



Njoroge v Cabinet Secretary, Ministry of Education & 3 others; Bunyi & another (Interested Parties); Ochich (Intended Interested Party) (Petition E015 of 2022) [2023] KEELRC 451 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 451 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E015 OF 2022**

HS WASILWA, J

FEBRUARY 21, 2023

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE KENYA NATIONAL
COMMISSION FOR UNESCO ACT, NO 5 OF 2013**

AND

**IN THE MATTER OF THE STATE CORPORATION ACT, THE CODE OF
GOVERNANCE FOR STATE CORPORATION(MWONGOZO), 2015 AND
GOVERNMENT CIRCULAR REF NO.OP/CAB9/1A/DATED 23RD NOVEMBER , 2014**

AND

**IN THE MATTER OF UNCONSTITUTIONAL, IRREGULAR, UNLAWFUL,
OPAQUE APPOINTMENT OF DR. EVANGELINE NJOKA AS THE SECRETARY
GENERAL OF THE KENYA NATIONAL COMMISSION OF UNESCO**

AND

**IN THE MATTER OF UNCONSTITUTIONAL, IRREGULAR, UNLAWFUL AND OPAQUE
APPOINTMENT OF PATRICK OCHICH ANTONINA LENTOIJONI AND PROF. GRACE
BUNYI AS MEMBERS OF THE BOARD OF KENYA NATIONAL COMMISSION OF UNESCO.**

BETWEEN

MARTIN NJOROGE PETITIONER

AND

CABINET SECRETARY, MINISTRY OF EDUCATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

KENYA NATIONAL COMMISSION OF UNESCO 3RD RESPONDENT



EVANGELINE NJOKA 4TH RESPONDENT

AND

GRACE BUNYI INTERESTED PARTY

ANTONINA LENTOIJONI INTERESTED PARTY

AND

PATRICK OCHICH INTENDED INTERESTED PARTY

JUDGMENT

1. The Petitioner filed this petition on November 1, 2022 through the firm of Odhiambo Opar and company Advocates seeking the following prayers: -
 - a. A declaration that the appointment of Dr. Evangeline Njoka as the Secretary General/ Chief Executive Officer of the Kenya National Commission for UNESCO in the year 2013 for a period of five (5) years was not undertaken through a process that is transparent, accountable, open, participatory, competitive and merit based in violation of Articles 10(2)(a) and 9(c) and 232(1)(d), (e), (f) and (g) of *the Constitution* and is therefore unconstitutional, null and void.
 - b. A declaration that Dr. Evangeline Njoka was not eligible for reappointment as the Secretary General/ Chief Executive Officer of the Kenya National Commission for UNESCO in the year 2018 for a period of five (5) years and that her re-appointment was not undertaken through a process that is transparent, accountable, open, participatory, competitive and merit based in violation of Articles 10(2)(a) and 9(c) and 232(1)(d), (e), (f) and (g) of *the Constitution* and is therefore unconstitutional, null and void.
 - c. A declaration that Dr. Evangeline Njoka did not and does not validly hold office as the Secretary General / Chief Executive Officer of the Kenya National Commission for UNESCO and is liable to surrender all benefits and remuneration which she has received and drawn in that capacity between 2013 and the date hereof, within 21 days of this judgment.
 - d. A declaration be and is hereby issued that pursuant to section 18 of the *Kenya National Commission for UNESCO Act, 2013* and Clause 2.5.3 of the Human Resource Policy and Procedures Manual for the Kenya National Commission for UNESCO, Dr. Evangeline Njoka is not eligible for extension, renewable or re-appointment as the Secretary General/ Chief Executive Officer of the Kenya National Commission for UNESCO beyond 31st May, 2023, or her two terms of five (5) years each.
 - e. A declaration be and is hereby issued that pursuant to section 6(1)(g) and the First Schedule to the *Kenya National Commission for UNESCO Act, 2013* the Kenya National Examinations Board, Teachers Service Commission, a Public University Senate, the Kenya Institute of Curriculum Development and Director General responsible for education and training have a mandatory duty to nominate and submit names of three (3) representatives to the 1st Respondent for consideration and appointment as members of the Board of the Kenya National Commission for UNESCO.
 - f. A declaration be and is hereby issued that pursuant to section 6(1)(g) and the First Schedule to the *Kenya National Commission for UNESCO Act, 2013* the 1st Respondent has a duty to



appoint three (3) persons out of the names submitted by the Kenya National Examinations Board, Teachers Service Commission, a Public University Senate, the Kenya Institute of Curriculum Development and Director General responsible for education and training as members of the Board of the Kenya National Commission for UNESCO vide a notice in the Kenya Gazette.

