



Muthoka v Kenya Medical Training College; Kenya Anti- Corruption Commission (Interested Party) (Employment and Labour Relations Petition E018 of 2022) [2022] KEELRC 4087 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4087 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E018 OF 2022**

M MBARŪ, J

SEPTEMBER 22, 2022

**IN THE MATTER OF: THE ENFORCEMENT OF THE CONSTITUTION OF KENYA,
2010;**

AND

IN THE MATTER OF: SECTIONS 5 AND 41 OF THE EMPLOYMENT ACT, 2007;

AND

**IN THE MATTER OF: SECTIONS 5, 6, 7, 8, 9 & 10 OF PUBLIC SERVICE (VALUES
AND PRINCIPLES) ACT NO. 1A OF 2015;**

AND

**IN THE MATTER OF: SECTIONS 4, 6, 7, 8, 9 & 11 OF THE FAIR ADMINISTRATIVE
ACTION ACT NO. 4 OF 2015;**

AND

**IN THE MATTER OF: RULES 4, 10, 11, 22, 23, AND 24 OF THE CONSTITUTION OF
KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE
AND PROCEDURE RULES, 2013;**

BETWEEN

DE MIRIAM NDUNGE MUTHOKA PETITIONER

AND

KENYA MEDICAL TRAINING COLLEGE RESPONDENT

AND

KENYA ANTI- CORRUPTION COMMISSION INTERESTED PARTY



JUDGMENT

PETITION

1. The petitioner is seeking the following;

Orders and Declarations that:-

- a) A declaration is hereby issued that the revocation and subsequent termination of the Petitioner's employment in the letters dated January 11, 2022 and February 22, 2022 by the Respondent was irregular, illegal, unlawful and amounted to unfair labour practice and contrary to the provisions of sections 41, 43 and 45 of the Employment Act as read with Article 236 of the Constitution.
- b) An order is hereby issued rescinding the decision by the Respondent's Board in revoking and subsequent termination of the Petitioner's appointment vide a letters dated January 11, 2022 and February 22, 2022 and the effective reinstatement of the Petitioner to her employment with the Respondent herein on similar terms and/or privileges without loss of any benefits and remuneration.
- c) A Permanent injunction restraining the Respondent either by itself, servant and/or agents, officials, representatives from advertising or having so advertised, from acting thereupon, interviewing, recruiting or otherwise in any other manner replacing the Petitioner in her position as the Corporation Secretary of the Respondent.
- d) General damages for the constitutional violations of the Petitioners' fundamental rights at Kshs 7,000,000
- e) Maximum compensation (12 months) for Loss of Employment.
- f) Certificate of Service.
- g) The Honourable Court do issue any other Orders and give such directions as it may deem fit to meet the ends of justice.
- h) Costs of the Petition
- i) Interest on (e) and (f) the above at Court rate

Petition

2. The petitioner is an adult female. The Respondent is a State Corporation under the Ministry of Health charged with the role of training various health disciplines in the health sector as established under the State's Corporations Act Cap 446.
3. The interested party is established under Section 3 of the Ethics and Anti-Corruption Commission Act pursuant to Article 79 of the Constitution, 2010 with the mandate to ensure compliance with the provisions of Chapter Six of the Constitution and the Leadership and Integrity Act on moral and ethical standards for state and public officers.



4. The Petitioner was appointed to the service of the Respondent as Corporation Secretary on November 13, 2015 in accordance to Sec 8(5) of the [KMTC Act of 1990](#), as amended by Health Laws Amendments following an advertisement in the local daily newspaper, dated October 16, 2015.
5. In the above stated advertisement the qualifications requirements for appointment as Corporation Secretary were;
 - a. Hold a Master's degree in Business Administration from a university recognized in Kenya.
 - b. Have a Certificate in Certified Public Secretary (CPS)
 - c. Have served in a position of management /teaching for a period of at least three years.
 - d. Have interpersonal and communication skills
 - e. Have passion for continuous professional development
 - f. Have knowledge and experience in project review, monitoring and evaluation and;
 - g. Have knowledge of higher learning Institutions training and programs.
6. The Petitioner fulfilled all the stated requirements as per the advertisement and was confirmed to the position, and admitted to the permanent and pensionable establishment with effect from November 16, 2015.
7. The Petitioner worked for the Respondent until her employment terminated after seven (7) years in the position of Corporation Secretary.
8. The Respondent's Career Progression guidelines came into force two (2) years after the Petitioner's appointment as Corporation Secretary and introduced a new requirement to have the holder of the position of Corporation Secretary to have a Master's or Bachelor's degree in law. The State Corporation Advisory Committee through a letter dated November 20, 2017 in approval of the Respondent's Human Resource Instruments proceeded to also recommended that the Respondent may proceed to reserve the Petitioner's current terms as the Corporation Secretary on a 'Personal-to-holder' basis.
9. The functions of the State Corporation Advisory Committee pursuant to Section 27 (l) of the State Corporation Act and Clause 1.7 of Mwangozo make their decisions are enforceable.
10. The Inspector General -Corporations, in exercise of the powers conferred under section 18 of the State Corporations Act appointed a team of Inspectors to conduct audit into allegations on malpractices leveled against the Respondent. The audit was as a result of Ethics and Anti-Corruption Commission recommending to the Inspector General (Corporations) to conduct investigations pursuant to Inspectorate of State Corporations mandate.
11. Through a letter dated March 10, 2020 the Petitioner was invited to appear among other officers of the Respondent before the inspectorate of State Corporations Audit team. Following the investigations, the Inspector General (Corporations) finalized and forwarded their findings in form of a report to the Head of public service, various government offices including the Ethics and Anti-Corruption Commission. In the Report it was recommended that the Board should take action against Prof Michael Kiptoo (whose term has ended), Dr Silas Njeru and Mr JK Mwangi and that the Cabinet Secretary should censure the Board members who sat in the meeting that approved the Petitioner's appointment.
12. With regard to the petitioner the report recommended that;



