



REPUBLIC OF KENYA



KENYA LAW
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**Okoti v Cabinet Secretary, Industry, Trade and Co-operatives &
13 others; Kenya Bureau of Standards (Interested Party) (Petition
19 of 2020) [2022] KEELRC 1416 (KLR) (25 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1416 (KLR)

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

PETITION 19 OF 2020

MA ONYANGO, J

MAY 25, 2022

**IN THE MATTER OF: ARTICLES 3(1), 22(1) & (2)(C), 48, 50(1),
159(1) AND 258(1) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION AND VIOLATION OF ARTICLES
1(1), 2(1-4), 3(1), 10, 24, 73, 75, 29, 131(2)(A), 153(4), AND 232 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE ALLEGED VIOLATION OF
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
ARTICLES 27, 41(1) AND 47 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE ALLEGED ABUSE
OF EXECUTIVE POWERS IN THE IRREGULAR
APPOINTMENT BY THE CABINET SECRETARY
OF THE CHAIRPERSON AND MEMBERS OF THE
NATIONAL STANDARDS COUNCIL (THE KEBS BOARD OF DIRECTORS),
UNDER SECTION 6 (2)(A) & (D) AND (3) OF THE STANDARDS ACT (CAP. 496)**

AND

**IN THE MATTER OF: ALLEGED CONFLICT OF INTEREST IN THE APPOINTMENT OF
BERNARD M. NGORE AS THE CHAIRPERSON OF NATIONAL STANDARDS COUNCIL**

AND

**IN THE MATTER OF: THE DOCTRINES OF
LEGITIMATE EXPECTATION AND VOID AB INITIO**



BETWEEN

OKIYA OMTATAH OKOITI PETITIONER

AND

**CABINET SECRETARY, INDUSTRY, TRADE AND CO-
OPERATIVES 1ST RESPONDENT**

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE STATE CORPORATIONS ADVISORY COMMITTEE ... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

**BERNARD M. NGOBE, CHAIRPERSON NATIONAL STANDARDS
COUNCIL 5TH RESPONDENT**

**MARY WANJA MATU, INDEPENDENT MEMBER NATIONAL STANDARDS
COUNCIL 6TH RESPONDENT**

**HELEN KABETI NANGITHIA, INDEPENDENT MEMBER NATIONAL
STANDARDS COUNCIL 7TH RESPONDENT**

**FOUZIA A. ABDIRAHAAAN, INDEPENDENT MEMBER NATIONAL
STANDARDS COUNCIL 8TH RESPONDENT**

**PATRICK M. MUSILA, INDEPENDENT MEMBER NATIONAL STANDARDS
COUNCIL 9TH RESPONDENT**

**EDWARD NJOROGE, INDEPENDENT MEMBER NATIONAL STANDARDS
COUNCIL 10TH RESPONDENT**

**ERIC MUNGAI, INDEPENDENT MEMBER NATIONAL STANDARDS
COUNCIL 11TH RESPONDENT**

**GILBERT LANG'AT, INDEPENDENT MEMBER NATIONAL STANDARDS
COUNCIL 12TH RESPONDENT**

**ROGERS OCHAKO ABISAI, INDEPENDENT MEMBER NATIONAL
STANDARDS COUNCIL 13TH RESPONDENT**

**BERNARD NJIINU NJIRAINI, MANAGING DIRECTOR KENYA BUREAU OF
STANDARDS 14TH RESPONDENT**

AND

KENYA BUREAU OF STANDARDS INTERESTED PARTY

JUDGMENT

1. The Petitioner describes himself as a law abiding citizen of Kenya, a public spirited individual, a human rights defender and the Executive Director of Kenyans for Justice and Development Trust, whose purpose is promoting democratic governance, sustainable economic development and prosperity.



2. The 1st Respondent – The Cabinet Secretary, Industry, Trade and Co-operatives – is in charge of the parent ministry responsible for the Kenya Bureau of Standards (KEBS). The Cabinet Secretary has been sued herein for abusing his powers under Section 6(2)(a) & (d) of the Standards Act (cap. 496) by handpicking and appointing persons to the offices of Chairperson and independent members of the National Standards Council (the KEBS Board of Directors) without subjecting them to a fair, open, competitive, merit based, and inclusive recruitment process open to public participation.
3. The 2nd Respondent – Public Service Commission is a constitutional commission and a body corporate established under Article 233 of the Constitution of Kenya. Article 234 as read with Sections 11 and 12 of the Public Service Commission Act 2012, empowers the Commission to establish and abolish offices in the public service; and appoint persons to hold or act in those offices, and to confirm appointments; exercise disciplinary control over and remove persons holding or acting in those offices; promote the values and principles referred to in Articles 10 and 232 throughout the public service; investigate, monitor and evaluate the organisation, administration and personnel practices of the public service; ensure that the public service is efficient and effective; and develop human resources in the public service. The Commission has been sued herein for failing to ensure that appointments to the National Standards Council (NSC) were made strictly in compliance with the Constitution and national legislation, through to a fair, open, competitive, merit based, and inclusive recruitment process.
4. The 3rd Respondent – State Corporations Advisory Committee is established under Section 26 of the State Corporations Act (Cap 446). The functions of the Committee as set out in Section 27(c) of the Act include advising on the appointment, removal or transfer of officers and staff of State corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment. The Committee has been sued herein for failing to ensure that appointments to the National Standards Council were made strictly in compliance with the Constitution and national legislation, through to a fair, open, competitive, merit based, and inclusive recruitment process.
5. The 4th Respondent - The Hon. Attorney General has been sued in this petition as the legal adviser and representative of the Government of Kenya, who shall promote, protect and uphold the rule of law and defend the public interest, within the meaning of Article 156 of the Constitution.
6. The 5th Respondent – Bernard M. Njoro (Chairperson NSC) has been sued as a person whom the Cabinet Secretary for Industry, Trade and Co-operatives handpicked and appointed to the public office of the Chairperson of the National Standards Council. The Petitioner avers that the 5th Respondent was appointed contrary to the law which requires that public office be filled through a transparent, competitive, inclusive, and merit based recruitment process open to public participation. The Petitioner avers that the appointment of the 5th Respondent meant that the Government took over the seat meant to represent the public on the NSC. That his appointment was invalid, null and void because, in appointing him, the Minister purported to have revoked the appointment of his predecessor by H. E. the President. That the 5th Respondent, as Chairperson, he is a conflicted person to the extent that his elevation as a public official puts him in a position to regulate his private businesses which fall under the sector.
7. The 6th to 13th Respondents – Mary Wanja Matu, Helen Kabeti Nangithia, Fouzia A. Abdirahaaan, Patrick M. Musila, Edward Njoroge, Eric Mungai, Gilbert Lang’at, Rogers Ochako Abisai have been sued as persons whom the Cabinet Secretary for Industry, Trade and Co-operatives handpicked and appointed to the public office of the independent Member of the National Standards Council contrary to the law which requires that public office be filled through a transparent, competitive, inclusive,



and merit based recruitment process open to public participation. The Petitioner avers that their appointment meant that the Government took over the seats meant to represent the public on the NSC. Hence, as beneficiaries of the impugned appointments, they are persons with identifiable stakes in these proceedings.

