



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 137 OF 2019

IN THE MATTER OF VIOLATION OF ARTICLES 3, 10, 20, 21, 22, 23, 27, 28, 41, 47, 50, 73, 232, 236 & 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF STATE CORPORATIONS ACT, PHARMACY & POISONS ACT, EMPLOYMENT ACT, PUBLIC SERVICE COMMISSION ACT & MWONGOZO CODE OF REGULATIONS

AND

IN THE MATTER OF DISSOLUTION OF THE BOARD OF MANAGEMENT OF NATIONAL QUALITY CONTROL LABORATORY BY PHARMACY & POISONS BOARD WITHOUT ANY CONSULTATION WITH THE STATE CORPORATION ADVISORY COMMITTEE

-BETWEEN-

MR. RONOHI SITIENI.....1ST PETITIONER

DR. IRENE KAMANJA.....2ND PETITIONER

MS.HELLEN BOSIBORI.....3RD PETITIONER

MS. GEOGINA MUCHAI.....4TH PETITIONER

MR.PAUL MUNYAO.....5TH PETITIONER

-VERSUS-

PHARMACY & POISONS BOARD.....1ST RESPONDENT

CABINET SECRETARY MINISTRY OF HEALTH.....2ND RESPONDENT

-AND-

HON. ATTORNEY GENERAL.....1ST INTERESTED PARTY

NATIONAL QUALITY CONTROL LABORATORY.....2ND INTERESTED PARTY

DR. EDITH WAKORI.....3RD INTERESTED PARTY

DR.SIMON MUNGAI.....4TH INTERESTED PARTY

DR.LILIAN BALUSI.....5TH INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 15th November, 2019)

JUDGMENT

The petitioners filed the petition dated 20.07.2019 through Kinyanjui Njuguna & Company Advocates. The amended petition was filed on The petitioners prayed for:

- a. A declaration that the petitioners and 3rd to 5th interested parties are entitled as against the respondents and all persons to the protection of their fundamental rights and freedoms enshrined in the Bill of Rights which applies to all and binds all State Organs including but not limited to fair labour practices and the respondents are under a duty to observe the provisions enshrined in Articles 10, 73, and 232 of the Constitution with regard to the contract with the Petitioners and 3rd to 5th interested parties.
- b. A declaration that the decision of the 1st respondent conveyed vide Gazette Notice No. 6599 dated 01.07.2019 of revocation of appointment of the entire Board of Management of National Quality Control Laboratory and its simultaneous secretive substantive appointment of the new Board of Management was in contravention of the Constitution and the same is null and void.
- c. A declaration that the content or decision conveyed by the 1st respondent's eight (8) letters Ref. No. PPB/ NQCL/ VOL.II/19/010 – 017, all dated 18.07.2019 and delivered from 29.07.2019 to the petitioners and or interested parties to the effect that the Board of Management of the 2nd interested party or the 2nd interested party by itself reports and or is supervised by the 1st respondent and further that petitioners and the 3rd to 5th interested parties failed in any way to discharge their duties as members of the Board of Management of the 2nd interested party contravenes the letter and spirit of the relevant provisions in the Pharmacy and Poisons Act and the State Corporation Act and the same is unconstitutional, null and void.
- d. Consequently an order of certiorari to remove to the Honourable Court and to quash decision of the 1st respondent conveyed vide Gazette Notice No. 6599 dated 01.07.2019 of revocation of the appointment of the entire Board of Management of National Quality Control Laboratory and its simultaneous secretive substantive appointment of the new Board of Management.
- e. Consequently an order of certiorari to remove to the Honourable Court and quash the 1st respondent's eight (8) letters Ref. No.PPB/ NQCL/VOL.II/19/010 – 017 all dated 18.07.2019 and delivered from 29.07.2019 to petitioners and the 3rd to 5th interested parties.
- f. A declaration that Dr. Jackson Kioko automatically ceased to be the Chairman of the Board of Management of the 1st respondent from September 2017 upon coming into effect of the Health Act, 2017 revocation of Gazette Notice No. 2194 notwithstanding for his appointment was by office of the Director of Medical Services: As such, his continued acting or pretending as Chairman or member of the Board of the 1st respondent since September, 2017 has been illegal and decisions that may have been made if his absence would have collapsed the quorum of the meeting are null and void.
- g. A declaration that the 2nd interested party cannot report to or be supervised by the 1st respondent as the same is contra-statute and unconstitutional.
- h. An order be issued by the Honourable Court for just compensation by the 1st respondent to the petitioners and 3rd to 5th interested parties for an amount or sum to be determined by the Court for contravention of fundamental rights and freedoms and failure to observe the National values and principles of Kenya as well as principles of public service enshrined in the Constitution thus

