



**Njuguna v Kenya Literature Bureau & another; Public Service Commission (Interested Party)
(Petition E099 of 2024) [2024] KEELRC 13315 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13315 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E099 OF 2024
HS WASILWA, J
NOVEMBER 28, 2024**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 22, 23, 24, 34, 35,
41, 46, 48, 50, 73, 75, 156,159,161,162; 165, 201, 232, 233, 234,
235, 236 AND 258 OF THE CONSTITUTION OF KENYA (2010).**

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: KENYA LITERATURE BUREAU ACT

AND

IN THE MATTER OF: THE STATE CORPORATIONS ACT

AND

**IN THE MATTER OF: MWONGOZO, THE CODE OF
GOVERNANCE FOR STATE CORPORATIONS, JANUARY, 2015**

AND

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATIONS

AND

IN THE MATTER OF: THE FAIR AND ADMINISTRATIVE ACTION ACT, 2015

IN THE MATTER OF: NATIONAL COHESION AND INTEGRATION (NCI) ACT, 2008

BETWEEN

CATHERINE WANJIRU NJUGUNA PETITIONER

AND

KENYA LITERATURE BUREAU 1ST RESPONDENT

VICTOR LOMARIA 2ND RESPONDENT



AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

JUDGMENT

1. The petition before me was filed by the Petitioner herein Catherine Wanjiru Njuguna against the Respondents Kenya Literature Bureau and Victoria Lomaria and the Interested Party herein the Public Service Commission.
2. The Petitioner through a Petition dated 1st July, 2024 sought for the following reliefs: -
 - a. A declaration that it is only the Interested Party, the Public Service Commission, which has powers to approve, review and make recommendations with regard to human resource policies and practices of officers/employees, HR instruments/structures in accordance with the provisions of Article 232 (2) of *the constitution*.
 - b. An injunction to prevent the Respondents from implementing new Human Resources instruments until the same are subjected to public participation, consultation and views of staff, prior to implementation and approval by the Interested Party hereof.
 - c. A declaration that the Respondent has failed in its duty to uphold the rule of law, *the Constitution* and to protect public interest in the making appointments dated 28th June, 2024, without public advertisement for the positions, conducting interviews, without conducting competitive and seamless recruitment of the said senior staff.
 - d. A declaration to be issued to the effect that the appointments of the Acting General Manager, Publishing and Production; Acting General Manager, Finance & Commercial Services; Acting General Manager, Human Resources and Administration; Acting Manager, Planning and Risk Management; Acting Manager, Marketing; Acting Manager, Information, Communication Technology; Acting Manager, Production; Acting Manager, Supply Chain and Acting Assistant Manager, Administration made by the Respondents on 28th June, 2024, was invalid, null and void ab initio.
 - e. An order of certiorari be issued quashing the Respondents' appointments of the Acting General Manager, Publishing and Production; Acting General Manager, Finance & Commercial Services; Acting General Manager, Human Resources and Administration; Acting Manager, Planning and Risk Management; Acting Manager, Marketing; Acting Manager, Information, Communication Technology; Acting Manager, Production; Acting Manager, Supply Chain and Acting Assistant Manager, Administration made by the Respondents on 28th June, 2024.
 - f. A declaration that the Respondents have failed in their duty to uphold the rule of law, *the Constitution* and to protect public interest in the impugned recruitment of the new senior managers on 28th June, 2024, without conducting competitive, meritorious and seamless recruitment.
 - g. A declaration be and is hereby issued to the effect that the 2nd Respondent, Mr. Victor Lomaria has completed serving a maximum of two (2) terms as the 1st Respondent's Managing Director.



- h. An injunction preventing the 2nd Respondent, Mr. Victor Lomaria from continuing to act as the 1st Respondent's Managing Director.
 - i. An order directed to the 1st Respondent to carry out competitive and seamless recruitment of its new Managing Director and other staff, strictly after compliance with the law and *the Constitution*.
 - j. Any other or further orders that this Honorable Court may deem fit to grant.
 - k. Costs of this Petition.
3. The Petitioner states that she has locus standi to institute this suit by virtue of Articles 258, 1(c), 4(2), 10,22,23,50(1), 159, 165, 258 of *the Constitution* as read together with section 5 of the *High Court (Organization and Administration) Act*, No. 27 of 2015.