- g. A declaration be and is hereby issued that the appointment of three persons contemplated as members of the Board of the Kenya National Commission for UNESCO under section 6(1)(g) of the [Kenya National Commission for UNESCO Act](#), 2013, does not come into force and operation until the 1st Respondent makes the appointments in question vide a notice in the Kenya Gazette.
- h. A declaration be and is hereby issued that the appointment of Mr. Patrick Ochich, Ms. Antonina Lentoijoni and Prof Grace Bunyi as members of the Board of the Commission violate section 6(1)(g) of the [Kenya National Commission for UNESCO Act](#), 2013 and is therefore illegal, null and void.
- i. A mandatory injunction be and is hereby issued directing Patrick Ochich, Antonina Lentoijoni and Prof Grace Bunyi to refund all the allowances and benefits that they have received as members of the Board of the Commission within twenty-one (21) days from the date of the judgment hereof.
- j. A declaration be and is hereby issued that the appointment of Mr. Patrick Ochich, Ms. Antonina Lentoijoni and Prof Grace Bunyi was not undertaken through a process that is Open, transparent, competitive, accountable and merit based in violation of Articles 10(2)(a) and 9(c) and 232(1)(d), (e), (f) and (g) of [the Constitution](#) and is therefore unconstitutional, null and void.
- k. A declaration that pursuant to the [State Corporations Act](#), Cap 446, Clause 1.18 (f) the Code of Governance for State Corporations and Government Circular Ref. No. OP/CAB.9/1A dated 23 November, 2010 Dr. Evangeline Njoka should proceed on terminal leave effective 1st December, 2022, being six (6) months to the expiry of her non-renewable contract on 31st May, 2023, to pave way for a transparent, open, participatory and accountable recruitment of the new Secretary General / Chief Executive Officer.
- l. A mandatory injunction be and is hereby issued compelling Dr. Evangeline Njoka to vacate office as the Secretary General/ Chief Executive Officer effective 1st December, 2022, to allow the recruitment of the new Secretary General / Chief Executive Officer of the Kenya National Commission for UNESCO.
- m. A mandatory injunction be and is hereby issued compelling the 1st Respondent to convene a selection panel to appoint the Chairperson of the Board of the Commission as required by sections 8(1) and (2) of the [Kenya National Commission for UNESCO Act](#), 2013 within seven (7) days of the judgment hereon.
- n. Any other orders that the Court may deem just and equitable to grant.
- o. Costs of the Petition,



Brief facts.

2. The Petitioner stated that Kenya National Commission for UNESCO, (herein after referred to as the Commission) is a state corporation and a body corporate established under [*Kenya National Commission for UNESCO Act*](#), no 5 of 2013.
3. That the Commission is mandated with; ensuring permanent presence of UNESCO in Kenya, Implementing UNESCO activities and budget program and fostering liaison between UNESCO and the state agencies concerned with education, Science, culture, communication and information. Its composition is provided for under section 6 of the UNESCO Act, who comprises of the Chairperson, Principal Secretaries for culture, education, gender and youth, information and technology and treasury. In addition, the Commission has members comprising representatives from organization specified in its first schedule being; Kenya National Examination Board, Teachers Service Commission, Public Universities Senate, Kenya Institute of Curriculum Development and Director General of Education and training.
4. The Petitioner took issue with the appointment of the interested parties herein as members of the Commission and stated that the interested parties were neither competitively recruited or appointed, neither were they Gazetted vide the Kenya Gazette Notice as required.
5. It was stated that the procedure for the appointment of the chairperson is provided for under section 8 of the UNESCO Act which provides for the formation a selection panel within 14 days from the date which the vacancy arises in the office of the chairperson. Upon selection, the selection panel is to forward three names of suitable person to the president for appointment of one as the chairperson of the Commission.
6. The Petitioner stated that vacancy in the office of the Chairperson arose on 23rd June, 2022 when the term of the immediate chairperson, Dr. Misigo Amatsimbi expired. Despite receiving a notice of expiry of term, a selection panel has not been formed to date.
7. It is averred that the appointment of the secretary to the commission is provided for under section 17(1) of the Act and designate the said secretary as the CEO of the commission and the one in charge of running the day to day management of the Commission.
8. The Petitioner avers that, the 4th Respondent assumed office as the first secretary and the CEO effective 1st June, 2013, without going through any recruitment process. Nevertheless, that section 18 of the Act provided for the term of the CEO of five years, with the option of re-appointment which the Respondents re-appointment the 4th Respondent for a second time regardless of the fact that he was not competitively recruited at the beginning.
9. Pursuant to the powers given under section 18 of the Act, for the commission to determine the number of terms a CEO can serve, the Commission approved and promulgated the Human Resource Policy and Procedure manual for the Kenya National Commission for UNESCO, 2019 which set out the term limit for a CEO at clause 2.5.3 to two terms of 5 years each.
10. Despite capping the term of the CEO to two terms of five years each, it is stated that the Respondents are working in cahoots to illegally re-appoint the 4th Respondent for an illegitimate third term contrary to the HR Manual and policy.
11. The Petitioner alleged that the appointment of the 4th Respondent and the interested parties without following due procedure and observing the dictates of [*the Constitution*](#) on transparency and