- a. The Respondent's Board either considers redeploying the Petitioner to a suitable position based on her qualifications as the Petitioner did not meet the current job specification for the post as outlined in the career guidelines of 2017 or alternatively;
- b. The Respondents Board accords the Petitioner reasonable time frame to acquire the requisite qualifications for the Corporation Secretary as per the approved Respondent's Career progression guidelines of 2017 by government.
13. The Respondent without consulting the Petitioner elected the second option as recommended by the Inspectorate and resolved to accord the Petitioner reasonable time frame to acquire the requisite qualifications for the Corporation Secretary as per the approved Respondent's Career Progression Guidelines of 2017 by government in its special meeting of March 1, 2021.
14. In a letter dated March 2, 2021 the Respondent informed the Petitioner of the decision while acknowledging that they had not informed the Petitioner that in 2017 they had recommended the need for Corporation Secretary position to have a Masters or Bachelor's degree in law and this was included in the Career Progression Guidelines. The Board further requested the Petitioner to respond to the letter showing her suitability for the position and progress, including timelines to meet the requirements as stipulated in the Career progression Guideline for 2017.
15. Upon receipt of the letter, the Petitioner responded through a letter dated March 17, 2021, accepting the Board's decision and demonstrated progress to align her qualifications to the Career Guidelines of 2017, indicating the period she required to study the Bachelor's Degree in law four (4 years), which was the only qualification that she required. The respondent in reply reminded the petitioner of the Board's decision of March 1, 2021.
16. The Petitioner has since complied with the Board's decision, as the Petitioner had started studying law at Mt Kenya University, Parklands Law Campus and is currently a Second year Law Student performing with good grades.
17. On December 20, 2021 the Ethics and Anti-Corruption Commission wrote to the Respondent advising the Respondent to revoke the Petitioner's appointment as Corporation Secretary and that the position of the Corporation Secretary be filled in accordance with requirements of Mwongozo and Specifications for the post of Corporation Secretary as outlined in approved Respondent's Career Guidelines of 2017.
18. On December 29, 2021 the Respondent's Chairperson informed the Petitioner of the request by Ethics and Anti-Corruption Commission in the said letter and informed her to file her Defence for consideration by the Respondent's Board. On January 4, 2022 the petitioner responded and outlining the malice by the Ethics and Anti-Corruption Commission in its recommendation.
19. In a letter dated January 11, 2022 the Respondent revoked the Petitioner's Appointment and re-advertised the position. The Petitioner was sent on thirty (30) days annual leave to await further information and to hand over functions in her office.
20. The petition is that the Respondents' action is actuated with malice and unreasonable contrary to the provisions of the Respondents Human Resource Policy and Procedure Manual (2017), Mwongozo Code, the code of governance of State Corporations issued the executive order No 7/2015 overrides all other rules and regulations generated and or developed by the Respondent. That all Board Members of the KMTTC, upon their appointment were inducted on *Mwongozo Code*, the [*Employment Act*](#), the [*State Corporations Act*](#) and the [*Constitution*](#) which binds the Board in its functions including



21. The petition is that the actions of the Respondent are arbitrary, malicious, and a personal vendetta targeted at select officers without any basis. The Human Resource function of the office of Corporation Secretary falls under the purview of the Board and not the Ethics and Anti-Corruption Commission. None of the officers' indicted in the report together with the Respondent's Board members who were in charge of the recruitment of the Petitioner have been sent home or held to account for their responsibilities.
22. The fundamental expectation of the Petitioner was that the Respondent had made a 'commitment to her namely that her employment Contract would subsist subject to her acquiring the requisite qualifications for the position as per the approved Respondent's Career progression guidelines of 2017 which had come into force two years after her employment Further, the expectation of such a commitment was within the range of reasonable expectations objectively aroused by the conduct of the Respondent in terms of the evaluation reports, the letter dated November 20, 2021 by the State Corporation Advisory Committee and the Special Board resolution of March 1, 2021.
23. The Petitioner had legitimate expectation that she would continue to serve the Respondent as an employee in her position as the Corporation Secretary until the end of her contract. The Respondent breached their duty to act honestly and in good faith and to

exercise care, diligence and skill of a reasonably prudent person in exercising their power as an employer. The revocation of the Petitioner's appointment was effected maliciously and without any due regard to the Petitioner's rights and obligation and her welfare.
24. The petition is based on the violation of constitutional rights and freedoms particularly Article 10 with regard to national values and principles of governance which binds all State organs. State officers, public officers and all persons whenever any of them applies or interpret this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. The decision of the Respondents to subject the Petitioner investigations by two different government agencies over the same subject matter is not in tandem with this article and it seeks to prejudice the human rights, social justice, accountability and transparency in the discharge of national duty.
25. There is violation of Article 20 of the Constitution which binds all State organs and all persons and to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. The unlawful revocation of the Petitioner's appointment in compliance with the recommendations by a body without the mandate of dismissing/'revoking a state officer's appointment infringes on and inhibits on the Petitioner's ability to enjoy the fundamental rights and to be a productive employee.
26. There is Infringement of article 27 of the Constitution where Respondent discriminated against die Petitioner by failing to provide reasons as to why only the Petitioner was singled out and her appointment revoked. The Petitioner was subjected by the Respondent to discrimination, inequality and unequal treatment before the law in breach of the Petitioner's rights under Articles 27 and 236 of the Constitution and the Respondent's Human Resource Policy and Procedure Manual, 2017.
27. The particulars of breaches are that the respondent denied the Petitioner equal treatment before the law with respect to the provisions of the Respondent's Procedure Manual (2017); equal benefit of die law; Revoking the Petitioner's letter of appointment thereby terminating the Petitioner's employment and failing to take disciplinary action contrary to the provisions of the Respondents Human Resource Policy and Procedure Manual (2017); in the alternative and without prejudice, the Respondent exercised administrative action or decision in abuse of power and/or in misfeasance in public office.



28. There is Infringement of the right to fair labour practices in accordance with Article 41 of the Constitution of Kenya, 2010 in that the Petitioner has been issued with a revocation of employment letter based on the advise of a body without the mandate to do so after the Respondent has passed a resolution to have the Petitioner continue with her employment. The particulars of such breaches are The Respondent revoking the Petitioner's appointment; The Respondent subjecting the Petitioner to two different recommendations by different government agencies over the same issue; the Respondent took action against the Petitioner by way of victimization; the Respondents has acted in utter disregard of the principles of natural justice in making its decision; infringement of the right to fair administrative action in accordance with article 47 of the Constitution of Kenya, 2010 and section 4 part 1 of the Fair Administrative Action Act, 2015 by the Respondent's failure to accord the Petitioner a fair hearing before taking any adverse decisions against her.
29. The Respondent revoked the Petitioner's employment, sent her on leave not requested for and requesting her to wait for further direction. This was in violation of the law without any justifiable reason. Failing to subject the Petitioner to both substantive and procedural fairness before taking adverse decision against her in terms of articles 236 of the Constitution. Section 41, 43 and 45 of the Employment Act. Failing, neglecting and/or refusing to recognize that the office of the Ethics and Anticorruption Commission does not have the power to revoke/dismiss an employee. None of the officers indicted in tire report have been sent home or held to account for their responsibilities.
30. Infringement of the right to fair administrative action and fair labour practice in accordance with Articles 10,41,47,73 and 236 of the Constitution respectively in that the Respondent has revoked the Petitioner's appointment in a sham, opaque and capricious manner by concealing the actual/real reasons for so acting and failure to disclose all material facts and information relevant to the decision, the Respondent being a public body funded by the public funds must be transparent and accountable for its actions.
31. The petitioner is seeking for declarations that her rights under Article 47 of the Constitution as read together with the Fair Administrative Action Act No 4 of 2015 was breached by the Respondent. an order that articles 10, 27, 28, 41, 47, 50 (1) & 236 of the Constitution have been violated by the Respondent thus the Respondent's action is null and void.
32. The petition is supported by the Petitioner's Supporting Affidavit and Supplementary Affidavit and avers that Following an advertisement in the local daily newspaper, dated Friday October 16, 2015 for the job position of Corporation Secretary at the Respondent she applied for the position and after a competitive rigorous process was appointed to the service of the Respondent as Corporation Secretary on November 13, 2015. the team that conducted the recruitment, selection, and interview was the Respondent's Human Resource Committee without any undue influence as alleged.
33. The petitioner was duly qualified for the position of Corporation Secretary having attained some level of Certified Public Secretaries (CPS) qualification and applied for and granted Exemption by Kenya Accountants and Secretaries National Examination Board (KASNEB) confirming that I had attained the necessary qualification for Certified Public Secretaries (CPS). she attained Certified Public Secretaries (CPS) qualifications to the Respondent Board during her application for the position of Corporation Secretary and made the interviewing committee aware that she in the process of attaining the required Certified Public Secretaries (CPS) qualification having attained some level of qualification on the same and hence improper for the Respondent to claim that she did not have the necessary qualifications for the position of Corporation Secretary.



