



Benjamin v Nakhumicha, Cabinet Secretary, Ministry of Health & 15 others (Constitutional Petition E077 of 2023) [2023] KEELRC 1560 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1560 (KLR)

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

B ONGAYA, J

JUNE 22, 2023

**IN THE MATTER OF ILLEGAL & IRREGULAR APPOINTMENT OF DR. FRED SIYOI AS THE REGISTRAR / CEO OF THE PHARMACY AND POISONS BOARD (PPB) & REVOCATION OF LEGITIMATE PPB BOARD
IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 27, 28, 41, 43, 47, 73, 159, 162, 232, 236, AND 258 OF THE CONSTITUTION OF KENYA, 2010
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
IN THE MATTER OF PUBLIC SERVICE COMMISSION ACT NO. 10 OF 2017
IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT NO.10 OF 2017
IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015
CONSTITUTIONAL PETITION NO. EO77 OF 2023**

BETWEEN

MAGARE GIKENYI J BENJAMIN PETITIONER

AND

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

PHARMACY AND POISONS BOARD 2ND RESPONDENT

ISHA ANAND 3RD RESPONDENT

BERNARD KIMUTAI MAIYO 4TH RESPONDENT

BEATRICE K.M AMUGUNE 5TH RESPONDENT

CHARLES GITHUA GITHINJI 6TH RESPONDENT



JOSEPHINE MBURU	7 TH RESPONDENT
ATTORNEY GENERAL	8 TH RESPONDENT
FRED SIYOI	9 TH RESPONDENT
JOHN MUNGUTI KISENGE	10 TH RESPONDENT
PAUL MUNGUTI NJARIA	11 TH RESPONDENT
DORCAS WANJIRU NGECHU	12 TH RESPONDENT
STEPHEN OGUTU OYAYA	13 TH RESPONDENT
MIRIAM WAIRIMU NDIRANGU	14 TH RESPONDENT
DIANA MARION	15 TH RESPONDENT
JACINTA WASIKE	16 TH RESPONDENT

RULING

1. The petitioner filed an application in person by way of a notice of motion dated 25.04.2023. The petitioner is a Consultant Trauma and General Surgeon. The application invoked Articles 1, 2, 3, 22, 23, 50, 73, 159, 232, 236, 258 and 259 of *the Constitution* of Kenya 2010; sections 33, 34, 37 and 38 of the *Public Service Commission Act*, 2017; rule 4, 23 and 24 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; Regulation 17 of the ELRC Rules 2016; section 1A and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya; and, all other enabling inherent powers of the Court and provisions of law.
2. The applicant prayed for orders as follows:
 - a. (spent).
 - b. (spent).
 - c. That pending the hearing and determination of the petition conservatory order do issue, staying and suspending the appointment of the 1st interested party, Dr. Fred Siyoi, as the Registrar or CEO of the 2nd respondent as well as staying and suspending the twin Gazette Notices No. 637 dated 19.01.2023 and No. 2116 dated 23.02.2023 that purported to respectively revoke the appointment of the 2nd to 7th interested parties and subsequent replacement of new Board of Directors.
 - d. That pending the hearing and determination of the petition, the Board of Management of the 2nd respondent ante the impugned Gazettement consisting of the 2nd to 7th interested parties is at liberty to independently appoint an acting Registrar or CEO from amongst the current pool of employees holding substantive management positions with the 2nd respondent.
 - e. That any other order or modification of the prayers in which the Honourable Court may deem fit to grant for purposes of attaining justice for all Kenyans.
 - f. That costs of the application be provided for.
3. The application was based upon the annexed petitioner's supporting affidavit and upon the following grounds:



