



PUBLIC SERVICE COMMISSION

Our Ref: PSC/LEG/GEN/23/VOL.III/33

5th December, 2023

Your Ref: TBA

Dr. Chris Kiptoo, CBS
Principal Secretary
The National Treasury
Treasury Building
P. O. Box 30007-00100
NAIROBI

Dear *Dr Kiptoo,*

RE: ADVISORY ON APPROVAL OF RECRUITMENT OF STAFF FOR STATE CORPORATIONS AND PUBLIC UNIVERSITIES

Background information

1. It has come to the attention of the Commission that whenever State Corporations and Public Universities request for approval from the National Treasury to recruit their staff, they are required to submit, among other things, confirmation that their human resource instruments have been approved by the State Corporations Advisory Committee (SCAC) based on a Circular Ref. OP/CAB.9/1A dated 7th February, 2022 from the then Head of the Public Service (HOPS).
2. There have been several State Corporations and Public Universities that have been making phone calls to the Commission to inquire into the above position as they are now confused as to who between the Commission and SCAC approves their human resource management instruments thereby hampering efficiency and effectiveness in the public service within State Corporations and Public Universities.
3. This requirement from the National Treasury is against the Circular and Guidelines dated 8th August, 2023 that had been issued by the Commission on the development and review of human resource management instruments for State Corporations and Public Universities.

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4. It is against the above background that the Commission has deemed it necessary to proffer this advisory to the National Treasury on this issue so that State Corporations and Public Universities are lawfully facilitated through the requisite approval from legally mandated entities so as to conduct the recruitment of their staff whenever vacancies arise in various positions within their establishments.

The obtaining legal position

5. The question as to which entity has the requisite constitutional and legal mandate to approve human resource instruments in the public service and specifically for State Corporations and Public Universities has been settled by the courts of law in this country.
6. In a judgment delivered on 25th January, 2022 in the case of Manyara Muchui Anthony -vs- Communications Authority of Kenya & 3 Others, [2022]eKLR, (copy attached as PSC-1) the Court (Hon. Monica Mbaru, J) found and held inter alia that:
- i. *Section 5(3) of the State Corporations Act to be is in conflict with Article 234(2) as read together with Article 260 of the Constitution on regulation of the public service and definition of who a person in the public service is.*
 - ii. *The entity given constitutional authority to employ, issue terms and conditions of service, review, audit and advice with regard to public service is the Public Service Commission. Employees in the service are subject to the constitutional mandate of the Public Service Commission.*
 - iii. *The regulation of the human resource of state corporations fall squarely under the constitutional mandate of the Public Service Commission.*
[Emphasis added]
7. In a judgment delivered on 13th April, 2022 in the case of Consumer Federation of Kenya (COFEK) -vs- National Social Security Fund Board of Trustees & 2 Others, [2022]eKLR, (copy attached as PSC-2) the Court (Hon. Dr. Jacob Gakeri, J) found and held *inter alia* that:
- [95.] There are sufficient constitutional, statutory provisions and judicial articulations to the effect that employees of state corporations are public officers in the public service.*

[104.] Significantly, the functions and powers of the Public Service Commission under Articles 234(1) and (2) do not apply to the offices identified in Article 234(3). The list of exemptions does not include officers in the state corporations, a fact the framers of the Constitution of Kenya, 2010 must have been aware of.

[105.] For the foregoing reasons, it is the finding of the Court that the Public Service Commission has the constitutional mandate to exercise the powers and functions under Article 234 of the Constitution over the public service, the Attorney General's legal opinion No. AG/CONF/4/127 Vol. II of 21st August, 2014 notwithstanding.

[111.] The committee (SCAC) appear to have been exercising powers it did not have ab initio.

[112.] More importantly, the Court is also guided by Section 7 of the 6th Schedule of the Constitution of Kenya, 2010 which provides guidance on how a statute such as the State Corporations Act should be construed. The Section provides as follows:

1. All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

2. If, with respect to any particular matter—

a.) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

b.) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

[113.] What the Court gathers from these provisions is that because the responsibility of issues of human resource in state corporations is now specifically vested in the Public Service Commission as a constitutional imperative, the provisions of Article 234 of the Constitution prevail over Sections 5(3), 27 or any other provisions of the State Corporations Act.

Finally, a cursory glance of the Act reveals that it is yet to be aligned to the provisions of the Constitution of Kenya, 2010.

[119.] Bearing in mind that the Public Service Commission Act was enacted in 2017 and came into operation on 20th April 2017, it is the Court's view that its provisions were intended to reinforce the provisions of Article 234 of the Constitution of Kenya, 2010 and underscore its preeminent character.

[120.] In nutshell, these constitutional and statutory provision demonstrate that the Public Service Commission is the only body with constitutional authority to approve human resource instruments of state corporations and other state bodies.

[121.] In simple parlance, the Board of Directors of a state corporation is the policy making body of the corporation and provides the strategic direction. It is the decision maker on all matters of policy. [Emphasis added]

8. The above decisions have since been affirmed in the decision delivered on 13th July, 2023 in the case of Mombasa ELRC Judicial Review Application No.E001 of 2022 Republic -v- Kenya Ports Authority Board of Directors & 3 Others Ex Parte Commission for Human Rights Justice (copy attached as PSC-3).
9. Further, in a judgment delivered on 27th July, 2023 in the case of Nairobi ELRC Petition No.E149 of 2023 Enos Namasaka & 9 Others -v- Kenya Medical Supplies Authority & Others, (copy attached as PSC-4) the court emphasized on the role of the Commission to establish and abolish offices in the public service including State Corporations by declaring as unconstitutional, null and void the decision by Kenya Medical Supplies Authority (KEMSA) to declare redundancy thereby leading to abolition of public offices in the said State Corporation without the approval of the Commission or without a delegation instrument issued to its Board of Directors by the Commission to either establish or abolish offices therein.
10. The above decisions have neither been varied/stayed nor set aside by any Superior Court of record in Kenya.
11. It is as a result of the foregoing that on 8th August, 2023, the Commission issued a Circular on the development and review of human resource instruments for State Corporations and Public Universities (copy attached as PSC-5). At the same time, the Commission issued Guidelines to that effect (a copy can be obtained from the Commission's website www.publicservice.go.ke). In the two documents, the Commission reiterated the correct legal position that human resource instruments for

State Corporations and Public Universities must be approved by the Commission before the same can be implemented.

12. The Commission's Circular and Guidelines aforementioned in effect superseded any other directive from any other person to the contrary and as such, the National Treasury should not rely on the circular from the Head of the Public Service Ref. OP/CAB.9/1A dated 7th February, 2022 as that Circular neither supersedes the Commission's constitutional and legal mandate nor the pronouncements by the courts of competent jurisdiction on the Commission's constitutional and legal mandate to approve the human resource instruments for the public service and specifically for State Corporations and Public Universities.
13. The above notwithstanding, the State Corporations Advisory Committee or any other expert may assist State Corporations and Public Universities in the development of their human resource management instruments but the eventual approval of the said instruments before implementation must be sought and obtained from the Public Service Commission.
14. The Commission is also aware that the Hon. Attorney-General vide a letter Ref. No.AG/CONF/2/C/31 VOL. VI dated 27th July, 2023 had issued an advisory that is contrary to court pronouncements on this matter. Consequent to the said advisory, SCAC issued a Circular Ref. No.OP/SCAC 9/21/2 II/(31) dated 8th August, 2023 in that regard in which it attempted to undermine the Commission's constitutional and legal mandate as clarified by the Courts. It should be noted that the two letters from the Attorney-General and SCAC respectively have since been challenged in court and an order issued barring and/or staying their implementation. This is vide a court order issued on 22nd September, 2023 by Hon. L.N. Mugambi, J in **NRB HC Constitutional Petition No.E303 of 2023 – John Githongo & Ano. -v- State Corporations Advisory Committee & Others.** (copy attached as PSC-6)
15. Accordingly, on the strength and authority of *inter alia* the Constitution, the Public Service Commission Act, 2017, the Public Service Commission Regulations, 2020 and various court pronouncements outlined above, the National Treasury is advised and directed as follows:
 - a. The State Corporations Advisory Committee (SCAC) does not have the requisite legal authority to approve the human resource management instruments (Organization Structure, Grading Structure, Staff Establishments, Career Progression Guidelines and Human Resource Management Policies & Procedures Manual) for State Corporations and Public Universities.