34. The advertisement by the Respondent for the position of Corporation Secretary did not have a requirement for registration with the Institute of Certified Public Secretaries of Kenya (ICPSK).
35. The Respondent and the Interested Party cannot claim that I did not possess the required qualifications for the position of Corporation Secretary when the requirement never existed when I made an application for the position of Corporation Secretary. I secured the position on the basis of merit having met all the qualifications as per the advertisement and the allegations by the Respondent are malicious and made in bad faith.
36. The Respondent's Career Progression guidelines came into force two (2) years after appointment as Corporation Secretary and introduced a new requirement to have the holder of the position to have a Master's or Bachelor's degree in law. Further the State Corporation Advisory Committee vide a letter dated November 20, 2017 in approval of the Respondent's Human Resource Instruments proceeded to also recommend that the Respondent may proceed to reserve the petitioner's current terms of the Corporation Secretary on a ———Personal-to-holder|| basis. the Mwongozo Code of governance the Code of Governance for State Corporations (Mwongozo Code) is merely a guide on requirements for recruitment and therefore an employer retains discretion to develop additional qualifications for its employees regarding the Human resource affairs of their organizations.
37. The Inspector General (Corporations) was seized of the matter regarding the petitioner's recruitment having conducted the investigations and made recommendations on the same. The involvement of the other agencies in the internal Human Resource affairs of the Respondent was therefore misguided. the involvement of the Interested Party in the Human Resource affairs of the Respondent amounted to an illegality as the Ethics and Anti-Corruption (EACC) acted *ultra vires* and overstepped its mandate when it had referred the allegations on malpractices leveled against the Respondent to the Inspector- General (Corporation) which has the lawful mandate for investigation. there is no evidence of fraud, corruption or any other issue falling within the jurisdiction of the Ethics and Anti-Corruption Commission (EACC).
38. The judgement in ELRC Petition No E109 OF 2020 Prof Michael Kiptoo v Kenya Medical Training College did not in any way infer a relationship between the petitioner and the former Chairman of the Respondent's Board but rather highlighted that there was no attempt to traverse the assertions made by the petitioner regarding the existence of a relationship between herself and the chairman. Reliance on the decision as the basis for terminating employment is an attempt to cover up the failure by the Respondent to follow due procedure and an attempt to justify the unlawful termination of my employment.

Response

39. In reply, the respondent filed the Replying Affidavit of DR Kelly Oluoch the Ag Chief Executive Officer and who avers that the Respondent is established as a college under Section 3 of the [Kenya Medical Training College Act](#) and is a state Corporation in terms of section 2 of the [State Corporations Act](#).
40. Dr Oluoch also avers that he is Secretary and an *ex-officio* member of the Board and avers that the Petitioner herein has been in employment of the Respondent following the job advertisement published by the Respondent on October 16, 2015 and the related recruitment process. The job advertisement particularized the requirements of the position of a corporation secretary to include:
 - i. Have a certificate in certified public secretary (CPS)
 - ii. Submission of copy of Membership association certificate.



41. In the course of employment of the Petitioner, the Inspector-General (Corporations), being the office established under section 18 of the *State Corporations Act*, conducted a special audit of the Respondent on various issues including recruitment of the Petitioner into the position of Corporation Secretary and issued a report dated November 16, 2020 and which made various findings on the subject including the findings that:

'The shortlisting, interviews and subsequent ranking of Ms Muthoka as the best candidate out of the 26 applicants despite not meeting all the job specifications as contained in the advertisement bordered on favoritism and nepotism and therefore contravened the provisions of the Public Officer Act, 2003. For instance, Ms Muthoka did not possess a certificate in Certified Public Secretary and work experience required;

The appointment of Ms Miriam Muthoka as the Corporation Secretary was unjustified given that a deserving 12 out of 26 candidates who met the minimum requirements as advertised qualified for the appointment the Inspector General thereafter proceeded to make various recommendations on the subject matter including the recommendation that:

The Cabinet Secretary, Health should censure the following Board members who sat in the Board meeting held on November 13, 2015 that irregularly approved the appointment of Ms Miriam Ndunge Muthoka as the Corporation Secretary, a position that did not exist in the approved staff establishment and despite not meeting the Job specifications as contained in the advertisement:

42. The Inspector General's recommendations in the special audit report was guided by the law as contained in Section 18 of the *State Corporations Act*. the Inspector General had to act within the confines of the law thus prompting the involvement of other government bodies such as EACC to act within their stated mandate as per the law. The Inspector General's report was copied to various public officers including that of the Chief Executive Officer of the Ethics and Anti-Corruption Commissions (EACC), Secretary of State Corporation Advisory Committee, the Auditor General and the Principal Secretary of Ministry of Health. The Ministry of Health was duly seized of the matter and sought implementation of the said report as communicated vide letter dated December 23, 2020.

43. As a consequence, the EACC also took interest in the matter of recruitment of the Petitioner as the Respondent's Corporation Secretary and in respect of which it commenced and conducted investigation that culminated into a report communicated to

the Respondent vide letter dated December 20, 2021. the EACC informed the Respondent's Board of its investigations into the Petitioner's irregular appointment as Corporation Secretary. Further the EACC established from its investigations that:

i. The Position of Corporation Secretary did not exist in the Respondent's Organizational Structure in 2015 when the Petitioner was recruited.

ii. The Petitioner was not qualified as per the advertisement for the position of corporation secretary dated October 16, 2015, as she did not have a certificate in Certified Public Secretaries (CPS).

iii. The Petitioner was equally not a member of the Institute of Certified Public Secretaries of Kenya (ICPSK) at the time of her appointment.

44. The Respondent's Board independently deliberated on the EACC's recommendations and accorded the Petitioner an opportunity to present her defence on the matter. Through letter of December 29, 2021, the Petitioner was requested to convene a Board meeting of the Respondent in a fortnight for purposes of deliberating on the matter.