- a. In petition No. E 018 of 2023 at Nairobi the Court ordered that an acting appointment cannot be made from officers not already in the service of the appointing authority's establishment. The Attorney General was the 4th respondent in that matter but the decision appears not implemented across public service.
- b. The 2nd respondent's new Board members namely Dr. Isha Anand, Bernard Kimutai Maiyo, Dr. Beatrice K. M Amugune and the Chairperson out of 9 members of the 2nd respondent's Board held a meeting on Monday 27.02.2023 and without statutory quorum appointed the 1st interested party as acting CEO or Registrar of the 2nd respondent. At that time of acting appointment, the 1st interested party was not a staff member of the 2nd respondent because his earlier appointment as CEO or Registrar had been cut short on 26.09.2020 when the High Court issued a decree or order of Certiorari that quashed the said appointment and subsequently by a ruling dated 20.04.2020 the Court of Appeal dismissed the 2nd respondent's application for stay of execution of the said order and decree. The 1st interested party did not therefore hold any position in the 2nd respondent's establishment and could not be appointed to act as CEO or Registrar and in any event he had reached the mandatory retirement age of 60 years and he held no special skill over the existing staff or those in the open market.
- c. Section 2 of the *Public Service Commission Act*, 2017 defines an acting appointment as a 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. Clearly then, the appointment of the 1st interested party to act as CEO and Registrar of the 2nd respondent was irregular as not fitting the test and criteria in the definition. He held no substantive position with the 2nd respondent. He was not eligible for the acting appointment.
- d. The legitimate Board of the 2nd respondent made up of the 2nd to 7th interested parties had on 13.01.2023 rejected or declined the application by the 1st interested party for renewal or re-appointment as CEO or Registrar for a second term. The rejection or decline was upon the ground that the 1st interested party had no valid contract of employment capable of being renewed for the same had been quashed by the Court in September 2019 and as well, he had attained the mandatory retirement age of 60 years and, he had no special skill over the existing staff as provided at section 52 of the Public Service Act. Thus that legitimate Board had on 13.01.2023 simultaneously appointed Dr. Jacinta Wasike as the acting Registrar or CEO pending the timeous commencement of the recruitment process to fill the vacant position of CEO and Registrar substantively through open, transparent and competitive process provided at section 5(4) of the *Pharmacy and Poisons Act* thus, "The Board shall through a transparent and competitive recruitment process appoint the Registrar."
- e. The petitioner states that for lack of better words, a ghost being infuriated and frustrated by the acting appointment of Dr. Jacinta Wasike impersonated the 1st respondent, unprocedurally and illegally revoked the appointment of the 2nd to 7th interested parties by Gazette Notice No. 636 dated 20.01.2023. Further, there being no ghost, the 1st respondent or the Cabinet Secretary has no mandate or power to revoke the appointment of members of the Board of a state corporation once constituted. Such power vests in the President per section 7(3) of the *State Corporations Act* and exercised per principles of natural justice as was held in *Ronoh Sitienei & 4 Others –Versus- Pharmacy & Poisons Board & Cabinet Secretary of the Ministry of Health; Attorney General & 4 Others (Interested Parties) [2019]eKLR*.



