



**Republic v Cabinet Secretary, Ministry of Education & another; Wamoto (Exparte Applicant)
(Judicial Review 3 of 2023) [2024] KEELRC 106 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 106 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
JUDICIAL REVIEW 3 OF 2023**

JW KELI, J

JANUARY 31, 2024

(FORMERLY NAIROBI JUDICIAL REVIEW NO. E025 OF 2023)

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 22, 23, 27, 28, 41, 47,
48, 236, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 3,4,7, AND 9 OF THE FAIR
ADMINISTRATIVE ACTIONS ACT NUMBER 4 OF 2015**

AND

**IN THE MATTER OF TECHNICAL AND VOCATIONAL
EDUCATION AND TRAINING ACT NO. 29 OF 2013**

AND

THE LAW REFORM ACT SECTION 8 AND 9 CHAPTER 26 LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

CABINET SECRETARY, MINISTRY OF EDUCATION 1ST RESPONDENT

MOSES WESANGULA POIPOI 2ND RESPONDENT

AND

PETER MALOBA WAMOTO EXPARTE APPLICANT



JUDGMENT

1. The Exparte Applicant (hereinafter “Applicant”) had been appointed as the Chairman of Webuye West Technical and Vocational College (“Hereinafter “College”) Board vide a letter dated 18th January 2023 and delivered on 30th January 2023. He accepted the appointment on 30th January 2023 and proceeded to undertake his duties as such despite the alleged hostility by the College Principal who is the Chief Executive Officer of the college and who was mandated to provide logistical support to the Board for convening and transacting its business.
2. He states that the College principal was requested to provide support for a Board Meeting, but declined, citing interruption in the smooth running of the college, which prompted the applicant to call for a Special Board meeting on 30th June 2023.
3. The applicant states that it was at that point that he learned that the 2nd Respondent was holding himself out as the Chairman of the Board, a position he was holding, and this prompted him to write to the Principal Secretary of the Department of Technical and Vocational Training in the Ministry of Education on 26th June 2023 seeking clarification on the position held by the 2nd Respondent.
4. He never received a response to the said query but received a letter dated 5th May 2023 from the 1st Respondent on 3rd July 2023 revoking his appointment as Chairperson of the Board citing violations of the Mwingozo Code of Conduct for State Corporations and alleged circulars Chief Of Staff and head of Public Service RefNo. OP/SCAC.9/73 VOL.1(84) date 30th July 2015 and Circular by the Cabinet Secretary Ministry of Education Ref No. MOEST/CONF/2/2 VOL. IV(50) dated 9th January 2019.
5. The Applicant, being aggrieved with the 1st Respondent’s decision, then filed the instant judicial review proceedings by way of Chamber Summons dated 17th July 2023, and on being granted leave Notice of Motion dated 31st July 2023 and filed in court on the 27th October 2023 seeking the following Judicial Review reliefs:-
 - a. An Order of Certiorari is issued to remove into this Court and quash the decision of the 1st Respondent dated 5th May 2023 revoking the Ex parte Applicant’s appointment as the Chairperson of the Board of Governors for Webuye West Technical and Vocational College.
 - b. An Order of Mandamus be hereby issued to compel the 1st Respondent to reinstate the Ex-Parte Applicant as the Chairperson of the board of Governor for the Webuye West Technical and Vocational College.
 - c. An Order of Prohibition be hereby issued to prohibit the Respondents from unlawfully interfering with the Ex-Parte Applicant’s Performance of duties assigned by him as the Chairperson of the Board of Governors for the Webuye West Technical and Vocational College.
 - d. An Order of Prohibition be hereby issued to prohibit the 1st Respondent from appointing any other person to the position of chairperson of the Board of Governors for the Webuye West Technical and Vocational College until expiry of the Ex parte Applicant’s term of office.
 - e. An Order of Certiorari be hereby issued to bring to this Honourable Court to quash the decision of the 1st Respondent appointing the 2nd Respondent as the Chairperson of the Board of Governors for the Webuye West Technical and Vocational College.