injuring the petitioners and 3rd to 5th interested parties' feelings and dignity and exposing them to public ridicule and odium and possible prejudice as regards future national service in the view of the requirements of Chapter 6 of the Constitution and occasioning them losses and damages.

- i. An order that the costs consequent upon the petition be borne by the respondents in any event.
- j. Any such other order as the Honourable Court shall deem just and fair.

The petition was supported by the annexed affidavit of John Ronoh Sitienei, the 1st petitioner, and exhibits thereto. The petitioners are at all material time prior to the dispute in the petition members of the Board of the 2nd interested party appointed by the 1st respondent, the Pharmacy and Poisons Board. The 3rd, 4th, and 5th interested parties are members of the Board of 2nd respondent. The 3rd interested party sits on both Boards of the 1st respondent and 2nd interested party.

The 2nd interested party is established under the Pharmacy and Poisons Act Cap 244 of laws of Kenya as a facility for quality control of medicines. It is categorised by the State Corporations Advisory Committee at category PC – 4B State Corporation in the Ministry of Health. Its functions include analytical testing of medicinal samples for certification of analysis; and inspection of medicines manufacturing premises for GMP certificate of compliance. Section 35F (1) of the Act provides that there shall be a Board of Management for Laboratory (2nd interested party) which shall consist of nine members to be appointed by the Pharmacy and Poisons Board. Section 35 E (1) provides that the Laboratory shall be a body corporate with perpetual succession and a common seal and shall have power to sue and be sued in its corporate name and to acquire, hold and dispose of movable and immovable property for its own purposes.

It is the petitioners case that in September 2017 the Parliament passed amendments to the Public Health Act in line with the Health Act. Section 9(1) of the former Public Health Act provided that there shall from time to time be appointed a Director of Medical Services as may be deemed necessary. The section was amended to provide that there shall from time to time be appointed a Director-General for health as may be deemed necessary. Further, section 3(1) (a) of the Pharmacy and Poisons Act provides that the Cabinet Secretary shall appoint a Board to be known as the Pharmacy and Poisons Board which shall consist of the following persons – (a) The Director of Medical Services who shall be the Chairman. The current Director- General of Health is Dr. John Wekesa Masasabi while Dr. Jackson Kioko who formerly held the office of Director of Medical Services is currently acting Chief Executive Officer of Kenya Health Professionals Oversight Authority. Under the transitional section in the Health Laws Amendment Act, 2019 the appointment of the Board of the 1st respondent is suspended until the term of the present Board ends on 08.03.2020. The petitioners allege that Dr. Jackson Kioko continues to masquerade as the Chairman of the 1st respondent's Board whereas he is no longer the Director of Medical Services, an office which has since been abolished and replaced with that of Director-General for Health now held by Dr. John Wekesa Masasabi.

The petitioners' case is that on 19.07.2019 Dr. Jackson Kioko as Chairman of the Board of 1st respondent published Gazette Notice No. 6599 dated 01.07.2019 revoking the entire Board of Management of the 2nd interested party and simultaneously secretly made substantive appointments. In particular the appointment of petitioners and 3rd to 5th interested parties was revoked and 9 new members appointed including Col. Ismael Awle (Dr.) as Chairman and members being Anastasia Nyalita (Dr.), Beatrice Kagai Amugune (Dr.), Wilberforce O. Wanyanga (Dr.), Agnes Kabithe Chege (Dr.), Joseph Sigei, Phillip Omondi Odhiambo, Maureen N. Matu (Dr.) and Timothy Mtana Lewa, FPSK (Dr). The appointment was under section 35F (1) of the Pharmacy and Poisons Act as read with section 51 of the Interpretation and General Provisions Act. The members of the Board of 2nd interested party whose appointment was revoked had been appointed by the 1st respondent under section 35F (1) of the Pharmacy and Poisons Act by Gazette Notice No. 1940 dated 02.03.2018 to serve for a term of 3 years effective 28.02.2018 so that the appointment was due to lapse on or about 28.02.2021.

