



**Njoroge v Ministry of Education & 3 others; Bunyi & 2 others (Interested Parties)
(Petition E015 of 2022) [2022] KEELRC 13498 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13498 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E015 OF 2022
HS WASILWA, J
DECEMBER 13, 2022**

BETWEEN

MARTIN NJOROGE PETITIONER

AND

MINISTRY OF EDUCATION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

KENYA NATIONAL COMMISSION OF UNESCO 3RD RESPONDENT

EVANGELINE NJOKA 4TH RESPONDENT

AND

GRACE BUNYI INTERESTED PARTY

ANTONINA LENTOIJONI INTERESTED PARTY

PATRICK OCHICH INTERESTED PARTY

RULING

1. Before me for determination is the petitioner/applicant's application dated November 1, 2022, filed under certificate of urgency pursuant to articles 2, 10, 20, 22,23,47, 50(1), 159, 165, 232, and 258 of the *Constitution*, section 12 of the *Employment and Labour Relations Court Act*, section 19 and 24 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, inherent jurisdiction of the court and all other enabling provisions of law, seeking the following orders;-
 1. Spent.
 2. Spent.



3. Spent.
 4. Spent
 5. Pending hearing and determination of the petition herein, a conservatory order in form of an injunction be and is hereby issued directing Dr Evangeline Njoka, the secretary General/Chief Executive Officer of the Kenya National Commission for UNESCO to proceed on terminal leave effective November 30, 2022, being six (6) months before her contract of employment expires on May 31, 2023.
 6. Pending hearing and determination of the Petition, a conservatory order be and is hereby issued suspending the appointment of Patrick Ochich, Antonina Lentoijoni and Prof Grace Bunyi as members of the board of Kenya National Commission for UNESCO and restraining them from performing the functions of the members thereof.
 7. Pending hearing and determination of the petition herein, a conservatory order be and is hereby issued restraining the 1st and 3rd Respondents from extending, re-appointing and renewing the employment contract of Dr Evangeline Njoka as he secretary General/ Chief Executive officer of he Kenya National for UNSECO beyond the May 30, 2023 or expiry of her two -term contract of five years each.
 8. That costs of this application be provided for.
2. The basis upon which the application is made is that; -
- a. The Kenya National Commission for UNESCO, (herein after referred to as the Commission) is a state corporation established under [Kenya National Commission for UNESCO Act](#), No 5 of 2013, with section 17(1) of the said [Act](#) establishing the office of the Secretary General/ Chief Executive Officer.
 - b. It is stated that the said CEO is appointed by the 1st Respondent in consultation with the board of the Commission.
 - c. The Commission pursuant to section 18 and with the approval of the State Corporation Advisory Committee of the said Act, promulgated the Human Resource Policy and Procedure Manual, 2019 which provides at clause 2.5.3 that the CEO shall be appointed on a contract of five (5) years, renewable once subject to good performance.
 - d. It is contended that the 4th respondent was appointed by the 1st and 3rd respondent in 2013 in a process that was devoid of transparency, public participation and accountability contrary to article 10(2) & 232(1) of the [Constitution](#).
 - e. It is averred that no advertisement or interviews were conducted before the said appointment were made.
 - f. By the letter of 19th and October 26, 2022, the Petitioner/Applicant has sought from the Commission for information with regard to advertisement, interview and appointment of the 4th Respondent, which letters have not elicited any response.
 - g. It is the Petitioner's case that despite the appointment of the 4th Respondent being opaque, she was re-appointed for a second term in the year 2018 with effect from June 1, 2018 which contract is to expire on May 30, 2023.