- f. An order that the costs of this Application be borne by the Respondents.
6. The application was supported by the grounds on its face, further grounds set out in the Statutory Statement dated 17th July 2023, and a Verifying Affidavit sworn on the same date by Peter Malobo Wamoto, the Applicant.

The 2nd Respondent opposed the application through a replying affidavit sworn on 20th September 2023. The 1st Respondent did not file any response.

Directions

7. The Courton 31st October 2023 directed the parties to canvass the application by way of written submissions, which were duly filed. The Applicant's written submissions drawn by Waithaka & Associates Advocates were dated 20th November 2023. The 2nd Respondent's written submissions drawn by MAK & Partners Advocates LLP were dated 6th December 2023 and received in Courton an even date.

Ex Parte Applicant's case in summary

(The case as per Verifying Affidavit sworn on 17th July 2023)

8. The Applicant was appointed as the Chairman of Webuye West Technical and Vocational College Board vide a letter dated 18th January 2023 and delivered on 30th January 2023 (PMW-1).
9. He states that he accepted his appointment on 30th January 2023 (PMW-2) and proceeded to perform all duties assigned to him, despite the alleged frustrations he encountered from the College Principal.
10. He states that no complaints, concerns, or any communication was raised questioning his performance.
11. He contends that the College Principal undermined his performance and on many occasions declined to convene or facilitate the holding of meetings by further refusing to furnish the applicant with pertinent information relating to the college.
12. The Applicant contends that the College Principal is designated under Section 30 of the *Technical and Vocational Education and Training Act*, No. 29 of 2013 (TVET Act) as the Chief Executive Officer of the College with the responsibility of providing logistical support to the Board.
13. The Applicant contends that as per clause 1 of the First Schedule of the TVET Act, the Board is mandated to meet as often as necessary but four Months should not lapse between meetings. He states that he sought the College principal's support to hold a Board Meeting only for the same to be declined on the grounds that the meeting would affect the smooth running of the college.
14. He alleges that he as a responsible chairperson keen to uphold the law in running the college, called for a Special Board meeting on 30th June 2023 according to clause 11(3) of the second schedule of the TVET Act, through the letter which had erroneously been dated 30th July 2023 instead of 30th June 2023 and which he shared with Board Members via WhatsApp ("PMW3").
15. He states that he learned that the 2nd Respondent was holding himself out as the Chairperson of the Board of College and through his letter of 26th June 2023 ("PMW4") to the Permanent Secretary for the Department of Technical and Vocational Training in the Ministry of Education he sought for clarification on the position relating to the said Chairperson who was a stranger to him.