The background to the petition is that there has been vibrant litigation about the proper statutory mandate of the 1st respondent on the one hand and the 2nd interested party on the other. One such case is **National**

Quality Control Laboratory –Versus – The National Assembly and 5 Others HCMCA No. 168 of 2019, challenging amendments to the Pharmacy and Poisons Act in the Health Laws (Amendment) Bill, 2018 and subsequent assent into law without consideration by the Senate. By the letter dated 18.06.2019, Dr. F.M. Siyoi (1st interested party's CEO) wrote to the petitioners and the 3rd, 4th and 5th interested parties about steps taken in view of 2nd respondent's task to the 2nd interested party's Board to withdraw **National Quality Control Laboratory –Versus – The National Assembly and 5 Others HCMCA No. 168 of 2019**. The 2nd interested party by the letter dated 26.06.2019 and signed by its Chief Executive Officer and Director Dr. Hezekiah Chepkwony it was conveyed to the Head of Public Service and the 2nd respondent that HCMCA No. 168 of 2019 had been withdrawn on 26.06.2019 upon filing the notice to withdraw the application in the Court.

An opinion by the Attorney General dated 08.05.2018 addressed to Kenya Trade Network Agency (KenTrade) set out the mandate of the 1st respondent and 2nd interested party as complementary but distinct. The Attorney General's further opinion to the 2nd respondent dated 13.03.2019 was that the legality and impact of Rule 10 of the Pharmacy and Poisons (Registration of Drugs) Rules which introduced as a prerequisite, a GMP Certification before the importation of any medicinal substances into Kenya had been subject of litigation in **Dr. Pius Wanjala –Versus- Ministry of Health Misc. Civil Application No.159 of 2016** and judgment delivered on 16.03.2017 by Odunga J. The opinion advised the 2nd respondent that the findings by Odunga J were sound and with full force of the law (unless overturned on appeal) thus binding between the 1st respondent and the 2nd interested party herein as regulatory bodies.

The petitioners' case is that in a meeting of 13.06.2019 the respondents summoned the entire Board of Management for the 2nd interested party (the petitioners) and directed them to withdraw **National Quality Control Laboratory –Versus – The National Assembly and 5 Others HCMCA No. 168 of 2019** and the 2nd respondent directed the 1st respondent as the appointing authority to revoke the appointment of the petitioners as members of the Board of 2nd interested party for having filed the case in Court. In the interests of harmony the Board of the 2nd interested party met later on 18.06.2019 and resolved to withdraw the case from Court.

The petitioners' further case is that the 2nd respondent removed the Director and Deputy Director of the 2nd interested party from office by usurping the authority of the Board of the 2nd interested party and purported to appoint a new Director and his Deputy. The decisions were challenged in ELRC Petition No. 124 of 2019 and on 15.07.2019 the Court (Onesmus Makau J) granted conservatory orders staying the operation of the decisions by the 2nd respondent in that regard. The petitioners' case is that the 2nd respondent supports the 1st respondent in usurping the 2nd interested party's statutory mandate to the extent that the findings by the 2nd interested party on non-compliant manufacturing companies to Good Manufacturing Practice (GMP) systems have been disregarded with the consequence that the public is exposed to dangerous substandard drugs.

The petitioners further case is that under section 4 of the State Corporations Act on ministerial responsibility for state corporations, the President may assign ministerial responsibility for any state corporation and matters relating thereto to the Vice President and the several Ministers as the President may by directions in writing determine. Under section 5A (1) of the Act the President may by notice in the Gazette exempt a state corporation, not being a state corporation established under section 3 of the Act, from any provisions of the Act. The 2nd interested party had not been exempted from the provisions of the Act and the petitioners' case was that the 1st interested party could not supervise it or its Board but was subject to the Cabinet Secretary in parent ministry and to the evaluation and monitoring of performance appraisal of the Boards of state corporations by the State Corporation Advisory Committee in accordance with Mwongozo, the Code of Governance for State Corporations and Government circular Ref. No. OP/CAB.1/ 43/1 of 29.06.2011. Thus the 2nd interested party signed an annual performance contract with the 2nd interested party's Board of Management which in turn signed an annual performance contract with the Cabinet Secretary for Health.