- f. That none of the 2nd to 7th interested parties were not subjected to any performance appraisal by SCAC or disciplinary process by any authority and apart that the 1st respondent had no authority or power to make the impugned revocation, there was no basis or reason for such revocation and the revocation contravened the general provisions of the *Fair Administrative Action Act* and the principles of Natural Justice enshrined in Articles 10, 27, 28, 47, 509, 73 and 232 of *the Constitution*. The revocation was an ambush against the 2nd to 7th interested parties having performed their statutory duty and whose outcome did not favour the 1st interested party, a clear violation of Article 236 of *the Constitution*. The 2nd to 7th interested parties had reported to their nominating associations that the 1st interested party was hiding crucial management information from them including financial information and usurpation of their mandate of registration of drugs and pharmaceutical practitioners.
- g. The Principal Secretary of the Ministry of Health had on 20.01.2023 (as appearing the support the ghost decision) issued a press statement to the effect that Dr. Jacinta Wasike had never been appointed as acting CEO and Registrar and that the contract of the 1st interested party as incumbent CEO had been renewed for a second term to facilitate continuity to support continuity in Kenya's bid to attain international standards in the regulation of health products and technologies and hoped the media would withdraw the erroneous reporting in that regard.
- h. By gazette notice No. 2116 dated 23.02.2023, it is the petitioner's case. A ghost again impersonated the 2nd respondent and unprocedurally appointed an illegal and illegitimate Board of Management of the 2nd respondent consisting of three members only, Dr. Isha Anand; Bernard Kimutai Maiyo; and Dr. Beatrice K.M Amugune instead of statutory eight (8) members as required under section 3 of *Pharmacy and Poisons Act*. The three appointed members and the Chairman met on 27.02.2023 and purported to appoint the 1st interested party as the acting Registrar and CEO of the 2nd respondent, and, revoked the appointment of Dr. Jacinta Wasike as such by the 2nd to 7th respondents. The appointments under gazette notice No. 2116 dated 23.02.2023 were free of the requests to the relevant medical associations to nominate their respective nominees to the Board namely Kenya Medical Association (KMA); Kenya Pharmaceutical Association (KPA); Pharmaceutical Society of Kenya (PSK); and Training Institutions Caucus of higher learning and contrary to section 3(1) of the *Pharmacy and Poisons Act*. Further the appointment of Dr. Isha Anand a Pharmacist employed by the Nairobi Hospital under section 3(1) (d) of the Act was callous for the section provides for a representative of the pharmacy training institutions and not from a hospital and no training institution had been requested to submit such a nominee.
- i. The 1st respondent has confirmed she was not involved in the activities by the ghost and by letter dated 11.04.2023 to Kenya Pharmaceutical Association requesting the Association to nominate two members of opposite gender to represent the Association in the Pharmacy and Poisons Board – yet the appointments had already been undertaken per impugned gazette notice No. 2116 dated 23.02.2023.
- j. Under section 5(4) and (5) of the *Pharmacy and Poisons Act*, the 2nd respondent's Board has the authority to appoint a CEO and Registrar in a transparent and competitive process and the Registrar holds office for 4 years and is eligible for reappointment only once and subject to good performance.
- k. The 1st respondent settled to appoint the senior most officer to act but its officers influenced it (Bernard Kuria, Stephen Khaemba, and Ruth Kibaara) to appoint Dr. Jacinta Wasike because



she comes from the same region and ethnicity as the 1st respondent. Thus on 13.01.2023 the 1st respondent had written to reply the Board that Dr. Jacinta Wasike, the 8th respondent, is appointed to act as Registrar and CEO of the 2nd respondent. Thus the ghost and the 1st interested party moved as now impugned herein.

- l. The Court should therefore intervene to protect [the Constitution](#) and law. The matter is of public interest and the Court should intervene.
4. The 2nd respondent appointed G & A Advocates LLP to act in the matter and filed the notice of preliminary objection dated 08.05.2023 upon the following grounds:
 - a. The Court lacks jurisdiction because section 12 (1) of the [Employment and Labour Relations Court Act](#) has been disregarded as there is no employer-employee relationship between the petitioner and the respondents and there is no dispute as contemplated in Article 162(2) of [the Constitution](#) and section 12(1) of the Act.
 - b. Thus, in view of ground (a) above the petitioner lacks locus standi.
 - c. The application and entire petition is misconceived, incompetent, bad in law, incurably defective, and, an abuse of court process.
 5. The 1st interested party filed a notice of preliminary objection on 09.05.2023 through Chimei & Company Advocates and upon the following grounds:
 - a. The petitioner lacks locus standi as there exists no employer-employee relationship between the petitioner with any of the respondents in line with the Court of Appeal in Nakuru Civil Appeal No. E136 OF 2022 Clerk , Nakuru County Assembly & 2 Others –Versus- Kenneth Odongo & 3 Others which determined that in absence of an employment relationship, a petitioner lacks locus to bring a petition or claim before the ELRC for redress on violation of fundamental rights and freedoms.
 - b. The petition offends the principles enunciated by the Court of Appeal in Civil Appeal No. 656 of 2022 National Social Security Fund Board of Trustees –Versus- Kenya Tea Growers Association that decided cases are in agreement that constitutional issues can be determined by the ELRC only if they arise from an employer-employee dispute.
 - c. The petition offends the express provisions of Articles 22, 23, and 258 of [the Constitution](#) which vests in the High Court the exclusive and unlimited jurisdiction to hear and determine applications for redress of a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights save for limited situations as provided for under Article 162(2) of [the Constitution](#) and section 12(1) of the Employment and [Labour Relations Act](#).
 - d. Consequently, the Honourable Court lacks jurisdiction to entertain the instant petition as there exists no employer-employee relationship between the petitioner and any of the respondents.
 6. The 2nd to 6th interested parties filed the replying affidavit of Dr. John Munguti Kisengi, the 2nd interested party and whom the 3rd to 5th interested parties authorised to plead. They act in person. Their replying affidavit stated to the effect as follows:
 - a. They were appointed Board of Directors of the 2nd respondent by Gazette Notice No. 3379 dated 28.02.2022 for three years effective 04.03.2022 per section 3 of the [Pharmacy and Poisons Act](#). The inaugural meeting with the Cabinet Secretary was held on 01.07.2022. The tenure