- accountability, the Appointments violated Articles; 2(1),(4),10(2)(c), 21,23 47, 153(4), 165,232, 258 of *the Constitution*.
12. The Petitioner stated further that the Respondents violated section 18 of UNESCO Act, as read with Clause 2.5.3 of the Kenya National Commission for UNESCO, Human Resource Policy and Procedure Manual, in conspiring to have the 4th Respondent renew her contract for a further term making her hold the said office for an accumulative period of 15 years contrary to the HR Manual.
 13. It is stated also that the appointment of the interested parties in is violation of Section 6(1)(f) of the Human Resource Manual and Policy because the said members were not nominated by the bodies contemplated under the Act for their appointment by the cabinet secretary. Also that the 1st Respondent failed to appoint the said members giving the 4th Respondent authority to handpick the members of the commission contrary to the express provision of the law.
 14. The Petitioner took issue with the appointment of the interested parties because recruitment procedure such as public participation under Article 10(2)(a) of the Constitution, Advertising and the affording of equal opportunity was not given to the all persons especially people living with disability, prior to the appointment of the said members.
 15. The Petitioner stated that the clause 1.17 of the Code of Governance for State Corporation requires all state Corporations such as the 3rd Respondent to ensure that there is a succession plan for the Chief Executive officers and other senior management staff. Cognizant of that fact, the Government dispatched a circulate reference number; OP/CAB.9/1A dated 23rd November, 2010 requiring the CEO to go for a six month leave before expiry of their contract to enable smooth appointment of their successor. Therefore, that the 3rd Respondent should ensure there such succession plan is put in place, which they have failed.
 16. The Petitioner stated that the Respondent have violated section 8 of the *Kenya National Commission for UNESCO Act*, 2013 when the 1st Respondent failed to constitute a select committee to spear head the appointment of another chairperson when a vacancy at the office of the chairperson arose on 23rd June, 2022.
 17. In the supplementary affidavit deposed upon on 14th November, 2022, the Petitioner stated that the State Corporation Act is the General Act that govern all state cooperation in Kenya such as Kenya National Commission of UNESCO and section 6 of the said Act provide for gazettelement of appointed board members of the Corporation. Therefore, Kenya National Commission of UNESCO Act should be read together with the *State Corporations Act* and not in isolation.
 18. The Petitioner further stated that he does not know one Dr. Misigo Amatsimbi and therefore was not instructed by him to file this suit. He reiterated that he filed this case on his own in the bid to protection the violations of the law. Further that he is not a party in Nairobi ELRC Petition number E167 of 2022 and merely learnt of it from the 4th Respondent but after perusal of the said Nairobi ELRC Petition no. 167 of 2022, he discovered that the issue in dispute is on legality of recruitment of 22 employees pursuant to a publication that appeared on the Daily Nation of 13th September, 2022, which issue is different from the issues raised in this Petition.
 19. On that basis, The Petitioner urged this Court to critically analyze the facts and evidence before it and grant the reliefs sought.
 20. The Honourable Attorney General entered appearance on behalf of the 1st and 2nd Respondents on the 10th November, 2022 but did not file any response to the petition. The 3rd and 4th Respondents were represented by the firm of Acord Law Advocates LLP, who filed a replying affidavit on the 14th



November, 2022 sworn by the 4th Respondent on 11th November, 2022. The interested parties on the other hand were represented by Kinyanjui Kirimi and Company Advocates who filed a replying affidavit deposed upon by Patrick Ochich, the 3rd Respondent, on the 20th December, 2022.

3rd and 4th Respondents' case.

21. The Respondents herein took issue with the locus of the Petitioner to institute this Petitioner and stated that the Petitioner is bringing this suit as proxy of the former Chairman of the Board, one Dr. Misigo Amatsimbi, whose term expired on 23rd June, 2022. Also that the said former chairman has filed another application in Nairobi being ELRC Petition number E167 of 2022, through another proxy.
22. The Respondents stated that the 3rd Respondent was initially a department in the ministry of Education till 2013 when it was elevated to a state corporation through the [Kenya National Commission for UNESCO Act](#), 2013.
23. The affiant denied handpicking the interested parties herein as members of the Board and averred that the interested parties were nominated and appointed by the 1st Respondent as representatives of the organizations stated under the first Schedule of UNESCO Act, to the board of the 3rd Respondent.
24. It was their case that the 3rd Interested party, Prof. Patrick Ochich was appointed on 29th December, 2020 representing Kenya National Examination Council, the 1st Interested party, Prof. Grace Bunyi was appointed on 29th June, 2020 representing Public University Senate, while the 2nd Interested party Ms. Antonina Lentoijoni was appointed on 28th July, 2020 representing Teachers Service Commission.
25. Additionally, that other members of the Board Include; Ms. Mary Rotich an alternative member representing the Teachers Service Commission, Mr. Jerome Ochieng representing Ministry of Information, communication and Technology, Prof. Collette Suda representing Ministry of Public Service and Gender Affairs, Dr. Bellio Kipsang representing Ministry of Education, Dr. Julius Muia representing National Treasury and Ms. Josephtha Mukobe representing Ministry of Sports, Culture and Heritage. She then took issue with the fact that the Petitioner singled out the three interested parties when all the above board members were appointed on similar process. On that basis she objected to the production of the letter dated 5th February, 2020 as the Applicant's evidence.
26. It was stated that the allegation that the interested parties were not appointed vide a Gazette notice is misplaced because Section 6 of the Kenya National Commission of UNESCO Act, on appointment of Board members does not contemplate any gazettelement of its members.
27. On the appointment of the chairperson of the Commission, the affiant avers that the 3rd Respondent vide the letter of 9th June, 2022, notified the Head of Public Service Commission on the vacancy of the chairperson position.
28. The affiant avers that she was appointed the secretary General of the 3rd Respondent by the cabinet secretary in consultations with the Board pursuant to Section 17 of the Kenya National Commission of UNESCO Act and took office with effect from 1st June, 2013. Further that the Petitioner is misdirected in alleging that her appointed need to follow procedure of advertisement, shortlisting etc. when no such procedure is provided for under the Act, the UNESCO Act being the guiding document in their recruitment.