Facts of the case.

- 4. By a decision dated 28th June, 2024, the Respondents acted ultra vires and or purported to illegally implement new HR instruments/structure without the mandatory approval by the Interested Party, the Public Service Commission which has powers to approve, review and make recommendations with regard to human resource policies and practices of officers/employees, HR instruments/structure in accordance with the provisions of Article 232 (2) of the Constitution.
- 5. The 1st Respondent's staff were not involved in the formulation and development of New KLB HR Instruments/Structure used to appoint staff in acting capacity as per Articles 10 and 232(1) (d) of *the Constitution* of Kenya 2010 which obligates public organs to embrace participation and involvement of the people in the process of policy making. Therefore, there was no inclusivity in the development of the 1st Respondent's HR Instruments 2024.
- 6. The impugned HR Instruments, 2024, which contain the organizational structure referred to above, did not undergo any public participation and stakeholder involvement including the unions, non-management employees, management staff members, senior management, and the Board of Management.
- 7. The Petitioner avers that there is a dispute between the interested party and SCAC on who is responsible for guiding and approving the development of HR Instruments and Plans in the public sector. The Superior Courts have clearly pronounced themselves as to which is the rightfully mandated institution. It is the interested Party. Further, the State Corporations Act Cap 446 does not confer SCAC any responsibility to approve or develop HR instruments and is itself null and void since it infringes *the Constitution* of Kenya 2010.
- 8. The Petitioner contends that it is the constitutional mandate of the Interested Party to develop HR instruments in State Corporations and Public Universities. Therefore, SCAC has been exercising delegated authority; which has since been legally withdrawn by the Interested Party.
- 9. There is reference to approval by the Board of "a reorganized organizational structure" without stating how it was designed, developed and whether it received the mandatory approval by the Interested Party thereof in compliance with the PSC Circular Ref. No. PSC/GEN/22/11/ (90) dated 8th August 2023 on the Guidelines for development and review of Human Resource Management Instruments for State Corporations and Public Universities.
- 10. The Petitioner avers that the 2nd Respondent who is the Managing Director of the 1st Respondent, is in office illegally. The 2nd Respondent was appointed in September 2016 and finished his second and final



term of three (3) years in office in September 2022. He is therefore not authorized to transact business on the 1st Respondent.

11. There are numerous procedurally staff members on temporary terms who are supposed to be given permanent tenure and placed in strategic and sensitive positions.
12. The Petitioner avers that the Respondents have failed to supply the said information thus violating Article 35 of *the Constitution*. The Petitioner avers that the recruitment of new staff must be seamless and competitive to ensure that members of the public are not prejudiced. The recruitment process must be competitive, meritorious, seamless and embrace public participation under Articles 10 and 232 of *the Constitution*. The Petitioner avers that the Respondents have purported to handpick a preferred candidate without embracing competitiveness and merits.
13. The 2nd Respondent gravely violated Article 75 of *the constitution* of Kenya which provides that a State officer shall behave, whether in public and official life, in private life, or in association with other persons; in a manner that avoids any conflict between personal interests and public or official duties; compromising any public or official interest in favour of a personal interest and demeaning the office the officer holds.
14. The impugned appointments failed the test of competitiveness and transparency due to the restrictive job requirements. The Respondent failed to comply with the provisions of articles 10 and 232 of *the Constitution*, and the provisions of MWONGOZO for state corporations, January, 2015.
15. The recruitment failed to meet core values such as equity, transparency and competitiveness. The purported impugned appointments was unfair and opaque. There was no advertisement, public participation in the recruitment process as names of shortlisted candidates and interview dates and venue were not published for the public to provide information on the shortlisted candidates. The process was shrouded in secrecy.