of the previous Board had lapsed on 03.03.2020. It was on Friday 06.01.2023 that they were informed about Court decision to recruit a Registrar and CEO because they understood that the 1st interested party's contract of service was to lapse on 27.02.2023 and he also had a few days to reach the mandatory retirement age of 60-years. The 1st interested party had applied by the letter dated 06.01.2023 and received by the Board on 06.01.2023 for extension of his contract of employment for a second term of four years. The Board declined the request because it had been made belatedly at a time he had no contract between him and the 2nd respondent capable of being renewed and he was just about to attain 60 years of mandatory retirement.

- b. Thus the Board firmly decided to commence the recruitment process for the Registrar and CEO commencing with appointment of an acting Registrar and CEO from existing senior staff of the 2nd respondent and to have the 1st interested party to proceed on terminal leave. In full Board meeting on 06.01.2023 an ad hoc committee was appointed to shortlist five persons in order of merit (per Public Service Commission guidelines and the [Pharmacy and Poisons Act](#)) who could be appointed as acting Registrar and CEO of the 2nd respondent pending the recruitment process of the substantive Registrar and CEO. On the same 06.01.2023 the Board Chairman requested for support staff from the parent Ministry of Health since his office was non-executive and had no staff that could handle the documentation during the recruitment of a CEO as the 1st interested party had already declared conflict of interest as related to the recruitment process.
- c. The Ministry deployed three officers during the recruitment process namely Benard Kuria a State Counsel; Ruth Kibaara a Human Resource Officer; and Stephen Khaemba a Deputy Director of Human Resource and all from the Ministry. They were in attendance of Board meetings on recruitment of an acting Registrar and CEO. The assistance was normal as 50.3% of the 2nd respondent's staff are deployed from the Ministry.
- d. The ad hoc committee met on 10.01.2023 and considered a long list of 41 Civil Servant Pharmacists deployed to the 2nd respondent from the Ministry in Job Groups L to S. The Committee considered the records of the officers against provisions of the [Pharmacy and Poisons Act](#) - section 5 (4) thereof; the Public Service Commission Regulations 2020 regulations 16 and 23; Mwongozo Code of Governance for State Corporations; the [Public Service Commission Act](#) -section 34; and the Human Resource Policies and Procedures Manual for the Public Service -section B29; and various government circulars on acting appointment. A special Board meeting was held on 12.01.2023 and the report by the ad hoc committee was considered and in order of seniority and compliance with eligibility the five (5) shortlisted officers for acting CEO and Registrar included 1. Abdulahi Ali Arale; 2. Wasike Jacinta Nasimiyu Director Corporate Services; 3. Oguta Wilfred Ochieng – Director, Pharmacy Practice; 4. Ibrahim Ahmed Mohamed Director, Medical Products and Health Technologies; and 5. Meriakol Johnathan Nawiy. The three Directors directly reported to the CEO and Registrar and thus ranked higher than the others. Dr. Ibrahim Ahmed Mohamed was undisputedly the Senior most but was ranked 4th because his file lacked a certificate of Strategic Leadership Course lasting 6 months from a reputed institution and which was part of the eligibility criteria. Thus Dr. Wasike Jacinta Nasimiyu was the senior most administrator at the 2nd respondent's establishment and was unanimously approved for appointment as acting CEO and Registrar of the 2nd respondent for 6 months. The 1st respondent was informed in the spirit of consultation and her roles under section 4 of the [State Corporations Act](#) and the name forwarded on 12.01.2023. The 1st respondent wrote back on 13.01.2023 giving the concurrence.