- b. Only the Public Service Commission has been constitutionally and legally mandated to approve the human resource management instruments for State Corporations and Public Universities.
- c. The human resource instruments for State Corporations and Public Universities must first be approved by the Public Service Commission before the National Treasury can approve the recruitment of staff in those entities.
- d. The National Treasury should ensure that there is strict compliance with the Commission's Circular and Guidelines dated 8th August, 2023 by all State Corporations and Public Universities before approval is granted to them for the recruitment of staff within their establishments.
- e. Any human resource management instruments for State Corporations and Public Universities that have not been approved by the Public Service Commission are unconstitutional, null and void.

Be guided accordingly and take necessary action.

Yours



FCS DR. SIMON K. ROTICH, CBS
SECRETARY/CEO
PUBLIC SERVICE COMMISSION

Encl/

Copy to: **Mr. Felix K. Koskei**
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All Chief Executive Officers
State Corporations

All Vice Chancellors
Public Universities



**Anthony v Communications Authority of Kenya & 3 others (Petition
E161 of 2021) [2022] KEELRC 1117 (KLR) (25 January 2022) (Judgment)**

Manyara Muchui Anthony v Communications Authority of Kenya & 3 others [2022] eKLR

Neutral citation: [2022] KEELRC 1117 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E161 OF 2021
M MBARU, J
JANUARY 25, 2022**

BETWEEN

MANYARA MUCHUI ANTHONY PETITIONER

AND

COMMUNICATIONS AUTHORITY OF KENYA 1ST RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE 2ND RESPONDENT

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

The Public Service Commission has the mandate to regulate the human resource of state corporations.

The court made a determination about the constitutionality of section 31 of the Public Service Commission Act. It stated that section 31 of the Public Service Commission Act allowed the PSC to delegate its functions in whiting but such section was in conflict with articles 232, 233, 234, 235 and 236 with regard to the public service and the Public Service Commission under the Constitution and such section should be declared null and void.

Reported by John Ribia

Constitution Law – state corporations – State Corporations Advisory Committee (SCAC) - Public Service Commission (PSC) – mandate of SCAC vis-à-vis the mandate of PSC - whether positions held in state corporations were in the public service subject to regulation by the State Corporations Advisory Committee or by the Public Service Commission – between SCAC and the PSC, who should regulate the human resource of state corporations – Constitution of Kenya, 2010, articles 232, 233, 234, 235 and 236; Public Service Commission Act, Act No. 10 of 2017.

Statutes – constitutionality of statutory provisions – constitutionality of section 31 of the Public Service Commission (PSC) Act - whether section 31 of the PSC Act that provided that the PSC may delegate its duties was in conflict with articles 232, 233, 234, 235 and 236 (in respect of the public service and Public Service Commission) of the Constitution.



Constitutional Law – public officers – categorisation of employees of parastatals/state corporations – whether an employee of a parastatals/state corporation was a public officer – what did the courts consider in making a determination as to whether an individual was a public officer – Constitution of Kenya, 2010, article 260.

Brief facts

The Communications Authority of Kenya (CAK) (1st respondent) advertised for two vacant positions in the print media on October 1, 2021 with respect to director frequency spectrum management and director competition management and applicants were directed to submit applications by October 26, 2021. On September 28, 2021 the CAK issued an internal advertisement inviting applications for 43 vacant positions. Applicants were to submit applications by October 19, 2021. The advertisements were issued pursuant to the new human resource policies and guidelines prepared and prescribed by the CAK for the State Corporations Advisory Committee (SCAC) (2nd respondent). The human resource manual required that all serving and prospective employees of the CAK from the position of assistant manager and above must have a minimum academic qualification of a master's degree and that the persons must have undertaken supervisory or management courses lasting not less than 2 to 4 weeks respectively from a recognised institution. The CAK had scheduled trainings for the identified staff to undertake supervisory and senior management courses to be conducted at the Kenya School of Government during the year 2021/2022.

The petition was that the scheduled staff trainings were discriminatory and prejudicial to members of staff who would have undergone the training on supervisory and senior management courses before the close of the advertisements for vacant positions. The petitioner stated that the scheduled training gave an unfair advantage to the staff whose trainings had been timed to take place before the deadline for the submissions of the applications.

The petitioner also sought a declaration that section 31 of the Public Service Commission (PSC) Act (that provided that the PSC may delegate its duties) was in conflict with articles 232, 233, 234, 235 and 236 of the Constitution (in respect of the public service and Public Service Commission).

Issues

- i. Whether positions held in state corporations were in the public service and were subject to regulation by the State Corporations Advisory Committee or by the Public Service Commission.
- ii. Whether section 31 of the Public Service Commission (PSC) Act (that provided that the PSC may delegate its duties) was in conflict with articles 232, 233, 234, 235 and 236 (in respect of the public service and Public Service Commission) of the Constitution.
- iii. Who should regulate the human resource of state corporations?
- iv. What did the courts consider in making a determination as to whether an individual was a public officer?
- v. Whether an employee of a parastatal/state corporation was a public officer within the meaning of article 260 of the Constitution.
- vi. Whether consent filed in a different suit could apply in perpetuity to regulate the employment of employees of a state corporation.

Relevant provisions of the Law

Public Service Commission Act, Act No. 10 of 2017

Section 31

31. Delegation of powers

- (1) *The Commission may, where appropriate and in writing, delegate any power or assign a duty conferred to it under the Constitution or this Act to its members, an officer, body or authority in the public service.*
- (2) *A delegation or assignment under subsection (1) shall not prevent the Commission from exercising the power.*
- (3) *A delegation under this section—*
 - (a) *shall be subject to any conditions that the Commission may impose;*



- (b) shall not divest the Commission of the responsibility concerning the exercise of the powers or the performance of the duty delegated, and
- (c) may be withdrawn, and any decision made by the person to whom the delegation is made may be withdrawn or amended by the Commission.
- (4) The Commission may, at any time, institute an audit, investigation, inquiry or visit to determine whether the delegated powers are properly exercised by the authorized officer.
- (5) Where the audit, investigation, inquiry or visit establishes that an authorized officer has breached any condition or improperly exercised delegated powers, the Commission shall take corrective measures including revoking the delegation.

Constitution of Kenya, 2010

Articles 233, 234, 235 and 236

233. The Public Service Commission

- (1) There is established the Public Service Commission.
- (2) The Public Service Commission consists of a chairperson, a vice chairperson and seven other members appointed by the President with the approval of the National Assembly.
- (3) Subject to clause (4), a person is not eligible for appointment as a member of the Commission if the person—
 - (a) has, at any time within the preceding five years, held office, or stood for election as—
 - (i) a member of Parliament or of a county assembly; or
 - (ii) a member of the governing body of a political party; or
 - (b) holds any State office;
 - (c) is, or has at any time been, a candidate for election as a member of Parliament or of a county assembly; or
 - (d) is, or has at any time been, the holder of an office in any political organisation that sponsors or otherwise supports, or has at any time sponsored or otherwise supported, a candidate for election as a member of Parliament or of a county assembly.
- (4) Clause (3)(c) and (d) cease to apply to a person after two general elections for Parliament have been held since the person ceased to be such a candidate or office holder.
- (5) There shall be a secretary to the Commission.
- (6) The secretary—
 - (a) is the chief executive of the Commission; and
 - (b) shall be appointed by the Commission for a term of five years, and is eligible for re-appointment once.

234. Functions and powers of the Public Service Commission

- (1) The functions and powers of the Commission are as set out in this Article.
- (2) The Commission shall—
 - (a) subject to this Constitution and legislation—
 - (i) establish and abolish offices in the public service; and
 - (ii) appoint persons to hold or act in those offices, and to confirm appointments;
 - (b) exercise disciplinary control over and remove persons holding or acting in those offices;
 - (c) promote the values and principles referred to in Articles 10 and 232 throughout the public service;
 - (d) investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
 - (e) ensure that the public service is efficient and effective;
 - (f) develop human resources in the public service;
 - (g) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;



(b) evaluate and report to the President and Parliament on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the public service;

(i) bear and determine appeals in respect of county governments' public service; and

(j) perform any other functions and exercise any other powers conferred by national legislation.