Respondent's case

16. In response to the Petition, the Respondent swore a replying affidavit dated 8th July, 2024 and stated as follows: -
 - a. The 1st Respondent is governed by the *Kenya Literature Bureau Act* (KLB Act), which establishes the office of the Managing Director under Section 8(1). The Managing Director is responsible for policy execution and the day-to-day operations of the Bureau.
 - b. Section 5(1)(g) of the KLB Act stipulates that the Managing Director forms part of the Board of Management of the 1st Respondent.
 - c. The current Managing Director was duly appointed for an initial three-year term beginning 1st September 2016 and reappointed for a second term of five years starting 1st September 2019, as evidenced by official letters and Gazette notices.
 - d. The Respondents deny allegations in the Petition and Supporting Affidavit, asserting that:
 - i. The 1st Respondent has always adhered to applicable laws and regulations in its operations.
 - ii. The HR instruments and organizational structure were reviewed and approved by the Public Service Commission (PSC) in May 2024 after due consultation.
 - e. The Petitioner's claims that the 1st Respondent acted without requisite approval or due process are denied as false, malicious, and misleading.



- f. The 1st Respondent's staff, including union representatives, were consulted during the review of HR instruments in February 2020, as evidenced by internal memos.
 - g. The organizational structure was approved internally by the 1st Respondent's Board and externally by the PSC, as per the law.
 - h. Temporary appointments to acting roles under the new structure were made to ensure continuity while the substantive recruitment process is underway. These acting roles are for a three-month period, starting 1st July 2024.
 - i. Allegations of ethnic bias and improper appointments are dismissed as unfounded, with the Respondents emphasizing that qualifications, experience, and suitability were the primary considerations.
 - j. Claims of the Managing Director's illegitimacy are rejected, as there is no term limit stipulated in the KLB Act or other relevant laws.
 - k. The Petitioner's reliance on the Internal Memo dated 28th June 2024 is disputed, with the Respondents stating it was improperly obtained and should be struck out.
 - l. The Respondents highlight the 1st Respondent's operational and financial independence, noting its crucial role in publishing and supplying textbooks to over 30,000 schools nationwide. The restructuring aims to enhance competitiveness and operational efficiency.
 - m. The temporary appointments have already been communicated, accepted, and implemented. Disruption at this stage would adversely affect the 1st Respondent's operations and create unnecessary operational gaps.
 - n. The Petitioner's case is deemed frivolous and vexatious, lacking any clear nexus or demonstrated public interest.
 - o. The Respondents assert that the Petition and Application are misconceived and pray for their dismissal with costs.
17. The Respondent filed grounds of opposition dated 8th July, 2024 based on the following: -
- a. The Petitioner failed to demonstrate any locus standi or stake in the matter as required under Article 22 of *the Constitution* or any other law and the Court lacks jurisdiction to entertain the Petition.
 - b. The conservatory orders sought are untenable, as they aim to halt the implementation of actions that have already been concluded. The acting appointments were communicated, accepted, and implemented. The orders sought are therefore incapable of enforcement.
 - c. The Petition and Application amount to an abuse of the court process for the following reasons:
 - i. The claims are premised on misleading facts, non-disclosure of material information, and malicious averments. Notably, the Petitioner falsely alleges that the 1st Respondent's HR instruments were not approved by the Interested Party, contrary to evidence provided.
 - ii. The Petition relies on illegally obtained documents, such as the internal memorandum dated 28th June 2024. These documents, being inadmissible, should be struck out. The Supreme Court in *Kenya Railways Corporation & 2 Others v Okoit & 3 Others*



[2023] KESC 38 emphasized that admitting such illegally obtained information undermines the administration of justice as provided under Article 50(4) of *the Constitution*.

- iii. The Petition falsely asserts violations of *the Constitution* without substantive evidence, advancing ulterior motives under the guise of public interest. The Supreme Court in *Kenya Railways Corporation & 2 Others v Okoiti & 3 Others* cautioned against abuse of Articles 22 and 258 of *the Constitution*, urging courts to rein in such abuses when they arise.
- d. Based on the above, the Respondents pray that the Petition and Application be struck out in limine with costs awarded to the Respondents.