8. The 14th Respondent – Bernard Njiinu Njiraini (Managing Director KEBS) has been sued as a person who was sixth at the interviews. The Petitioner avers that through collusion and corruption, on the irregular and unlawful recommendation of the National Standards Council, the Cabinet Secretary for Industry, Trade and Co-operatives appointed to be the Managing Director of the Kenya Bureau of Standards contrary to Government policy which requires that the best three candidates be considered for appointment.
9. The Interested Party – the Kenya Bureau of Standards is a statutory body established under the Standards Act (CAP 496) of the laws of Kenya to, among other issues, promote standardisation in industry and commerce, and to provide for the testing of both locally manufactured and imported commodities to enforce standards of quality or description. The Bureau has been joined herein as an entity that has an identifiable stake or legal interest or duty in the proceedings.
10. The Petitioner states that his locus to institute the instant suit is derived from Articles 3(1), 22, 50(1), 258 while the jurisdiction of this Court is derived from Articles 1(c), 4(2), 10, 22, 23, 50(1), 159, 162, 165, 258 and 259 of the Constitution of Kenya, 2010 as read with Section 12 of the Employment Act.
11. It is the Petitioner’s case that Kenya Bureau of Standards (KEBS) is a public body subject to the constitution and national legislation. It is established under an Act of Parliament, the Standards Act which establishes the National Standards Council which is the policy making body charged with supervision and control of the administration and financial management of KEBS. That the Chairperson and independent members therefore represent the public pursuant to Article 1(2) of the Constitution.
12. The Petitioner states that the Managing Director is the Chief Executive Officer of KEBS responsible for the day to day administration of KEBS within the broad guidelines formulated by NSC.
13. The aims and objectives of KEBS include preparation of standards relating to products, measurements, materials, processes, etc. and their promotion at national, regional and international levels; certification of industrial products; assistance in the production of quality goods; quality inspection of imports at ports of entry; improvement of measurement accuracies and dissemination of information relating to standards.
14. The main functions of KEBS are as follows:
 - i. Promote standardization in industry and commerce.
 - ii. Provide facilities for examination and testing commodities manufactured in Kenya.
 - iii. Test goods destined for exports for purposes of certification.
 - iv. Prepare, frame or amend specification and codes of practice.
15. The Petitioner states that to execute its all-important mandate as an impartial regulator of very sensitive sector that is responsible for the daily safety of Kenyans, it is necessary that the Chairperson and the independent members of the NSC are appointed strictly according to the Constitution and national legislation to ensure its autonomy from vested interests, so that all players in the industry can have the full benefit of the law.



16. It is the Petitioner's case that the 1st Respondent abused his mandate under Section 6(a) and (d) of the Standards Act when he handpicked and appointed the Chairperson and six independent members of the NSC contrary to the law which requires that public office be filled through a transparent, competitive inclusive and merit based recruitment vide Gazette Notice No. 10752 dated 14th November 2019 appointing Bernard M. Ngure Chairman and revoking the appointment of Ken Wathome Mwatu as Chairman and Bernard M. Ngore member of NSC.
17. That vide Gazette Notice No. 4337 dated the 3rd May, 2019, without subjecting him to a transparent, competitive, inclusive, and merit based recruitment process open to public participation, the Cabinet Secretary for Industry, Trade and Cooperatives appointed Bernard M. Ngore To be a member of the National Standards Council, for a period of three (3) years, with effect from the 3rd May, 2019.
18. That vide Gazette Notice No. 13258 dated the 19th December, 2018, without subjecting them to a transparent, competitive, inclusive, and merit based recruitment process open to public participation, the Cabinet Secretary for Industry, Trade and Cooperatives appointed Gilbert Lang'at, Eric Mungai, and Hellen Kabeti Nangithia to be members of the National Standards Council, for a period of three (3) years, with effect from the 14th December, 2018.
19. That vide Gazette Notice No. 10751 dated the 14th November, 2019, without subjecting them to a transparent, competitive, inclusive, and merit based recruitment process open to public participation, the Cabinet Secretary for Industry, Trade and Cooperatives appointed Rogers Abisai Ochako (an Advocate) to be a member of the National Standards Council, for a period of three (3) years, with effect from the 13th November, 2019.
20. That vide Gazette Notice No. 2870 dated the 21st April, 2015, without subjecting him to a transparent, competitive, inclusive, and merit based recruitment process open to public participation, the Cabinet Secretary for Industrialization and Enterprise Development (who was then responsible for the KEBS) appointed Wisdom Mwamburi, Mary Wanja Matu (still on the NSC), Hilary Kosgei, Mboche Waithaka, Mohamed Hussein Ali, Micah Powon, Eric Mungai, Gladys Maingi, Fouzia Abdirahman (still on the NSC), and Nazir Gulam, to be members of the National Standards Council, for a period of three (3) years with effect from the 17th April, 2015.
21. It is further the averment of the Petitioner that vide Gazette Notice No. 922 dated 25th January 2018, H.E. The President violated the Constitution when he handpicked and appointed Mugambi Imanyara to be Chairman of NSC.
22. It is further the averment of the Petitioner by Gazette Notice No. 7042 dated 12th July 2018, H.E. The President appointed Ken Wathome Mwatu to be Chairperson of the NSC for the unexpired term of Mugambi Imanyara and revoked the appointment of Mugambi Imanyara vide Gazette Notice No. 922 of 2018.
23. It is the Petitioner's case that in appointing Ken Wathome Ngore as the Chairman to serve the unexpired term of Mugambi Imanyara pursuant to Section 7(3) of the State Corporations Act, H. E. President acted within the law, unlike when he earlier appointed Mugambi Imanyara. Section 7(3) of the State Corporations Act gives the President discretionary powers in the national Interest, 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 Petitioner relies on the case of *Okiya Omtatah Okoiti v Attorney General & 2 others (supra)*, where this Court held that:

“The Court further finds that there was nothing unlawful in the President, pursuant to the revocations made under section 7(3) of the *State Corporations Act*, by himself appointing the members of the Board of KRA to replace those whose tenure had been revoked...”

24. The Petitioner avers that the Cabinet Secretary’s decision to revoke a valid Presidential appointment, by purporting to appoint Bernard M. Ngore to replace Ken Wathome Mwatu who was appointed by the President is invalid, null and void. It is his position that there is absolutely no way that the Cabinet secretary could validly override the President’s appointment of Ken Wathome Mwatu and replace him with BERNARD M. NGORE.
25. It is the Petitioner’s averment that as the Chairperson of the NSC, Bernard M. Ngore is seriously conflicted in his regulatory functions. He is the founder and CEO of Top Quality Motors Ltd, and he is involved in importation of motor vehicle spare parts. He is also the immediate former Chairperson of the Kenya Motor Repairs Association.
26. It is the averment of the Petitioner that because of the conflict of interest, KEBS has under his stewardship enacted and enforced policies geared towards advancing partisan interests over public interest. He gives as examples the enlargement of pre-export verification of conformity (PVOC) to standards services through two tenders which are the subject of High Court Constitutional Petition No. 34 of 2020 *Okiya Omtatah Okoiti v Kenya Bureau of Standards & 2 others* pending before the High Court.
27. The Petitioner posits that the NSC and the Cabinet Secretary acted ultra vires and in vain when they appointed the 14th Respondent to be the Managing Director of the KEBS yet he was ineligible for the appointment having come sixth at the interviews.
28. The Petitioner avers that the results of the interviews were as follows:



S/N	Candidate Name	Score	Average
Geoffrey Muriira	Karau	835	76
Nixon Sigey	Kipkemboi	812	74
Martin Chesire		792	72
Ismail Fahmy Shaiye		730	66
John Wamwati		722	66
Bernard Njiraini	Njiinu	709	64
Peter Mutie		706	64
Solomon Muturi	Macharia	701	64
Oliver Waindi		701	64
Derek Okova	Wangaki	689	63

29. The Petitioner avers that government policy on appointments of chief executive officers of public bodies is very clear. That paragraphs 15 and 16 of the Government Circular Ref. No. OP/CAB.9/21/2A/LII/43 of 23rd November, 2004, titled “Guidelines on Terms and Conditions of Service for State Corporations – Chief Executive Officers, Chairmen and Board Members, Management Staff, Unionisable Staff” provides:

“Competitive Sourcing of Chief Executives

15. In order to attract persons of sound background with the relevant skills and experience which each State Corporation requires to manage its business efficiently and effectively, Boards are advised that henceforth new appointments of Chief Executive Officers should be competitive. The recruitment process should involve a careful preparation of a Job Description and Job Requirements which include job and person specifications. The short listing and interview process should be transparent based on a verifiable Recruitment Procedure approved by the Board.
16. The three best candidates will then be considered for final decision by the appointing authority taking into account interview scoring sheets and the interview panel’s recommendations.”



