent board members. However, by the subsequent Presidential revocation of their membership by gazette notice no. 9129 dated 29.06.2023, the Court returns that, thereby, valid vacancies accrued in that respect.
23. The Court, within the foregoing findings, determines that the revocation of the appointment of the 2nd to 7th interested parties as board member by the 1st respondent and appointment of the 3rd, 4th and 5th respondent in that respect was unlawful, unconstitutional and null as voidable at the Court's instance. However, the subsequent Presidential revocation and appointment in that regard under section 7(3) of the [State Corporations Act](#) has not been shown to be unconstitutional or unlawful.
24. The 2nd issue is whether the appointment of the 1st interested party as the CEO and Registrar of the 2nd interested party was unlawful. Section 5 of the [Pharmacy and Poisons Act](#) provides thus:
- “(1) There shall be a registrar of the Board who shall be the Chief Pharmacist.
- (2) The registrar shall perform such duties and exercise such powers, in addition to those required under the provisions of this Act to be performed and exercised, as the Board may from time to time direct.”
25. The 1st interested party has explained circumstances of his appointment in his replying affidavit. While alleging a Court of Appeal order impaired the 1st interested party's appointment, the petitioner has not exhibited the order or made submissions in that respect so that the Court considers that allegation as unfounded. The facts as explained by the 1st interested party have not been rebutted by the Petitioner. The Court observes that the impugned board as had been constituted by the 1st respondent was unconstitutional and unlawful, ultra vires null and voidable at the Court's instance. It transpires that the Presidential revocation and subsequent appointment of the board members being the 3rd, 4th and 5th respondents corrected the scenario. Further, the Court has considered that the Court should not act in vanity to make finding and relief that the 1st respondent vacates office only for the current Board to reappoint him. The Court has as well considered the ripple effect of such finding on the many decisions the 1st interested party must have made in exercise of the authority under the [Pharmacy and Poisons Act](#) and returns that as of necessity the appointment should be left to rest especially in view of the subsequent and prompt corrections in exercise of section 7(3) of the [State Corporations Act](#) and in particular, the retroactive Presidential revocation of appointment of the 2nd to 7th respondents not having been found unlawful in any material respect. Thus, it appears to the Court that the circumstances and the evidence favour the resting and not disturbing the board's appointment decisions with respect to the 1st interested party.
26. Parties are in agreement that, an acting appointment is restricted to the existing employees or staff of the organization, which is temporary conferment upon a public officer, by the 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, and per the [Public Service Commission Act](#), 2017. In the instant case per 1st interested party's replying affidavit, it has been



shown that the interested party was in the 2nd respondent board's employment at all material times. The Court has found that by the consent order exhibited, he continued in employment and by the standing circular he referred to he was entitled to seek to continue in office beyond the age of 60 years. By that finding, the Court returns that the issue raised for the petitioner, about an order for certiorari to remove into the court for purposes of being quashed, the purported appointment on or around 13.01.2023 of Dr. Jacinta Wasike as the acting Registrar or CEO, is overtaken. It would be superfluous to issue certiorari because the issue is moot and the order would not serve useful practical purpose.

27. The 3rd issue is on the preliminary objection or ground of opposition filed for the 1st and 8th respondents. The Court returns as follows.
28. On the jurisdictional issue and as submitted for the petitioner, the issue is res judicata and the Court functus officio as the issue is already determined in the ruling delivered on 22.06.2023. The Court has considered the judgment of the Supreme Court in Kenya Tea Growers Association and 2 others -Vesus- The National Social Security Fund Board of Trustees and 7 others Petition E004 of 2023 as consolidated with Petition No. E002 of 2023 (Kooame CJ & P; Mwilu DCJ & V-P; Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) delivered on 21.02.2023. At paragraph 75 of the Judgment, the Supreme Court with reference to section 12(2) of the *Employment and Labour Relations Court Act* concluded thus, "From the above provisions of *the Constitution* and the Act, it is clear that the jurisdiction of the ELRC is limited in terms of the types of disputes and the parties." Further, "[83] Can it be said that the parties herein are not among the disputants contemplated under Section 12(2) of the ELRC Act? Even where the Act stipulates that a complaint, application or suit may be lodged against the Cabinet Secretary for Labour or any office established by law for that purpose? Or that the nature of the dispute is not one that falls within the jurisdiction of the ELRC, even where, as in this case, both employers and employees, trade unions, and workers associations are decrying what they consider to be the adverse effect of a new law on their working conditions? We are in agreement with the Court of Appeal to the effect that this dispute did not arise strictly from an employer-employee relationship. But what about the other aspects of the dispute? What meaning is to be ascribed to the phrase "labour relations"?" Further, "[79] In our view, there is nothing in *the Constitution*, the ELRC Act, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC Court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under Article 165 of *the Constitution*, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the ELRC Act. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by Article 162 (2) (a) of *the Constitution*, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the Court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of *the Constitution*, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to Article 165 (5) (b). We are therefore in agreement with the appellants' submissions regarding this issue as encapsulated in paragraph 69 of this Judgment." Paragraph 69 of that judgment stated, "[69] Additionally, it is the appellants' case that provision of social security benefits including pensions is an integral component of employment and labour relations both domestically and internationally. The NSSF Act 2013, they submit, falls within that sphere. They urge that pension rights cannot exist outside of employment; and that the drafters of *the Constitution* intended that the ELRC should have jurisdiction on all matters relating to employment and labour relations."



29. By that Supreme Court decision, it should be obvious that as found in the ruling delivered on 22.06.2023 in the instant petition, the dispute was about appointment of the 1st interested party as the 2nd respondent's CEO and Registrar and it was not separable from the question of whether the persons exercising the role of employer as members of the 2nd respondent Board constituted a proper employer. By subject and parties, the Court had jurisdiction to determine the dispute. The dispute was about employment relationship as well as the validity of the 1st interested party and the 2nd Respondent as employer and employee. The 2nd respondent's preliminary objection dated 08.05.2023 filed by G & A Advocates LL.P shall equally fail as unjustified.
30. To answer the 4th issue on remedies, the Court returns that the petition will partially succeed and partially fail as found earlier in this judgment. Considering the public interest litigation and the margins of success, each party to bear own costs of the proceedings.

In conclusion, judgment is hereby entered for the parties and the petition as amended determined with orders:

1. The declaration that the appointment of the Registrar and CEO of the Pharmacy and Poisons Board must at all material times be in strict compliance with the provisions of section 5 of the *Pharmacy and Poisons Act* and, conducted, and appointed by the board of directors of the 2nd respondent without any interference and or involvement, whatsoever, by any other authority including the 1st respondent.
2. The declaration that it was unconstitutional, as found in this judgment, for the 1st respondent to revoke the appointment of the 2nd to 7th interested parties without stated reasons of failure to carry out their functions under the Act or in the national interest.
3. The declaration that the decisions contained in both the Gazette Notices No. 636 dated 19.01.2023 and No. 2116 dated 23.02.2023 of revocation of the appointment of the 2nd to 7th Interested parties are invalid, null and voidable as found in this judgment.
4. Each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 23RD FEBRUARY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