45. The Petitioner indeed prepared a written response in her letter dated January 4, 2022 and was invited to attend the Respondent's Board meeting on January 11, 2022 wherein she made oral representations on the subject issues.
46. Dr Oluoch avers that the Code of Governance for State Corporations (Mwongozo Code), issued jointly by the Public Service Commission (PSC) and the State Corporations Advisory Committee (SCAC) in January 2015 and promulgated as executive Order No 7 provides that a person shall not be appointed as Corporation Secretary of a state corporation, unless they are a member of the Institute of Certified Public Secretaries in good standing.
47. The Respondent being a State Corporation is bound by the provisions of the Mwongozo Code of Governance. the Respondent's decision to revoke the Petitioner's appointment as the Corporation Secretary through letter dated January 11, 2022 was justified.
48. The Board of the Respondent held independent and further deliberations into the matter whilst relying on the Petitioner's detailed response in defense to the EACC investigation outcome touching on her irregular appointment and communicated to the Respondent in her letter dated January 4, 2022; the disciplinary hearing was conducted by the Respondent's Board at its meeting held on January 11, 2022 and the Petitioner allowed to make oral submissions which was followed by the Board decision to terminate the petitioner's employment. The decision was communicated in a letter dated February 22, 2022.
49. The Petitioner's employment with the Respondent was terminated on the basis of Irregular appointment as a Corporation Secretary of the Respondent in that the Petitioner did not have the requisite qualifications contained in the KMTC job advertisement dated October 16, 2015 and particularly the requirement for a certificate in certified public secretaries (CPS) and Lack of membership to Institute of Certified Public Secretaries Kenya (ICSPK) at the time of Petitioner's appointment.
50. The process of terminating the Petitioner's employment was conducted diligently and within the procedural fairness parameters of the law. The Respondent gave the Petitioner the reasons why it was contemplating the revocation of her employment in a letter dated November 13, 2015 and termination of her employment as Corporation Secretary. The Petitioner gave her response in a letter dated January 4, 2022 and presented the same orally before the Board on January 11, 2022, which response was duly considered and deliberated upon by the Respondent's Board of directors. The Petitioner was given a hearing on January 11, 2022 and employment terminated on February 22, 2022.
51. The Petitioner has deliberately omitted to state the requirement for membership to the relevant association as per the job requirements. The Petitioner has deliberately omitted and/or failed to attach any copy of certificate confirming that indeed she had a final certificate in Certified Public Secretary (CPS) at the time of her employment as required in law. The Petitioner has deliberately omitted and/or failed to attach any copy of her certificate of registration issued by the Registration of Certified Public Secretaries Board established under section 11 of the Certified Public Secretaries Act. The Petitioner has deliberately omitted and/or failed to attach any copy of her membership certificate as at the date of her employment as issued by the Institute of Certified Secretaries of Kenya being the relevant body for certified public secretaries professional.
52. Dr Oluoch also avers that further to the foregoing, the question of the Petitioner's irregular appointment as the Respondent's Corporation Secretary arose before this Court in ELRC Petition No



E109 of 2020, Professor Michael Kiptoo v Kenya Medical Training College & Professor Philip Kyalo Kaloki; (Dr Miriam Ndunge Muthoka as 2nd Interested Party), wherein the court held that;

' 58. The 1st and 2nd respondents have not attempted at all in the affidavit by Mithamo Muchiri, to deny and or contradict, the facts set out by the petitioner under oath regarding the clandestine relationship between the 1st respondent and the 2nd interested party, which relationship coupled with non-disclosure of the same at the point of appointment of the 2nd interested party by the 1st and 2nd respondents constitute gross breach of Article 10 and 73 of the Constitution of Kenya 2010 and the subject report made to EACC by the petitioner which report led to the victimization of the petitioner by the respondents the Petitioner having participated in the aforementioned Petition No E019 of 2020 as the 2^{na} Interested Party neither traversed nor contradicted these allegations.'

53. The conduct of the Petitioner's duties is a subject of performance contract evaluation which issue is not a subject matter of the petition herein. It is not true that the requirement for a masters or Bachelor's degree in law stated in the Respondent's career progression guidelines had anything to do with termination of petitioner's employment. the Petitioner was not qualified to be appointed as the Respondent's Corporation Secretary in respect of the requirements in the advertisement placed in the daily local newspaper on October 16, 2015 and clause 1.20 the Mwongozo Code of Governance for State Corporations enacted in January 2015. the irregular appointment of the Petitioner/Applicant as the Respondent's Corporation Secretary not only curtails the critical public sector reforms being undertaken by the government, but also offends the express provisions of article 232 of the Constitution of Kenya 2010. Respondent's decision of March 1, 2021 cannot supersede the express provisions of the Constitution.
54. The Petitioner is attempting to avoid culpability by only addressing the Respondent's 2017 Career Guidelines with respect to the Ethics and Anti-Corruption Commission's letter of December 20, 2021. The EACC upon investigations made findings that the petitioner was not qualified as per the job advertisement as she did not have a certificate in Certified Public Secretaries (CPS) and was not a member of the Institute of Certified Public Secretaries of Kenya (ICPSK) in terms of the provisions of Section 2, 19 and 20 of the Certified Public Secretaries of Kenya Act or any statutory modifications. The petitioner became a member of ICPSK on February 28, 2018 despite ascending to the position of Corporation Secretary with effect from November 13, 2015. appointment was irregular for being contrary to the constitutional provisions, Clause 1.20 of the Mwongozo Code 2015 and section 36 of the Public Service Commission Act.
55. Further that the termination letter dated February 22, 2022 informed the Petitioner of her right to Appeal within 42 days which she failed to apply.
56. The EACC is empowered under, *inter alia*, sections 4(2) and 42(8) & (10) of the Leadership and Integrity Act No 19 of 2012, Chapter six (6) of the Constitution of Kenya 2010 as well as the Ethics and Anti-Corruption Commission Act No 22 of 2011, to require public entities to carry out such functions and exercise such powers as may be necessary to enforce compliance with the leadership and integrity requirements. the Respondent is a public entity duly established under the Acts of parliament and is hence under express obligation to assist in the enforcement of the leadership and integrity requirements hereinabove mentioned in compliance with its internal due processes. the Board of Directors took the initiative to interrogate and deliberate on the findings of EACC prior to making any decision affecting the Petitioner.



Interested party

57. In reply, the interested party filed the Replying Affidavit of **Jackson Gichuki Mwai** the Ethics Compliance Officer who avers that the Ethics and Anticorruption Commission is established under Section 3 of the Ethics and Anti Corruption Commission Act, 2011 pursuant to the provisions of Article 79 of the Constitution and is mandated to ensure compliance with the provisions of Chapter Six of the Constitution and the Leadership and Integrity Act and which lays out the basic tenets on moral and ethical standards for state and public officers.
58. Mr Mwai also avers that part of his duties at the Commission include dealing with matters touching on Chapter Six of the Constitution, Leadership and Integrity Act, and the Public Officer Ethics Act, which the Commission enforces in the exercise of its mandate. He is also an Investigator with the Commission duly appointed under Section 23 of the Anti-Corruption and Economic Crimes Act.
59. The Commission is empowered by law to investigate the conduct of any person and/or body which in its opinion constitutes corruption or economic crime, and unethical conduct pursuant to the provisions of Chapter Six of the Constitution of Kenya, the Anti-Corruption & Economic Crimes Act, Ethics & Anti-Corruption Commission Act, and Leadership and Integrity Act.
60. The Commission is mandated under Article 252 of the Constitution to conduct investigations on its own initiative or on a complaint made by a member of the public on October 14, 2020 the Commission received a complaint of abuse of office and conflict of interest against Prof Philip Kaloki, now the former Chairman of the respondent and Peter Turn the former CEO/Director KMTTC that the two influenced the recruitment of Dr Miriam Ndunge Muthoka, the Petitioner herein, as the Corporation Secretary despite her not being qualified for the position.
61. Upon receipt of the complaint, the Commission pursuant to its mandate conducted investigations into the matter by taking the necessary steps. In particular, the Commission through letter dated October 15, 2020 wrote to the Chief Executive Officer, KMTTC requesting to be furnished with some specified certified copies of documents and the Chief Executive Officer, KMTTC in a letter dated October 21, 2020 submitted documents and information that had been requested by the Commission. The Commission also invited for interview various public officers including the Petitioner to aid in the conduct of the investigations.
62. From the investigations the Commission established that on October 16, 2015 through the Daily Nation, KMTTC advertised inter alia for the positions of Director/Chief Executive and Corporation Secretary. The Applications were to be sent to the Chairperson, KMTTC Board of Management not later than October 30, 2015. The advertisement provided for the key responsibilities, requirements, and tenure and performance management for the advertised positions. In particular, for the position of the Corporation Secretary, among other mandatory requirements, a candidate was required to 'Have a Certificate in Certified Public Secretary [CPS].
63. The advertisement attracted a total of twenty-six (26) Applicants.
64. On November 2, 2015 the Board of Management, Human resource Committee held a special Committee meeting to deliberate on the applications where they proposed a two-day retreat in Nakuru to select candidates for interview for the post of Chief Executive Officer and the Corporation Secretary. The meeting also tasked a Mr Kanji and Mr Obiye to develop criteria for selection purposes and shortlisted seven applicants including the Petitioner.