29. It is averred that there is no complaint raised by any person whatsoever on denial of equal opportunity for appointment as alleged. Further that any actions undertaken in conformity with section 17 of Kenya National Commission of UNESCO Act are considered lawful.
30. It is stated that section 18 of Kenya National Commission of UNESCO Act provides for the renewal of term of the Secretary General which the Cabinet Secretary in Consultation with the Board renewed with effect from 1st June, 2018, therefore that the 4th Respondent is legally in office. Additionally, that her last contract expressly provided that the second term will not be renewed and that she does not desire, neither has she applied for a third term as the Secretary General of the 3rd Respondent.
31. It is their case that clause 1.18 of Mwongozo Code of Governance provided for appointment of Chief Executive Office, who is appointed by the Board of State Corporation which is distinguishable from her position of being Secretary General appointed by the Cabinet Secretary. On that note, she stated that Kenya National Commission of UNESCO Act shall apply instead of Mwongozo Code of Governance because the Act is specifically addressed to the Board unlike Mwongozo Code of Governance.
32. The affiant states that the circular reference number OP/CAB.9/1A dated 23rd November, 2010, titled “procedure for re-appointing of service Chief Executive Officers in State Corporation”, which is relied upon by the Petitioner does not provide for the six months’ terminal leave before expiry of the contract, therefore the claim of terminal leave sought by the Petitioner should be disallowed.
33. The 4th Respondent avers that she has not threatened or taken any action to impede the recruitment of her successor. In fact, that the appointment is to be made by the Cabinet secretary whom she does not have control over as such the allegation by the Petitioner is farfetched and a product of imagination.
34. The affiant in conclusion stated that the entire petition is indirectly seeking to eject him from office before the end of her term, in the name of terminal leave, and urged this Court to disallow the petition with costs.

Interested parties case.

35. The interested parties relied on the replying affidavit sworn by the 3rd Interested party, Patrick Ochich on the 20th December, 2022, who adopted the contents of the 3rd and 4th Replying affidavit deposed upon on 11th November, 2022.
36. In addition, he stated that the appointment of the interested parties was done in accordance with the dictates of Article 10 and 232 of *the Constitution* as read with the provisions of State Operation Act and the *Kenya National Commission for UNESCO Act*.
37. He stated that the Petition is frivolous, vexatious, scandalous and an egregious abuse of Court process whose aim is to discredit the 3rd and 4th Respondents.
38. It is contended that this Court lack the requisite jurisdiction to hear and determine this case and an appeal on the issue of jurisdiction has already been raised in the Court of Appeal vide the Notice of Appeal dated 1st December, 2022.
39. The Interested parties, in conclusion, urged this Court to dismiss the petition with costs.
40. The Petition was disposed by written submission with the Petitioner filing on the 23rd January, 2023, the 3rd and 4th Respondent on the 7th February, 2023 and the interested parties on the 30th January, 2023. There were no submissions on record by the 1st and 2nd Respondents.



Petitioner's Submissions.

41. The Petitioner began by submitting on his locus to institute this Petition and argued that he is empowered under Article 22(1) as read with Article 258(2)(c) of *the Constitution* in instituting this petition in the bid to protect the violation of *the Constitution*. To support his argument, he relied on the case of Timothy Otuya Afubwa & Another V County Government of Trans Nzoia & 3 others [2016] eKLR where the Court held that Article 22(1) and 258(1) of *the Constitution* are so wide in scope to allow everyone to use in protection of violation of *the Constitution*.
42. On that basis, he argued that the petition was filed to call out the 1st to 3rd Respondents for violating *the constitution* in illegally appointing and re-appointing the 4th Respondent as the CEO of the Commission and the Interested parties as Members of the commission without following due process of appointment of such officers. To reinforce that argument, the Petition relied on the case of Kiluwa Limited and another V Commissioner of Lands and 3 others [2015] eKLR.
43. The Petitioner submitted that the 4th Respondent was first appointed by the 1st Respondent through the letter of 23rd August, 2012 before the establishment of the 3rd Respondent, which later by the letter of 3rd September, 2013, soon after the UNESCO Act came into force, ratified its illegal appointment and confirmed the 4th Respondent as the CEO of the 3rd Respondent. It was argued that this appointment and subsequent reappointed in 2018 ought to be declared illegal, null and void on the grounds that it was not undertaken through a process that is transparent, participatory, accountable and open contrary to Articles 10(2) and 232 of *the Constitution*, as admitted in paragraph 12(iv)&(v) of the Respondents' affidavit.
44. The Petitioner submitted that the appointment of the 4th Respondent being the CEO of the commission, ought to have been done in accordance with the provisions of Constitution, it being the supreme law of the land, as such the recruitment should have been conducted in strict adherence to Article 10 and 232 of *the Constitution*. To support their argument, the Petitioner relied on the case of Robert Muriithi Ndegwa V Minister for Tourism [2012] eKLR where the Court held that;

“The Court holds that there would be no suitability or merit in public employment in event of presence of bribery, cronyism, nepotism, tribalism, and in absence of qualifications, competence, competition, integrity and respect for inclusion and diversity.”
45. The Petitioner also relied on the case of Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties) [2021] eKLR where the Court held that;

“Without advertisement and subjecting the interested Parties to interviews, it cannot be said that the requirements of competition and merit were complied with. Similarly, there was no demonstration that the requirements on gender, ethnicity and persons with disabilities were complied with. The reading of Article 232 of *the Constitution* and section 10 of the *Public Service (Values and Principles) Act*, are clear that appointments in public service and State corporations should comply with the principles of public service. 112. The Respondents did not even attempt to show that there was any semblance of some form of transparency and accountability in the appointments. There was also no evidence of any form of competition prior to making the appointments. Without complying with transparency, fair competition and merit, the appointments cannot be said to have met the constitutional standard in Article 232(1). It is plain that the President and Cabinet Secretaries made the appointments



without regard to the Constitution and the statute; a move that also violated national values and principles of governance in Article 10 of the Constitution.”