(3) Clauses (1) and (2) shall not apply to any of the following offices in the public service—

(a) State offices;

(b) an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic;

(c) an office or position subject to—

(i) the Parliamentary Service Commission;

(ii) the Judicial Service Commission;

(iii) the Teachers Service Commission;

(iv) the National Police Service Commission; or

(d) an office in the service of a county government, except as contemplated in clause (2)(i).

(4) The Commission shall not appoint a person under clause (2) to hold or act in any office on the personal staff of the President or a retired President, except with the consent of the President or retired President.

(5) The Commission may delegate, in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.

235. Staffing of county governments

(1) A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for—

(a) establishing and abolishing offices in its public service;

(b) appointing persons to hold or act in those offices, and confirming appointments; and

(c) exercising disciplinary control over and removing persons holding or acting in those offices.

(2) Clause (1) shall not apply to any office or position subject to the Teachers Service Commission.

236. Protection of public officers

A public officer shall not be—

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

Held

1. Under Section 12(2) of the Employment and Labour Relations Court Act, 2011, the law provided for employment and labour relationships which the Employment and Labour Relations Court had jurisdiction to address. The court was given a constitutional mandate to hear and determine all employment and labour relations disputes.
2. The instant petition was anchored under the provisions of various articles including articles 22, 23, and 258 of the Constitution of Kenya, 2010 (Constitution). Under those provisions, a petitioner was allowed to file a petition to vindicate the rule of law and get the unlawful conduct stopped. In doing so, the strict rule of *locus standi* applicable to private litigation was relaxed and a broad rule was evolved which gave standing to any member of the public acting *bona fide* and having sufficient interest in instituting an action for redress of a public wrong or public injury. The public good was clear.
3. A determination on the constitutionality of section 31 of the Public Service Commission Act went to the mandate of the Communications Authority of Kenya (CAK) in managing its human resource vis-à-vis the mandate of the State Corporations Advisory Committee (SCAC) and Public Service



Commission's (PSC). Those were matters which called on the court to address the constitutionality of various statutes looked at together with the Constitution and make a finding.

4. The employment and Labour Relations Court Act stipulated the procedure for the enforcement of employment rights. The petitioner had filed the petition on his own behalf and on behalf of the Kenyan public as the issues addressed affected and were likely to affect the entire country. Such matters gave the petitioner proper standing before the court.
5. The collectivity of public service and being a public officer were all interlinked into public service. The only exception was state officers performing a function within a State organ. All other persons serving the people of Kenya were in the public service. That was the constitutional definition under article 260 of the Constitution. Employees of state corporations were public officers within the meaning of article 260 of the Constitution.
6. Remuneration and benefits were not directly drawn from the consolidated fund or directly provided by Parliament. Under section 11 of the State Corporations Act, state corporations were required to prepare and submit to the line minister and the Treasury for approval, yearly estimates of their revenue and expenditure accompanied by proposals for funding of the projects they were to undertake, or implement during the financial year. State corporations and parastatals generated their own revenue for expenditure, and their funding was not necessarily wholly provided for by Parliament.
7. Before determining whether an individual was a public officer and in line with the provisions of article 259 of the Constitution, the court considered the following questions;
 1. Was the person concerned in an office in the national government, the county government or the public service?
 2. Did that person receive remuneration or benefits payable from the consolidated fund or directly by moneys provided by Parliament?
 3. Did that person perform a function within a State organ or a state corporation?
8. Officers and persons serving/working in state corporations were public officers within the meaning of Article 260 of the Constitution. A body corporate established under an Act of Parliament was a state corporation within the meaning of that Act, and therefore subject to the Constitution. All state corporations had national outreach by nature and design and fell squarely under the auspices of the National Government. The CAK was also a public service institution that was in existence under the former Constitution and its officials and employees would be considered public officers under it. The effect of the transitional clause in section 31 of the sixth schedule to the Constitution applied with regard to the CAK employees.
9. The import of *Katiba Institute & another v Attorney General & Another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021] eKLR was not that officers of state corporations were not within the meaning of public officers and did not hold office in public service. The matter related to the appointment of board chairpersons and board members thereof and not with regard to persons employed on contract to work and serve under the Board.
10. An employee in a parastatal or a state corporation and a board member appointed under the State Corporations Act by the President held different positions in fact and in law. The two could not be equated and placed under the same legal regime. One was under an appointment by the President and subject to removal under the same mandate whereas an employee was recruited and appointed under terms and conditions of service to perform a public service in the state corporation. State corporations were agencies of the government.
11. The CAK had been in existence since the year 1999 regulating the communications/ICT sector in Kenya, a resource that belonged to the people of Kenya, the public, held in trust for them by the government. The employees of the CAK were paid from public funds, not private funds.
12. All other public officers had to include all shades of public servants, including employees of the state corporations, which like the CAK were agents and instrumentalities of the government. The



- involvement of the Public Service Commission, PSC, with regard to all other public officers, was to be limited to advising the government and its agencies in the human resource policy, not defining and running the process.
13. The constitutional threshold for regulation of public service was a mandate of the PSC. Article 234(2) of the Constitution which directed in mandatory terms that the Commission was to establish and abolish offices in the public service and appoint persons to hold or act in those offices, and to confirm appointments. That was therefore the repository of all public service regulation in terms of terms and conditions of service in its collectivity. It was a constitutional mandate.
 14. The State Corporations Act in its preamble stated that the Act made provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes. The control and regulation of state corporations was therefore statutory. Pursuant to section 5(3) of the State Corporations Act, the Board of a state corporation was allowed to employ staff on terms and conditions of service as the Minister in consultation with the Committee may approve. That was in contradiction of article 234(2) read together with article 260 of the Constitution on regulation of public service and definition of who a person in the public service was.
 15. The entity given constitutional authority to employ, issue terms and conditions of service, review, audit and advice with regard to public service was the PSC. Employees in the service of the CAK were subject to the constitutional mandate of the PSC.
 16. The legal opinion issued by the Attorney General (AG) should translate into legislation giving effect/force to the provisions of article 234 of the Constitution. That was to ensure the intentions of the people of Kenya in stating that the Public Service Commission was in charge of the public service were not negated by other statutory provisions in force as at August, 2010.
 17. The AG had to address such matters with urgency and harmonise the legislation with the Constitution as without giving a proper framework, litigation such as the instant petition would continue to be filed out of great need to streamline public service applied by different agencies due to the nature of the statutory mandate specific to each authority, agencies, state corporations and parastatals. A common thread should flow from the PSC as mandated under the Constitution. Without it, authorities such as the CAK would continue to err for no fault of their own.
 18. State corporation staff were not officers in the public service and were outside the mandate of the Salaries and Remuneration Commission save the constitutional mandate of the Salaries and Remuneration Commission in addressing remuneration for public officers and giving advice to public service was fundamentally and foundationally different from that of the Public Service Commission who was given constitutional authority to;
 1. establish and abolish offices in the public service; and
 2. appoint persons to hold or act in those offices, and to confirm appointments.
 19. The AG was to take forward the opinion expressed above and give it the force of law. The diverse state corporations under the mandate of the SCAC particularly the CAK would benefit in terms of the law, policy and human resource instruments in force.
 20. The PSC was also given constitutional authority under article 234(2)(d) to investigate, monitor and evaluate the organisation, administration and personnel practices of the public service. Such mandate called for a proactive Commission. By standing aside to wait for state corporations to make requests for investigation, monitoring and evaluation was not sufficient. It could not happen considering the elaborate measures taken by the CAK to review its Human Resource instruments in consultation with the SCAC and the Minister had since approved the same for implementation. Such a situation demonstrated inaction on the part of the PSC and an abdication of its constitutional mandate.
 21. The PSC had failed to investigate the practices of the CAK and SCACs as provided for under section 60 of the Public Service Commission Act. The withdrawal of the delegated authority issued to the CAK was not sufficient. It was imperative that pursuant to article 234(2) of the Constitution, the PSC in



conjunction with the the AG should ensure legislative changes in managing public service. That would build harmony and cohesion under one constitutional commission, the PSC, by taking charge over public service. That was the essence of article 234(2)(g) and (h) of the Constitution that the PSC should review and make recommendations to the national government on conditions of service, qualifications of officers and evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in articles 10 and 232 of the Constitution were complied with in the public service. Unless the PSC was able to draw from those provisions and address them on priority basis, petitions such as the instant one would continue to be filed.