30. The Petitioner avers that failure to abide by the law when making the appointments to public office was against the public interest, and it voided the said appointments for being contrary to the requirements of, inter alia, Articles 10, 27, 47, 73, 75, 201(a), and 232 of *the Constitution*, including non-discrimination, inclusivity, the rule of law, public participation, good governance, and transparency (openness) and accountability, the provision to the public of timely, accurate information according to Articles 10(2) and 35(3) of *the Constitution*.
31. That the appointment of the 5th Respondent violated the express prohibition against the conflicts of interest under Articles 73 and 75 of *the Constitution*.
32. The Petitioner seeks the following reliefs:
 - i. A declaration that the 1st Respondent's impugned decision to handpick and appoint the Chairperson and the independent members of the NSC contrary to the law which requires that public office be filled through a transparent, competitive, inclusive, and merit based recruitment process open to public participation was irregular, unlawful and unconstitutional and, therefore, invalid, null and void ab initio.
 - ii. A declaration that the 1st Respondent's irregular and unlawful appointment of the Chairperson and the independent members of the NSC meant that the Government took over the seats meant to represent the public on the NSC.
 - iii. A declaration that the 1st Respondent's decision to revoke a valid Presidential appointment, by purporting to appoint Bernard M. Ngore to replace Ken Wathome Mwatu who was appointed by the President is invalid, null and void.
 - iv. A declaration that Bernard M. Ngore, the 5th Respondent, is conflicted and, therefore, his appointment as the Chairperson of the NSC Board was unconstitutional invalid, null and void ab initio.
 - v. A declaration that, having come sixth at the interviews, Bernard Njiinu Njiraini was not eligible to be recommended by the National Standards Council for appointment by the 1st Respondent as the Managing Director of the Kenya Bureau of Standards.
 - vi. A declaration that the appointment by the 1st Respondent, on the recommendation of the National Standards Council, of Bernard Njiinu Njiraini as the Managing Director of the Kenya Bureau of Standards, was invalid, null and void ab initio.
 - vii. An order quashing the 1st Respondent's appointments, and the gazette notifications of the said appointments, of Bernard M. Ngore as the Chairperson and of Mary Wanja Matu, Helen Kabeti Nangithia, Fouzia A. Abdirahman, Patrick M. Musila, Edward Njoroge, Eric Mungai, Gilbert Lang'at, Rogers Ochako Abisai as the independent members of the National Standards Council.
 - viii. An order quashing the 1st Respondent's appointment of Bernard Njiinu Njiraini as the Managing Director of the Kenya Bureau of Standards.
 - ix. An order compelling the 1st to 4th Respondents to appoint a new Chairperson and new independent members of the NSC strictly in compliance with *the Constitution* and national legislation.
 - x. In the alternative for the Chairman, an order restoring Ken Wathome Mwatu as the Chairman of the NSC.



- xi. An order compelling the 1st to 4th Respondents to appoint a new NSC strictly in compliance with the Constitution and national legislation.
 - xii. An order compelling the 1st to 4th Respondents to ensure that new Chairperson and the new independent members of the NSC are appointed strictly in compliance with *the Constitution* and national legislation.
 - xiii. An order compelling the 1st to 4th Respondents to ensure that a new Managing Director of the Kenya Bureau of Standards is appointed strictly in compliance with *the Constitution* and national legislation.
 - xiv. An order compelling the 1st to 4th Respondents to pay to the petitioner the costs of this suit.
 - xv. Any other relief this Honourable Court may deem just to grant.
33. The petition is supported by the affidavit of the Petitioner shown on 6th February 2020 in which he reiterates the averments in the petition.
34. In the submissions filed by the Petitioner, he reiterates that he has locus standi under Article 22 and 258 of *the Constitution*, that public interest cases encompass more than just the parties to the suit as such suits are meant to benefit the wider public and not the individual directly involved. He relies on the decision in *Kiluwa Limited & another v Commissioner of Lands & 3 others* [2015] eKLR, the Court held, inter alia:
- “ 23. Section 60 of the repealed Constitution of Kenya, has effectively been replaced by Article 159(d) of *the Constitution* of the Second Republic, which expressly mandates the court to do justice to all without regard to either status or procedural technicalities. In addition, Articles 22 and 258 and no less Articles 3 and 48 of *the Constitution*, grant every person not only access to courts, but also the right to protect, defend and uphold *the Constitution*.”
35. He further relies on the case of *Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 others* [2016] eKLR it was held that:
- “ 13. That their petition is on behalf of the public and they have invoked the provisions of Article 258(2)(c) and 22(1) of *the Constitution*. Article 22 deals with the Enforcement of Bill of Rights and provides that every person can bring court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed and the same can be brought by a person acting on behalf of the public. This Article in my view is so wide and the drafters of *the constitution* intended that nobody would be locked out of the mercy sit of justice when his interest or those of the public are threatened.
14. Article 258 of *the constitution* buttresses the provision of Article 22 above. I do find that the petitioners have locus standi. They fall within the class of persons anticipated under Article 258 of *the constitution*. They have not in my view brought this petition with ulterior motive or bad faith. What they are saying simply is that the hospital to be build or expanded would be public. The funds used to purchase would be public. If the process is flawed then the public would obviously suffer. The tax payer eventually would foot the bill.”
36. The Petitioner further submits that *the Constitution* contemplates public interest litigation (PIC) as a tool to impellent and defend *the Constitution*, to secure and preserve the rights and fundamental freedoms in the bill of rights to be filled even by persons not directly affected.



37. The Petitioner refers the Court to the Article “Advancing Human Rights And Equality Through Public Interest Litigation” accessed at <http://www.pilsni.org/about-public-interest-litigation>, the PILS Project states that:

“Public interest litigation, or PIL, is defined as the use of litigation, or legal action, which seeks to advance the cause of minority or disadvantaged groups or individuals, or which raises issues of broad public concern.

It is a way of using the law strategically to effect social change. Despite the range of equality and human rights protections available in Northern Ireland, the reality is that not everyone has equal access to those rights and not everyone has the resources or capacity to challenge an abuse of their rights through the courts.

By taking cases that can benefit disadvantaged groups or minorities rather than just one person, PIL can be used to provide access to justice to those who are most in need of it and yet who find themselves furthest from it.”

38. That the PILS Projects further public interest litigation and provides access to justice, reforms the law, holds government to account, raises awareness, empowers the disadvantaged and saves costs.

39. He relies on the decision in *Thakur Bahadur Singh and Another v Government of Andhra Pradesh and ...* on 23rd September, 1998 where the Andhra High Court stated:

“PIL has been a significant American development. The Council for Public Interest Law set up by the Ford Foundation in USA, in its report (1976) at pp. 6-7 defined PIL thus:

“Public Interest Law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary market place for legal services fails to provide such services to significant segments of the population and to significant interest.

Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.”

PIL programmes focus on policy-oriented cases, where a decision will affect large number of people or advance a major law reform objective. The consequences extend well beyond the particular litigants. PIL programmes are also designed to provide legal services to undeserved groups on matters of immediate concerns only to the parties directly involved...

PIL is essentially to ensure observations of the provisions of *the Constitution* or the law which can be best achieved to advance the cause of community or disadvantaged groups and individuals or public interest by permitting any person, acting bona fide and having genuine interest in maintaining an action for judicial redress for public injury to put the judicial machinery in motion like *actio popularis* of Roman Law whereby citizen could bring such an action in respect of a public delict.”

40. He further relies on the case of *People's Union for Democratic Rights & Others v Union of India & others* [1982] 3 SCC 235 it was observed that:

“Public interest litigation is essentially a cooperative or collaborative effort by the petitioner, the State or public authority and the Court to secure observance of constitutional or basic



human rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society."