Dr. Waike Jacinta Nasimiyu was appointed to act by the letter dated 13.01.2023 and the 1st interested party given a letter to proceed on terminal leave. There was no interference on the part of the 1st respondent.

- e. On 19.01.2023 the ad hoc committee met to plan for substantive appointment of the Registrar and CEO of the 2nd respondent. The three officers deployed to assist the committee were recalled to the Ministry and they left abruptly making it impossible for the committee to proceed. By gazette notice No. 639 dated 19.01.2023 the appointments of the 2nd to 6th respondents were revoked and the process to appoint a substantive CEO and Registrar for the 2nd respondent ended prematurely. Prior to the revocation of appointments, the Board of Directors of the 2nd respondent had never been subjected, individually or jointly, to performance appraisal or evaluation by the State Corporations Advisory Committee that would have informed the revocation of appointment of the 2nd to 6th interested parties. That after the revocation of their appointment they were not given letters detailing the grounds for the revocation by the 1st respondent. The revocation without cause was a violation of their constitutional rights against discrimination, basic principles of natural justice and the right to fair administrative action. The revocation caused them indignity, psychological torture, brought their integrity into question, tarnished their reputations and brought to them public ridicule and defamation of character – and reserved the right to pursue redress for the personal and professional injuries to reputation. They were keen to resume duty and Board of Directors of the 2nd respondent to discharge lawful duties up to end of their respective tenure.
7. The petitioner filed his further affidavit sworn on 09.05.2023. The petitioner urged as follows:
- a. Paragraph 1.7.4 of Mwongozo Code provides that where required skills are not available to the Committee, the Board may, with the approval of the State Corporations Advisory Committee co-opt non-board members to the committee of the Board. The 2nd to 6th interested parties co-opted officers deployed from the Ministry to assist in recruitment of the acting CEO without the requisite approval. Further, nothing stopped the Board in such recruitment from relying on its own officers and staff such as the its Corporation Secretary Nancy Arunga and Counsel Kibet and its Human Resource Officers. The appointment of Dr. Wasike Jacinta to act was null and void ab initio due to participation of the Ministry officers who had no proper authority to participate at ad hoc committee meeting on 10.01.2023 and full Board meeting on 12.01.2023.
 - b. Dr. Ibrahim Ahmed Mohamed being the undisputed senior most officer, he ought to have been appointed to act. Seniority is defined in the Public Service Commission Human Resource Policies and Procedures Manual for Public Service, 2016 and it must apply. The Commission's circular dated 11.03.2020 had suspended application of the Strategic Leadership Development Programme certificate and Dr. Ibrahim had obtained it in 2012 ahead of Dr. Wasike and nothing stopped the Board from calling Dr. Ibrahim to confirm his records. No reason was given why Dr. Wasike had been preferred over Dr. Wilfred Oguta Ochieng.
 - c. The 2nd respondent and the 1st interested party have filed similar preliminary objections dated 08.05.2023 and 09.05.2023 respectively. In United States International University (USIU) – Versus- Attorney General [2012]eKLR it was held by the Court of Appeal that the Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incidental to those matters. Thus the Court has no jurisdiction for Articles 22, 23 and 258 petition was unfounded.