46. On emphasizing the need by all public offices to observe Article 10 in the appointment of public officers, the Petitioner relied on the case of Community Advocacy and Awareness Trust & others V Attorney General and 6 others [2012] eKLR where the Court held that:-

“27th August 2010 ushered in a new regime of appointments to public office. Whereas the past was characterized by open corruption, tribalism, nepotism, favoritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. The Constitution signifies that the end of ‘jobs for the boys’ era. Article 10 sets out the values that must be infused in every decision making process including that of making appointments.”

47. The Petition further relied on the case of Okiya Omtatah Okoiti V Kenyatta University Council and others [2015] eKLR where this Court held that;

“Another problem, is the glaring omission to state that the public can submit Memorandum in respect of the Applicants whose names would have to be published so that they are clearly known and comments made. This has been the trend in recent public appointments which is a good practice.”

48. From the foregoing, the Petitioner submitted that the appointment of the 4th Respondent as the CEO of the 3rd Respondent was done devoid of procedure and in violation of the Constitution and thus should be declared null and void.

49. On whether the 4th Respondent, should proceed on terminal leave, the Petitioner submitted that the code of governance was promulgated for the purpose of regulating and controlling state Corporation such as the 3rd Respondent. It was argued that the 6 months leave is contemplated in the Government circular reference number OP/CAB.9/1A dated 23rd November, 2010, that provided for the CEO to indicate its interest of renewing the contract six months prior to the lapse of the contract and in the intervening period, an acting CEO be appointed during the process of recruitment, so that in the intervening period an acting CEO is taking the place of the CEO and the CEO be granted terminal leave. To support this argument, the Petitioner relied on the case of Okiya Omtatah Okoiti V Kenyatta University Council and others (Supra) where this Court held that;

“On issue of 1st Interested Party proceedings on leave, this is the mandatory provisions for all Chief Executive Officers under the State Corporation Act. Given that her term expires in less than 6 months on 31.3.2016, it would be prudent for her to proceed on terminal leave so that the process of recruitment of the next Vice Chancellor is not seen as being influenced by her or those perceived close to her. She must therefore vacate her office immediately and proceed on terminal leave immediately to pave way for a transparent, open, participatory recruitment of a new Vice Chancellor of Kenyatta University.”

50. It was then argued that, the public and the 4th Respondent will not be prejudiced in any way if the Orders directing the 4th Respondent to proceed on leave is granted.

51. On the appointment of the interested parties, the Petitioner submitted that the Respondents and the interested parties have not exhibited any evidence to affirm their allegation that they were duly appointed by the 1st Respondent as provided by law and instead that the Respondents have produced in evidence letter showing the appointment of the interested parties by the respective organizations



only, without any approval of the same by the 1st Respondent, thus the entire appointment is illegal for lacking in procedure established at section 6(1) of the UNESCO Act. Furthermore, that the appointment of the interested parties was not done in a competitive and transparent manner as envisioned under Article 10 and 232 of *the Constitution*.

3rd and 4th Respondent's Submissions.

52. It was submitted from the onset that the appointment of the 4th Respondent was done in accordance with the National Commission for UNESCO Act, 2013, specifically Section 17. It was argued that compliance with *the constitution* is imperative upon all person and state corporation and in this matter the Respondent submitted that the Petitioner relied on the Katiba Institute case to support his claim which case is distinguishable from the current matter because in the Katiba Institute case, the Petitioners were seeking to declare the appointment of various state corporations and agencies by the President and the cabinet secretaries, unconstitutional for breach of Articles 2(2),10(2),27(3), 232(2) and 234(2) of *the Constitution*, because the section providing for the appointment of the said state corporation officers did have a clause requiring the appointments to be open ,transparent, competitive and merit based appointment.
53. On the contrary, the Petitioner in this case is seeking to declare the appointment of the 4th Respondent null and void when the appointment was in strict adherence of Section 17 of the UNESCO Act. He argued that the Petitioner ought to have sought for declaration of section 17 as unconstitutional in order to invalidate the appointment of the 4th Respondent if at all. The Respondent submitted further that the Katiba case heavily relied upon by the Petitioner is subject of Appeal in Attorney General V Katiba Institute & 2 others (Civil Application no. E018 of 2021, which Court suspended the implementation of the judgement till the Appeal is heard and determined.
54. On that basis, the Respondent submitted that since the issue is pending in the Court of Appeal this Court should refrain from making adverse Orders taking cue of the stay Orders made by the Court of Appeal. In addition, the Respondent submitted that if any adverse orders are made for the removal of the 4th Respondent before expiry of her term and the three members the commission, the business of the Commission will be paralyzed because the 3rd Respondent requires a quorum of two-third to carry out any of its businesses. To support this argument, the Respondent relied on the case of Attorney General V Katiba Institute (Supra) where the Court of Appeal held that;
- “By declaring the appointments unconstitutional the appointees can no longer conduct any business of the concerned corporations and Parastatals. The citizens of this country look upon these institutions to provide services and in the absence of board members then they shall remain in operational and in limbo for unspecified time. Some of the parastatals are strategic whereas others impact on the economy of the country. No new appointments to the boards can be made unless and until amendments to the impugned statutes are effected by parliament and nobody knows when this will be done. This state of affairs is obviously not in the public interest.”
55. The Respondents Submitted that the 4th Respondent was appointed and served the public for all the years and expended her knowledge and expertise to the benefit of the public and in return she was paid salary. The argument by the Petitioner seeking for a refund of salary and all emoluments paid to the 4th Respondent for the period she served as the CEO of the 3rd Respondent is not backed up by any law and the same ought to collapse.