22. The complaint received from the petitioner should have moved the PSC into action. They had opted to blame the CAK and SCAC. Such did not benefit the people of Kenya in any way. It only frustrated persons in the public service for lack of a proper legislative framework supported by policy and human resource instruments that were streamlined under the Public Service Commission.
23. Pursuant to section 27 of the State Corporations Act, the CAK and SCAC were under the law allowed to review and investigate the affairs of the CAK and make recommendations and upon advice, review the establishment and reorganise its functions; and where necessary, advise on the appointment, removal or transfer of officers and staff. The 1st respondent in consultation with the SCAC and the Minister had reviewed its human resource and policy instruments and advertised for various positions internally and externally, which was the subject of the petition. That was done in recognition of the existing laws and in adherence to the provisions.
24. Challenges would not have arisen had the PSC been proactive in undertaking its mandate. The CAK was bound to follow the law as it was. The advertisements posted were within law and the human resource instruments approved for use by the SCAC and the Minister pursuant to section 27 of the State Corporation Act. The relief sought to declare the powers of the SCAC in approving the human resource instruments for use by the CAK would not issue. The CAK and SCACs had adhered to the law as it was.
25. Section 31 of the Public Service Commission Act allowed the PSC to delegate its functions in writing but such section was in conflict with articles 232, 233, 234, 235 and 236 with regard to the public service and the Public Service Commission under the Constitution and such section should be declared null and void.
26. The Public Service Commission as an independent constitutional commission was empowered under article 234(5) of the Constitution to delegate its functions and powers. Delegation of function and power did not negate the power held by a principal. Responsibility lay with the principal. Delegation did not imply parting with powers by the person who delegated but conferred authority to do things which otherwise the person delegating would have to do himself. A power to delegate further could only arise where it was within the scope of the primary delegate's authority.
27. It was constitutional and lawful for the PSC to delegate any of its functions to any of its members, officer, body or authority in the public service on condition that it was done in writing, with or without conditions. The PSC had issued such authority and delegated its powers to the CAK by letter dated July 30, 2018 save such matter had since been recalled by letter dated September 30, 2019. Regulation of the human resource of state corporations was the mandate of the PSC.
28. Various statutes, policies and practices in existence which gave the SCAC's various duties and responsibilities to regulate state corporations should be addressed by the PSC and the AGs accordingly to avoid further petitions in that regard. Such matters could well be addressed for the Executive and Parliament with expert advice from the PSC in consultation with the the AG to address and ensure adherence to article 234(2)(h) of the Constitution. There were far-reaching implications in the failure by the PSC to undertake an investigation and audit of all state corporations, including the CAK pursuant to article 234(2)(d) of the Constitution to ensure that the public service was efficient



and effective towards the development of human resources in the public service. That could only be achieved through concerted efforts between all the listed respondents.

29. The CAK's Human Resources policies and guidelines prescribed and approved by the SCAC were to remain in operation and application until further action was undertaken on the same by the PSC and the AGs. The PSC was to address and investigate and audit the CAK human resource instruments, policies and practices within 365 days from the date of the judgement and issue appropriate recommendations. The PSC was to report to the court on the measures undertaken to harmonise the law to meet the constitutional threshold pursuant to article 234 of the Constitution. The CAK had been granted operational autonomy by the SCAC. That was lawful and valid and would suffice pending action by the PSC and the AGs in the next 365 days. The orders were to run concurrently with the PSC undertaking an investigation of the organisation, administration and personnel practices of the CAKs and address.
30. The CAK was to proceed to use and apply and or implement the approved human resource policies and guidelines prescribed and approved by the SCAC for the next 365 days which was a reasonable time and space to engage and ensure a streamlined public service through the PSC.
31. The orders sought with regard to issuance of an injunction stopping the recruitment of director frequency spectrum management and director competition management of the CAK, which was done in the context of existing legislation out of no fault of the CAK and SCACs, would not issue. The recruitment of such officers was to proceed as advertised in application of approved human resource policies and guidelines applicable to the CAK.
32. To ensure completeness and taking into account the date the advertisements were closing the same was stopped by the court for good cause and to allow for the hearing of the petition, the CAK was to post and publicise a new date for receipt of all applications. That would give interested and eligible applicants a reasonable opportunity to put in their applications.
33. With regard to the internal advertisement for various vacant positions of the CAK, every employer had the prerogative to manage its internal affairs but that prerogative should not be used to deny any eligible employee a deserved promotion on the basis of fair competition and merit. Where the CAK had developed tools to ensure fairness and reward merit, with the advantage of expertise drawn from the SCAC, the internal advertisement for various positions was well addressed.
34. The core objective of article 232 of the Constitution was to ensure that all public/state institutions made all appointments and promotions on the basis of fair competition and merit and an advertisement was meant to promote fair competition among eligible candidates.
35. There existed no law which required an employer to confirm an officer in a vacant position on account of having acted in such position whatever the period of service. The parameters of article 232 of the Constitution applied. Every eligible candidate had to be given a reasonable opportunity to apply and fairly compete with others.
36. The petitioner was seeking to had and be provided with certified copies of Delegated instrument and revocation/withdrawal thereof of any delegated authority to the SCAC to carry out human resource powers and functions of the Public Service Commission. A letter of delegated authority was issued and dated July 30, 2018 and which was recalled by letter dated September 30, 2019. Such matter was not controverted in any manner. The facts as stated were part of the court record.
37. A consent filed in a different suit in the year 2015 could not apply in perpetuity to regulate the employment of all employees of the CAK particularly with regard to conversion of employment status from permanent and pensionable to contract terms even where the law permitted and the subject employee had given consent pursuant to section 13 of the Employment Act, 2007.
38. An employer had the prerogative to issue employment terms and conditions to each employee based on the business need and operational requirements save where the employer sought to change such terms from one employment regime to the other, such matter had to be brought to the attention



of the employee and who should give consent in writing. Conversion of employment terms and conditions was lawful and a legitimate practice at the shop floor subject to adherence to the applicable law, agreement or private treaty with the employee or the representative trade union or employers' organisation/association.

39. Section 10(5) of the Employment Act, 2007 required that any change to the employment contract be made in consultation with the subject and affected employee and upon the revision of the contract of service, it had to be done in writing and the subject employee(s) must signify his/her consent to the change/revision. In the instant case, where indeed the respondent had made changes, revised and or reviewed the terms and conditions of employment of any employee, there was need for interrogation as to whether written consent and approval was obtained and if so, whether the subject employee was aggrieved by any matter and if not, the matter must rest as the consent entered into in any other matter between another employee(s) and the CAK had to be looked at in its own merits. Employment was personal and specific and every employment contract had to be addressed on its terms and conditions.

Petition allowed.