The petitioners' further case is that the 2nd interested party was established in 1992 as a body corporate separate from the 1st respondent and as per sections 35A, 35B, 35C, 35E, 35G, 35H, 35I, 35J, and 35K of

the Pharmacy and Poisons Act. Further the 2nd interested party is functionally the technical arm of the 1st respondent but it remains an independent complimentary body within the Act. The petitioners urge that the only role the 1st respondent plays over the 2nd interested party is the appointment of the members of the Board of Management as per section 35F of the Act and to prescribe the Good Manufacturing Practice (GMP) standards to be used by the 2nd interested party as per sections 35 A (5) as read with section 35B of the Act – constituting the only statutory relationship between the two state corporations.

The petitioners further urge that in 2014 the petitioners were appointed competitively through an advertisement in the print media and this time round the 1st respondent purports to the 2nd interested party's Board of Management members by calling out friends who would take instructions from it to submit their resumes for appointment to the Board. The petitioner's case is that such handpicked Board members will be unable to assert the desired operational autonomy in the public interest and qualified persons have been discriminated against in violation of Article 27 of the Constitution.

Prior to revoking the Board of Management of the 2nd interested party, the respondents did not consult the Inspector General of the State Corporations Advisory Committee and there are no known investigations by the Inspector General against the 2nd interested party.

The petitioners allege that the revocation of their Board membership was not about their failure to perform their duties in the national interest and it violated their right to fair administrative action in Article 47 of the Constitution and their right to natural justice under Article 50 of the Constitution. Further the dismissal of the petitioners and the 3rd to 5th interested parties violated national values and principles of good governance, integrity, transparency and accountability as per Articles 10, 73 and 232 of the Constitution by dismissing them and secretly appointing a new Board. Further they alleged violation of Articles 1, 3, 22 and 258 of the Constitution. Further they urge that they were denied their right to equality before the law and freedom from discrimination as provided for in Article 27 of the Constitution by being whimsically dismissed. They urge that the Court invokes Article 236 to protect them as public officers.

The 1st respondent filed on 29.07.2019 the replying affidavit of Dr. Jackson Kioko through Gumbo & Associates Advocates (Chairman of the Board of 1st respondent, Pharmacy and Poisons Board). The grounds of opposition as urged are as follows:

a. Whereas the President is vested with authority to remove board members of state corporations on account of failure to perform or serve in the national interest per section 7(3) of the State Corporations Act, the 1st interested party is equally vested with authority to revoke the appointments of the members of the Board of the 2nd interested party acting as the appointing authority.

b. Members of the Board of the 2nd interested party are appointed and serve upon privilege and are not in regular employment which requires one to be accorded a fair hearing before revocation. A Board member can be removed in accordance with the provisions of the Constitution, State Corporations Act and Mwongozo.

c. Dr. Jackson Kioko is the legitimate Chairperson of the Board of the 1st respondent. In particular section 3(2) of the Health Amendment Laws provides for transitional clause thus, at the commencement of the Act, any person who, immediately before the commencement of the Act was a member or staff of any of the Boards proposed to be reconstituted under the Act shall be deemed to be a member or staff of the reconstituted Board for the unexpired period of his or her term of service. He serves as the acting Chief Executive Officer of the Health Professionals Oversight Authority but his appointment as Chairperson of the Board of the 1st respondent was by the gazette dated 08.03.2017 and had not been revoked.

d. Members of the Board of 2nd interested party are public officers by definition in section 2 of the Public Officer Ethics Act. The Pharmacy and Poisons Act does not provide for removal of Board Members of the 2nd interested party. However section 51(1) of the Interpretation and General

Provisions Act provides, “**Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss, or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed, constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or reappoint it.**”

e. The revocation of the appointments have no nexus to the **National Quality Control Laboratory –Versus – The National Assembly and 5 Others HCMCA No. 168 of 2019.**

f. The 1st respondent and 2nd interested party are complimentary and constant in-fights between the Boards undermine delivery of service to the public.