16. The Applicant contends that all the while he was the Chairperson of the Board of the college, the Area Member of the National Assembly was uttering falsehoods about him in public and besmirching his character, and threatened to sack him from his position and replace him with another person of his choice. He contends that the said member of the National Assembly stated that he could have the applicant replaced by simply making a telephone call to the Cabinet secretary.
17. The Applicant states that on 3rd July 2023, he received a letter dated 5th May 2023(“PMW5”) revoking his appointment as a chairperson of the Board, citing violations of the Mwongozo Code of Conduct for State Corporations and Circulars: Chief Of Staff and head of Public Service Ref No. OP/SCAC.9/73 VOL.1(84) date 30th July 2015 and Circular by the Cabinet Secretary Ministry of Education Ref No. MOEST/CONF/2/2 VOL. IV(50) dated 9th January 2019.
18. He contends that his revocation letter was backdated two months before he called for a Special Board Meeting in a bid to interfere with due process.
19. The applicant states that the Fair Administrative Actions Act requires that administrative decisions be made and communicated without undue delay and there cannot be any good or legitimate reason for communicating a decision two months after it was made.
20. The Applicant contends that the reasons for his revocation as Chairperson misapplied the law and facts in that:-
 - i. The grounds provided do not fall under the grounds set out under clause 9 of the second schedule in the Regulations(“PMW-6”)
 - ii. The Revocation Letter contained a fundamental error of fact and law by stating that the Mwongozo Code of Conduct applies to the chairperson of the Board of the College as he is still the Chairperson of the Public Service Board of Trans Nzoia County.
 - iii. That the 1st Respondent was aware that the applicant held the position of Chairperson of the Public Service Board of Trans-Nzoia County before his appointment and the same was aimed to tap into his knowledge for the benefit of the college and that he had furnished his Curriculum vitae in January 2023.
 - iv. Mwongozo Code only applies to State Corporations yet the college is not a State Corporation.
 - v. The *State Corporations Act*, No. 11 of 1986 provides for the definition of a State Corporation and a College does not fall under such Category. The College only offers Artisans Certificates and Diploma certificates and thus not a Body Corporate under Section 26 of the TVET Act and thus not a State Corporation.
 - vi. That he was never given an opportunity to make his representations before his appointment was revoked; and
 - vii. Fair Labour Practices enshrined under Article 41(1) of *the Constitution* of Kenya require that due process be observed before revoking his appointment as a Chairman of the Board of the College.
21. The Applicant states that the circulars cited by the 1st Respondent have never been availed to him even after requesting for the same(“PMW-7”).
22. The Applicant states that he has learned that the 2nd Respondent was appointed in his place as Chairperson of the Board yet he is a public officer by virtue of being the Dean of Masinde Muliro



University of Science and Technology and also the Chairman of Kamusinga High School School's Board.

23. That by holding the Chairmanship of the board of management of Kamusinga High School, the 2nd Respondent holds the same position as the Applicant and the basis for the Applicant's revocation of appointment and replacement with a person holding a similar position is discriminatory and a violation of Section 5 of the *Employment Act*.
24. The Exparte Applicant contends that the deceptive manner in which the 1st Respondent communicated its decision to revoke his appointment is malicious and that if the orders sought are not granted, the 2nd Respondent who was appointed as Chairperson will attempt to call for a Board meeting which will cause damage to the college as the 2nd Respondent is being imposed on the college and may call for meetings and change policies aimed at utilizing the meager public funds available in the college illegally to the detriment of students of the school.
25. The Applicant stated that he is aware that his revocation raised concerns in the community neighbouring the college and among students and they have rejected the 2nd Respondent's appointment.
26. The Applicant states that the actions of the Respondents are a manifest breach of law and a violation of basic tenets of Fair administrative action.

2nd Respondent's case in summary

(The case as per the Replying affidavit sworn on 20th September 2023)

27. It is the 2nd Respondent's case that he was appointed as the Chairperson of the Webuye West Technical and Vocational College Board vide a letter dated 5th May 2023("MWP-1"). He states that his appointment was proper and procedurally conducted as per the requirements of the TVET Act and he accepted his appointment on 15th May 2023("MWP-2").
28. He contends that his appointment was not politically procured and he was appointed on merit.
29. He states that he assumed office at the College and has performed his duties exclusively including the preparation of performance Contracts for the College and chaired and attended both informal and formal meetings at the College.
30. He contends that if the Applicant's application were allowed, it would prejudice his appointment and he ought not to be faulted for the woes facing the applicant as he neither participated in the recruitment process nor administrative processes within the college.
31. He states that the applicant is malicious, vexatious, frivolous, and outright abusive of the court process and ought to be dismissed.

Determination

32. The Court directed the Notice of Motion be canvassed by way of written submissions. The parties complied.

Issues for determination.

33. The Applicant in his submissions addressed the following issues:-
 - a. Does the Mwongozo Code apply to the Webuye West Technical and Vocational College?