Orders

- i. *Pursuant to article 234(2) of the Constitution the PSC was to review, audit and make recommendations with regard to the CAK human resource policies and practices of its officers/employees and report to the court within 365 days;*
- ii. *The PSC was to undertake an investigation of the organisation, administration and personnel practices of the CAK and report its recommendations within 365 days;*
- iii. *The PSC was directed to develop human resource policies and guidelines for the CAK in strict compliance with the Constitution and the law based on orders (i) and (ii) above;*
- iv. *The CAK were to re-issue the internal and other public advertisements for filling of vacant positions and allow receipt of applications within the next 14 days without placing to a disadvantage those who had already applied and those likely to apply in the extended period; the CAK was to apply existing approved tools until receipt of recommendations of the PSC in accordance with (i) and (ii) above; and*
- v. *Each was to shall bear its own costs.*

Citations

Cases

1. Attorney General & 2 others v Independent Policing Oversight Authority & another (Civil Appeal 324 of 2014; [2015] eKLR) — Explained
2. Chemilil Sugar Company Limited, Muhoroni Sugar Company Limited and South Nyanza Sugar Company Limited v Kenya Union of Sugar Plantations and Allied Workers (Cause 1882 of 2014; [2014] eKLR) — Explained
3. Hassan, Sumayya Athmani v Paul Masinde Simidi & another (Civil Appeal 195 of 2016; [2019] eKLR) — Explained
4. Kandie, Juma Kiprono & 2 others v Communications Authority of Kenya (Cause 128 of 2015; [2015] eKLR) — Explained
5. Katiba Institute & another v Attorney General & another (Constitutional Petition 331 of 2016; [2020] eKLR) — Explained
6. Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties) (Petition 236 of 2018; [2021] eKLR) — Explained
7. Kenya Union of Commercial, Food and Allied Workers v Salaries and Remuneration Commission & 2 others (Petition 30 of 2014; [2015] eKLR) — Explained
8. KUDHEIHA v SRC (Petition 294 of 2013; [2014] eKLR) — Explained
9. Mogusu, Rogers Mogaka v George Onyango Oloo & 2 others (Petition 96 of 2014; [2015] eKLR) — Explained



10. Mugendi, Daniel N v Kenyatta University & 3 others (Civil Appeal 6 of 2012; [2013] eKLR) — Explained
11. National Union of Water & Sewerage Employees v Mathira Water And Sanitation Company Limited & 2 Others (Cause 1664 of 2012; [2013]) — Explained
12. Njau, Alfred & 5 others v City Council of Nairobi (Civil Appeal 74 of 1982; [1983] eKLR) — Explained
13. Okoiti, Okiya Omtatah & another v Ann Waiguru Cabinet Secretary, Devolution & Head of Public Service (Petition 42 of 2014; [2014] eKLR) — Followed
14. Oriaro, Geoffrey v Cabinet Secretary Ministry of Labour Social Security and Services & 4 others (Petition 24 of 2015; [2015] eKLR) — Explained
15. Outa, Frederick Otieno v Jared Odoyo Okello & 4 others (Petition 6 of 2014; [2014] eKLR) — Explained
16. Republic v Communications Authority of Kenya Ex parte Information Communication Technology Association of Kenya (ICTAK) (Judicial Review Application 21 of 2020; [2021] eKLR) — Explained
17. Republic v Karisa Chengo (Petition 5 of 2015; [2017] eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 — Article 3; Article 22; Article 23; Article 34(5); Article 156; Article 159; Article 160; Article 165; Article 232(g); Article 233; Article 234(2)(a)(i),(5); Article 235; Article 236; Article 258; Article 260(1) — Interpreted
2. Co-operative Society's Act, 1997 (Act No 12 of 1997) — In general — Cited
3. Employment And Labour Relations Court Act, 2011 (Act No 20 of 2011) — Section 12(2) — Interpreted
4. Exchequer And Audit Act (Cap 412) — In general — Cited
5. Kenya Information and Communications Act, 1998 (Act No 2 of 1998) — Section 5A — Interpreted
6. Kenya National Qualifications Framework Act, 2014 (Act No 22 of 2014) — In general — Cited
7. Public Officer Ethics Act, 2003 (No. 4 of 2003) — Section 2 — Interpreted
8. Public Service Act — Section 31 — Interpreted
9. Public Service Commission Act, 2017 (Act No 10 of 2017) — Section 3; Section 25; Section 26; Section 27; Section 31; Section 33; Section 55(3)(5); Section 58(1); Section 60 — Interpreted
10. State Corporations Act (Act No. 11 of 1986) — Section 4; Section 5(3); Section 18(3); Section 26; Section 27(c) — Interpreted
11. Employment Act — In general — Cited

Advocates

None mentioned

JUDGMENT

1. The petitioner is seeking the following orders;
 1. A declaration that the 2nd respondent has no legal power or mandate whatsoever to prescribe or to approve Human Resource policies and guidelines for the 1st respondent or for any other public body;
 2. A declaration that section 31 of the Public Service Act is in conflict with articles 232, 233, 234, 235 and 236 (in respect of the Public Service and Public Service Commission) of the Constitution and the same is declared null and void;



3. A declaration that the 1st respondent's Human Resources policies and guidelines prescribed and approved by the 2nd respondent are null and void;
4. A permanent injunction against the 1st respondent from adopting, implementing or in any other way whatsoever dealing with the Human Resource policies and guidelines prescribed and approved by the 2nd respondent;
5. A permanent injunction stopping the recruitment of Director Frequency Spectrum Management and director Competition Management of the 1st respondent whereof invitation for applications close on October 26, 2021 and that the status quo be and is hereby maintained until such a time a legitimate recruitment process will be conducted in accordance with the law;
6. A permanent injunction stopping the internal advertisement for various vacant positions of the 1st respondent whereof invitations for applications close on October 19, 2021;
7. A declaration that the Board of the 1st respondent misadvised itself by subjecting its decision to confirm members of staff who have been acting in various positions to the approval or concurrence by the 2nd respondent;
8. The court be pleased to quash and set aside the letter dated August 6, 2021 by the 2nd respondent requiring the 1st respondent to implement the impugned HR policies and guidelines and declining to concur with the decision of the 1st respondent's Board to confirm members of staff who have been acting in various positions;
9. The court to direct the 3rd respondent to develop Human Resource Policies and guidelines for the 1st respondent in strict compliance with the law;
10. The court to direct the 3rd respondent to investigate the organisation, administration and personnel practices of the 1st and 2nd respondents;
11. The court be pleased to issue an order compelling the 3rd respondent to provide certified copies of Delegated instrument and revocation/withdrawal thereof of any delegated authority to the 2nd respondent to carry out human resource powers and functions of the Public Service Commission;
12. The court be pleased to issue any other or further remedy deemed fit to grant;
13. An order directing the respondents to pay costs of this petition.

Petition

2. The petitioner is a male adult. The 1st respondent is duly established under section 3 of the Kenya Information Communications Act and mandated to licence and regulate postal, information and communication services in line with article 34(5) of *the Constitution*. The 2nd respondent is established under the *State Corporations Act*. The 3rd respondent is established under article 234 of *the Constitution* and the 4th respondent is the Principal Legal Advisor to the government pursuant to article 156 of *the Constitution*.
3. The petition is that the 1st respondent advertised for two vacant positions in the print media on October 1, 2021 with respect to Director Frequency Spectrum Management and director competition management and applicants were directed to submit applications by October 26, 2021.



4. On September 28, 2021 the 1st respondent issued an internal advertisement inviting applications for 43 vacant positions. Applicants were to submit applications by October 19, 2021.
5. These advertisements were issued pursuant to the new Human Resource policies and guidelines prepared and prescribed by the 1st respondent for State Corporations Advisory Committee, the 2nd respondent.
6. The Human Resource manual requires that all serving and prospective employees of the 1st respondent from the position of Assistant Manager and above must have a minimum academic qualification of a Masters Degree and that the persons must have undertaken Supervisory or Management Courses lasting not less than 2 to 4 weeks respectively from a recognised institution. The 1st respondent has scheduled trainings for the identified staff to undertake supervisory and senior management courses to be conducted at the Kenya School of Government during the year 2021/2022.
7. The petition is that the scheduled staff trainings are discriminatory and prejudicial to members of staff who will have undergone the training on Supervisory and Senior Management Courses before the close of the advertisements for vacant positions. The scheduled training given unfair advantage to the staff whose trainings have been timed to take place before the deadline for the submissions of the applications.
8. The 1st respondent previously sought to fill the vacant position of Director General through an advertisement that contained the requirement that were not supported by the law. the matter was challenged in court but the 1st respondent still went ahead to advertise for the position in an irregular and incompetent manner despite findings in ELRC JR No 21 of 2020 – Republic of Kenya v Communications Authority of Kenya, ex parte Information Communications Technology Association of Kenya (ICTAK).
9. The office of the Director General of the 1st respondent is the highest ranking office in the Authority and is therefore not expected that junior officers in the advertised positions including Assistant Managers would be required to have much higher qualifications than the Director General. The 3rd respondent has the constitutional and statutory mandate to review the qualifications relating to public office in a public body.
10. The 3rd respondent issued a circular dated March 11, 2020 suspending the requirement of Strategic Leadership Development Programme and Masters Degree as parameters for promotion of public officers to senior positions and that promotion of public officers will be based on requisite experience and individual performance. Whereas such circular related to public officers it is not envisaged that members of the public and the serving employees of the 1st respondent would be required to have the same to qualify for the advertised positions.
11. Under section 55 of the Public Service Commission Act the 3rd respondent is mandated to review and make recommendations to the Cabinet Secretary on qualifications relating to a public office and the guiding principles for the review of qualifications are under section 55(5) of the Act. The 3rd respondent is also required to allow interested persons an opportunity to make representations before the review of qualifications.
12. The petitioner has an interest in the review and recommendations of the qualifications of the 1st respondent as a potential employee and has a duty to protect serving employees of the 1st respondent who are affected by the review of the qualifications. The 3rd respondent is expected to consult with the relevant professional bodies in reviewing the qualifications pursuant to section 55(3) of the