- d. Section 12(1) of the *Employment and Labour Relations Court Act* is not exhaustive on the disputes that can be filed to the Court as it uses the word including. The disputes brought to the Court are those relating to or arising from an employment and labour relationship.
- e. The 1st interested party and the 2nd respondent have filed an appeal in a previous similar matter urging that the proper court with jurisdiction is this Court and not the High Court.
8. The 2nd to 7th respondents filed the replying affidavit of Dr. Charles Githua Githinji the 6th respondent and chairperson of the 2nd respondent's Board. It was filed through G & A Advocates LLP. It was stated and urged as follows:
- a. There is no prima facie established. The 1st interested party was regularly appointed as acting CEO and Registrar of the 2nd respondent per section 2 of the *Public Service Commission Act*. He had been acting CEO and Registrar of the Board since 17.03.2017. On 25.01.2019 a vacancy in the position was advertised. The same was challenged in HC Petition No. 2 of 2019 in Machakos, Wambua Maithya –Versus- Pharmacy and Poisons Board [2019] eKLR . The 1st interested party was appointed CEO of the Board from 27.02.2019 for 4 years and was eligible for reappointment for 4-years subject to successful performance. The appointment was quashed by the judgment in Machakos, Wambua Maithya –Versus- Pharmacy and Poisons Board [2019] eKLR . It was clarified in the ruling of 25.01.2019 that the 1st interested party reverted to his position as acting Registrar and CEO. An application to review that ruling was dismissed on 22.02.2021.
- b. The 6th respondent assumed office on 23.01.2023 and received a request from the 1st interested party to reconsider the previous Board decision of 13.01.2023 declining the 1st interested party's request for renewal of contract and appeal dated 16.01.2023. The term of the 1st interested party was due to lapse on 28.02.2023 and his request for renewal had been made on 28.02.2022. The Board considered the request on 27.02.2023 and the term of the 1st interested party was extended for 6 months effective 28.02.2023 to allow the Board time to consider to renew or not to renew the contract at the end of the 6 months; and, for the Board to undertake a comprehensive evaluation of the 1st interested party's performance. Thus, the 1st respondent was appointed by a lawful authority, a quorate Board consisting of the Chairperson and 4 other Board members consistent with section 34 (a) of the *Public Service Commission Act*, 2017 and section 4 (4) of the *Pharmacy and Poisons Act*.
- c. The appointment of the Chairperson under gazette notice No. 630 of 20.01.2023 and subsequent appointment of the 3rd to 5th respondents and Board members by gazette notice No. 2116 was lawful per Article 232 and section 3 of the *Pharmacy and Poisons Act* and any dispute be decided after merit hearing of the petition.
- d. The revocation of the 2nd to 7th interested parties was in accordance with section 51 (1) of the *Interpretation and General Provisions Act* and section 3 (1) of the *Pharmacy and Poisons Act* Cap 244. In effect the 1st respondent or any Cabinet Secretary can revoke appointments of Board members of a Board of a state corporation.
- e. The 1st respondent's contract of service is not subject to retirement age of 60 years. The term is contractual and renewable based on performance and business requirements.
- f. The appointment of the 2nd to 7th interested parties was revoked by gazette notice No. 636 and that revocation is subject of an order for certiorari in the main petition. Whether the persons appointed by gazette notice No. 2116 were nominated by relevant associations is a matter for



full hearing. Whether appointment of 3rd respondent was ultra vires section 3 (1) (d) is a matter for full hearing. Whether the 1st respondent meddled for Dr. Wasike Jacinta to be appointed an acting Registrar and CEO is equally a matter for full hearing.