g. By the letter dated 18.07.2019 the Board members of the 2nd interested party have been notified about reasons for revocation of their respective appointments including inefficiency in service delivery including unreliable timelines and prohibitive cost of analytical testing; failure to make regulations for appointment, conduct and discipline of its staff; failure to adhere to reporting mechanisms on timely submission of work plans and subsequent reports; the Board disregarded constitutional values of public service and applicable law in appointing its Director; improper and inefficient administration of the Laboratory in breach of corporate governance principles.

h. Section 30 of the State Corporation Act provides that a board member is formally appointed by gazette and issued with a letter of appointment. The same is codified in “**Mwongozo**”.

i. The new Board of the 2nd interested party was appointed on merit considering their skills, qualifications and competencies.

j. The 2nd interested party has failed to collaborate with other government agencies in the health sector but has instead by itself or its surrogates filed not less than 10 cases in courts. The effect is a policy failure to effectively regulate the pharmaceutical industry. Thus the need to take remedial measure – restore sanity in the industry.

The 2nd respondent filed on 25.07.2019 the replying affidavit of Susan Mochache, Principal Secretary at the Ministry of Health and through the Attorney General. The 2nd respondent urged as follows:

a. The role of a parent Ministry is to offer policy direction and guidelines to the state corporations.

b. The petition does not disclose constitutional violations but are mere allegations. There are no facts supporting the alleged violations. No cause of action has been disclosed against the 2nd respondent.

c. Under section 35F (1) of the Pharmacy and Poisons Act the Board of the 1st respondent has the authority to appoint or dismiss the Board of the 2nd interested party.

d. Section 46 of the Employment Act, 2007 does not apply because the Board members are not employees *per se*.

e. The Board members of the 2nd interested party did not enjoy a protected term in office.

f. Sections 7(3) and 18(1) (a) of the State Corporations Act are irrelevant to the present dispute as they refer to revocation of appointment initiated by the President.

g. There is an audit query against the 2nd interested party for failure to account for Kshs.90 million.

The Court has considered all the material on record including the various affidavits and exhibits filed for the parties. The Court has considered the submissions filed for the parties.

The **1st issue** for determination is whether the 1st respondent enjoyed the statutory authority and power to revoke the appointment of the petitioners and the 3rd to 5th interested parties as members of the Board of Management of the 2nd interested party as was done by Gazette Notice No. 6599 dated 01.07.2019. It is submitted for the respondents and the 1st interested party that the 1st respondent is empowered to appoint the members of the Board of Management of the 2nd interested party by reason of section 35F of the Pharmacy and Poisons Act Cap 144 laws of Kenya. Since the 1st respondent is the appointing authority, it has power to revoke the appointments under section 51 of the Interpretation and General Provisions Act, Cap 2 laws of Kenya. The petitioners and the 2nd interested party agree that the 1st respondent is the appointing authority as urged for the respondents and the 1st interested party. However, the petitioners and the 2nd interested party submit that the 2nd interested party is an autonomous state corporation subject to the State Corporations Act and which applied if at all the appointment of the petitioners and the 3rd to 5th interested parties as members of the Board of Management of the 2nd interested party was to be terminated or revoked prior to lapsing of the statutory 3 years' tenure under section 35F (2) of the Pharmacy and Poisons Act which provides that a member of the Board of Management appointed under the subsection (1) thereof shall hold office for 3 years but shall be eligible for reappointment.

The Court returns that the 2nd interested party is a state corporation and is therefore subject to provisions of the State Corporations Act. As urged for the 2nd interested party and the petitioners, the 2nd interested party has not been exempted from the provisions of the Act. There is no dispute amongst the parties that the 2nd interested party is a state corporation within the meaning assigned under the State Corporations Act. Section 7(3) of the State Corporations Act provides thus, **"7(3) Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board, the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine."**

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

The maxim is *generalia specialibus non derogant* meaning **"general things do not derogate from specific things."** (See **Black's Law Dictionary 10th Edition**) For good order of running of state corporations in the national interest, section 7(3) of the State Corporations Act was enacted complete on remedial measures where the tenure of a member of the Board of Management of a state Corporation was to be cut short prior to lapsing of the prescribed tenure. Thus, section 7(3) of the State Corporations Act gives the President discretionary powers in the national interest (and within the safeguards in the section), to revoke the appointment of any member and appoint another member for the remainder of the term or constitute a new board for a period to be determined in consultation with the State Corporations Advisory Committee. The court finds that section 7(3) of the State Corporations Act, is the legitimate and the specific manner of dealing with a situation whereby the tenure of a member of a board of State Corporation is to be aborted on account of unsatisfactory performance. The Court considers that section 7(3) State Corporations Act is carefully drafted to ensure that Boards of State Corporations remain in place and a member's appointment thereto is revocable only by the President and within the confines of that provision's safeguards.