Public Service Commission Act and are expected that they would seek the view of the Kenya National Qualifications Authority established under the Kenya National Qualifications Framework Act.

13. The 2nd respondent does not have the legal mandate to prescribe human resource policies and guidelines as such is the mandate of the 3rd respondent pursuant to article 234 of the Constitution. Even where such mandate is delegated under section 33 of the Public Service Commission Act, the body exercising such delegated power must comply with the requirements of the Constitution and the Public Service Commission Act particularly section 55 of the Act.
14. The 3rd respondent in a letter dated July 30, 2018 delegated some human resource functions to the authorised officers seeking information on various matters, save the 2nd respondent is not one such body. The 2nd respondent has no legal mandate to manage the human resource of the 1st respondent in law or in fact.
15. Section 31 of the Public Service Commission Act allow the 3rd respondent to delegate its functions in writing but such section is in conflict with articles 232, 233, 234, 235 and 236 with regard to the public service and the Public Service Commission under the Constitution and such Section should be declared null and void.
16. The purported approval given to the 1st respondent through letter dated May 17, 2021 by the Ministry of ICT, Innovation and Youth Affairs and the subsequent Human Resources policies and guidelines developed and prescribed for the 1st respondent are therefore null and void and not capable of being implemented. These policies have been developed in violation of the Constitution. All positions subject of the internal advertisement are held by members of staff of the 1st respondent in acting positions some for over 5 years.
17. The petition is also that the 1st respondent Board of Directors made a decision to confirm 59 members of staff to the substantive positions where they have been acting but made the confirmation subject to the concurrence of the 2nd respondent.
18. In a letter dated August 6, 2021 the 2nd respondent declined to approve the decision of the 1st respondent board to promote employees to the positions they were acting in and instead advised them to advertise in line with the new policies and guidelines.
19. The 1st respondent board misadvised itself by subjecting its decisions to the approval of the 2nd respondent whereas under article 34(5) of the Constitution and section 5A of the Kenya Information and Communications Act it ought to be independent. The 1st respondent also failed to appreciate that promotion of its employees should be in compliance with promotion guidelines as prescribed by the 3rd respondent and not by internal advertisement.
20. The advertised position of Director, Frequency Spectrum Management is held by an officer, who is due to retire in March, 2022. The position of Director Competition Management has officially been created by transferring certain directors to other Directorates and thereby making it look like a vacancy when indeed there has been a substantive holder of Director Competition, Tariffs and markets Analysis now remained Competition Management in the new organisational structure.
21. The new human resource policies purport to convert the employment of all serving Directors from permanent and pensionable terms to employment on contracts. The conversion is detrimental to the directors and is in contempt of the Consent Orders that the 1st respondent recorded in court in ELRC Cause No 128 of 2015 Jumna Kiprono Kandie & 2 others v Communications Authority of Kenya. The 1st respondent agreed that before making any changes to its internal or organisational structure it would



comply with the law, regulations and policies that would not adversely affect the terms of employment for employees. For such contempt the 1st respondent ought to be punished.

22. The petition is that there is a deliberate conspiracy between the 1st and 2nd respondents to undermine *the Constitution* to frustrate members of staff of the 1st respondent and lock out qualified members of the public from joining the employment of the Authority. The respondents have devised human resource tools that are meant to lock out deserving members of staff from being promoted and further locking out qualified members of the public from applying for position that fall vacant within the Authority. They have created new senior positions of Directors just below the statutory position of Director General in express disregard to section 25, 26 and 27 of the *Public Service Commission Act* on establishment of public offices in the public service.
23. The petition is that the 3rd respondent has failed to investigate the illegal practices of the 1st and 2nd respondents as provided for under section 60 of the *Public Service Commission Act* despite these violations being brought to their attention.
24. The petition is that the petitioner has filed the petition in the public interests and under the provisions of articles 3, 22, 258, 23 and 159 read together with 160 and 165 of *the Constitution* and that unless the orders sought in the petition are granted there shall be grave public interest injury suffered that will irreparable and the respondents have no risk to be suffered.
25. The petition is supported by the affidavit of the petitioner.

1st Respondent

26. The 1st respondent in response filed the replying affidavit of Ezra Chiloba the Director General (DG) and avers that the petitioner is a stranger and lacks *locus standi* to file and prosecute this application and petition against the 1st respondent and has no sufficient interest in law to commence these proceedings since section 12(2) of the *Employment and Labour Relations Relation Court Act*, the petitioner is neither an employee of the 1st respondent nor an employer, a trade union or parties defined under the law to file a petition before this court.
27. The petitioner's supporting affidavit contains contradictions, fabrications and material non-disclosure calculated to mislead the court. The 1st respondent is the regulatory authority for the communication sector in Kenya and has been regulating the ICT industry in Kenya since 1999 when it was established under the *Kenya Information and Communications Act* (KICA) and has facilitated growth in the ICT sector since.
28. Mr Chiloba also avers that the 1st respondent has been implementing 5-year strategic plan cycles which provide the roadmap for its operations and resource allocation geared towards facilitation of growth in the ICT sector and in order to respond to the changing needs, has regularly reviewed its talent management strategy, skills requirements and utilisation of the existing human resource policies. Under the 2018/2023 strategic plan the 1st respondent committed to strengthen its institutional capacity and stimulate a high performing culture so as to deliver its mandate.
29. On May 15, 2017 the State Corporations Advisory Committee issued a circular requiring all state corporations to submit their human resource instruments for their approval and the 1st respondent reviewed its HR instruments including the Human Resource Policy and Procedures Manual, Career Guidelines, Job Grading, Organisational Structure and Staff Establishment. The process adopted on the review as indicated that;