- h. The Petitioner avers that despite the contract of the 4th Respondent coming to an end, he has established that the 1st and 3rd Respondent are working in cahoots with the 4th Respondent to secure a third term contract for the 4th Respondent contrary to clause 2.5.5 of the Respondent's manual.
 - i. He states that the *State Corporations Act*, the *Code of Governance for State Corporations, 2015* and the Government Circular, Ref No OP/CAB.9/IA dated November 23, 2010 provides that existing CEOs of state Corporation whose contracts are expiring on May 31, 2023, should proceed on terminal leave of six months and the acting CEO to be appointed during this transition period.
 - j. That the 4th Respondent has refused to obey the law and go for the said leave to allow for recruitment of his successor.
 - k. That the interested parties, who are in office in the capacity of members of the board were not appointed by the 1st Respondent as envisaged under section 6(1)(g) of the *UNESCO Act*, as such continue to illegally draw allowances from the commission.
 - l. The Petitioner urged this Court to move with speed and remove the 4th Respondent from office and place her on terminal leave, failure to which the 4th Respondent is likely to run-down UNESCO Commission.
3. The Application is supported by an affidavit of Martin Njoroge. The Petitioner/Applicant deposed upon on November 1, 2022, which reiterated the contents of the application.
 4. The Application is opposed by the 3rd and 4th Respondents who filed a replying affidavit deposed upon by the 4th Respondent, Dr Evangeline Njoka, on the November 11, 2022. In the said affidavit, the affiant avers that he does not know the locus of the Petitioner but that the said Petitioner is bringing this suit as proxy of the former Chairman of the Board, one Dr Misigo Amatsimbi, whose term expired on June 23, 2022. He added that the said former chairman has filed another application in Nairobi being ELRC Petition number E167 of 2022. Also through another proxy.
 5. She avers that the 3rd Respondent was initially a department in the ministry of Education till 2013 when it was elevated to a state corporation through the *Kenya National Commission for UNESCO Act, 2013*.
 6. She denied handpicking the interested parties herein as members of the Board and averred that the interested parties were nominated and appointed by the 1st Respondent as representatives of the organizations in the board of the 3rd Respondent. That 3rd Interested party, Prof Patrick Ochich was appointed on December 29, 2020 representing Kenya National Examination Council, the 1st Interested party, Prof Grace Bunyi was appointed on June 29, 2020 representing Public University Senate, while the 2nd Interested party Ms Antonina Lentoijoni was appointed on July 28, 2020 representing Teachers Service Commission.
 7. Additionally, that other members of the Board Include, Ms Mary Rotich an alternative member representing the Teachers Service Commission, Mr Jerome Ochieng representing Ministry of Information, communication and Technology, Prof Collette Suda representing Ministry of Public Service and Gender Affairs, Dr Bellio Kipsang representing Ministry of Education, Dr Julius Muia representing National Treasury and Ms Josephta Mukobe representing Ministry of Sports, Culture and Heritage. She then took issue with the fact that the Petitioner singled out the three interested parties when all the above board members were appointed on similar process. On that basis she objected to the production of the letter dated February 5, 2020 as the Applicant's evidence.



8. It was stated that the allegation that the interested parties were not appointed via a Gazette notice is misplaced because Section 6 of the Kenya National Commission of UNESCO Act, on appointment of Board members does not contemplate any gazettelement of the members.
9. The affiant avers that she was appointed the secretary General of the 3rd Respondent by the cabinet secretary in consultations with the board of Board pursuant to section 17 of the Kenya National Commission for UNESCO Act and took office with effect from June 1, 2013. She denied the alleged factors that the cabinet secretary needed to consider before appointing her. She stated further that the Petitioner is misdirected in alleging that her appointed need to follow procedure of advertisement, shortlisting etc. when no such procedure is provided for under the Act.
10. It is the affiant's averments that section 17 of Kenya National Commission for UNESCO Act has not been declared unconstitutional therefore any acts made in conformity with the Act are considered lawful.
11. She states that section 18 of Kenya National Commission for UNESCO Act provides for the renewal of term of the Secretary General which the Cabinet Secretary in Consultation with the Board renewed with effect from June 1, 2018, therefore that she is legally in office. Additionally, that her last contract expressly provided that the second term will not be renewed and that she does not desire, neither has she applied for a third terms as the Secretary General of the 3rd Respondent.
12. It is her case that clause 1.18 of Mwongozo Code of Governance provided for appointment of Chief Executive Office, who is appointed by the Board of State Corporation which is distinguishable from her position of being Secretary General appointed by the Cabinet Secretary. On that note, she stated that Kenya National Commission of UNESCO Act shall apply instead of Mwongozo Code of Governance because the Act is specifically addressed to the Board unlike Mwongozo Code of Governance.
13. The affiant states that the circular reference number OP/CAB.9/1A dated November 23, 2010, titled "Procedure for re-appointing of service Chief Executive Officers in State Corporation", which is relied upon by the petitioner/applicant in seeking the conservatory orders, does not provide for the six months' terminal leave before expiry of the contract, therefore the claim of terminal leave sought by the petitioner should be disallowed.
14. She avers that she had not threatened or taken any action to impede the recruitment of her successor. In fact, that the appointment is to be made by the Cabinet secretary whom she does not have control over as such the allegation by the Application is farfetched and a product of imagination.
15. The affiant in conclusion stated that the entire petition and the application herein are indirectly seeking to eject him from office before the end of her term, in the name of terminal leave, and urged this Court to disallow the application with costs.
16. In response to the Replying affidavit, the applicant filed a further affidavit deposed upon on November 14, 2022 stating that the State Corporations Act is the general Act that govern all state cooperation in Kenya such as Kenya National Commission of UNESCO and section 6 of the said Act provide for gazettelement of appointed board members of the Corporation and that Kenya National Commission For UNESCO Act should be read together with the State Corporations Act.
17. He avers that he does not know one Dr Misigo Amatsimbi and therefore was not instructed by him to file this suit. He reiterated that he filed this case on his own in the bid to protection the violations of the law. Further that he is not a party in Nairobi ELRC Petition number E167 of 2022 and merely learnt of it from the 4th Respondent but after perusal of the said Nairobi ELRC Petition No 167 of 2022, he discovered that the issue in dispute is on legality of recruitment of 22 employees pursuant to