56. On whether the 4th Respondent should be compelled to proceed on terminal leave, the Respondents submitted that there is no section at the State Corporation Act that requires a CEO of a commission to proceed on six months leave before expiry of a contract. It was argued that although this Court had alluded to the need by state officers to proceed on leave in the case of *Omtatah Okoiti V Kenyatta University Council and others* [2015] eKLR, the said decision was subject of Appeal in *Olive Mwhiki Mugenda & Another V Okiya Omtatah Okoiti & 4 others* [2016] eKLR where the Court of Appeal set aside and therefore the decision is no longer applicable.
57. It was also argued that the reliance of the circular titled; “Procedure for Re-appointment of service of Chief Executive Officers in State Corporation” is misleading because the said document was to give guidance for reappointment only, unlike the case herein, where the CEO is on the verge of leaving the 3rd Respondent. Furthermore that the said circular did not give the specific timeline within which the said CEO was to take terminal leave and if such Orders are to be granted the Court will be overstepping on its mandate and rewriting the said circular something which is outside its jurisdiction.
58. In conclusion, the Respondents submitted that there is no provisions requiring the CEO of the 3rd Respondent to proceed on six months terminal leave before expiry of the contract and thus the Petition is without any merit and urged this Court to dismiss it with costs to the 4th Respondent.

Interested parties Submissions.

59. The interested parties began by stating the conditions to be met in securing conservatory orders and citing the case of *Kitale Industries Limited V County Government of Nakuru; Kenya Railways Corporation (Interested Party)* [2020] Eklr D. O Ohungo J held as follows:

“Conservatory Orders are public law remedies aimed at preserving the subject matter of a dispute pending hearing and determination of the main petition. In *Judicial Service Commission v. Speaker of the National Assembly & Another* [2013] eKLR, Odunga J stated as follows: Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person. 13. The Supreme Court emphasized the public law nature of conservatory orders in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows: [86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

60. They also cited the case of *Tom Odhiambo Ojienda V Kenya Revenue Authority & Another* [2018] Eklr W.A. Okwany J held that:

“Courts have severally held that in considering an application for conservatory orders the Court is not called upon to make any definite finding either of fact or law as that is the



province of the Court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly, in determining this application, this Court is not required, and will not venture into making any definite and conclusive findings on either fact or law as to do so may have the impact of prejudicing the hearing of the main Petition. 40. Apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted he or she stands suffer real danger or prejudice. See Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General, Nairobi HC Pet. No 16/2011, Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission, Mombasa HC Pet. No. 7 of 2011. 41. In the case of Centre for Rights Education and Awareness (CREAW) & 7 Others Nairobi Petition No. 16 of 2011 Musinga, J (ahtw) stated that: “...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.” 42. In a majority decision in the case of The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012, it was held as follows: “In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

61. They submitted that they were all appointed in accordance with UNESCO Act, the state Corporation Act and *the Constitution*, after following due process of nomination by the relevant bodies specified under the UNESCO Act. It was argued that the Petitioner targeted the interested parties for removal, when there are other members who have been nominated by the various organizations specified under the first schedule of UNESCO Act, who were equally appointed in similar process. Furthermore, that no basis has been demonstrated by the Petitioner in seeking for the removal of the interested parties and for the orders of refund of allowance so far paid.

62. It was submitted that since the Orders sought by the Petitioner are mandatory injunctive Orders, its burden of proof is higher than that of prohibitory Orders because the Petitioner is seeking to undo an action that has already been done. To support this argument, she relied on the case of Pevan East Africa Limited V Betting control and Licensing Board & 2 others; Safaricom Limited and another (Interested parties) [2019] eKLR where the Court relied on the case of In East African Fine Spinners Ltd and 3 Others –v- Bedi Investment Ltd, where the Court of Appeal stated that;

“mandatory injunctions are often a means of undoing what has already been done so far as that is possible. A request for a mandatory injunction (as opposed to a freezing order or a prohibitory injunction) is an extraordinary remedial process and the Court should grant such an order only in clear and exceptional circumstances. I am afraid the Petitioner never addressed the question whether there exist clear and exceptional circumstances in this case



nor do I glean any... In view of my analysis enumerated herein above, and my conclusions herein before detailed, I find and hold that this Petition fails in its entirety. Accordingly, I hereby dismiss the amended Petition dated 12th July 2019 with no orders as to costs.”