Interested party's case

18. The interested party the Public Service Commission (PSC), through its acting Secretary/CEO, Remy N Mulati filed a replying affidavit dated 26th July, 2024 in opposition to the Petitioner's claims. The Interested Party avers as follows: -

a. Mandate of the PSC

The PSC is established under Article 233 of *the Constitution*, with its functions outlined in Article 234(2). These include establishing offices, making appointments, exercising disciplinary control, promoting public service values, and ensuring efficiency in the public service.

b. Human Resource Instruments

In exercising its mandate, the PSC develops and approves human resource instruments, namely:

- i. Organizational Structure, Staff Establishment, and Grading Structure.
- ii. Career Guidelines outlining qualifications, job descriptions, and progression.
- iii. Human Resource Manual detailing terms and conditions of service. The PSC also issues policies applicable to State Corporations and Public Universities.

c. Approval of Instruments for the 1st Respondent

The PSC reviewed and approved the Staff Establishment, Organizational Structure, and Grading Structure of the 1st Respondent on 21st May 2024. Career Guidelines were approved during a meeting on 19th June 2024, with the approval letter dispatched on 9th July 2024 due to administrative delays.

d. Acting Appointments of 28th June 2024

The Interested Party contends that the 1st Respondent's acting appointments violated Section 34 of the *Public Service Commission Act*, as they were not aligned with approved human resource instruments, including the Career Guidelines, which were unavailable at the time. The acting appointments also failed to meet the prescribed qualifications and procedures.

e. Violation of Policy



The 1st Respondent did not adhere to Section C.14 (4) of the Human Resource Policies and Procedures Manual for Public Service, which requires acting appointments in Job Group 'Q' and above to be accompanied by a draft indent for advertisement.

f. Directive to Rectify the Breach

Upon analyzing the Petition, the PSC wrote to the 1st Respondent on 17th July 2024, directing that:

- i. Acting appointments comply with approved organizational structures and regulations.
- ii. Vacant positions be advertised for competitive recruitment as per Section 37 of the [Public Service Commission Act](#).

g. Appointment of the Managing Director

The Managing Director's term was renewed in September 2019 for five years, contrary to the Mwongozo Code of Governance for State Corporations, which limits terms to three years, renewable once. The PSC asserts that this reappointment violated established governance standards.

h. Action Taken

The PSC communicated to the Cabinet Secretary, Ministry of Education, and the Kenya Literature Bureau Board, highlighting the illegality and directing corrective measures. The Interested Party prays that this Honorable Court considers the above matters in its determination of the Petition.

19. I have examined the averments and submissions of the parties herein and set these as the issues for this court's determination; -

1. Whether the petitioner herein has locus to file this petition
2. Whether the Respondent breached [the constitution](#) in its review of the human resource instruments and in the appointment of various officers in acting capacities
3. Whether the 2nd Respondent is rightfully in office
4. What remedies to grant in the circumstances
5. Who bears costs of this petition

20. Issue No 1. locus

On the issue of locus, the respondent submitted that the petitioner has no locus to file this petition. The issue of documents in filing a constitutional petition largely vests on article 22(1) and (2) of [the Constitution](#) of Kenya 2010 which states as follows:

22.

- (1) Every person has the right to institute court Proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—



- a. a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
- SUBPARA (d)
- an association acting in the interest of one or more of its members

21. The petitioner herein falls in the category of any person which is the operative word here and therefore the submission that the petitioner herein has no locus to institute this petition is unfounded.

22. ISSUE NO 2

On whether there are any constitutional breaches by the respondent, the petitioner has averred that this petition is founded on breaches of *the Constitution* and in particular articles 232(2) of *the constitution* amongst others. Article 232(2) of *the Constitution* states as follows:

(2) The values and principles of public service apply to public service in—

- (a) all State organs in both levels of government; and
- (b) all State corporations.

(3) Parliament shall enact legislation to give full effect to this article.

23. In reference to this breach the petitioner avers that the respondent acted illegally by purporting to implement new HR instruments/structures without the mandatory approval by the interested party the Public Service Commission which is clothed with such powers to approve, review and make necessary recommendation with regard to HR policies and practices of the respondent's employees.

24. Indeed under article 232 of *the Constitution*, the principles of Public Service include inclusivity and public participation. The petitioner aver that the staff of the 1st respondent were not involved in the formulation and development of the new KLB HR instruments.