While making that finding the Court returns that the authorities cited for the 1st respondent and where

section 51(1) of the Interpretation and General Provisions Act was held to apply are clearly distinguishable because they clearly did not relate to appointment and revocation of appointment with respect to a member of the board of management of a state corporation. **Dominick Obel Obongo & Another –Versus- County Director of Education, Siaya County & Another [2019]eKLR** (Aburili J), and **Independent Policing Oversight Authority & Another –Versus- Attorney General & 660 Others [2014]eKLR**, (Lenaola J) did not relate to cases where specific alternative statutory provision existed and obviously did not relate to appointments and revocation of appointment of a member to a board of state corporation like in the instant case.

To answer the 1st issue for determination, the Court returns that once the members of the 2nd interested party were appointed by the 1st respondent, the tenure of individual members as appointed could be cut short by revocation only under section 7 (3) of the State Corporations Act. The Court returns that by revoking the appointments of the petitioners and the 3rd to 5th interested parties, the 1st respondent acted ***ultra vires*** section 7(3) State Corporations Act and Gazette Notice No. 6599 dated 01.07.2019 was clearly null and void. To that extent, the Court returns that the 1st interested party acted unreasonably in contravention of Article 47 of the Constitution. Further, as urged for the petitioners and the 2nd interested party, the 1st respondent thereby violated the petitioners' respective right to equality before the law as provided for in Article 27 of the Constitution. The petitioners have established that the protection of public officers under Article 236 was undermined. The revocation of the appointments is found ***ultra vires***, unconstitutional, null and void ***ab initio***.

The parties spent considerable effort on the procedure and merits of the revocation of the petitioners' appointments. The Court returns that the revocation being empty of necessary statutory authority and trapped by the constitutional violations as found, evaluation of its propriety in terms of considerations of procedural and merit or substance will serve no practical purposes as the purported revocation was null and void ***ab initio***. Nevertheless, it is sufficient for the Court to return that in every removal of a public officer from the office held, Article 236 on due process applies and if the 1st respondent had authority in making the impugned revocation, the material on record shows that prior to the revocation there had been no prior notice, hearing, and reason given so that tenets of fairness or due process or natural justice were clearly breached.

While making the findings on the 1st issue for determination, the Court similarly returns that in so far as the revocation of the appointments by the 1st respondent was ***ultra vires***, null and void, the letters flowing from that revocation Ref. No. PPB/NQCL/VOL.11/ 19/ 010 to 017 all dated 18.07.2019 addressed to the petitioners and the 3rd to 5th interested parties by Dr. Jackson Kioko, chairman of the Board of the 1st respondent are found ***ultra vires***, null and void. In particular the 1st respondent lacked leadership and managerial oversight authority over the 2nd interested party as such authority was clearly vested in the State Corporations Advisory Committee and the Cabinet Secretary under the State Corporations Act and as was urged for the 2nd interested party. The 2nd interested party has established that the annual performance contract was concluded between the Cabinet Secretary and the 2nd interested party and between the 2nd interested party's Board of Management and its Director and Chief Executive Officer and in line with the Mwongozo Code guiding the leadership, governance and management of state corporations, as well as, the role of the Cabinet Secretary under the State Corporations Act.

The **2nd issue** for determination is whether the appointment of other persons in place of the petitioners and the 3rd to 5th interested parties as members of the Board of Management by Gazette Notice No. 6599 dated 01.07.2019 was unconstitutional. The Court has found that the revocation was ***ultra vires*** section 7(3) State Corporations Act and the 1st respondent enjoyed no statutory power to take an immediate remedial measure as was vested in the President under the section. Thus the Court finds that there was no valid vacancy to be filled by the 1st respondent in purported exercise of the statutory power to appoint members of the Board of Management of the 2nd interested party. Further, the Court returns that the constitutional and statutory norms of openness, transparency, meritorious, competitiveness, and suitability tests as envisaged in Articles 10, 27, 73, and 232 of the Constitution as well as the provisions of the Public Officer Ethics Act, 2003 and the Public Service Commission Act, 2017 applied to the advertisement, recruitment and selection of appropriate and competent persons for appointment by the 1st respondent as Members of the Board of Management for the 2nd interested party and under section 35F

of the Pharmacy and Poisons Act Cap 144 laws of Kenya. The Court upholds its opinion in the judgment in **Okiya Omtatah Okoiti –Versus- Attorney General & 2 Others and Francis K. Muthaura & 5 Others [2019]eKLR**, thus,