41. He submits that this petition is filed in good faith pursuant to Article 3(1) of *the Constitution* to respect, uphold and defend *the Constitution*, including constitutionalism and the general rule of law in the appointment of persons to public offices by those authorised in law to make the appointments.
42. That the petition meets the tests of bona fide public interest litigation. The Petitioner submits that he is a renowned crusader of constitutionalism, good governance, and probity in public affairs management, and the information in the petition is not vague or indefinite. The facts relied upon in the petition are prima facie true and correct in the sense that the respondents have violated clear provisions of *the Constitution* and statutes, which this Court should redress by upholding and enforcing the law.
43. On the jurisdiction of the Employment and Labour Relations Court to entertain this petition, the Petitioner submits that this Court has the jurisdiction to determine whether the established procedures in *the Constitution* and in legislation, for appointing persons into public office, were violated in the appointment of the 5th Respondent as the Chair of KEBS; in the appointment of the 6th to 13th Respondents as Members of the Board of KEBS; and in the appointment of the 14th Respondent as the Director of KEBS.
44. That it is trite that the jurisdiction of a court or tribunal is derived from *the Constitution*, statute, or by principle laid out in judicial precedent. The Petitioner relies on the decision of In the Matter of Interim Independent Electoral Commission [2011] eKLR, at paragraphs 29 and 30, where the Supreme Court held:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent...”
45. That the same position was held in the case of Samuel Kamau Macharia vs Kenya Commercial Bank & 2 Others [2012] eKLR, where, at paragraph 68, the Supreme Court stated thus:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”
46. The Petitioner submits that, whereas any dispute resolution procedure laid down in statute should be exhausted first, whenever the bar to this Court’s jurisdiction is raised, the Court should examine the nature of the case and the reliefs sought, to determine whether or not the aggrieved party would get redress elsewhere.
47. That the instant petition challenges the violation by the respondents of specific provisions of *the Constitution* of Kenya, 2010 and statute concerning the exercise of executive powers vested in the Cabinet Secretary to appoint the Chair and Members of the KEBS Board; and jointly in the Cabinet Secretary and the Board to recruit and appoint the KEBS Director/CEO.
48. That the issues raised in the petition are pure employment matters reserved for the Employment and Labour Relations Court under Article 162(a) as read with 165(5)(b) and 41(1) of *the Constitution*.
49. That the Employment and Labour Relations Court, and not the High Court has original and exclusive jurisdiction to determine whether the issues complained about herein violated provisions of *the Constitution* and legislation.



50. That whereas the Commission on Administrative Justice (CAJ) is in place, its jurisdiction is very limited. The CAJ has no powers to provide remedy. The jurisdiction of the Commission and its powers are anchored in Article 252 of *the Constitution* as well and specifically in Section 26 of the *Commission on Administrative Justice Act* No. 23 of 2011. The powers are limited to investigations only as under Section 29 (3) of the Act. After investigations, if the commission finds that a certain administrative action was unlawful, it can only make recommendations to relevant authorities. Ditto for the National Cohesion and Integration Commission.
51. That the jurisdiction of the any tribunal under the law does not oust this Court's jurisdiction to hear and determine matters respecting violations of *the Constitution* because the mandates of tribunals are limited and automatically eliminate the petitioner as an aggrieved party entitled to have audience before them as a public interest litigant.
52. He further submits that in *Republic v National Environment Tribunal & 2 Others ex-parte Athi Water Services Board* [2015] eKLR, it was stated that a judicial or quasi-judicial tribunal, such as the Commission on Administrative Justice, does not have inherent powers. In *Choitram v Mystery Model Hair Salon* [1972] EA 525, Madan J. (as he then was) stated that powers must be expressly conferred; they cannot be a matter of implication.
53. That it was in appreciation of the foregoing position that the Court in *Ex Parte Mayfair Bakeries Limited vs. Rest Restriction Tribunal and Kirit R (Kirit) Raval Nairobi HCMCC No. 246 of 1981* held that:

“... in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal such as Rent Control Board, the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication and that a Tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore, where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration.

The mere fact that an Act of Parliament does not prescribe a remedy in case of breach of a person's rights does not in my view bar an aggrieved party from moving the Court for appropriate orders. So even if it were true, and I do not agree, that to uphold the Motion herein would render the Tribunal superfluous, a party with a genuine grievance is not thereby rendered remediless, in my view the Tribunal's functions cannot be curtailed by acceding to the instant Motion as long as it operates within its lawful powers and parameters.”

54. The Petitioner submits further that tribunals do not have jurisdiction to determine disputes regarding the interpretation and application of *the Constitution* and/or to issue remedies for the violation of *the Constitution*. That the bulk of the reliefs sought in the instant petition require the authoritative interpretation of *the Constitution*, which is not within the mandate of tribunals or subordinate courts.



55. The Petitioner submits that this Court should assert its judicial authority to protect *the Constitution* and the law from being violated by the actions of the respondents. The Petitioner relies on *Cohens v Virginia* 19 U.S. 264 (1821) where it was held that:

“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of *the Constitution*. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to *the Constitution*. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty.”

56. The Petitioner submits that both Articles 2(4) and 165(3) (d) (i) as read together with 165(5)(b) give this Court the power to invalidate any law, act or omission that is inconsistent with *the Constitution*.

57. The Petitioner submits that this role of the Court to protect *the constitution* has gained currency in many jurisdictions in the world. The Petitioner relies on the decision by the South African Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others* (2002) 5 LRC 216, 248 at paragraph 99 explains its understanding of the role to protect the integrity of *the Constitution* thus:

“The primary duty of courts is to *the Constitution* and the law, which they must apply impartially and without fear, favour or prejudice. *The Constitution* requires the State to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with *the Constitution*, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by *the Constitution* to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by *the Constitution* itself.”

58. The Petitioner submits that the High Court of Kenya has also captured its role of protecting the integrity of *the Constitution* in the most eloquent way in its judgement in *Jayne Mati & another v Attorney General & another* [2011] eKLR. That in that case, the Court, first citing from the judgement of the Supreme Court noted:

“In the Matter of the *Interim Independent Electoral Commission*(Supra at para 54) the Supreme Court stated:

“The Effect of *the Constitution*’s detailed provision for the rule of law in processes of governance, is the legality of executive or administrative actions to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”

These sentiments, in my view, apply with equal force to the legislature and legislative processes. For *the Constitution* has ushered in a new era, not of Parliamentary supremacy but



one of supremacy of *the Constitution*. The superintendents of *the Constitution* are the courts of law which recognise that each organ in its own sphere working in accordance with law not only strengthens *the Constitution* but ensures that the aspirations of Kenyans are met.”

59. The Petitioner submits that the principle of the supremacy of *the Constitution*, which is contained in Article 2 of *the Constitution*, and explained in the case of Jayne Mati (*supra*), means that this Court is obligated to invalidate an act, omission or any law which contravenes *the Constitution*. It is submitted that the impugned actions and omissions of the respondents contravened *the Constitution* and national legislation and should be struck down in their entirety by this Court.
60. The Petitioner submits that, since the jurisdiction to interpret and apply *the Constitution* falls within this Court’s mandate, this Court has the jurisdiction to hear and determine the issues herein.
61. That in exercising its judicial authority, this Court is obliged under Article 159(2)(e) of *the Constitution* to protect and promote the purpose and principles of *the Constitution*.
62. The Petitioner submits that in respect of this case, the purposeful, value and principle based interpretation required by Article 259 and 159(2)(e) would be the one that protects the principles of transparency, competitive and merit based recruitments, participation of the people, rule of law, good governance and inclusiveness set out in Article 10. It also has to take into consideration the values and principles of public service set out in Article 232 as well as the Bill of Rights, especially Articles 27, 41 (1), and 47(1) of *the Constitution*.
63. For emphasis the Petitioner relies on the decision of *In the Matter of Interim Independent Electoral Commission (supra)*.
64. On whether *the Constitution* was violated the Petitioner relies on the decision in *Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjihia & another* [2016] eKLR where the Court held that:
- “That the Court can interfere where there is improper exercise of discretion is now trite. As was held by Warsame, J (as he then was) in *Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003*, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by
- i. an outright refusal to consider the relevant matter;
 - ii. a misdirection on a point of law;
 - iii. taking into account some wholly irrelevant or extraneous consideration...”
65. He further relies on Article 47 which provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. He submits that



Republic v Kenya Power & Lighting Co. Ltd. & another [2013] eKLR where the Court held:

“I think the words of Lord Greene, M.R. at page 229 in the *Wednesbury Corporation case (supra)* will make good closing remarks in this case. He observed that:-

“It is true the discretion must be exercised reasonably. Now what does that mean” Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority... In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.”

66. He further relies on the decision in Republic v National Police Service Commission *ex parte* Daniel Chacha [2016] eKLR, the Court defined the scope of the rights under Article 47 of *the Constitution* as follows:

“In Judicial Service Commission v Mbalu Mutava & another [2015] eKLR, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

67. On whether the pleasure doctrine applies in Kenya, the Petitioner submits that gone are days when public officials served under the pleasure doctrine, where individuals were appointed to public office at the whims of the appointing authority, and served at the pleasure of the appointing authority, mainly the President, the ministers (cabinet secretaries), and the upper echelons of the broader executive.

68. That Black’s Law dictionary, 9th Edition gives the meaning of a ‘pleasure appointment’ as

“The assignment of someone to employment that can be taken away at any time, with no requirement of cause, notice or hearing.”