a publication appearing on the daily nation of 13th September, 2022, which issue is different from the issues raised in this Petition.

18. The interested parties did not file a response to the application but sought to rely of the replying affidavit of the 4th Respondent sworn on November 11, 2022.

Applicant's Submissions

19. The applicant submitted that for grant of conservatory Orders to issue, the applicant must demonstrate that he has an arguable case or a *prima facie* case, that the injury or threatened loss is irreparable if the petition is successful and the petition shall be rendered nugatory if the Orders sought are not granted and finally to demonstrate that it is in public interest for the Court to issue conservatory orders. In this he cited the case of *Mahansons (Kenya) Limited v The Registrar of titles* [2017] eKLR.
20. The Applicant define a *prima facie* case by citing the case of *Mrao Limited v First American Bank of Kenya Limited and 2 others* [2003] eKLR where the court held that;

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
21. It was argued that premised on the material before court the Respondent have violated several provisions of Statute and *Constitution*. It was argued that the 4th Respondent was initially appointed as a secretary to the board vide a letter of August 23, 2012 when the 3rd Respondent long before the 3rd Respondent, a clear demonstration of the weighty issue on the legality of the appointment of the 4th Respondent that need to be heard in the main petition.
22. It was argued further that the Respondent upon the establishment of the 3rd Respondent on the January 25, 2013, issued the 4th Respondent with another appointment letter for 5 years effective June 1, 2013 which appointment was not done in accordance with procedure of appointment on advertisement, shortlisting and interviewing. He added that the 4th Respondent's appointment was thus not competitive, transparent, accountable and participatory as contemplated under articles 10 and 232 of the *Constitution*. This fact was admitted by the Respondent in paragraph 12 of its replying Affidavit.
23. It was submitted that though section 17 of *Kenya National Commission of UNESCO Act* provide for recruitment of the secretary General/ CEO the same should be done in accordance with the law unless exemption clause is provided therein which is not the case herein. It was further argued that the *Constitution* is the supreme law of the land and articles 10 and 232 ought to apply in the recruitment exercise of members of the State Corporation as expressly stated in articles 232(2)(b).
24. The petitioner argued that the appointment of the 4th respondent was not done in accordance with the law from the beginning and urged this court to allow its application in terms of prayer 5 and 6 of the application herein and find the appointment of the 4th respondent an illegality. To support this argument the Applicant relied on the case of *Robert Muriithi Ndegwa v Minister for Tourism* [2012] eKLR where the Court held that;-

“The court holds that there would be no suitability or merit in public employment in event of presence of bribery, cronyism, nepotism, tribalism, and in absence of qualifications, competence, competition, integrity and respect for inclusion and diversity.”