63. On that basis, the interested parties submitted that there are no exceptional circumstances tabled by the Petitioner to warrant the issuance of the reliefs sought. They then urged this Court to dismiss the petition for want of merit with costs to them.
64. I have examined all evidence and submissions of the parties herein. The issues for this Court’s determination are as follows:-
 1. Whether the Petitioner has *locus standi* to file this petition.
 2. If yes whether the petition has merit in relation to the appointment of the CEO.
 3. Whether the petition has merit in relation to the appointment of the members of the commission the Interested Parties herein.
 4. Whether this Court can grant the remedies sought.

Issue no. 1 locus standi of the petitioner

65. The Petitioner submitted that he instituted this petition as empowered under Article 22 (1) & (2) of *the constitution* of Kenya as read with Article 258 (2) (c) of the said constitution.
66. Article 22 (1) of *the constitution* provides as follows:-

“22. Enforcement of Bill of Rights

 - (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”.
67. Article 258 (2) (c) of *the constitution* provides as follows:-

258“(2)In addition to a person acting in their own interest, Court proceedings under clause (1) may be instituted by—

 - (a)
 - (b)
 - (c) a person acting in the public interest;”
68. It is clear that Article 22 (1) above provides that “every person” has a right to institute Court proceedings claiming that a right or fundamental freedom in the bill has been denied, violated or infringed or is threatened. The person having this right to institute Court proceedings can bring the suit on his own accord or on behalf of another. The article as worded has no restrictions on any person instituting suit so long as the Petitioner can demonstrate there is a right infringed upon or there is a threatened with infringement.
69. Article 258 on the other hand is coached in similar terms as Article 22. The petitioner in my view falls within the pervue of any person who has a right to institute this proceedings whether on his own or on behalf of another.
70. It is therefore my finding that the submissions that the Petitioner has no locus to institute this petition is not merited fails accordingly.



ISSUE NO. 2 APPOINTMENT OF THE CEO

71. The Petitioner has averred that the 4th Respondent CEO of the 3rd Respondent was appointed irregularly and the Court should therefore declare her appointment irregular null and void and also order her to be sent on compulsory leave to pave way for the appointment of her successor.
72. A look at the documents presented before me show that the 4th Respondent was initially the 3rd Respondent's CEO in 2013 for a period of 5 years. She was later re-appointed to the same position for another period of 5 years in 2018 which term is set to expire in 2023.
73. The Petitioner contends that the re-appointment was done through a non-transparent position and seeks a declaration to that effect and that she is not eligible to any further extension beyond 31st May, 2023.
74. To this averment, the 3rd Petitioner has submitted that her appointment was done transparently and in a competitive merit-based manner and that she does not seek to be re-appointed beyond May 2023.
75. The 3rd Respondent denied she had picked any member of the commission nor its CEO. The 3rd Respondent contends that the 4th Respondent was appointed as the Secretary General by the Cabinet Secretary in consultation with the board pursuant to Section 17 of the KNC of UNESCO Act and she took office from 1st June, 2013.
76. Section 17 of the KNC of UNESCO Act provides as follows;-

“ 17. Secretary-General of the Commission

- (1) There shall be a Secretary-General of the Commission who shall be appointed by the Cabinet Secretary in consultation with the Board and on terms and conditions specified in the instrument of appointment.
- (2) A person shall be qualified for appointment as a Secretary-General to the Commission if the person—
 - (a) is a citizen of Kenya;
 - (b) holds at least a masters degree from a university recognized in Kenya in UNESCO's areas of competence or related field;
 - (c) has at least ten years experience at management level; and
 - (d) meets the requirements of Chapter Six of *the Constitution*.
- (3) The Secretary General shall be the Chief Executive Officer of the Commission and Secretary to the Board and shall be responsible to the Board for the day-to-day management of the affairs of the Commission including—
 - (a) the day-to-day operations of the Commission;
 - (b) the management of the funds of the Commission;



- (c) the administration and management of the property of the Commission; and
- (d) the supervision and control of the officers and other staff of the Commission”.

77. As per this section, the Secretary General of UNESCO (k) is an appointee of the Cabinet Secretary of Education in consultation with the board.

78. The 4th Respondent was indeed appointed by the Cabinet Secretary of Education vide a letter dated 1st June 2013. This being an appointment in public service, the provision of Article 232 which states as follows must be adhered to:-

“232. Values and principles of public service

(1) The values and principles of public service include—

- (a) high standards of professional ethics;
- (b) efficient, effective and economic use of resources;
- (c) responsive, prompt, effective, impartial and equitable provision of services;
- (d) involvement of the people in the process of policy making;
- (e) accountability for administrative acts;
- (f) transparency and provision to the public of timely, accurate information;
- (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
- (h) representation of Kenya’s diverse communities; and
- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.

(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”.

79. In this regard, there is need to have the appointment done openly, competitively e.t.c.

80. There is no advert exhibited by the 4th Respondent declaring a vacant position for the post, invitation for eligible candidates to apply, a list of the short listed candidates minutes of the interviews that resulted in her recruitment date of interview and even the recommendation to the Cabinet Secretary for the 4th Respondent’s appointment by the board.



81. The same applies in respect of the renewal which should be done as per the Mwongozo Code of Conduct which at 1.18 states as follows;-

“Appointment of the CEO – The Board should:-

- a. Appoint and remove the CEO
- b. Ensure that the CEO is recruited through a competitive process
- c. Ensure that the CEO possesses the minimum qualifications and experience set out in Attachment
- d. Define and approve authority levels for the CEO.
- e. Ensure that it has put in place a succession plan for the CEO and other senior management staff”.