“To answer the 3rd issue for determination, the Court considers that until Parliament enacts specific recruitment and appointment procedure, the provisions of the Public Service Commission Act, 2017 on criteria for appointments and advertisement of vacancies shall apply to normal appointments made under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) – because except for the urgent remedial appointments pursuant to section 7(3) of the State Corporations Act, the Court returns that normal appointments under section 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) must comply with the criteria for appointment as prescribed in Articles 232, 73, and 10 of the Constitution. The Court further considers that for temporary and remedial appointments by the President, like in the instant case, as made under sections 6(2) (a) and (e) respectively of the Kenya Revenue Authority Act (Cap.469) and pursuant to section 7(3) of the State Corporations Act, they are not unconstitutional for want of competitive recruitment and selection as such appointments are clearly vested in the President’s discretion by the statute and in the specific statutory circumstance.”

The Court returns that the opinion fully applies to the appointments by the 1st respondent under section 35F (1) of the Pharmacy and Poisons Act Cap 144 laws of Kenya of members of the Board of Management of the 2nd interested party. The evidence is that the constitutional and statutory tests of appointments were violated starting with impaired vacancy, lack of open advertisement for equality of opportunity to all potential candidates, lack of transparent selection interviews, lack of considerations of merit, lack of competitiveness of qualifications and competencies, and absence of criteria of suitability of candidates. The Court finds that the purported appointments under Gazette Notice No. 6599 dated 01.07.2019 was unconstitutional for violation of relevant tests in in Articles 10, 27, 73, and 232 of the Constitution as well as the relevant provisions of the Public Officer Ethics Act, 2003 and the Public Service Commission Act, 2017 on the procedure, criteria and factors to consider in undertaking appointment of public officers.

The **3rd issue** for determination is whether Dr Jackson Kioko is a valid and lawful holder of the office of Chairperson of the Board of Management of the 1st respondent. Section 3(1) (a) of the Pharmacy and Poisons Board Cap 244 (Revised 2018) provides that the Cabinet Secretary shall appoint a Board to be known as the Pharmacy and Poisons Board which shall costs of **“(a) the Director-General of Medical Services who shall be the Chairman;”** That subsection was introduced by the Health Laws Amendment Act 2017. The section was further amended under the Health Laws (Amendment) Act, 2019 to provide that the 1st respondent’s chairperson shall be appointed by the President and who shall be a registered pharmacist of good standing with a degree in pharmacy; and have at least 10 years’ experience in the pharmaceutical sector. Prior to the 2017 amendment the subsection provided, **“(a) the Director of Medical Services who shall be the chairman.”** There is no dispute that Dr. Kioko previously held the office of Director of Medical Services but which position was abolished by the Health Act 2017 which introduced the office of Director – General of Health Services. The Board of the 1st respondent was appointed under Gazette Notice No. 2194 published 10.03.2017 and dated 08.03.2017. The appointment was by Cleopa Mailu, Cabinet Secretary and for 3 years (due to lapse on or about 08.03.2020). Section 3 (2) of the Health Laws (Amendment) Act, 2019 provides that at the commencement of the Act, any person immediately before the commencement of the Act was a member or staff of any of the Boards proposed to be reconstituted under the Act shall be deemed to be a member or staff of the reconstituted Board for the unexpired period of his or her term of service. The Act commenced on 17.05.2019.