69. The Petitioner submits that the pleasure doctrine does not apply in Kenya anymore and it is totally wrong to appoint or dismiss public officials as though they still serve at the pleasure of the President as was the case under sections 24 and 25(1) of the repealed Constitution.
70. For emphasis the Petitioner relies on the case of *Richard Bwogo Birir v Narok County Government & 2 others* [2014] eKLR as upheld by the Court of Appeal in *Narok County Government & another v Richard Bwogo Birir & another* [2015] eKLR where the courts affirmed that the pleasure doctrine does not apply under *the Constitution* of Kenya by virtue of Article 41 and 47 thereof.
71. He submits further that Article 132(2) of *the Constitution* best demonstrates the elimination of the pleasure doctrine in relation to the Executive's imperial powers to hire and fire public officials. The President and his Cabinet no longer have a free hand to hire and dismiss public officials. That the President and the Cabinet Secretaries must adhere to the laws governing the appointment/removal of public officials.
72. The Petitioner submits that the *Public Service Commission Act* applies to the recruitment of the KEBS Board and the Chief Executive Officer. He submits that even though under the *Standards Act*, the Cabinet Secretary has the mandate to appoint the Chair and members of the Board and to together with the Board to appoint the Chief Executive Officer, they are also bound by the *Public Service Commission Act*, 2017.
73. It is not in dispute that on the appointment of the KEBS CEO, Section 5(1) of the *Standards Act* states explicitly that:
1. The Minister shall, on the advice of the Council, by notice in the Gazette, appoint a Director of the Bureau who shall be the chief executive officer of the Bureau.
74. It is submitted that the recruitment of the KEBS CEO is also subject to the Government Circular Ref. No. OP/CAB.9/21/2A/LII/43 of 23rd November, 2004, titled "Guidelines on Terms and Conditions of Service for State Corporations - Chief Executive Officers, Chairmen and Board Members, Management Staff, Unionisable Staff" at paragraphs 15 and 16 which have been reproduced a paragraph 29 above
75. Regarding whether or not such Government Circulars are binding on appointing authorities, at paragraphs 25 and 28 of its judgement in *Okiya Omtatah Okiiti v Board of Directors, Athi Water Services & 6 others* [2017] eKLR this Court held:
- "I have had occasion to peruse Mwongozo and have formed the opinion that it is a government policy aimed at enforcing the national values and principles of governance set out under Article 10 of *the Constitution*. I therefore agree with the Petitioner that failure to enforce Mwongozo would be an affront to *the Constitution*.
- The Respondents and the Interested Party also question the Petitioner's locus standi to bring the Petition. They argue that the window granted to members of the public to bring constitutional petitions under Articles 22 and 258 cannot be utilized to enforce a government policy. In light of my finding that Mwongozo is in fact an enforcement mechanism of the national values and principles of governance set out under Article 10 of *the Constitution*, I must find that the Petitioner, who is a member of the public is well within his right to bring this Petition in the public interest."
76. In the circumstances, it is submitted that the guidelines are applicable herein.



77. It is submitted that Article 233 establishes the Public Service Commission while Article 234 delineates its functions and powers. That several statutes clarify that Public Service Commission is the agency recruitment of public officers. That Article 234(3) & (4) creates an exception where Article 234(1) & (2) do not apply. It states:
- (3) Clauses (1) and (2) shall not apply to any of the following offices in the public service –
 - a. State offices;
 - b. an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic;
 - c. an office or position subject to—
 - i. the Parliamentary Service Commission;
 - ii. the Judicial Service Commission;
 - iii. the Teachers Service Commission;
 - iv. the National Police Service Commission; or
 - d. an office in the service of a county government, except as contemplated in clause (2)(i).
 - (4) The Commission shall not appoint a person under clause (2) to hold or act in any office on the personal staff of the President or a retired President, except with the consent of the President or retired President.
78. The Petitioner submits that the positions under review in this petition, being KEBS Chair and Board Members and the CEO, are not within what is exempted by Article 234(3) and (4).
79. The Petitioner submits that under the foregoing provisions of *the Constitution*, a few minimum requirements emerge in recruiting persons to positions in the public service:
- a. First, the power to recruit persons to fill those positions is reposed in the Public Service Commission - Article 234(2)(a)(ii).
 - b. Second, in recruiting persons to those positions the guiding principles would be public participation, transparency, fair competition and merit, integrity as the basis of appointments and promotions – Articles 232, 73, 47(1) & 10.
 - c. Affording adequate and equal opportunities for appointment, of — men and women; the members of all ethnic groups; and persons with disabilities - Article 232(1)(i) & 27.
80. The Petitioner submits that any appointments to the public service made without subjecting appointees to a fair, open, competitive, merit based, and inclusive process, and without involving the 1st Respondent, as required by *the Constitution*, is antithetical to *the Constitution* and it is, therefore, invalid, null and void.
81. The Petitioner submits that the appointments of the 5th to 14th Respondents are invalid, null and void ab initio.
82. The Petitioner submits that his legitimate expectations that lawful tasks imposed on the said respondents would be exercised only as provided under the law was breached.
83. The Petitioner submits that *the Constitution* and the law clearly spell out the scope of the powers of the 1st, 5th to 13th Respondents. That the Petitioner had legitimate expectations that they would



not arrogate to themselves extra powers howsoever or by whomsoever, by making the impugned appointments. That the Petitioner's legitimate expectations were breached by the said respondents when they acted ultra vires their respective powers to make the impugned appointments. That the impugned appointments are illegal and unconstitutional and, therefore, invalid, null and void.

84. The Petitioner relies on the case of *Community Advocacy and Awareness Trust v Attorney General*, [2012] eKLR, at paragraph 73, where the Court held as follows: -

“27th August 2010 ushered in a new regime of public appointments of public office. Whereas the past was characterized by open corruption, tribalism, nepotism, favouritism, scrapping the barrel and political patronage, new dispensation requires a break from the past.”

85. The Petitioner relies also on the case of *Joseph Mutuura Mbeeria & another v Cabinet Secretary for Education, Science & Technology & 2 others* [2014] eKLR where the Court held that:

“We rely on the provisions set out above in holding the view that the Minister should have applied the provisions of Articles 10 and 232 of *the Constitution* as well as Section 36 (1)(d) of the Act and subjected the appointment of the Interested Party's Council members subject of this Petition to an inclusive, competitive, accountable and transparent process that involves public participation and best practices in management, equal and affordable opportunities for all, promotes public trust, is non-discriminatory, promotes equity, equality and social justice.”

86. The Petitioner submits that just like any other Kenyan citizen he has legitimate expectations that all public and/or Government officers like the 1st to 13th Respondents herein must uphold the rule of law and constitutionalism whenever they perform their statutory or constitutional mandate.

87. The Petitioner submits that the 1st Respondent violated the petitioner's legitimate expectations by handpicking and appointing the 5th to 13th Respondents into public office without subjecting them to an inclusive, competitive, accountable and transparent process that involves public participation and best practices in management, equal and affordable opportunities for all, promotes public trust, is non-discriminatory, promotes equity, equality and social justice.

88. The Petitioner submits that his legitimate expectations were further violated when the 5th to 13th Respondents recommended the 14th Respondent for appointment, and the 1st Respondent appointed him as the Director/CEO of KEBS, yet he had failed at the interviews, having come it at number six. It is not in dispute that he was not among the top three.

89. The Petitioner submits that he had a legitimate expectation that, in making the impugned appointments of the Council Chair and Board Members and the Director/CEO under the *Standards Act*, the appointing authorities would act in line with the provisions of *the Constitution* of Kenya, including Articles 1, 2, 3(1), 4(2), 10, 27, 41(1), 47(1), 73, 129, 153(4)(a), and 232; sections 36 and 37 of the *Public Service Commission Act*; Section 52(1) of the *Leadership and Integrity Act*; and paragraphs 15 and 16 of the “Guidelines on Terms and Conditions of Service for State Corporations”.

90. The Petitioner submits that all the vacancies on the National Standards Council (the KEBS Board) were filled outside the structures of Articles 10, 27, 41(1), 47(1), 73(2)(a), and 232(1)(g) and Sections 36 and 37 of the *Public Service Commission Act* 2017 which underpin among others, the constitutional requirement of fair competition and merit as the basis of appointment, in all cases where the Cabinet Secretary is required by *the Constitution* or legislation to nominate or recommend a person for appointment. Hence, the action is invalid and of no legal effect.