25. The petitioner also cited the case of *Katiba Institute and another v The Honourable Attorney General and others* [2021] eKLR and the case of *Community Advocacy and Awareness Trust and others v Attorney General and 6 others* [2012] eKLR where the court emphasized on the recruitment meeting the requirements of articles 232 and 10 of the *Constitution*.
26. Having conceded that the appointment of the 4th Respondent was not done in accordance with the process of advertisement, shortlisting and interviewing contemplated under the law, the applicant argued that they have demonstrates a *prima facie* case and urged this court to issue the conservatory orders sought. further that a similar finding be made with regard to the 4th respondent's subsequent re-appointment from June 1, 2018.
27. On the prayer to place the 4th Respondent on 6 months terminal leave, the Applicant submitted that the *State Corporations Act* is the National legislation that makes provision for the establishment, control and regulations of all State Corporation in Kenya such. On that basis, the Government circular reference number OP/CAB.9/1A dated November 23, 2010 as read with clause 1.18 of the *Code of Governance of State Corporations 2015* provides that a CEO whose terms is not renewable will proceed in terminal leave to pave way for the recruitment of their successors. To support their argument the applicant cited the case of *Okiya Omtatah Okoiti v Kenyatta University Council and others* [2015] eKLR where the court held that;-
- “On issue of 1st Interested Party proceedings on leave, this is the mandatory provisions for all Chief Executive Officers under the State Corporations Act. Given that her term expires in less than 6 months on 31.3.2016, it would be prudent for her to proceed on terminal leave so that the process of recruitment of the next Vice Chancellor is not seen as being influenced by her or those perceived close to her. She must therefore vacant her office immediately and proceed on terminal leave immediately to pave way for a transparent, open, participatory recruitment of a new Vice Chancellor of Kenyatta University.”
28. Accordingly, he urged the Court to be persuaded by its own reasoning in the above case and order for the 4th Respondent to vacate office and proceed on terminal leave. In any case that no prejudice will be suffered by the 4th Respondent.
29. On whether the appointment of the interested parties was procedural, it was submitted that the appointment of the three interested parties was in violation of section 6(1)(g) of *UNESCO Act* because the said members were appointed by the CEO of the organizations contemplated under first schedule of *UNESCO Act* instead of being appointed by the 1st Respondent, a clear indication that the appointment was flawed. It was argued further that the power to appoint the said members is bestowed upon the cabinet secretary, which powers cannot be delegated. Furthermore, that even if the said appointment were made by the 1st Respondent, their procedure of appointment was flawed as it failed to follow the dictates of section 6(2) of the *State Corporations Act* on gazzette ment of appointed members and also violated article 10 and 232 on transparency and accountability of the said appointment
30. In conclusion, the applicant urged this court, based on his arguments above to allow the application and issue conservatory orders sought.



3rd and 4th Respondents Submissions.

31. The respondent identified three issues for determination; whether the orders sought are in the nature of conservatory orders, whether the court can issue conservatory orders who effect is to give final orders and whether the applicant has met the threshold for issuance of conservatory orders sought.
32. The Respondent submitted with regard to the first issue, that the Orders sought are not conservatory but injunctive, because the applicant is seeking to compel the Respondents to act in a certain way. In defining conservatory orders, the Respondent cite the case of *Isaiab Luyara Odando and another v Kenya Revenue Authority and 6 others, Nairobi Branch Law Society of Kenya (Interested Party)* [2022] eKLR where the court cited the case of Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co Ltd v MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR defined a conservatory order as follows: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter. In *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR the court had the following to say about the nature of conservatory orders: Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

33. Accordingly, the respondent submitted that the applicant has not indicated what they are conserving or preserving in the main petition. Also that conservatory orders are issued in rem not in personam.
34. On the second issue, it was submitted that the prayers sought in the application in the interim nature have an effect of giving final Orders, such as the order compelling the 4th Respondent to proceed on terminal leave. Also that the prayers sought in the application are similar to the prayers sought in the main petition and therefore should not be granted in the interim when it can be granted in after hearing the main suit. To support its case, the respondent submitted that the orders of this court in *Omtatab Okoiti v Kenyatta University Council and others* (*supra*) were appeal in Civil Appeal 11 and 16; *Olive Mwibaki Mugenda and anther v Okiya Omtatab Okoiti and 4 others* [2016] eKLR where the Court of appeal set aside the Ruling of the Court and held that;-

“guided by the dicta of this court in the decisions of Vivo Energy case (*supra*), we are convinced and satisfied that the learned judge erred in law in granting final orders at the interlocutory stage when the main Petition had not been heard.”