65. On November 10, 2015 the shortlisted applicants including the Petitioner were invited for interview and upon conclusion, a report was prepared indicating the outcome and score achieved by the applicants.
66. On November 13, 2015 the report was presented to a special Board of Management meeting and in adopting the report a resolution was made appointing the Petitioner as the Corporation Secretary having secured the highest score and on the same day, she was appointed as the Corporation Secretary.
67. Mr Mwai also avers that investigations by the Commission revealed that the Petitioner made an Application for Registration for CPS with KASNEB on October 9, 2015 and on October 23, 2015 KASNEB wrote to her informing her that she has been granted exemption in eight (8) Units.

'Investigations established that as at November 13, 2015 when the Petitioner was appointed as the Corporation Secretary, she was not qualified in terms of the provisions of the Certified Public Secretaries of Kenya Act, MWONGOZO or any statutory modifications and that she was not a member of the Institute of Certified Public Secretaries of Kenya. She was registered as a member on February 28, 2018 more than 2 years after being appointed Corporation Secretary on November 13, 2015. specifically, the Petitioner during her appointment was not a member of the Institute of Certified Public Secretaries of Kenya in terms of the provisions of Section 2, 19 and 20 of the Certified Public Secretaries of Kenya Act or any statutory modifications.'

68. Section 2 of Certified Public Secretaries of Kenya, Cap 534 defines a Certified Public Secretary to mean a person registered as a certified public secretary under Section 19. Section 19 provides for Application for registration and in particular Section 19(1) provides that a person wishing to be registered as a certified public secretary shall apply to the Registration Board.
69. Section 20(1)(a), Certified Public Secretaries of Kenya, Cap 534 provides that subject to the section, a person is qualified to be registered if— he has been awarded by the Examinations Board a certificate designated the Final Certificate of the Certified Public Secretaries Examination;
70. According to the Mwongozo on the Appointment of Corporation Secretary; -
- a. The Board should be assisted by a qualified, competent and experienced Corporation Secretary who shall be competitively recruited.
 - b. The Board should ensure that the Corporation Secretary is qualified in terms of the provisions of the Certified Public Secretaries of Kenya Act or any statutory modifications or re-enactment.
 - c. The Board should ensure that the Corporation Secretary is a member of the Institute of Certified Public Secretaries of Kenya in good standing.
71. Pursuant to the provisions of Article 232(1) (g) of the Constitution on the values and principles of public service, which all public and State officers are supposed to adhere to include among others; fair competition and merit as the basis of appointments and promotions. Sections 11 of the Leadership and Integrity Act and Section 9(1)(a) of the Public Officer Ethics Act requires all public officer to observe professionalism and carry out their duties in a way that maintains public confidence in the integrity of the office.
72. Pursuant to Article 259 of the Constitution provides that the Constitution should be interpreted in a manner that contributes to good governance.



73. The petitioner was not qualified to be appointed as the Corporation secretary for KMTC a fact well known to her and the board and the Commission is undertaking a criminal enquiry on the culpability of the board. The latter attempt by the Petitioner to comply with the requirement of the position in terms of compliance goes against the Constitution and labour laws and the Petitioner is liable for the income earned while she was unqualified.

Submissions

73. The parties agreed to address the petition by way of written submissions.
74. The petitioner submitted that The Petitioner submitted that the contention by the Respondent that the Petitioner was irregularly and/or procedurally recruited is self- defeating as it is the Respondent, who recruited the Petitioner and subsequently confirmed the validity of her appointment with issuance of the letter of confirmation dated 1st July, 2015. the Respondent has taken seven years to discover that the Petitioner’s appointment was irregular demonstrates a witch hunt. it was not within the petitioner’s mandate to ensure compliance with any of the Respondent’s internal human resource policy procedures and functions. if the Respondent was acting in good faith, it would have had recourse as recommended by the Inspector General of State Corporations, to regularize and cure any anomalies of the process; which the Respondent had actually deliberated upon and made resolution to have the Petitioner align herself with the job requirements. however the Respondent unlawfully reneged from this decision and relied on the advice of the Interested Party to mete the ultimate sanction of revocation and termination of employment. employment was regular, lawful and legitimate.
75. In Kisumu Civil Appeal No 51 of 2014, Speaker of the County Assembly - Kisii County & 2 others v James Omamba Nyarge, the Court of Appeal questioned why the appellant had taken more than eight (8) months to discover that the appointment of the respondent contravened the provisions of the County Government Act and the Constitution. In the case of Sibiah Stella Otieno v Cabinet Secretary, Ministry of Interior and Co-ordination of National Government & 7 others [2021] eKLR the Court held that;

If there was any irregularity in the signing of the appointment letter, it was up to the Respondents to rectify the irregularity and not mete out the ultimate sanction of termination or revocation of appointment. The failures, therefore, should not have been visited upon the Petitioner through revocation of appointment.

76. The Petitioner submitted that the revocation and subsequent termination from employment violated Sections 41, 43 and 45 of the Employment Act and Article 41 and 236(b) of the Constitution of Kenya. if there was a basis to remove her on the basis of qualifications and irregular appointment, then Article 50(1) of the Constitution requires that she be given a hearing on the said allegations but which opportunity the Respondent never afforded to her. The failure to subject her to a fair hearing was also against clause 11.8 of the Respondent’s Procedure Manual [2017]. the Respondent never provided the Minutes of the Board Resolution terminating the Petitioner from employment and has not demonstrated that it observed the due process protections assured to the Petitioner as a public officer. under the Mwongozo Code of governance for State Corporations under clause 1.2 provides among other functions, that the Board shall exercise their role collectively and not individually. the action of the Interested Party to recommend revocation of her appointment was therefore malicious, unlawful, unconstitutional and an abuse of office.
77. The Petitioner further submitted that contrary to the provisions of Section 4(3) (a) of the Fair Administrative Actions Act, the Respondent did not give her prior notice and the reasons why it revoked and subsequently terminated her appointment after providing her with the option of