91. The Petitioner submits that the 5th to the 13th respondents are individuals the Cabinet Secretary handpicked and appointed to public offices on the KEBS Board in a process that is not allowed by both the Constitution and the law.
92. That Article 131 (4)(a) provides that Cabinet Secretaries shall act in accordance with the Constitution.
93. That Article 129 provides:
 1. Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.
 2. Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit.
94. That under Article 232, the appointment of officers to the public service must be through a transparent process, and based on fair competition and merit. That these constitutional provisions are replicated and further bolstered in the Public Service (Values and Principles) Act 2015 (PSVPA) which, from the outset, provides at Section 4 that the Act applies to the public service in—
 - a. all State organs in the national and county governments; and
 - b. all State corporations.
95. That the Act at Section 10 elaborates on the Constitutional principle of fair competition and merit as the basis of appointments and promotions.
96. The Petitioner submits that the Constitution and the implementing Act makes transparency, inclusiveness, fair competition, public participation, and merit the minimum but central pillars of recruitment and appointment for anyone serving in the public service.
97. The Petitioner submits that where these minimum requirements are not met, the Constitution is violated, unless it can be shown through methodical and clear evidence that the exceptions in Section 10(2) of the PSVPA apply. That in this case, no evidence has been proffered to show either that that was the basis of the recruitment or that there was sufficient justification for it.
98. The Petitioner submits that the 1st Respondent has admitted in its replying affidavit dated 28th May 2020 and sworn on its behalf by Dr. Francis Owino that it did not comply with the Public Service Commission Act, 2017. Hence, the appointments of the 5th to 13 respondents to positions on the Standards Council are invalid, null and void.
99. The Petitioner relies on the position held in *Okiya Omtatah Okoiti v Francis K. Muthaura* (supra) and in *Okiya Omtatah Okoiti v Board of Directors, Athi Water Services*, (supra). The Petitioner submits that the impugned appointment of the 14th Respondent to be the Director/CEO of KEBS is equally invalid, null and void. Having not been among the top three, but having come in at number 6 (or 5) at the interviews, he was out of the qualification bracket and, therefore, he was automatically disqualified from consideration by the Board for appointment. That the decision of the Board to recommend him for appointment by the Cabinet Secretary, and his subsequent appointment by the Cabinet Secretary, are both invalid, null and void.



100. The Petitioner submits that the impugned appointments were nullities ab initio because they were made in contravention of the law. That in *MacFoy v United Africa Co. Ltd* (1961] 3 ALLER 1169, the Court held that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity.”

101. The 1st to 4th Respondents opposes the application through the replying affidavit of Dr. Francis Owino sworn on 28th March 2022 on behalf of the 1st to 4th Respondents. It is Dr. Owino’s position that the appointments of the 5th to 14th Respondents was in accordance with the provisions of the *Standards Act* which makes express and specific provisions for the appointments. That the *State Corporations Act* is not applicable. He further states the Section 37 of the *Public Service Commission Act* is not applicable.

102. For the 1st to 4th Respondents, it is submitted that this Court does not have jurisdiction to entertain this matter. They rely on the decision of the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Court stated that jurisdiction is conferred either by *the Constitution* or written law.

103. They further relied on the decision in *Attorney General & 2 others v Okiya Omtata & 14 others*, CIvI Appeal No. 621 fo 2020 where the Court held that parities must file suit in the correct forum, that where *the Constitution* has granted the High Court jurisdiction then the issues ought to be raised in the High Court.

104. The 1st to 4th Respondents further rely on the decision in *Kataba Institute & another v the Attorney General HCCP 331 of 2016* in which the Court held that the Employment and Labour Relations Court had no jurisdiction to determine issues of appointment of members of the National Land Commission.

105. On whether the appointment of the 14th Respondent was irregular, the 1st to 4th Respondents submit that the *Standards Act* is the parent Act and therefore the appropriate Act under which the Managing Director is appointed.

106. That the *State Corporations Act* is a general Act and is not applicable where the specific Act makes provision for appointment of Managing Director. They rely on the doctrine of *lex specialis derogate legi generali*, that the law governing specific matter overrides a law which only governs a general matter.

107. They submit that the appointment of the 14th Respondent did not violate *the Constitution*, relying on the decision in *Okiya Omtatah v Kenya Revenue Authority Board of Directors & 2 others* [2018] eKLR where the Court held that *Mwongozo* is a policy document which cannot override specific provisions of an Act of Parliament.

108. The 1st to 4th Respondents further relied on the decision in *Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others* [2012] eKLR where the Court held that all persons whose names are selected by the selection panel and forwarded to the appointing authority are qualified, competent and suitable to hold the positions for which they were selected.



109. On the issue whether the 6th to 13th Respondents were appointed in accordance with the law the 1st to 4th Respondents submit that the appointments were made pursuant to Section 6(2) and 4 of the Standards Act which does not provide for competitive recruitment.
110. They further submit that under the Standards Act the authority to appoint members of NSC is vested in the 1st Respondent and not the 2nd Respondent and the appointments met the requirements of Article 132(4) of the Constitution.
111. Finally, the 1st to 4th Respondents submit that the petition has failed to set out specifically the manner in which his constitutional rights were violated and he therefore lacks locus standi to institute the instant suit. They pray that the suit be dismissed.
112. Finally, the 1st to 4th Respondents submit that the Petitioner has failed to set out specifically the manner in which his constitutional rights were violated and he therefore lacks locus standi to institute the instant suit. They pray that the suit be dismissed.

Case of the 5th to 14th Respondents

113. The Respondents opposes the petition. They filed replying affidavits of Bernard Ngore on behalf of the 5th to 13th Respondents sworn on 23rd December 2020 and the Replying affidavit of Bernard Njiraini, the 14th Respondent sworn on 24th February 2020.
114. It is the case of the 5th to the 14th Respondents that the 5th Respondent was prior to his appointment as Chairperson of KEBS, in private practice operating a motor vehicle garage known as Top Quality Motors. That he had also served as a Director of Numerical Machining Complex. That he is a Mechanical Engineer and therefore competent to be appointed as Chairperson of KEBS. That he was competitively appointed under Section 6(2) of the Standards Act.
115. It is further submitted that the 6th to 13th Respondents are also professionals who had been in private practice, in business or professional services in private and public service and therefore qualified to be appointed as members of the NSC. That their appointment as members of NSC did not violate the provisions of any law.
116. The 5th to 13th Respondents submit that the petition does not meet the threshold for a constitutional petition citing the case of Northern Nomadic Disabled Persons Organisation v The Governors, Garissa & Another, Garissa HCCP No. 4 of the 2013, Brian Makori v Kenya National Examinations Council, Kisii HCCP No. 17 of 2016.

Analysis and Determination

117. Having considered the pleadings and submissions of the parties, the issues that arise for determination are the following: -
 - i. Whether the Court has jurisdiction to hear and determine the instant petition;
 - ii. Whether the Petitioner has locus standi to institute the instant petition;
 - iii. Whether the appointment of the 5th to 14th Respondents were in violation of the Constitution and statutes;
 - iv. Whether the Petitioner is entitled to the orders sought herein.
118. Before I consider the issues in dispute, there are several applications in this file which I need to dispose of.