35. On whether the applicant has met the threshold for granting of conservatory Orders, it was submitted that the allegation by the applicant that exiting state Corporation CEOs ought to go for terminal leave and specifically 6 months' leave is not provided anywhere in the *State Corporations Act, Code of Governance for State Corporations, 2015* and the Government circular No OP/CAB.9/1A, which the applicant relied upon while seeking to have the 4th Respondent take terminal leave. Further that the above circular was titled 'Procedure for Re-appointment of Service of Chief Executive Officers in State Corporations' which applies to CEOs seeking reappointment and not herself because her term is coming to an end on May 30, 2023.



36. From the foregoing, it was submitted that the applicant has not established any *prima facie* case that conservatory orders should issue. It was also argued that the applicant has not tabled evidence in support of his claim that the 4th Respondent will run down the commission and therefore the prayers should be declined. To support this argument, they cited the case of *Wilson Kaberia Nkunja v The Magistrats and Judges Vetting Board and others* [2016] eKLR wher the Court held that; -

“It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:

- a. An applicant must demonstrate that he has a *prima facie* case with a likelihood of success and that unless the Court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*;
- b. Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- c. The public interest must be considered before grant of a conservatory order.”

37. Based on the above cited case, the respondent submitted that the applicant has the onus of proving its case and satisfy all the above conditions in seeking conservatory orders. The Respondent then prayed for the application to be dismissed with costs.

Interested Parties Submissions.

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

“Conservatory orders are public law remedies aimed at preserving the subject matter of a dispute pending hearing and determination of the main petition. In *Judicial Service Commission v. Speaker of the National Assembly & Another* [2013] eKLR, Odunga J stated as follows: Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the *Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person. 13. The Supreme Court emphasized the public law nature of conservatory orders in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR as follows:

[86] Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional



values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

39. They also cited the case of *Tom Odhiambo Ojienda v Kenya Revenue Authority & another* [2018] eKLR WA Okwany, J held that:

“Courts have severally held that in considering an application for conservatory orders the court is not called upon to make any definite finding either of fact or law as that is the province of the Court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly, in determining this application, this Court is not required, and will not venture into making any definite and conclusive findings on either fact or law as to do so may have the impact of prejudicing the hearing of the main Petition. 40. Apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted he or she stands suffer real danger or prejudice. See Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General, Nairobi HC Pet No 16/2011, Muslims for Human Rights (MUHURI) & 2 others v The Attorney General & Judicial Service Commission, Mombasa HC Pet No 7 of 2011. 41. In the case of Centre for Rights Education and Awareness (CREAW) & 7 others Nairobi Petition No 16 of 2011 Musinga, J (ahtw) stated that:

“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a *prima facie* case with a likelihood of success and that unless the Court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

42. In a majority decision in the case of The Centre for Human Rights and Democracy & others v The Judges and Magistrates Vetting Board & others Eldoret Petition No 11 of 2012, it was held as follows:

“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

40. From the reasoning in the above case laws, the interested parties submitted that The Chief Executive Officer and Secretary-General of the 3rd Respondent is the Secretary to the Board. Section 17 of the Act provides for the qualifications and appointment of the Secretary-General and section 18 thereof provides for the term of the Secretary-General. On that note, they argued that the applicant does not have a *prima facie* case with a probability of success neither is he likely to suffer irreparable loss as an award of damages will be sufficient compensation should the outcome be in his favour.



41. It was submitted that none of the grounds for issuance of conservatory Orders have been demonstrated in the applicant's affidavit or in his submissions. Further, the applicant has not shown any real danger, that he will suffer prejudice as a result of the violation or threatened violation of the Constitution (if any).
42. It was submitted that the allegations that the Respondent's appointment of the interested parties herein is illegal, null and void on the basis that they were conducted contrary to articles 10 and 232 of the Constitution, 2010 is quite curious and malicious why the applicant targets the interested parties herein whereas there are other named interested parties (in the 3rd and 4th Respondents' replying affidavit which we fully rely on in this application) were appointed through the same process under the bodies established under the UNESCO Act and appointed by the 3rd Respondent. They maintained that the interested parties are indeed holding offices in accordance with the relevant provisions of the Constitution, the State Corporations Act and UNESCO Act 2013.
43. In conclusion, they urged this honourable court to dismiss the said application dated November 1, 2022 with costs to the interested parties.
44. I have examined all the averments of the parties herein. The issue for this court's determination is as follows;