- fulfilling the job requirements. That as stated at clauses 11.16.1 (i), (ii) and (iii) of the Respondent's Procedure Manual 2017, an irregularity in appointment is not an offence that falls within the purview of the procedure manual to warrant the revocation and subsequent termination of the Petitioner's employment. The revocation and termination are terms that refer to two distinct processes which the Petitioner was subjected to contrary to the law. Subjecting the petitioner to investigations and recommendations by two different government agencies over the same subject matter and issues goes against the principles of natural justice and which the right to fair administrative action under Article 47 of the Constitution and her right not to be discriminated upon under Article 27 of the Constitution and Section 5(1), (2) and (3) of the Employment Act, 2007 because out of the people named in the audit report, it was only the petitioner's appointment that was revoked and she was subsequently terminated.
78. In the case of Katiba Institute v Presidents Delivery Unit & 3 others [2017] eKLR, the court held that failure by the 1st respondent to provide information sought under Article 35(1) (a) and to also publicize the information in accordance with Article 35(3) on the basis of the petitioner's request was a violation of Article 10 of the Constitution on the values of the rule of law, participation of the people, human rights good governance transparency and accountability.
79. In the case of Robert Muriithi Ndegwa v Minister for Tourism [2012] eKLR, the court held that the respondent contravened Article 47 of the Constitution after holding that despite the respondent making a unilateral decision not to renew the contract, it failed to convey this position and the reasons before and after the due date for the renewal. The Court also held that such actions and omissions did not only contravene Article 236 of the Constitution that protects public officers, but also amounted to unfair labour practices as protected in Article 41 of the Constitution.
80. In the case of Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR, the Court of Appeal held that the respondent was entitled to the right to a fair hearing as provided under Article 50(1) of the Constitution on the basis that the adjudicator needed to be independent and impartial, and that the requirement for fairness in the hearing procedures adopted.
81. As regards violation of the doctrine of legitimate expectation, the Supreme Court of Kenya in the case of Communications Commission of Kenya & 5 Others v Royal Media Services [2014] eKLR held that for an expectation to be legitimate, it must be founded upon a promise or practice by the public authority that is bound to fulfill the expectation.
82. The Petitioner submitted that her fundamental expectation was that the Respondent had made a commitment to her that her employment contract would subsist subject to her acquiring the requisite qualifications for the position as per the approved Respondent's Career progression guidelines of 2017 which had come into force two years after her employment. Furthermore, the expectation of such a commitment was within the range of reasonable expectations through the conduct of the Respondent in terms of the evaluation reports.
83. The Petitioner submitted that she is entitled to the reliefs sought having demonstrated that her appointment as Corporation Secretary was wrongfully and unfairly revoked and she was unfairly terminated and should be paid constitutional damages of Kshs 5,000,000 as awarded by the Court of Appeal in the case of Ol Pejeta Ranching Limited v David Wanjau Muboro [2017] eKLR; In Nyeri ELRC Petition No 5 of 2015: Mundia Njeru Gateria v Embu County Government & 5 others [2015] eKLR, the court considered the aggravating circumstances as submitted for the petitioner and found that Kshs 5,000,000.00 for violation of the fundamental rights and freedoms would meet the ends of justice in the case. The Court considered among others, the case of Mak'Onyango vs Attorney General and Another [2013]1EA at 353 wherein the Court awarded Kshs 20,000,000.00 for violation



- of rights for unlawful and malicious arrest, search and detention during the aftermath of the attempted coup d'état on August 1, 1982, the same having amounted to torture, cruelty, inhuman and degrading treatment.
84. The Petitioner submitted that Section 12(3) of the *Employment and Labour Relations Court Act* 2011 provides for costs as a remedy and that she should be granted costs and interest in the case.
85. In reply, The Respondent submitted that it has mandatory specifications and/or requirements for the position of Corporation Secretary as advertised by it on October 16, 2015. at the time the Petitioner was applying for the position and subsequent appointment by the Respondent, she did not have a Certificate in Certified Public Secretary in the manner prescribed by the *Certified Public Secretaries of Kenya Act*.
86. It is a mandatory requirement under clause 1.20 (1) (c) and (d) of the Mwongozo Code of Governance for State Corporations that any person appointed as Corporation Secretary in a State Corporation must be qualified in terms of the provisions of the *Certified Public Secretaries of Kenya Act* and must be a member of the Institute of Certified Public Secretaries of Kenya in good standing. In any case, there is no contention that the Respondent is a state corporation. It also submitted that Section 36(1) (e) of the *Public Service Commission Act* has placed a burden on a candidate subject of appointment process to exhibit personal integrity which therefore required that the Petitioner be responsible to ensure that her appointment was lawful and regular. The Respondent referred to *ELRC Petition No E019 of 2020: Professor Michael Kiptoo v Kenya Medical Training College & Professor Phillip Kyalo Kaloki (Dr Miriam Ndunge Mutboka as 2nd Interested Party)* and urged this Court to draw a parallel reference to the set of facts herein to the legal doctrine of *res ipsa loquitur*.
87. The Respondent submitted that the Petitioner has not attempted to controvert and/or challenge the allegations of favoritism, nepotism and/or subsistence of a clandestine relationship with the Respondent's Board Chairman and neither has she demonstrated her qualifications for the subject position at the time of her appointment as under Section 119 of the *Evidence Act* and consequently, the Petitioner's appointment as the Respondent's Corporation Secretary was irregular, unlawful and unconstitutional.
88. The Respondent submitted that the revocation of appointment and subsequent termination of the Petitioner's employment was lawful because the Petitioner contravened Section 22(a) of the *Public Officer Ethics Act* which provides that a public officer shall practice and promote the principle that public officers should be selected on the basis of integrity, competence and suitability. The Petitioner also violated the general Leadership and Integrity Code under Part II of the *Leadership and Integrity Act* No 19 of 2012. it exercised its mandate to investigate the breach of the code as provided under Section 42 (10) of the Act and conducted investigations that culminated into a report finding that the Petitioner was not qualified for appointment as per the advertisement for the position. It then revoked the appointment of the Petitioner as empowered under Section 4(4) of the *Leadership and Integrity Act*.
89. In the Petitioner's written response and oral representations at the disciplinary hearing, these were found to be unsatisfactory and the Respondent's Board resolution to terminate her employment was therefore regular. The respondent discharged the legal burden of demonstrating a fair hearing process before terminating the Petitioner's appointment while the evidential burden of proving that due process was not followed shifts to the Petitioner as under Section 108 of the *Evidence Act* and that in the absence of any rebuttal, the Petitioner's case must fail.
90. The Respondent submitted that termination of the Petitioner's employment was fair as the reasons were related to her conduct, capacity and compatibility as well communicated in the termination



letter. In the case of *Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR*, the Court held that under Section 45 of the *Employment Act*, termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity. In the case of *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR*, the Court of Appeal overturned the trial court's finding of unfair termination based solely on procedure and opined that courts ought to assess the reasonableness and justifiability of the actions taken by the employer. The Respondent urges this Court to thus find and hold that the revocation of the Petitioner's appointment and subsequent termination of her employment was reasonable, fair and lawful. The Respondent is enjoined to act pursuant to the national values and principles of governance enunciated under Article 10(2)(c) of the *Constitution* of Kenya that all state and public officers observe good governance, integrity, transparency and accountability.