119. The first is the application dated 15th October 2021 in which the 5th Respondent seeks to amend the petition to strike out the names of the 7th, 8th and 10th Respondents on grounds that their terms as members of NSC lapsed on 10th May 2021.
120. The second application is dated 28th April 2022 and seeks orders to stay the ruling and judgment to be delivered on 25th May 2022.
121. The third is a notice of preliminary objection filed by the Petitioner dated 13th May 2022 seeking to strike out the notice of motion dated 28th April 2022 on grounds that:
- i. The application offends the principal objective of this Honourable Court expressed in Section 3 of the *Employment and Labour Relations Court Act* and the overriding objective expressed in section 1A of the *Civil Procedure Act* Cap 21 of the laws of Kenya.
 - ii. In the absence of leave granted to the 5th Respondent under section 75 of the *Civil Procedure Act*, no appeal lies against the orders of the Honourable Court made herein on 25th April 2022 and this Honourable Court therefore lacks jurisdiction to take cognizance of, hear and determine the 5th Respondent's application herein.
122. Prior to the application dated 15th October 2021, the 5th Respondent had filed an application dated 8th February 2021 seeking to consolidate this petition with Petition No. E091 of 2020 also pending before this Court. At the time that application was filed, the judgment in this suit had been scheduled for delivery on 19th February 2021.
123. The application dated 8th February 2021 was heard and dismissed by a ruling delivered on 9th July 2021.
124. Thereafter the judgment in this suit was scheduled for 26th November 2021.
125. By yet another application dated 17th September 2021, the 5th Respondent sought orders staying the delivery of the judgment pending determination of Civil Appeal No. 452 of 2021. The application was dismissed summarily on 29th September 2021 after the Court learned that similar prayers were pending before the Court of Appeal.
126. On 25th April 2022, I fixed the date for ruling in both the application dated 15th October 2021 and the judgment herein to be delivered on 25th May 2022. It is these orders that elicited the application dated 28th April 2022 to stay the judgment.
127. The law permits amendment of pleadings at any time before judgment is delivered. Under ordinary circumstances, the Court would consider the application for amendment to be genuine. However, taking into account the history that I have narrated above, I have come to the conclusion that this application, together with all prior applications by the 5th Respondent are intended to delay the delivery of the judgment herein for as long as he could. This I consider to be an abuse of the process of the Court.
128. The foregoing notwithstanding, I would still not grant the application for amendment. The reason is that whether or not the term of the office of the 7th, 8th and 10th Respondents have lapsed, the Court still ought to make a determination whether their appointment into office by the 1st Respondent complied with *the Constitution* and the various legislations that have been cited by the Petitioner.
129. Secondly, why is the 5th Respondent the one seeking the striking out of the 7th, 8th and 10th Respondents? Where are they? Why have they not come to Court themselves to apply for striking out of their names from these proceedings? What detriment will the 5th Respondent, the Applicant suffer



if the names of the 7th, 8th and 10th Respondents are not removed from these proceedings? In my view, none. The only consequence is the delay in the delivery of the judgment herein. Who benefits for such delay?

130. It is for these reasons that I dismiss the application for amendment of the petition.

131. With the said application dismissed, the application dated 28th April 2022 and the notice of preliminary objection dated 13th May 2022 fall by the wayside.

Jurisdiction of the Employment and Labour Relations Court in respect of the petition herein

132. The 1st to 4th Respondents contest the jurisdiction of this Court to hear this petition relying on the decision in Attorney General & 2 others v Okiya Omtata Okioti & 14 others [2020] eKLR. I had occasion to consider the decision in Okumu & 8 others v Badi, Director General Nairobi Metropolitan Services & 15 others; Nairobi City County & 12 others (Interested parties); Okioti (Exparte) (Petition 94 of 2020 & Miscellaneous Civil Application 60 of 2020 (Consolidated)) [2022] KEELRC 1 (KLR) (Employment and Labour) (31 January 2022) (Judgment).

133. In that case, the Attorney General made the same argument, that this Court had no jurisdiction to determine cases of appointment of members of the Board of Nairobi City Water Company. They cited the same authority. My finding was that the decision by the Court of Appeal was in relation to members of constitutional petitions and not board members of state corporations. In this case the issue is appointment of council members and the Chief Executive Officer of KEBS which is within the jurisdiction of this Court.

134. This Court has heard and determined numerous cases involving appointment of Chairpersons and board members of state corporations which have been upheld on appeal. I thus find that this Court has jurisdiction to determine this petition.

135. The second issue is whether the Petitioner has *locus standi* to institute the instant suit. Article 22(1) and (2) 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.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.

136. Further, Article 258 of [the Constitution](#) provides as follows:

258. Enforcement of this Constitution

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

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



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

137. The same issue arose in *Kiluwa Limited & another v Commissioner of Lands & 3 others* (supra) and *Timothy Otuya Afubwa & another v County Government of Trans Nzoia & 3 others* (supra). In both cases the courts held that Articles 22, 258 read with Article 3 and 48 of *the Constitution* grant every person not only access to courts but also the right to protect, defend and uphold *the Constitution*. The courts found that the Petitioners had *locus standi* by virtue of these provisions of *the Constitution*.

138. I do agree with the said decision that *the Constitution* did away with the requirement of *locus* where a person is defending *the Constitution*. I find that the Petitioner has *locus standi* to institute the instant petition as he has clearly pleaded that he does so in in his quest to defend *the Constitution* and in the public interest.

Whether the appointment of the 5th to 13th Respondents violated *the Constitution* and statues

139. It is the case of the Petitioner that Section 6(2)(a) and (d) and (3) of the *Standards Act* as read with Articles 1(1) and (2), 3(1), 4(2), 10, 27, 41(1), 47(1), 73, 75, 129, 153(4)(a), 232 and 259 of *the Constitution*, together with Sections 36 and 37 of the *Public Service Commission Act* guide the appointment of the 5th to 13th Respondents as Chairperson and members of NSC.

140. In *Okiya Omtatah Okoiti v Attorney General & 2 others; Francis K. Muthaura (AMB) & 5 others (Interested Parties)* [2019] eKLR the Court held as follows –

Outside the urgent remedial measures under section 7(3) of the *State Corporations Act*, the Court returns that normal appointments under Section 6(2)(a) and (e) respectively of the *Kenya Revenue Authority Act* (Cap. 469) must comply with the criteria for appointment as prescribed in Articles 232, 73, and 10 of *the Constitution*. The court upholds its opinion in *Robert Muriithi Ndegwa –Versus- Minister for Tourism, Petition No. 41 of 2012* at Nairobi, where it stated thus:

“...Article 232 of *the Constitution* provides for the values and principles of public service to 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 paragraph (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 men and women; the members of all ethnic groups; and persons with disabilities.

Section 22 of the *Public Officer Ethics Act*, 2003 provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections. Thus, by *the Constitution* and by statute, the standards for undertaking public employment have been determined. In the instant case, the petitioner was recruited competitively and it is not said that he lacks qualifications. 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....”

141. Again, in the case for Benson Riitho Mureithi v J. W. Wakhungu & 2 others [2014] eKLR the Court held:

“It would appear from the material before the Court that the question of the Interested Party's suitability for public office was not addressed in accordance with the requirements of *the Constitution*. The Cabinet Secretary, the 1st respondent, had power of appointment under section 51 of the *Water Act*... At section 2 of the First Schedule to the Act, it is provided that those proposed for appointment as Board members of Water Services Boards must be appointed on the basis of educational qualifications, experience, character and integrity of potential candidates for membership. Similar provisions are contained in section 22 of the Public Officers Ethics Act... The 1st Respondent, however, had a duty, imposed on her by the people of Kenya, to consider the Interested Party's suitability under *the Constitution*, and to make the appointment to the Board in accordance with the dictates of *the Constitution*...What does *the Constitution* require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10... It seems to me therefore that the primary responsibility lay on the 1st Respondent, and indeed on any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of members of Boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as *the Constitution* now demands... It may seem that *the Constitution* has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in *the Constitution*... In the present case, as the respondents tacitly concede... In the premises, this petition succeeds to the extent that the Court finds that the 1st respondent failed to act in accordance with *the Constitution*, and her appointment of the Interested Party as Chairman of the Athi Water Services Board fell below the standard set by *the Constitution*...”



142. The values and principles of public service as enacted in Article 232 and the national values and principles of governance as set out at Article 10 of [the Constitution](#) are binding on all state organs, state officers, public offices and all persons. The values apply to all state corporations.
143. Any appointments in a state organ or state corporation, or by any state or public officer that do not comply with the principles under Articles 10 and 232 are unconstitutional.
144. The Respondents do not deny that the 5th to 13th Respondents were handpicked by the 1st Respondent. Indeed, in the replying affidavit of Dr. Francis Owino, Phd, CBS, the Principal Secretary of the State Department for Industrialisation, Ministry of Industrialisation sworn on 28th May 2020, he admits that the appointments of the 5th to 13th Respondents were not competitive.
145. I find that the said appointments violated the provisions of Articles 10 and 232 of [the Constitution](#).