- b. Whether the 1st Respondent's action of Revoking the Ex-Parte Applicant's appointment violates his fundamental rights under Article 47.
 - c. Whether the 1st respondent's actions were illegal, unreasonable, irrational, and/or tainted with procedural impropriety.
 - d. Whether the Ex parte Applicant can be granted the prayers sought.
 - e. Who should bear the costs of these proceedings?
34. The 2nd Respondent in his submissions addressed the following issues:-
- a. Whether the recruitment process conferring the mandate to the 2nd Respondent a Chairperson of the Board.
 - b. Whether the 2nd Respondent should be held liable for the woes of the Ex parte Applicant.
35. The Court discerned that the issues for determination under the Application are:-
- i. Whether the 1st Respondent's action of Revoking the Ex-Parte Applicant's appointment violates his fundamental rights under Article 47 of *the Constitution*.
 - ii. Whether the Ex parte Applicant is entitled to the reliefs sought.

Whether the 1st Respondent's action of Revoking the Ex-Parte Applicant's appointment violates his fundamental rights under Article 47 of *the Constitution*.

36. The full facts of the appointment and revocation of the Exparte Applicant's appointment as Chairperson of the Webuye West Technical and Vocational College Board are outlined above.
37. The Exparte Applicant was vide letter dated the 18th January 2023 appointed as Chairperson of the Board of Governors for Webuye West Technical and Vocational College under section 28 (3) and the second schedule parts(1) and (2) of the Technical Vocational Education and Training (TVET) Act No. 29 of 2013 for a term of three years by Hon Ezekiel Machogu, Cabinet Secretary Ministry of Education(PMW1).
38. The Exparte Applicant annexed his acceptance letter dated 30th January 2023 (PMW1).
39. On the 5th May 2023 the same Cabinet Secretary addressed a letter to the Exparte Applicant titled:- 'Revocation of appointment as Chairperson Webuye West Technical and Vocational College.' The reasons for the revocation of the appointment were stated as follows:-'This is due to your position as the Chairperson of the Public Service Board Transnzoia County. Mwongozo the code of conduct for State Corporations does not allow for a person to hold the position of Chairperson in two(2) State Corporations. Reference is made to a circular from Chief of Staff and Head of Public Service Ref. No. OP/SCAC.9 /73 VOL.1(84) DATED 30th July 2015 on Board appointments and circular from then Cabinet Secretary Ministry of Education Ref. No.MOEST /COF/2/1 VOL.1V(50) dated 9th January 2019 on public servants serving as Chairpersons and independent council/ board members of public universities and State Corporations under the Ministry of Education.'
40. The Exparte Applicant challenged the said revocation on grounds:-
- i. The grounds provided do not fall under the grounds set out under clause 9 of the second schedule in the Regulations("PMW-6")



- ii. The Revocation Letter contained a fundamental error of fact and law by stating that the Mwangozo Code of Conduct applies to the chairperson of the Board of the College as he is still the Chairperson of the Public Service Board of Trans Nzoia County.
 - iii. That the 1st Respondent was aware that the Exparte Applicant held the position of Chairperson of the Public Service Board of Trans-Nzoia County before his appointment and the same was aimed to tap into his knowledge for the benefit of the college and that he had furnished his Curriculum vitae in January 2023.
 - iv. Mwangozo Code only applies to State Corporations yet the college is not a State Corporation.
 - v. The *State Corporations Act*, No. 11 of 1986 provides for the definition of a State Corporation and a College does not fall under such Category. That the College only offers Artisans Certificates and Diploma certificates and thus not a Body Corporate under Section 26 of the TVET Act and thus not a State Corporation.
 - vi. That he was never given an opportunity to make his representations before his appointment was revoked; and
 - vii. Fair Labour Practices enshrined under Article 41(1) of *the Constitution* of Kenya require that due process be observed before revoking his appointment as a Chairman of the Board of the College.
41. The Exparte Applicant states that the revocation letter was backdated since as of 26th June 2023 he was in office and had called for a special meeting for 30th July 2023(PMW3). He annexed excerpts of WhatsApp communication with the members of the board on 29th June 2023. He avers that he received the letter of revocation of his appointment on 3rd July 2023.