91. The Respondent submitted that on the allegation of discrimination, the Petitioner was the only person in the position of corporation secretary thus making it untenable to argue differentiated treatment let alone on what ground. That the Petitioner has notably not specified any ground(s) of the alleged discrimination and to what extent the revocation of her appointment amounts to discrimination vis-a-vis other employees comparable to her. In the case of *Rose Achieng' Mibudhi v Jos Hansen & Soehne (EA) Ltd, ELRC Cause No 130 of 2013*, the court held that if there is a specified ground for discrimination, then unfairness can be presumed but if on unspecified grounds, unfairness will have to be established by the Claimant. The Respondent implores this Court to observe that the Petitioner has fallen short of meeting the standard of proof for a claim of discrimination as alleged.
92. The Respondent submitted that the Petitioner's particulars of breaches of Article 41 are vague and do not speak specifically to how she has been subjected to unfair labour practices. As regards violation of the right to fair administrative action, in *Nairobi Constitutional Petition No E392 of 2021: Geonet Technologies Limited v Ministry of ICT innovation and Youth Affairs & 2 Others* the Court held that for there to be a violation of Article 47 rights, a party ought to prove that the impugned decision was so arbitrary that no reasonable authority could ever have come to it and that the Court of Appeal decision in *Mtana Lewa v Kabindi Ngala Mwangandi [2015] eKLR* defined arbitrariness as;

A decision or an action that is based on individual discretion, informed by prejudice or preference, rather than reason or facts.
93. The Petitioner was subjected to an administrative process that does not fall within the ambit of Article 50 of the *Constitution*. In the case of *Alnshir Popat & 8 Others v Capital Markets Authority [2016] eKLR*, the court held that the provisions of Article 50 do not apply to an administrative process and further, that Articles 47 and 50 (1) protect two distinct rights which should not be conflated.
94. The Respondent submitted that statutory provisions override an expectation howsoever founded and no legitimate expectation can be claimed where its fulfillment will require the decision maker to act unlawfully. In the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 Others [2007] eKLR*, the court held that the principle of legitimate expectation requires that public authorities must be held to their practices and promises by the Courts and the only exception is where a public authority has sufficient overriding interest to justify a departure from what has been previously promised. the Petitioner's claim fails on the basis of the legal doctrine *Ex Tupri Causa Non Oritur Actio* which requires that a Court of law should not aid a litigant whose cause of action arises out of an illegal act or contract. The Respondent urged this Court to thus find that based on the Petitioner's irregular appointment and lack of qualification as demonstrated herein above, there cannot be any violation of the doctrine of legitimate expectation and that consequently, no award for damages and/or



compensation should lie. That this Court should deny the invitation to endorse the aforesaid illegality as sought in the prayers made in the Petition.

95. The reinstatement of an employee by the Court is a discretionary matter that is wholly dependent on the circumstances at hand but which in this case is tantamount to this Court sanctioning the said irregularities. In the case of *Kenya Airways Limited v Aviation Allied Workers Union Kenya & 3 Others, Civil Appeal No 46 of 2013*, the Court of Appeal held that in considering reinstatement the court should be guided by factors stipulated in section 49(4) of the *Employment Act* which includes the practicability of reinstatement or re-engagement and any conduct of the employee that caused or contributed to the termination. The appellate court also found that the court should balance the interest of the employee with the interest of the employer.
96. The Interested Party failed to file written submissions.

Determination

97. On the pleadings, affidavits and written submissions, the issues which emerge for determination can be summarized as follows;
- i. Whether the petitioner's employment was irregular, unlawful, and illegal and amounted to unfair labour practice;
 - ii. Whether termination of the petitioner's appointment on January 11, 2022 was unlawful and wrongful and whether an order of reinstatement should issue;
 - iii. Whether there are constitutional violations;
 - iv. Whether the remedies sought should issue; and
 - v. Who should pay costs.
98. The petition is that the petitioner was appointed by the respondent as Corporation Secretary on November 13, 2015 and confirmed to the position on July 27, 2016. The petitioner held such position until the Inspector General – Corporations conducted a special audit of the respondent on various issues including her recruitment and in a report dated November 16, 2020 recommended that during recruitment the petitioner did not meet all the job requirements and such appointment was not justified.
99. The EACC took up the matter and conducted investigation and recommended the revocation of the appointment which the respondent did by termination of employment on February 22, 2022.
100. The petition is that the actions by the respondent are irregular, unlawful and amount to unfair labour practices since the petitioner served in the position of corporation secretary for over 7 years and was appointed upon due process and met all the requirements for the position and an order of reinstatement should issue.
101. The response is that following the appointment of the petitioner, there were complaints by various actors and the Director General – Corporation conducted investigation which revealed that following advertisement for the position of corporation secretary and subsequent interviews the petitioner was ranked as the best candidate out of the total 26 candidates despite not meeting all the job requirements and which bordered on favoritism and nepotism in contravention of the Public Officer Act. At the time of appointment, the petitioner did not have a certificate in Certified Public Secretary or work experience required. Appointment was therefore terminated on good basis.



102. The interested parties case is that following complaints and the report of the State Corporations, they conducted further investigation which revealed various malpractices with regard to the appointment of the petitioner as corporation secretary of the respondent in that the position advertised was not in the organizational structure of the respondent, the appointment was not approved by the State Corporations, as at November 13, 2015 when the petitioner was appointed she did not qualify in terms of the [Certified Public Secretaries of Kenya Act](#) and was not a member of the Institute of Certified Public Secretaries of Kenya. It was recommended that the appointment be revoked and the position be re-advertised.
103. The respondent is well defined as a state corporation and hence its officers are in the public service. Employment in the public service is regulated by among other provisions Articles 2(1), 10, 73(1), 232(1), 233 and 234 of the [Constitution](#) at ensuring fair competition or merit in the appointments as held in [Anthony v Communications Authority of Kenya & 3 others \(Petition E161 of 2021\) \[2022\] KEELRC 1117 \(KLR\) \(25 January 2022\) \(Judgment\)](#).
104. In recognition of the need to observe the principles of public service under Article 232, a code of governance for State Corporations, 'Mwongozo.' Was established to ensure that the management of State Corporations is aligned with Articles 10, 73 and 232 of the [Constitution](#), as well as the principles set out in Chapter 6 of the [Constitution](#).
105. On October 16, 2015 the respondent advertised for the position of corporation secretary in the local newspapers. The requirements for the positions were that;
- For appointment to this position, a candidate must:
- i) Hold a Master's degree in business administration from a university recognized in Kenya.
 - ii) Certificate in Certified Public Secretary (CPS).
 - iii) Have served in a position of management/teaching for a period of at least three years.
 - iv) Interpersonal and communication skills.
 - v) Passion for continuous professional development.
 - vi) Knowledge and experience in project review, monitoring and evaluation.
 - vii) Knowledge of higher learning institution's training and programs.
106. As noted above, the respondent as a state corporation is also regulated under the [Kenya Medical Training College Act](#) and the [State Corporations Act](#).
107. The [Kenya Medical Training College Act](#) establishes the Kenya Medical Training College as a self-governing institution to provide for its governance, control and management. Envisaged officers to undertake this mandate is outlined under Sections 8 and 9 thereof and none relate to the position of a corporation secretary.
108. Under the State Corporation Act established for the control and regulation of state corporations and the position and function of corporate secretary is not defined. The Director General – Corporations is then directed under Section 18(3) thereof together with a committee or Controller and Auditor-General to undertake special investigations of any state corporation and to report findings.
- (3) The Committee, or the Controller and Auditor-General may, if they consider it desirable, require the Inspector-General (Corporations) to conduct special investigations of any state corporation on their behalf and to report the findings to them.