- g. No legal wrong or injury has been caused to the applicant and there exist no employer employee relationship between the applicant and the 2nd respondent. Public interest demands that the status quo be maintained pending hearing and determination of the petition. The application therefore be dismissed with costs.
9. The 1st interested party filed his replying affidavit sworn on 24.05.2023. he urged and stated as follows:
- a. He is the CEO and Registrar of the 2nd respondent.
 - b. The new Board members' appointment should not be revoked as it would be in violation of section 3 of the *Pharmacy and Poisons Act* and section 51 (1) of the *Interpretation and General Provisions Act*.
 - c. He holds a substantive position with the 2nd respondent. He is acting CEO and Registrar in acting capacity for 6 months ending June 2023 as the Board considers his case for reappointment.
 - d. If interim orders are granted nothing will be left of the petition to determine.
 - e. In the ruling delivered on 17.06.2020 in in HC Petition No. 2 of 2019 in Machakos, Wambua Maithya –Versus- Pharmacy and Poisons Board it was clarified that the status quo ante, prior to the Court decision of 26.09.2019 prevailed, being that the 1st interested party continued to act as the Registrar and CEO in office.
 - f. The term of the initial Board lapsed on 03.03.2020 and a new Board was appointed on 28.02.2022 and he continued to act as CEO and the Board made no decision to terminate his contract.
 - g. Section 5(5) of the *Pharmacy and Poisons Act* entitles to be eligible for re-appointment for another term subject to performance.
 - h. He applied for renewal of the contract for 4 years by his letter of August 2022 and on 13.01.2023 the Board declined to extend his term and directed he proceeds on terminal leave. He sought review upon the ground that he had not been appraised. The newly appointed Board considered his request for review and his tenure was extended for 6-months awaiting the Board decision on renewal of his contract.
 - i. He had never left office until the lapse of his 4-years tenure and subsequent renewal of the term for 6-months. Ass CEO he served on fixed term contract and could serve beyond the mandatory retirement 60-years of age in public service. It is renewable based on performance and as upheld in Okiya Omtatah –Versus- Joseph Kinyua & Another [2018]eKLR.
 - j. The applicant has therefore failed to establish a prima facie case.
10. Submissions were filed for the parties on the preliminary objections and on the application. The Court has considered the material on record. The Court returns as follows.
11. The 1st issue is whether the Court lacks jurisdiction to entertain the petition on account of want of a contract of service as per the cases cited for the 2nd respondent and the 1st respondent. The Court returns that as urged and submitted by the petitioner, the submission is untenable. First, the dispute is about the appointment of the acting CEO and Registrar or Registrar and CEO of the 2nd respondent.



There are actual contracts of service as between the 1st interested party and the 2nd respondent and then the 2nd respondent and one Dr. Jacinta Wasike and other 2nd respondent's employees said to be potential candidates for appointment of the office of Acting CEO and Registrar of the 2nd respondent. The existence of those contracts appear to place the case in the holdings that there be a contract of service. The Court considers that any person can file a suit or petition in the when section 12(2) of the Act states that an application, claim, or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employers' organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. It appears to the Court that by that provisions, any person like the petitioner are entitled to move the Court as long as the issue in dispute is about formulation, interpretation, and implementation of a term and condition of service which may arise pre, post and during a contract of service. The Court further considers that the section appears to confer the Court jurisdiction in matters of employment, labour relations and related matters within the right of every person to move the Court as contemplated in Articles 22, 23 and 258 of *the Constitution*. Like in the instant case it is not simply that the matter arises and revolves around the mentioned contracts of service but as well, the petitioner is entitled to move the court in public interest litigation as he has done provided the dispute relates to employment or labour relations or related matters as envisaged in Article 162 (2) (a) and section 12 of the *Employment and Labour Relations Court Act*. The Court returns that the matter is within the Court's jurisdiction and the petitioner was entitled to move the Court within the tests set in Articles 22, 23 and 258 of *the Constitution*.

12. The 2nd issue is whether the petitioner has established the threshold for grant of the interim conservatory orders as prayed for. A conservatory order is granted to place a brake on flow of things so as to prevent a foreseeable injury. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR the Supreme Court stated thus, “[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.” This was applied by the High Court (MrimaJ) *Damour Florian Emmeric v Director of Immigration Services* [2022] eKLR and it was held thus, “35. In *Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others* [2015] eKLR, the Court summarized the principles for grant of conservatory orders as:
- (i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
 - (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - (iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”



13. The Court has considered the material before the Court against the set principles for grant of conservatory orders.
14. As relates to revocation of the appointment of the 2nd to 6th respondents, prima facie, in absence of any other material before the Court, the revocation was ultra vires and outside the constitutional and statutory mandate of the 1st respondent. As urged for the petitioner, in *Ronoh Sitienei & 4 Others-Versus- Pharmacy & Poisons Board & Cabinet Secretary of Ministry of Health; Attorney General & 4 Others (Interested Parties)* [2019]eKLR the Court held that once the 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 and section 51 (1) of the [Interpretation and General Provisions Act](#) did not apply at all. The Court stated as follows:

“The Court returns that the 2nd interested party is a state corporation and is therefore subject to provisions of the [State Corporations Act](#). As urged for the 2nd interested party and the petitioners, the 2nd interested party has not been exempted from the provisions of the Act. There is no dispute amongst the parties that the 2nd interested party is a state corporation within the meaning assigned under the [State Corporations Act](#). 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.”