Whether the applicant has established a prima facie case to warrant the orders sought

45. In determining this pertinent issue, I rely on the affidavits filed by the parties, the law and case law that has previously adjudicated upon similar issues.
46. The Respondents have submitted that this court should not allow prayers sought because they will be final orders which should be determined in the main petition.
47. Indeed the main consideration for this court on whether to grant or not grant orders sought is to consider whether there is a *prima facie* case established by the applicant or not.
48. A *prima facie* case is the establishment of a legally required rebuttable presumption and such is sufficiently established in the parties' favour if in initial examination, there is sufficient evidence which appears to exist to support a case.
49. The applicant herein submitted that the 4th Respondent the CEO of the 3rd Respondent was appointed to her office irregularly and has since served for 2 terms and second term expire in May, 2023 and so she should be asked to proceed on terminal leave to pave way for recruitment of her successor.
50. The applicant had argued that the 4th Respondent appointment was done irregularly which submission is now water under the bridge and which cannot be reversed by court in this application.
51. It is however conceded that the 4th respondent has since served for 2 terms and her 2nd term expires in May 2023. The applicant wants the 4th Respondent to proceed on terminal leave.
52. The applicant sought to rely on the Kenya National Commission of UNESCO – section 17 – which provides for the recruitment of the SG/CEO which should be done in accordance with the law.
53. The Kenya National Commission for UNESCO Act, 2013 (KNCUNESCO Act) established this commission which is a state corporation and a body corporate capable of being sued and suing.
54. The Act provides at section 17 for the establishment of the Secretary General of the commission who shall be appointed by the Cabinet Secretary in consultation with the Board on terms and conditions specified in the instrument of appointment. The Secretary General is also the CEO of the board.



55. Section 18 of the *Act* provides for terms of office of the Secretary General and states that the Secretary General will hold office for a term of five years but shall be eligible for re-appointment for further terms as may be determined by the board.
56. Under this Act it seems the Secretary General can serve for as many 5-year terms as possible as recommended by the board.
57. The applicant however referred this court to the *Mwongozo Code of Governance for State Corporation January 2015*. This document having come in force in January 2015 seems to add prudence to the law on the governance of state corporation.
58. Article 1. 19 (f) of the *Code* provides that the board shall ensure that it has in place a succession plan for the CEO and other Senior Management Staff.
59. On whether the 3rd Respondent's board has or is in the process of ensuring a succession plan for the CEO is a matter to be determined later.
60. However the *Act* and subsequent circulars issued by the cabinet office, the CEO is expected to proceed on terminal leave to allow for the advertisement and filling of the vacant positions.
61. In *Katiba Institute and another v the AG & others* [2021] eKLR the court emphasized the importance of a recruitment meeting the requirement of article 232 and 10 of the *Constitution*.
62. Under the Mwongozo Code again provision made on the CEOs of respective government corporation on issue of appointment and performance management framework and it is indicated that the terms will be:-

“ three year term or as otherwise provided under any other written law and (ii) renewable once subject to performance evaluated by the board”.
63. It is true that the 3rd Respondent has served and her 2nd term expires in May 2023 and it is therefore true under the Mwongozo code, her term will definitely expire in May 2023 and is not renewable.
64. In line with the said code again, the board is expected to initiate a succession plan to recruit a new CEO as per law.
65. The issue of the board members however can only be determined in the main petition as is a substantive issue.
66. The same applies to the issues of appointment of the interested parties which can only be determined in the main petition.
67. The only orders which I grant in the interim pending the hearing and determination of the main petition is that the 3rd Respondent should put in place proper mechanisms for succession planning of the CEO and/or including asking the 4th Respondent to proceed on any pending leave as the case may be.
68. The costs in the petition.

RULING DELIVERED VIRTUALLY THIS 13TH DAY OF DECEMBER, 2022.

HON LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-



Kotonya for Petitioner – present

Ojiambo for 3rd & 4th Respondents – present

Kirimi with Twei for interested parties – present

Court Assistant – Fred