1st Respondent

The 1st Respondent did not enter appearance. There was evidence before the Court of service.

The 2nd Respondent's case

42. The 2nd Respondent was Moses Wesangula Poipoi, the person appointed by the 1st Respondent as Chairperson of the college to replace the Exparte Applicant. The 2nd Respondent filed a replying affidavit dated 20th September 2023.
43. It was the 2nd Respondent's case that he was appointed as the Chairperson of the Webuye West Technical and Vocational College Board vide a letter dated 5th May 2023 by the said Cabinet Secretary for a term of three years. ("MWP-1"). This was the same date of the revocation of the Exparte Applicant's appointment(PMW5). The 2nd Respondent states that his appointment was proper and procedurally conducted as per the requirements of the TVET Act and he accepted his appointment on 15th May 2023("MWP-2").
44. The 2nd Respondent contends that his appointment was not politically procured and that he was appointed on merit and competency.
45. The 2nd Respondent states that he assumed office at the College and has performed his duties exclusively including the preparation of performance Contracts for the College, chairing, and attending both informal and formal meetings at the College.



46. The 2nd Respondent states that allowing the application would be prejudicial to him and the operations of the college since he was rightly appointed.

Decision

47. The Court sitting in judicial review exercises supervisory jurisdiction over the public body which made the decision, in this case, the 1st Respondent. The Supreme Court has guided on the scope of judicial review under the 2010 Constitution in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport and infrastructure & 3 others* SC Petition 17 of 2015 (2021)e KLR where the Court adopted with approval decision of G V Odunga, J in the case of *Republic v Chesang (Ms) Resident Magistrate & 2 others ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 others* [2017] eKLR as follows:- ‘100. The considerations for judicial review were aptly captured by G V Odunga, J in the case of *Republic v Chesang (Ms) Resident Magistrate & 2 others ex parte Paul Karanja Kamunge t/a Davisco Agencies & 2 others* [2017] eKLR where he held as follows: “25. However, it is important to remember that judicial review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the Judge disagrees with what the public body has done, but whether there is some recognizable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See *R v Traffic Commissioner for North Western Traffic Area ex parte Brake* [1996] COD 248. 26. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the Court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the Court may not set about forming its own preferred view of the evidence. See *Reid v Secretary of State for Scotland* [1999] 2 AC 512.”
48. Under the 2010 Constitution, the scope of judicial review is expanded beyond the Court checking whether a public wrong has been committed by the public body as noted by the Supreme Court in same decision(*John Florence Maritime Services Limited supra*) as follows:- ‘While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the Court may not set about forming its preferred view of the evidence. See *Reid v Secretary of State for Scotland* [1999] 2 AC 512.” The Supreme further stated:- ‘102. Despite the shift from common law to codification in *the Constitution* and the *Fair Administrative Action Act*, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. This finding is further reinforced by the fact that though the Court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body