- i. In December, 2020 the 1st respondent requested its employees to submit proposals and inputs to the HR instruments;
 - ii. Between 11th and January 22, 2021 a taskforce comprising member of the 1st and 2nd respondent carried out a review of the said HR instruments;
 - iii. On February 16, 2021 the management of the 1st respondent went on a retreat to discuss the proposals;
 - iv. The HR instruments were presented to the management committee on February 18, 2021;
 - v. On February 20, 2021 the Board of the 1st respondent went on a retreat to discuss the HR instruments and the 2nd respondent was invited to provide technical advice;
 - vi. The 1st respondent board approved the HR instruments on February 22, 2021;
 - vii. On March 7, 2021 the members of staff of the 1st respondent were invited to a meeting where the HR instruments were shared and were invited to make comments; and
 - viii. On March 1, 2021 the approved HR instruments were forwarded to the Ministry of ICT, Innovation & Youth Affairs for onward transmission to the 2nd respondent.
30. Mr Chiloba also avers that the staff of the 1st respondent were involved in the review of the HR instruments and the petitioner cannot purport that they were not afforded an opportunity to make representations. On March 11, 2020 the Head of Public Service issued a circular directing Boards of Directors to ensure that they were implanting SCAC approved Human Resource policy instruments in line with the circular. On May 17, 2021 the Principal Secretary, Ministry of Information Communication Technology and Youth Affairs informed the 1st respondent that the 2nd respondent had approved the authority's HR Instruments. The 1st respondent is now in the process of implementing the new instruments as part of the transition, the Board at its 97th meeting held on September 14, 2021 decided that vacant positions in various departments be filled through internal competition and in line with the new HR framework.
31. The 1st respondent on September 28, 2021 issued an internal advertisement inviting applications in respect of 43 vacant positions to be filled through internal competition. In addition to this, placed advertisements for two vacant positions that were posted on print media on October 1, 2021 for the position of Director Frequency Spectrum Management and the Director Competition Management. This was done in compliance with the HR instruments and article 232(g) of *the Constitution*, which mandates public institutions to make all appointments and promotions on the basis of fair competition and merit and the advertisement, is meant to promote fair competition among eligible candidates.
32. Mr Chiloba also avers that the requirement for a masters degree is not a new requirement in the new HR instruments as the 2007 Scheme of Service did not have a requirement of a post graduate degree from the Job Scale F/Assistant Managers across all departments. The 1st respondent has been sponsoring its employees for masters/post graduate degree programmes based on individual employees initiative and the requirement for masters degree for officers in the capacity of assistant managers and above is within the 1st respondent mandate as such officers need to be subject matter experts in their respective fields to be competent in their respective roles.
33. By a circular dated March 11, 2020 which suspended the requirement of Strategic Leadership Development Programme and Masters degree as parameters for promotion of public officers to senior position was a purpose specific policy meant to accommodate a specific niche of public officers who



at the time did not possess the requisite qualifications but needed to fill in vacant positions caused by retiring of old public officers. Such suspension was not meant to run indefinitely. The 2nd respondent has legal mandate to prescribe HR policies and guidelines for the 1st respondent the power to, where necessary, advice on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment removal, transfer or secondment

34. The 3rd respondent is required to delegate to the oversight agency responsible for state corporations/agencies its functions in relation to development and implementation of guidelines by state corporations/agencies and be responsible for;
- i. Customisation and issuance of guidelines for state corporations. Agencies in line with the guidelines on design of organisational structures;
 - ii. Approval of the organisational structures for state corporations/agencies;
 - iii. Provision of advice on the process of designing organisational structures for state corporations/agencies;
 - iv. Monitor the implementation of the approved structures; and
 - v. Ensure compliance with the provisions of these guidelines and provide annual reports.
35. The HR instruments developed by the 1st respondent are legal, valid and binding.
36. There is no law which give an obligation on the 1st respondent to confirm an officer in a vacant position on account of having acted in such a position.
37. The petitioner has no arguable case with a likelihood of success and should be dismissed with costs.

2nd Respondent

38. The 2nd respondent in response to the petition filed the replying affidavit of Wanjiku Wakogi the secretary and who avers that the 2nd responded is incorporated under the positions of section 26 of the *State Corporations Act* to review and investigate affairs of state corporation and make recommendations to the President as necessary and has other functions which includes to advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment. The 2nd respondent also has the role to advice the President on the removal of Board members and revocation of appointments.
39. Under the State Corporations (Performance Contracting) Regulations, 2004 the Minister for Treasury in consultation with the 2nd respondent is mandated to approve incentives for Board members and employees of the state corporations and under the Code of Governance for State Corporations (Mwongozo) the 2nd respondent is required to initiate development of guidelines on board induction, terms and conditions of service
40. The 2nd respondent undertakes its mandate directly and through the inspectorates of State Corporations in line with section 18(3) of the *State Corporations Act*.
41. Ms Wakogi also avers in reply that the residual framework governing the management of state corporations is the *State Corporations Act* and section 5(3) and 27(c) the 2nd respondent is mandated to facilitate advisories to Cabinet Secretaries relating to human resource in state corporations. Under section 15, the Board is required to offer oversight on operations and performances of state



corporations. The development of human resources for state corporations vests in the Board of Directors as provided for by the law.

42. The procedure for development of the relevant Human Resource Instruments pursuant to section 5(3) and 27(c) of the *State Corporations Act* is that the Board of Directors develop the instruments and submit to the responsible Minister for approval and upon receipt the Minister must consult with the 2nd respondent and upon a review advise the Minister on the same for approval and back to the organisation for implementation.
43. The objections of the Human Resource Policy instruments are to entrench good practices in management of employee and ensuring alignment with *the constitution* and all other relevant legislation is to institutionalise decision making on employee matters; create a transparent remuneration mechanism; create paths for growth and standards of behaviour and overall costs for the state corporation.
44. On March 19, 2021 the Ministry of ICT, Innovation and Youth requested the 1st respondent committee to consider the Human Resource Instruments pursuant to section 5(3) and 27(c) of the *State Corporations Act* and the 2nd respondent did so and at its 16th meeting held on April 14, 2021 issued its advice. The Human Resources Policy Instrument were transmitted to the Minister and part of considerations were the necessary qualifications that fit the purpose, mandate and performance of the state corporation, assure equity and equality of treatment across cadres and alignment to professional specific requirements. The career guidelines in particular insulate officers from newly introduced requirements for positions they substantively hold irrespective of minimum qualifications and experience for the higher grade.
45. The Committee in its considerations of the 1st respondent's Human Resources Policy instruments was in concurrence with the Board of Directors and the Minister of the need for a Masters degree qualifications for the advertised positions as they are not only technical positions requiring a higher level of competence but the staff appointed thereof would form the pool for which succession to the Director General position would be sourced.
46. The questions of a Masters degree requirement for officers below the Director General position as alleged by the petitioner to be a requirement was never determined by the court or settled by Consent. The 2nd respondent agreed with the 1st respondent's Board and the Minister for a Masters degree requirement for the position of Director General. Various court judgements have affirmed the place of Mwongozo Code of Governance for State Corporations within the legal framework and its applicability in the governance of state corporations.
47. Any recruitment including the filling of any vacant positions held in an acting capacity ought to be undertaken as per the approved Human Resource Policy instruments. The framework used in the review and approval is not unique to the 1st respondent and all other state corporations comply with its requirements in line with the prevailing law, policy and guidelines.
48. The alleged conversion of employment terms from permanent and pensionable to contract is aligned to the policy adopted by the government and guided by the Human Resource Instrument applicable to top level management and is intended to assure and incentivise performance based on the set targets.
49. The entire human resource management in state corporations falls outside the purview of the Public Service Commission (the Commission) in term of the 4th respondent Legal Opinion dated December 17, 2012 and Legal opinion on Salaries and Remuneration Commission mandate over State Corporations dated August 21, 2014.



50. The powers of the 3rd respondent under article 234(2) of *the Constitution* are subject to *the constitution* and the law. The *State Corporations Act* being *lex specialis* legislation grants mandate and function to various institutions and governance structures including the Office of the President.

3rd Respondent

51. In reply to the Petition, the 3rd respondent filed the replying affidavit of Simon K Rotich the Secretary and Chief Executive officer and who avers that the 3rd respondent has a constitutional mandated pursuant to article 234 of *the Constitution* and exercisable over all public offices including state corporations including the 1st respondent save for bodies outlined under article 234(3) of *the Constitution*.
52. Mr Rotich also avers that the question whether state corporations are part of the public service and whether its employees are public officers as defined in article 260 of *the Constitution* was addressed in High Court Petition No 294 of 2013 *KUDHEIHA v SRC* and the court held such employees are part of the public service and hence public officers. This remains the position. under article 234 of *the Constitution*, the effect of the enactment of *Public Service Commission Act* is that it is an Act for the provision of the functions, powers and the administration of the Public Service Commission and to give effect to article 234 of *the Constitution*.
53. Section 3 of the *Public Service Commission Act* states that the Act applies to all public bodies and persons holding office in the public service. Public body is then defined to include a corporations, council board, body or committee relating to any law which exercise its functions in the public service. In this regard, the *Public Service Commission Act* provisions apply to the 1st respondent which is a state corporation and public body. Section 55 of the *Public Service Commission Act* gives power to the 3rd respondent to review and make recommendations to the Minister responsible for the Public Service on qualifications relating to a public officer, category of public officer or all public officers in a public body.
54. On March 11, 2020 the 3rd respondent issued a circular suspending the requirement of Strategic Leadership Development Programme and Masters degree as parameters for promotion of public officers to senior positions and it was categorical that the requirement would still be a requirement for promotion to Director
55. Position or all positions graded at CSG 5 and above. It was noted that some of the requirements for promotion may not be facilitating acquisition of the envisaged skills, competencies and other attributes and the decision to suspend the said requirements was a temporary measure to enable for the evaluation and relevance and suitability of existing promotion courses in equipping public servants with the necessary skills, competencies and attributes.
56. Under article 234(2)(a)(i) of *the Constitution*, the 3rd respondent is given power to establish offices in the public service. Section 26 and 27 of the *Public Service Commission Act* was enacted to give effect to these constitutional provisions particularly the determination and creation of the number and kinds of offices in the public service and the law goes further to set the requirements the 3rd respondent should consider while undertaking such mandate.
57. Mr Rotich also avers that undersection 26 and 27 of the *Public Service Commission Act*, any office in the public service falling within its mandate to establish cannot be so established by any party or body without its approval. The development or review of the organisational structure of a public service entity such as the 1st respondent must be approved by the 3rd respondent before implementation pursuant to section 58 of the *Public Service Commission Act* and any change or implementation without