109. Under the mandate of the Director General – Corporations, a special audit/investigations of the respondent was conducted and a report filed dated November 16, 2020 with the findings that;
- i. The shortlisting, interviews and subsequent ranking of Ms Muthoka as the best candidate out of the 26 applicants despite not meeting all the job specifications as contained in the advertisement bordered on favoritism and nepotism and therefore contravened the provisions of the Public Officer Act, 2003. For instance, Ms Muthoka did not possess a certificate in Certified Public Secretary and work experience required;
 - ii. The appointment of Ms Miriam Muthoka as the Corporation Secretary was unjustified given that a deserving 12 out of 26 candidates who met the minimum requirements as advertised qualified for the appointment
110. The key recommendation thereof was that;
- The Cabinet Secretary, Health should censure the following Board members who sat in the Board meeting held on November 13, 2015 that irregularly approved the appointment of Ms Miriam Ndunge Muthoka as the Corporation Secretary, a position that did not exist in the approved staff establishment and despite not meeting the Job specifications as contained in the advertisement:
111. Such findings and recommendations arose from the facts established by the investigations that at the time of recruitment of the petitioner as corporation secretary, such position did not exist in the respondent’s approved staff establishment; there was no declaration of vacancy or budgetary allocation to cater for the personnel emoluments; creation of such office was done without consultation with the legal unit; and the respondent ignored key governance parameters under the requirements on job specifications in the advertisement for the post of corporation secretary. The petitioner was not qualified in terms of the Certified Public Secretaries Act and was not a member of the Institute of Certified Public Secretaries of Kenya.
112. The investigations also made a finding that the high ranking of the petitioner out of the 26 applicants despite not meeting all the job specifications as advertised was based on favoritism and nepotism and hence contravened the Public Officers Ethics Act and such appointment was not justified.
113. The EACC also conducted investigation and found malpractices in the appointment of the petitioner and made a recommendation that such appointment be revoked.
114. On December 29, 2021 the respondent directed the petitioner to respond to the matters raised against her and when filed her written response on January 4, 2022.
115. In the petitioner’s response, she admits that at the time of appointment on October 13, 2015 she did not possess the requisite qualifications for the Corporation Secretary as per the approved KMTC Career Progression Guidelines of 2017 by government in its special meeting of March 1, 2021. The petitioner proposed to the respondent to be granted time to study the Bachelor Degree in Law for 4 years and got registered at Mt Kenya University.
116. The petitioner also admits that as at November 13, 2015 she did not possess a certificate in Certified Public Secretary was not a member of the Certified Public Secretaries Kenya, a requirement for the position of corporation secretary as advertised.
117. For lack of meeting the minimum threshold for the advertised position, the appointment of the petitioner by the respondent was irregular and wrongful.
118. The appointment of the petitioner by the respondent on the onset as at November 13, 2015 was contrary to Article 232 of the Constitution, 2010 on values and principles of public service which



- include the failure to afford fair competition and merit as the basis of appointment and affording equal opportunities to the 26 applicants seeking the same position as advertised.
119. Such practice of the respondent cannot be justified as an unfair labour practice. The petitioner benefited from an eschewed process of recruitment and the offer to be allowed to acquire the requisite qualifications after the fact cannot apply to sanitize the irregular, wrongful and unjust process. The appointment was wrongful from the start.
 120. Where the recruitment process was so manifestly unfair as to give one party an advantage against other candidates, the inequality in the bargain obvious, no honest and fair person should accept the same.
 121. Where the bargain is favoritism and nepotism as alluded to in the findings of the Director
 122. General – Corporation in the investigations report of November 16, 2020 such matter put into perspective in these proceedings and the attendant proceedings in ELRC Petition No E109 of 2020 Prof Michael Kiptoo v Kenya Medical Training College this court is well persuaded in the findings that the appointment of the petitioner was improper, irregular and cannot find justification.
 123. In the case of *Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] eKLR* that an unconscionable contract is one in which the provisions are so one-sided, in view of all the facts and circumstances, that the contracting party is denied any opportunity for meaningful choice. Were the respondent and its board members to fairly and honestly audit the advertisement for the position of corporation secretary, the applications received and the qualifications of the petitioner, it should have been apparent that there was unfair competition at the shop floor contrary to Articles 41 of the *Constitution*, 2010 on fair labour practices and Article 232(1) (g) and (i) which prohibits unfair competition in public appointments based on ethnic considerations..
 - (g) Subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
 - (h) Representation of Kenya’s diverse communities; and
 - (i) Affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of--
 - (i) Men and women;
 - (ii) The members of all ethnic groups; and
 - (iii)
 124. On the issues outlined above, the court finds no constitutional, illegal or irregular matter to justify the remedy sought of reinstatement. The employment of the petitioner by the respondent as corporation secretary since November 13, 2015 was an unfair benefit. To claim therefrom would be to visit injustice on the Kenyan tax-payer.
 125. The appointment of the petitioner by the respondent without meeting the required threshold rendered such appointment invalid. It cannot be justified and or sanctioned by subsequent communications directing her to get the required qualification post-employment. Such appointment ought not to have taken place in the first instance. The appointing authority, the respondent and its Board members ought to be surcharged for the loss.
 126. The court brings to the attention of the respondents the provisions of Article 226(5) of the *Constitution*, 2010 with regard to the appointment of the petitioner on a non-existent office in its structures or provisions of a budgetary allocation to cater for the personnel emoluments thereof;



- (5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.
127. The petitioner is seeking to be issued with a Certificate of Service. Such document is issued pursuant to the provisions of Section 51 of the *Employment Act*, 2007 with regard to the period of employment. On the findings above that employment of the petitioner was null and void ab initio to issue a Certificate of Service as contemplated under Section 51 of the Act would be to sanction the same. Such remedy is not available.
128. On the award of costs, this is discretionary and taking into account the findings above, the petitioner having benefited from proceeds of unfair labour practices perpetuated by the respondent, to order costs each way would not find justification. Each party shall bear own costs.
129. Before conclusions, the issue arose with regard to the participation and recommendation made by the EACC with regard to the revocation of the appointment of the petitioner as the corporation secretary of the respondent. Whereas the EACC in its investigations established that the respondent in its organizational structure did not have the position of Corporation Secretary as at October 16, 2015 when the position was advertised and the petitioner was employed on November 13, 2015, there was an advertisement sent to the public which was followed by a recruitment process and the petitioner employed. The petitioner cannot be faulted for a process she had no control over. The respondent and its officer, particularly the Board, must take responsibility.

ACCORDINGLY, THE PETITION IS HEREBY FOUND WITHOUT MERIT AND IS HEREBY DISMISSED. EACH PARTY SHALL PAY OWN COSTS.

DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2022.

M. MBARŪ JUDGE