The Appointment of the 14th Respondent

146. The Petitioner contends that the 14th Respondent was appointed contrary to the provisions of the Public Service Act and Government Guidelines dated 23rd November 2004 on appointment of chief executive officers, chairman and board members, management staff and unionisable staff which require that after a competitive selection process, the best three names are submitted to the appointing authority to appoint one to be CEO. He avers that the 14th Respondent was not among the best three.
147. Section 5(1) of the [Standards Act](#) provides that the Minister on the advice of the Council, by notice in the gazette, shall appoint a Director of Bureau who shall be the Chief Executive Officer of the Bureau.
148. The 14th Respondent insists that he emerged the best in the selection. However, the evidence adduced by the Petitioner gives a different position.
149. It is not contested that the 14th Respondent went through a competitive selection process and that he met the qualifications. His selection therefore complied with the requirements of [the Constitution](#) and the relevant statutory provision. He was however not one of the top three candidates.
150. In a letter dated 28th August 2019, the NSC Board wrote to the Cabinet Secretary as follows: -

“OUR REF: KEBS/CONF/NSC/1 A-Vol.4 (101)

28th August 2019

Hon. Peter G. Munya, MGH

Cabinet Secretary

Ministry of Industry, Trade and Co-o Social Security House

PO Box 30547-00100

NAIROBI

Dear Waziri

RE: Recruitment Of The Chief Executive Officer Of The Kenya Bureau Of Standards

Reference is made to your letters ref: MOI/ADM/1/43/Vol. XXXVI dated 20th May 2019 in which you requested for the recruitment process for the Chief Executive Officer for KEBS to be repeated afresh and letter ref: MOI/ADM/1/43/Vol. XXXVI dated 27th August 2019 in which you have invited the National Standards Council for a meeting to discuss the progress of the recruitment process.



Following these requests, I am pleased to inform you that the National Standards Council has undertaken and finalised the recruitment exercise. The Council interviewed a total of ten (10) of the eleven shortlisted candidates and I am pleased to present here-below the top three candidates in order of ranking to enable you appoint a substantive Managing Director for the organisation.

1. Geoffrey Karau Muriira
2. Nixon Kipkemoi Sigey
3. Martin Chesire

The Council further recommends as suitable for consideration for the position, from the shortlist, the following two candidates:

1. Ishmael Fahmy Shaiye
2. Bernard Njiinu Njiraini

In addition, I am pleased to submit the 'following documents:

1. The summary report in which the following is included;
 - a. the shortlist of eleven (11) applicants detailing the criteria used for shortlisting,
 - b. the summary of, the interview for the ten (10) candidates who turned up."

151. The letter is contained at page 8 of the replying affidavit of

Bernard Njiraini, the 14th Respondent.

152. Again, in the affidavit of Dr. Francis Owino on behalf of the 1st Respondent he pleads as follows at paragraph 14(d) –

- (d) That the Council carried out interviews in the recruitment process finally resting with their letter dated 28th August to me recommending 5 names as being suitable for the position, three in order of score sheet ranking and additional two on the recommendation based on the outcome of the interview panel's assessments.

153. As was submitted by the Petitioner, the recruitment of the CEO of KEBS is subject to government circular Ref. No. OP/CAB.9/21/2A/LII/43 of 23rd November, 2004, titled "Guidelines on Terms and Conditions of Service for State Corporations - Chief Executive Officers, Chairmen and Board Members, Management Staff, Unionisable Staff".

154. It is indeed in compliance with this circular that the Council submitted the names of the three best candidates to the Minister for appointment.

155. In his replying affidavit Dr. Owino on behalf of the 1st Respondent and in the replying affidavit of the 14th Respondent they have attempted to explain why the 1st Respondent did not pick one of the three best candidates, stating that he was ranked the best by the recruitment consultant.



156. In the recruitment report of the consultant, which is also annexed to the affidavit of the 14th Respondent at page 18 of the replying affidavit, it is recommended as follows:

“ 5.0 Recommendation

Based on the Consultants’ evaluation at the interviews and the candidates’ performance the best ten (1) candidates for the position as identified by the Consultants can be found on annex 6.

By this report, the Consultant recommend that the Kenya Bureau of Standards Board conducts the final interviews so that the vacancy can be filled from the best candidates, identified for the position.

The outcome of this exercise so far is based on the information provided by the candidates and the consultant’s face to face interviews. However this is not sufficient to make the final judgment in determining the most suitable candidate for the managing director position.

Consequently, the consultant strongly recommends the following;

- 1) Further interviewing by the board of directors
- 2) Comprehensive background checks and verification of information supplied by the candidates. Preferably by the National Intelligence Service (NIS) and other relevant bodies.
- 3) Psychometric testing to ascertain leadership skills to ensure a good fit for the position
- 4) If applicable health assessment of the candidates

Hence the assessment done so far represents about 30% of the recruitment process.

This report shall be read together with the Applications Status report.”

[Emphasis added]

157. From the recommendation of the recruitment consultant, the Council was to carry out its own interviews and in the interviews of the Council, the persons who scored the highest are the three names submitted to the Minister, that is Geoffrey Karau Muriira, Nixon Kipkemoi Sigey and Martin Chesire.

158. According to Article 10 and 232 of *the Constitution*, the Minister was bound to pick the best candidate or explain why the best candidate was not picked.

159. It is evident from the replying affidavits of both Dr. Owino and Mr. Njiraini that the 14th Respondent was not the best candidate. The Petitioner avers that the 14th Respondent was ranked sixth. The preference of the 14th Respondent over the best three candidates has not been satisfactorily explained. The same was glaringly in violation of the policy to pick from the best three candidates who scored the highest in the interviews. It was also contrary to Article 10 and 232 which provides for fair competition, non-discrimination and transparency. I find that the appointment of the 14th Respondent as CEO of KEBS was in violation of *the Constitution* and Government Policy on recruitment of CEOs.

160. In making this finding, I agree with the decision of Majanja J. in *Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others* [2012] eKLR where he stated –

90. The argument, proffered by the petitioners and the 3rd Interested Party and supported by the 2nd Interested Party, that the person ranked first ought to have been selected would



in these circumstances be contrary to the legislative architecture which imposes on every participant in the process, at every stage, to have regard to the principles and values regarding appointment of persons to public office. Accepting that argument would also imply that the selection panel is the appointing authority and the other players are merely part of a conveyor belt.

91. The issue of who is more competent than the other is a matter of opinion of the members of the selection panel which conducted the interviews. The mandate of selection panel under the Act was to forward at least three names of those who meet the minimum qualification set out in section 10 of the Act and who also meet the standards outlined in *the Constitution* and section 11(13) of the Act.”

[Emphasis added]

Whether the Petitioner is entitled to the orders sought

161. Having made the findings above the Petitioner has substantially proved his averments in the petition and I make the following orders:

- (i) A declaration be and is hereby issued that the 1st Respondent’s impugned decision to handpick and appoint the Chairperson and the independent members of the NSC contrary to the law which requires that public office be filled through a transparent, competitive, inclusive, and merit based recruitment process open to public participation was irregular, unlawful and unconstitutional and, therefore, invalid, null and void ab initio.
- (ii) An order be and is hereby issued quashing the 1st Respondent’s appointments, and the gazette notifications of the said appointments, of Bernard M. Ngore as the Chairperson and of Mary Wanja Matu, Helen Kabeti Nangithia, Fouzia A. Abdirahman, Patrick M. Musila, Edward Njoroge, Eric Mungai, Gilbert Lang’at, Rogers Ochako Abisai as the independent members of the National Standards Council.
- (iii) A declaration be and is hereby issued that the appointment by the 1st Respondent, on the recommendation of the National Standards Council, of Bernard Njiinu Njiraini as the Chief Executive Officer of the Kenya Bureau of Standards, was invalid, null and void ab initio.
- (iv) An order be and is hereby issued quashing the 1st Respondent’s appointment of Bernard Njiinu Njiraini as the Chief Executive Officer of the Kenya Bureau of Standards.
- (v) An order be and is hereby issued compelling the 1st to 4th Respondents to ensure that new Chairperson and the new independent members of the NSC are appointed strictly in compliance with *the Constitution* and national legislation.

162. In view of the fact that the petition herein was in public interest and that the Petitioner acted in person, there shall be no orders for costs.

163. For the avoidance of doubt, any prayers not granted herein stand dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF MAY 2022.

MAUREEN ONYANGOZ

JUDGE

ORDER



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

MAUREEN ONYANGO

JUDGE