82. The 3rd Respondents HR Manual at 2.5.3 states as follows;-

“The secretary General/CEO shall be appointed on a contract of five (5) years renewable once subject to performance”.

83. In view of the provision of *the Constitution* requiring a competitive process for the CEO which seems not to have been done, I agree with the Petitioner that the 4th Respondent was appointed in an irregular manner since 2013 and thereafter her position was also renewed again irregularly in 2018.

84. That notwithstanding the 4th Respondent has served her term and the term is due to come to an end in May 2023. That being the position, I would find it imprudent to revoke the appointment at this tail end.

85. I would let it be until May 2023 when she is expected to exit service with no option of renewal. Given the delay in filing the petition, I find the Petitioner is guilty of laches and this Court cannot act in vain and aid the none vigilant by ordering her exit 2 months to the expiry of her term.

Issue no. 3

86. On issue of the appointment of the Interested Parties, Section 6 of the KNC of UNESCO Act establishes the board of the commission which shall consist of the following;-

“6. Establishment of the Board

- (1) There shall be a Board of the Commission which shall consist of—
 - (a) a chairperson who shall be appointed by the President;
 - (b) the Principal Secretary responsible for education and training;
 - (c) the Principal Secretary responsible for culture;
 - (d) the Principal Secretary responsible for gender, youth, children and social development;



- (e) the Principal Secretary responsible for information and technology;
 - (f) the Principal Secretary to the Treasury;
 - (g) three members comprising representatives of the organizations specified in the First Schedule and appointed by the Cabinet Secretary from amongst three persons nominated by the organizations.
- (2) The membership of the Board shall be such as to ensure that not more than two-thirds will be of the same gender and reflects the regional and ethnic diversity of the people of Kenya.
 - (3) The Secretary-General of the Commission shall be the Secretary to the Board.
 - (4) The members referred to in subsections (1)(b), (c), (d), (e) and (f) may, in writing, designate a senior officer, not below the level of a Deputy Secretary, to represent them in the Board”.
87. The Interested Parties herein are members appointed under (g) above who should be appointed upon being nominated by their organizations which are the Kenya National Examinations Board, the Teachers Service Commission, a representative of a public university senate, Kenya Institute of Curriculum Development and Director General responsible for education and training.
88. From the pleadings by the Petitioner, he contends that the three interested parties were not nominated by the bodies contemplated under the Act for their appointment by the Cabinet Secretary.
89. The interested parties contend that they were duly nominated by the organization they represent and were thereafter appointed by the Cabinet Secretary accordingly.
90. From the pleadings herein I note that there is no letter to the organization in question requesting for nominations for person to serve on the commission.
91. In respect of the 1st interested party, there is a letter from the Vice Chancellor Kenyatta University dated 29/6/2020 appointing her as an alternative member of the board of the 3rd Respondent. There is no basis upon which the Vice Chancellor Kenyatta University made this appointment as the appointing authority is only the Cabinet Secretary.
92. The nominee expected is from a public university senate and the basis upon which one public university decided to sent an appointment letter for a staff is not clear.
93. As concerns the 2nd interested party, Antonina Lentoijoni, it is on record that the Cabinet Secretary Prof. Magoha wrote to the CEO of TSC on 10/12/2020 (page 6 of replying affidavit of Respondent) informing her of the existence of the vacancy and requesting for a nominee.
94. Vide a letter dated 4th February, 2020 Mrs. Mary Rotich, Director (Field Services) was nominated for the TSC (page 7 of Replying Affidavit).
95. Upon the retirement of Mrs. Mary Rotich, Antonina Lentoijoni was nominated as a replacement vide the letter from the CEO dated 28th July, 2022. It is therefore clear that in respect of the 2nd interested party, the procedure for her nomination was followed and so she was perfectly appointed to serve as a board member of the 3rd Respondent.



96. As concerns the 3rd interested party, Patrick Ochichi ever the replying affidavit filed by the Respondent does not explain how he was appointed to serve as a board member of the 3rd Respondent if at all. He only avers that his appointment was done in accordance with the law and there is no violation at all.
97. He has not even explained which organization he represents and how he was appointed. He has not annexed any letters nominating him nor even appointing him.
98. It is therefore my finding that in relation to the 3rd interested party, his appointment appears not clear and is therefore irregular.

Issue no. 4 remedies

99. Having found as discussed above, it is my finding that the appointment of the CEO was irregular but the Petitioner having approached this Court late and given that the appointment lapses in May 2023, I will let her serve her term to the end. This Court cannot aid the indolent.
100. As concerns the interested parties, I find the appointment of the 1st Interested Party and the 3rd Interested Party irregular and is therefore revoked forthwith.
101. The appointment of the 2nd Interested Party is found regular and it stands.
102. As concerns the prayer for refund of money earned by the 1st & 3rd Respondent, I find that that is not a viable order to grant as it is in my view a matter which can only be resolved through a disciplinary process.
103. In view of the orders given, I also find that the 1st Respondent is also duly bound to ensure proper succession to the 3rd Respondent and so I direct that the process for the appointment of the successor to the 4th Respondent should be put in place by the 3rd Respondent and the 1st Respondent accordingly.
104. Given the nature of this petition, I would order that each party bears its own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF FEBRUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kotonya holding brief for Opar for Petitioner – present

Ojiambo for 3rd & 4th Respondents – present

Miss Tuei holding brief for Kirimi for Interested Parties - present