The Court returns that section 51 of the [Interpretation and General Provisions Act](#), Cap 2 laws of Kenya is a general provision. The section is clear in its wording that it applies in circumstances whereby, “...unless a contrary intention appears...” The Court finds that once board members of a state corporation have been appointed, they serve for the statutory term unless they fail to act in the national interest in which event section 7(3) of the [State Corporations Act](#) is invoked to revoke the appointment and the remedial action as prescribed in the section is invoked. Thus the Court finds that the tenure of the petitioners as board members of the 2nd interested party is mandatorily 3 years renewable and the specific law for revocation of the appointment and the precondition for such revocation is clearly provided for in section 7(3) of the [State Corporations Act](#).

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." The Court finds that prima facie, in the instant case the 1st respondent appears to have usurped the President's power to revoke the appointments of the 2nd to 6th interested parties.

15. As relates to the extension of the 1st interested party's tenure, the letter by the Chairperson Dr. Rodgers Atebe dated 13.01.2023 states that the 1st respondent's letter requesting for renewal dated 25.01.2022 had been received by the Board on 06.01.2023 and therefore the request for renewal had been belated and renewal for a further 4 years was declined. It appears that the new Board, but for the irregular appointment of some Board members, had the authority to review the decision declining the renewal. However, prima facie, the renewal was to be for 4 years and not for 6-months extension as was purportedly done. The Court has considered the effect of the extension and it could be that the Board members whose tenure had been irregularly cut were out of office and a new membership put in place. The Court considers that the extension appears to have been done and its validity could be well interrogated at the full hearing. In any event the Board should be able to address the issue pending the hearing and determination of the petition. The extension of the contract from 28.03.2023 for six months will not be disturbed. While making that finding, the Court has considered that the applicant urged that the 1st interested party had been on an acting status as the Registrar and CEO but no such evidence appears to have been provided. The 1st respondent has not exhibited his contract of substantive service that is said to have been lapsing on 27.02.2023 or thereabouts and running for 27.02.2023 by letter of that date. There is a real mix-up on whether the claimant was acting or on substantive terms of service. Such is an issue that renders that the Court considers would be resolved by the Board or by the Court at full hearing. At this stage of the proceedings, the Court finds that no prima facie case is established to keep the 1st interested party out of the office.
16. As relates to appointments of the new Board members, prima facie the petitioner has established that the appointments were to irregularly accruing vacancies by reason that the revocation of the 2nd to 6th interested parties had been irregular. Further, the petitioner has shown that the appointments were without nominations by the relevant statutory nominating authorities. Prima facie, the appointments appear incompetent.

In conclusion and view of the findings the Court returns that the petitioner has established the case for grant of interim conservatory orders as follows:

1. That pending the hearing and determination of the petition a conservatory order is hereby issued staying and suspending the twin Gazette Notices No. 637 dated 19.01.2023 and No. 2116 dated 23.02.2023 that purported to respectively revoke the appointment of the 2nd to 7th interested parties and subsequent replacement of new Board of Directors.
2. That pending the hearing and determination of the petition, the Board of Management of the 2nd respondent ante the impugned Gazettement consisting of the 2nd to 7th interested parties is at liberty to independently consider the status of service of the 1st interested party and may consider appointment of an acting Registrar or CEO from amongst the current pool of employees holding substantive management positions with the 2nd respondent or, substantively fill accruing vacancy in that regard in accordance with relevant law, public service regulations, and, applicable lawful policies and practices.
3. The costs of the application in the cause.
4. The preliminary objections are hereby dismissed with costs.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
THURSDAY 22ND JUNE, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