25. Under article 232(2) these values apply to allow state organs in both levels of Government and all State Corporations as the 1st respondent herein. Article 234 provide for functions and powers of the PSC which at article 234(2) are as follows:

(2) The Commission shall—

- (a) subject to this Constitution and legislation—
 - (i) establish and abolish offices in the public service; and
 - (ii) appoint persons to hold or act in those offices, and to confirm appointments.
- (b) exercise disciplinary control over and remove persons holding or acting in those offices;
- (c) promote the values and principles referred to in Articles 10 and 232 throughout the public service;
- (d) investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
- (e) ensure that the public service is efficient and effective;
- (f) develop human resources in the public service;



- (g) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
- (h) evaluate and report to the President and Parliament on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the public service;
- (i) hear and determine appeals in respect of county governments' public service; and
- (j) perform any other functions and exercise any other powers conferred by national legislation.

26. As indicated herein, the mandate of the Public Service Commission include developing Human Resources in the Public Service and promote the values and principles in article 10 and 232 throughout the Public Service. One way of ensuring these values and principles are promoted is by reviewing the HR instruments in the public service.
27. The petitioner averred that the Public Service Commission was never involved in the review that was undertaken by the 1st respondent. The Public Service Commission the interested party herein also submitted before this Court that they reviewed and approved the staff establishment and organizational structure and grading structure of the 1st respondent on 21/5/2014.
28. They however averred that the acting appointments done by the 1st respondent violated section 34 of the Public Service Act as they were not aligned with approved human resource instruments including the career guideline which were unavailable at the time that they also failed to meet the prescribed qualification and procedures.
29. In principle the interested party the Public Service Commission admitted that the 1st respondent made serious breaches even to the Human Resource Policies and Procedure Manual to Public Service which requires appointments in job group Q and above to be accompanied by a draft indent for advertisement.
30. In view of the admission of the Public Service Commission herein of the breaches and without any contrary evidence from the 1st respondent, it is my finding that the 1st respondent made breaches against the established constitutional principles and I return the verdict that indeed there was breach of *the Constitution* of Kenya 2010.
31. Issue No 3
This issue has been overtaken by events given that the 1st respondent vacated office on 31/8/2024 and there are no new issues to be determined. The issue is therefore declared moot.
32. Issue No.4 and 5
Having established that there were breaches of *the Constitution* by the 1st respondent herein, this Court finds the petition merited and issues the following orders:
- 1) A declaration that it is only the Interested Party, the Public Service Commission, which has powers to approve, review and make recommendations with regard to human resource policies and practices of officers/employees, HR instruments/structure in accordance with the provisions of Article 232 (2) of *the Constitution*.



- 2) An injunction to prevent the Respondents from implementing new Human Resources instruments until the same are subjected to public participation, consultation and views of staff, prior to implementation and approval by the Interested Party hereof.
- 3) A declaration that the Respondent has failed in its duty to uphold the rule of law, *the Constitution* and to protect public interest in making appointments dated 28th June, 2024, without public advertisement for the positions, conducting interviews, without conducting competitive and seamless recruitment of the said senior staff.
- 4) A declaration to be issued to the effect that the appointments of the Acting General Manager, Publishing and Production; Acting General Manager, Finance & Commercial Services; Acting General Manager, Human Resources and Administration; Acting Manager, Planning and Risk Management; Acting Manager, Marketing; Acting Manager, Information, Communication Technology; Acting Manager, Production; Acting Manager, Supply Chain and Acting Assistant Manager, Administration made by the Respondents on 28th June, 2024, was invalid, null and void ab initio.
6. An order of certiorari be issued quashing the Respondents' appointments of the Acting General Manager, Publishing and Production; Acting General Manager, Finance & Commercial Services; Acting General Manager, Human Resources and Administration; Acting Manager, Planning and Risk Management; Acting Manager, Marketing; Acting Manager, Information, Communication Technology; Acting Manager, Production; Acting Manager, Supply Chain and Acting Assistant Manager, Administration made by the Respondents on 28th June, 2024.
7. A declaration that the Respondents have failed in their duty to uphold the rule of law, *the Constitution* and to protect public interest in the impugned recruitment of the new senior managers on 28th June, 2024, without conducting competitive, meritorious and seamless recruitment.
8. An order directed to the 1st Respondent to carry out competitive and seamless recruitment of its new Managing Director and other staff, strictly after compliance with the law and *the Constitution*.
9. Costs of this Petition be borne by the 1st respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF NOVEMBER, 2024.

HELLEN WASILWA

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of



the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

HELLEN WASILWA

JUDGE