- or office with the power to make that decision.” I am guided as I proceed to decide on the application on the parameters to restrain myself to being the process and whether a public wrong has occurred.
49. The appointment of the Exparte Applicant was under section 28 (3) and the second schedule parts(1) and (2) of the Technical Vocational Education and Training (TVET) Act No. 29 of 2013. Schedule 2 provides for the appointment as follows:- “(1) The Board of Governors of a public institution shall consist of not less than seven and not more than nine members appointed by the Cabinet Secretary. (2) The membership of the Board of Governors shall comprise— (a) a chairperson;’...” The Exparte Applicant was appointed accordingly.
 50. Regulation 9 of Schedule 2 of the TVET Act provides for grounds for revocation of the appointment of chairperson and board member as follows:- ‘9. (1) The appointment of a member to a Board of Governors or to its committees shall be revoked and the member shall vacate office if the member — (a) resigns in accordance with paragraph 13 of this schedule; Secondment of officers to the Board of Governors. Frequency of meetings of the Board. (b) becomes insolvent or has conveyed or assigned his property or has made a proposition or arrangement for the benefit of his creditors; (c) is sentenced by a Court of law to imprisonment for a term of six months or more; (d) is incapacitated by physical or mental illness; (e) has been absent from three consecutive meetings of the Board of Governors without leave; (f) where the member is a representative, has his appointment revoked by the nominating body; or (g) is otherwise unable or unfit to discharge his functions as a member of the Board of Governors on account of any matter in this Act. (2) Where the office of a member of a Board of Governor becomes vacant by reason other than the expiry of the period of that office, the Cabinet Secretary, or the proprietor or sponsor may, in accordance with the provisions of this Act appoint another person to replace the member.’”
 51. The Court in the instant application was guided by the relevant law which is as outlined above. The Exparte Applicant challenged the process leading to the revocation of his appointment for violation of Article 47 of *the Constitution*. The Exparte applicant contended that the Mwongozo code did not apply to his appointment. On page iii of the Code, it stated that Mwongozo was issued as the regulations under section 30 of the *State Corporations Act*. The Exparte Applicant contends that the Mwongozo code applies to state corporations and not to the college he was appointed to. I read the code and the same was issued by former President Uhuru Kenyatta under section 30 of the *State Corporations Act*, CAP 446. Section 30 reads:- ‘30. Regulations The President may make regulations generally for the better carrying into effect of the provisions of this Act and the powers conferred by this section may be assigned in accordance with section 18 of *the Constitution*.’”
 52. The Exparte Applicant contends that the revocation of his appointment was erroneous as the college was not a state corporation. The Act defines a state corporation as follows:- “state corporation” means — (a) a state corporation established under section 3; (b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not— (i) the Permanent Secretary to the Treasury incorporated under the Permanent Secretary to the Treasury (Incorporation) Act (Cap. 101); (ii) a local authority established under the Local Government Act (Cap. 265); (iii) a co-operative society established under the *Co-operative Societies Act* (Cap. 490); (iv) a building society established in accordance with the *Building Societies Act* (Cap. 489); (v) a company incorporated under the *Companies Act* (Cap. 486) which is not wholly owned or controlled by the Government or by a state corporation; (vi) the Central Bank of Kenya established under the *Central Bank of Kenya Act* (Cap. 491); (vii) deleted by to Act No. 2 of 2002, Sch.; (c) a bank or a financial institution licensed under the *Banking Act* (Cap. 488) or other company incorporated under the *Companies Act* (Cap. 486), the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation; (d) a subsidiary of a state corporation;”