The petitioners’ case is that in September 2017, section 70 of the Health Act amended the Public Health Act, Cap. 242 in section 9(1) thereof by providing that there shall be a Director General for Health appointed from time to time and the office of Director of Medical Services was thereby abolished. Subsequently the 2nd respondent appointed Dr. John Wekesa Masasabi as the Director General for Health and Dr. Jackson Kioko was moved to CEO of Kenya Health Professions Oversight Authority and thus Dr. Jackson Kioko cannot continue as the Chairman of the Board of the 1st respondent and effective

September 2017. It is urged that the gazette notice No. 2194 dated 08.03. 2017 merely notified the public of the appointments therein but was not the appointment so that effective September 2017 Dr. Jackson Kioko could not hold the office of chairman of the Board of 1st respondent.

The Court has considered the submissions. The petitioners do not make submissions on the date Dr. John Wekesa Masasabi was appointed the Director General of Health and which must have been after September 2017 and at a time Dr. Jackson Kioko had been appointed by Gazette Notice No. 2194 dated 08.03.2017 as chairman of the Board of the 1st respondent. The evidence is that the appointment of Dr. Jackson Kioko was never revoked and there is no evidence that Dr. John Wekesa Masasabi ever got appointed as was envisaged in the 2017 amendment abolishing office of the Director of Medical Services and introducing the office of Director General of Health. The evidence is that as at 17.05.2019 when section 3 (2) of the Health Laws (Amendment) Act, 2019 commenced, Dr. Jackson Kioko was the Chairperson of the 1st respondent's Board of Management. His service as Chairperson is thereby protected by that section till on or about 08.03.2020. The petitioners' prayer for a declaration that Dr. Jackson Kioko is irregularly and unlawfully the chairperson in that regard will fail.

The petitioners made no specific submissions on the prayer for compensation for alleged violation of rights and freedoms. The Court deems the prayer abandoned or not justified.

The petitioners have substantially succeeded in their petition and are awarded costs of the proceedings.

In conclusion, judgment is hereby entered for the petitioners against the respondents for:

1. The declaration that the petitioners and 3rd to 5th interested parties are entitled as against the respondents and all persons to the protection of their fundamental rights and freedoms enshrined in the Bill of Rights which applies to all and binds all State Organs including but not limited to fair labour practices and the respondents are under a duty to observe the provisions enshrined in Articles 10, 73, and 232 of the Constitution with regard to the contract with the Petitioners and 3rd to 5th interested parties.
2. The declaration that the decision of the 1st respondent conveyed by Gazette Notice No. 6599 dated 01.07.2019 of revocation of appointment of the entire Board of Management of National Quality Control Laboratory and its simultaneous secretive substantive appointment of the new Board of Management was in contravention of the Constitution and the same is null and void to the extent as found in this judgment
3. The declaration that the content or decision conveyed by the 1st respondent's eight (8) letters Ref. No. PPB/ NQCL/ VOL.II/19/010 – 017, all dated 18.07.2019 and delivered from 29.07.2019 to the petitioners and or interested parties to the effect that the Board of Management of the 2nd interested party or the 2nd interested party by itself administratively reports and or is supervised by the 1st respondent and further that petitioners and the 3rd to 5th interested parties failed in any way to discharge their duties as members of the Board of Management of the 2nd interested party contravenes the letter and spirit of the relevant provisions in the Pharmacy and Poisons Act and the State Corporation Act as urged for the petitioners and the same is unconstitutional, null and void to the extent as found in this judgment.
4. The judicial review order of certiorari removing to the Honourable Court and quashing the decision of the 1st respondent conveyed vide Gazette Notice No. 6599 dated 01.07.2019 of revocation of the appointment of the entire Board of Management of National Quality Control Laboratory and its simultaneous secretive substantive appointment of the new Board of Management.
5. The judicial review order of certiorari removing to the Honourable Court and quashing each of the 1st respondent's eight (8) letters Ref. No. PPB/ NQCL/ VOL.II/19/010 – 017 all dated 18.07.2019 and delivered from 29.07.2019 to petitioners and the 3rd to 5th interested parties.

6. The declaration that the 2nd interested party enjoys leadership, management and governance autonomy as a separate body corporate from the 1st respondent and for such purposes cannot be administratively supervised by the 1st respondent as the same would be contrary to the State Corporations Act and unconstitutional in view of Article 27 of the Constitution.

7. The respondent to pay the petitioners' costs of the petition.

Signed, dated and delivered in court at **Nairobi** this **Friday, 15th November, 2019**.

BYRAM ONGAYA

JUDGE