53. The Exparte Applicant states that under section 26(2) of the TVET Act, the college he was appointed to was not a body corporate for it offers artisan certificates and diploma certificates. A reading of the section is to effect that such colleges have not been established as body corporates and thus I agree with the Exparte Applicant are not body corporates. The conclusion is that the college is not a state corporation. The relevant provisions of the law is the TVET Act:- “Section 26.(1) Institutions shall be organized under the Categories of following categories— institutions. vocational training centers, which shall offer courses up to Artisan Certificate; (a) technical and vocational colleges, which shall offer programmes up to Diploma; (b) teacher trainer colleges, which shall offer up to higher diploma level, and; (c) National Polytechnics, which shall offer up to higher Diploma level; and (d) such other categories as the Cabinet Secretary may specify. (2) The institutions provided for under subsection (1) (c) and (d) shall be established by the Cabinet secretary by Order published in the Gazette and shall be bodies corporate with perpetual succession and a common seal and shall in its corporate name, be capable of— (a) suing and being sued; (b) taking, purchasing or otherwise acquiring, holding, charging or disposing of both movable and immovable property; (c) borrowing money; (d) charging for services offered, with the approval of the Cabinet Secretary; (e) entering into contracts, and (f) doing or performing all other acts necessary for the proper performance of its functions under this Act which may be lawfully done or performed by a body corporate.” This Court is not invoked on merits but process as guided by the Supreme Court and will refrain from making a finding on merits of the revocation decision.
54. The service under pleasure doctrine has been done away under article 47 of the 2010 Constitution. It reads:- “47. Fair administrative action (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.” The Exparte Applicant was entitled to a lawful process of removal. The process of his revocation must comply with the TVET Act. Regulation 9 of Schedule 2 of the TVET Act provides for grounds for revocation of the appointment of chairperson and board member as follows:- ‘9. (1) The appointment of a member to a Board of Governors or to its committees shall be revoked and the member shall vacate office if the member — (a) resigns in accordance with paragraph 13 of this schedule; Secondment of officers to the Board of Governors. Frequency of meetings of the Board. (b) becomes insolvent or has conveyed or assigned his property or has made a proposition or arrangement for the benefit of his creditors; (c) is sentenced by a Court of law to imprisonment for a term of six months or more; (d) is incapacitated by physical or mental illness; (e) has been absent from three consecutive meetings of the Board of Governors without leave; (f) where the member is a representative, has his appointment revoked by the nominating body; or (g) is otherwise unable or unfit to discharge his functions as a member of the Board’ of Governors on account of any matter in this Act. (2) Where the office of a member of a Board of Governor becomes vacant by reason other than the expiry of the period of that office, the Cabinet Secretary, or the proprietor or sponsor may, in accordance with the provisions of this Act appoint another person to replace the member.”
55. The Court finds that the Exparte Applicant was not given notice of the intention of the revocation nor was he invited to respond. The letter of revocation was dated 5th May 2023 yet there was evidence before Court the Exparte Applicant was in office and working on 29th June 2023. The Court holds that the revocation was irregular and not in compliance with Regulation 9 of the 2nd schedule of the TVET Act(supra). The Court sitting in judicial review is concerned with the propriety of the process leading to the impugned decision.
56. The Court has found that the revocation of the Exparte Applicant’s appointment as Chairman of Webuye West Technical and Vocational College was devoid of compliance with the revocation



provisions under regulations under regulation 9 schedule 2 of the TVET Act thus an illegality and devoid of procedural fairness. The fate of the 2nd Respondent flowing from the decision of the court is that his appointment was a nullity ab-initio as there was no vacancy as at the time of his appointment.

Whether the Ex parte Applicant is entitled to the reliefs sought.

57. The Exparte Applicant sought the following judicial review reliefs:-
- a. An Order of Certiorari is issued to remove into this Court and quash the decision of the 1st Respondent dated 5th May 2023 revoking the Ex parte Applicant's appointment as the Chairperson of the Board of Governors for Webuye West Technical and Vocational College.
 - b. An Order of Mandamus be hereby issued to compel the 1st Respondent to reinstate the Ex-Parte Applicant as the Chairperson of the board of Governor for the Webuye West Technical and Vocational College.
 - c. An Order of Prohibition be hereby issued to prohibit the Respondents from unlawfully interfering with the Ex-Parte Applicant's Performance of duties assigned by him as the Chairperson of the Board of Governors for the Webuye West Technical and Vocational College.
 - d. An Order of Prohibition be hereby issued to prohibit the 1st Respondent from appointing any other person to the position of chairperson of the Board of Governors for the Webuye West Technical and Vocational College until expiry of the Ex parte Applicant's term of office.
 - e. An Order of Certiorari be hereby issued to bring to this Honourable Court to quash the decision of the 1st Respondent appointing the 2nd Respondent as the Chairperson of the Board of Governors for the Webuye West Technical and Vocational College.
 - f. An order that the costs of this Application be borne by the Respondents.
58. The 2nd Respondent was appointed on the 5th May 2023 as the Chairman the position claimed by the Applicant. The 2nd Respondent is innocent. The Court is not concerned with his holding of the job but whether a public wrong was committed by the appointing authority. That is the case herein. The 2nd Respondent invites the Court to be persuaded by the decision in Humprey Nyongera Makokha and another v CAK and another JR No. 4 of 2014 where the Court declined to nullify subsequent appointment based on the principle of proportionality. The Court in the case stated:-⁴ 49. In terms of remedies, the Petitioner had asked the Court to make certain orders. The Petitioner has asked the Court to declare all previous appointments made to Boards of State Corporations and similar bodies, which were not made through a fair, open, competitive, merit-based based and inclusive process null and void ab initio. However, based on the principle of proportionality, the larger community of Kenya as opposed to individual rights of the Petitioner would be trampled upon. Government Corporations serve a big role in the economy of the country and therefore interfering with appointments already made will be counteractive and have grievous ripple effects on the economy and the running of those bodies and even those employees already serving in those State Corporations.”
59. I find the decision in the Humprey Nyongera Makokha case was informed by the fact it related to the legality of the recruitment regarding state corporations in general. I also find this was not a subsequent appointment as submitted by the 2nd Respondent. Indeed it was a public interest case. The facts were different. The court decides each case on its own merit. I am not persuaded to apply the decision in the instant case. In the instant case, there was a public wrong committed against the Exparte Applicant and the Court would be abrogating its role by failing to right the wrong.



60. I am persuaded by the decision of the Court in *Okiya Omtatah Okoiti v President of Kenya & 6 others* [2017] eKLR where the Court on making a finding that there was a wrongful revocation of termination held:- “The revocation of the appointment of the 3rd interested party and purported replacement by the 2nd interested party did not meet the aforesaid criteria and was unlawful, null and void. 33. The final orders of the Court are as follows; (a.) A declaration is hereby issued that the 2nd respondent’s purported removal of the 3rd interested party and the appointment of 2nd interested party to replace the 3rd interested party as the chairman of the Betting and Licencing Control Board is unlawful, null, and void. (b.) The Gazette Notice No. 5331 of 12th July 2016 is a nullity in law ab initio (c.) The 3rd interested party to serve his full three (3) year term as the Chairman of the Betting Control and Licensing Board unless otherwise lawfully removed from office.”
61. Similarly, I hold that the revocation of the appointment of the Exparte Applicant was unlawful, unprocedural and thus null and void.
62. The final orders of the Court are as follows:-
- a. An Order of Certiorari is hereby issued quashing the decisions of the 1st Respondent dated 5th May 2023 revoking the Ex parte Applicant’s appointment as the Chairperson of the Board of Governors for Webuye West Technical and Vocational College and of appointment of the 2nd Respondent on even date.
 - b. A declaration is hereby issued that the appointment of the 2nd Respondent to replace the Exparte Applicant vide letter dated 5th May 2023 by the 1st Respondent as the Chairperson of the Board of Governors for Webuye West Technical and Vocational College is unlawful, unprocedural null and void and a nullity ab-initio.
 - c. It is hereby ordered that the Exparte Applicant to serve his full three (3) year term as the Chairperson of the Board of Governors for Webuye West Technical and Vocational College unless otherwise lawfully removed from office.
 - d. Costs of the Petition awarded to the Exparte Applicant payable by the 1st Respondent.
63. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 31st DAY OF JANUARY 2024

JEMIMAH KELI

JUDGE

In The Presence of:

For Ex -Parte Applicant : Waithaka Advocate

For 1st Respondent: No appearance

For 2nd Respondent: Kuloba Advocate- I apply for certified typed proceedings.

Court Order

The Respondents be availed typed and certified copies of the proceedings upon request in the normal court registry process.

It is so ordered

JEMIMAH KELI



JUDGE

31/01/2024