approval is unconstitutional and express violation of article 234(2)(a) (i) of the Constitution and section 26, 27 and 58(1) of the Public Service Commission Act.

58. The 3rd respondent has not received any request from the 1st respondent to review or establish any position qualifications relating to public officers or offices and was not aware of any review until letter by the petitioner dated October 8, 2021 inquiring about the matter.
59. The petition that section 31 of the Public Service Commission Act is unconstitutional is not correct since article 234(5) of the Constitution gives the 3rd respondent power to delegate in writing with or without conditions any of its functions and powers under the constitution to any person in the public Service. Under this mandate the 3rd respondent delegated to the 2nd respondent powers pursuant to letter dated December 14, 2015 but the powers delegated did not relate to the provisions of article 234(2) of the Constitution to establish and abolish offices in the public service which is a fundamental function of Public Service Commission and cannot be delegate to a third party as such would be prone to abuse to the detriment of the people of Kenya.
60. On September 30, 2019 the 3rd respondent recalled and withdrew the delegation of its functions to the 3rd respondent. Such has not been reinstated and the 2nd respondent has no power to establish, abolish or determine the organisational structure of the 1st respondent.
61. The State Corporations Act on the powers and functions of the 2nd respondent does not include that of establishment or abolition of offices or review of organisational structures of state corporations. The 3rd respondent has not been requested to either establish or review the organisational structure of the 1st respondent nor has it approved human resource policies and guidelines. There is no request to investigate the personnel practices of the 1st respondent and prayers (a), (i) and (m) of the petition are premature. Prayers (d) of the petition cannot issue since section 31 of the Public Service Commission Act is in line with article 234(5) of the Constitution and the petition should be dismissed with costs to the 3rd respondent.
62. In the written submissions, the 1st respondent submitted that the petitioner is a stranger and lacks the requisite *locus standi* to file and prosecute the petition against the respondents and has no sufficient interest in law to commence these proceedings before this court. That he is not an employee of the 1st respondent and is certainly not in any way aggrieved or affected by the internal advertisements inviting applications in respect of the forty-three (43) vacant positions in the 1st respondent meant to be filled through internal competition. The petitioner also has no interest in the external advertisements for the positions of Director Frequency Spectrum Management and the Director Competition Management as he has not annexed a copy of his application for any of those 2 positions. As such, counsel urges this court to dismiss the instant petition for lack of *locus standi*.
63. The 2nd respondent is an unincorporated entity established under section 26 of the State Corporations Act and under section 27 of the State Corporations Act mandates it to review and investigate the affairs of State Corporations and make such recommendations to the President as it may deem necessary; in consultation with the 4th respondent and the Treasury to advise the President on the establishment, reorganization or dissolution of state corporations; where necessary to advise on the appointment, removal or transfer of officers and state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment. The 2nd Respondent is also required to *inter alia* advise the President on removal of a Board or any member of a Board of a State Corporation; including the revocation of appointments, nomination of new members of the Board, or Constitution of a new board under section 7(3).



64. The functions and powers of the 3rd respondent articulated in article 234(2) are subject to the Constitution and Legislation. The State Corporations Act being a *lex specialis* legislation grants mandate and function to various institutions and governance structures including the Office of the President, the 2nd respondent, the Inspector General Corporations, the National Treasury, Cabinet Secretaries of respective line ministries, the Boards of Directors and Chief Executive Officers of the entities themselves and not the 3rd respondent. State Corporations are established as special purpose vehicles to serve a specific strategic public purpose, governed by principles of corporate governance and espousing common characteristics as are applicable to private sector entities.
65. The 3rd respondent has mandate over state corporations and is a matter *sub judice* as the same is now the subject of an appeal in Civil Appeal No E096 of 2021. Therefore state corporations and parastatals are not offices in the national or county governments or public service. That article 234(2) (f) of the Constitution and section 55 of the Public Service Commission (PSC) Act which mandates the 3rd respondent to develop human resources policies in the public service do not extend and/or apply to the 1st respondent which is a state corporation. The only entity known in law with the mandate to approve HR policies and guidelines for state corporations like the 1st respondent is the 2nd respondent.
66. The 1st respondent also submitted that due process was followed in the development, approval and implementation of the HR instruments for the 1st respondent. The framework used in the review and approval of Human Resource Policy Instruments is not in any way unique to the 1st respondent and all other State Corporations comply with this requirement in line with prevailing law, policy and issued guidelines. Further, due process was followed in the development, approval and implementation of the HR Instruments by the 1st Respondent.
67. The alleged conversion of employment terms from permanent and pensionable to contract, with respect to the advertised directorship positions is aligned to a policy position adopted by the Government, guided by the Human Resource Instruments applicable to the top level management and is intended to assure and incentivize performance based on the set targets.
68. The 2nd and 4th respondents submitted that the court lacks jurisdiction on two grounds. First the petitioner lacks *locus standi* to file and prosecute this petition against the respondents as he has no sufficient interest in law to commence these proceedings. Secondly, the petition does not disclose a cause of action or dispute within the meaning of section 12(1) of the Employment and Labour Relations Court Act. He relies on the case of Geoffrey Oriaro v Cabinet Secretary Ministry of Labour Social Security & Services & Others [2015] eKLR where the court held that for there to be an employer-employee relationship, a person must be having an oral or written contract of service and must be receiving a wage or salary for services rendered. There must be a contract of service.
69. The ELRC does not have jurisdiction to declare the provisions of an Act of Parliament unconstitutional as this is the preserve of the High Court. He relies on the case Republic v Karisa Chengo & 2 others [2017] eKLR where the Supreme Court held that;
- The three are different and autonomous Courts and exercise different and distinct jurisdictions. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.
70. The human resource policies and guidelines issued by the 2nd respondent are lawful and the impugned Human Resource policies and guidelines issued by the 2nd respondent are lawful as the same are formulated pursuant to the provisions of section 27 of the State Corporations Act and The Code of



Governance for State Corporations (*Mwongozo*). Section 4 and 5(3) of the *State Corporations Act* as well as provisions of *Mwongozo* authorize the Cabinet Secretary and the 2nd respondent to exercise oversight authority over state corporations falling within their docket.

71. Courts have issued several Judgements to the effect that State Corporations are not offices within the public service and as such the Public Service Commission has no role in the management and operations of State Corporations. He relies on the case of *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021] eKLR where the court stated as follows;

We therefore find and hold that positions in Parastatals and State Corporations are not positions in the public service.

72. Consequently, the court should not interfere with the 2nd respondent's mandate to prescribe Human Resource policies and guidelines for the 1st Respondent or any other state corporation as this is the statutory mandate of the 2nd respondent and the law ousts the jurisdiction of the 3rd respondent in the management of state corporations.

73. The Attorney General for the 3rd and 4th respondents submitted that there are only four sectors in our country upon which all organisations, institutions, enterprises and businesses may fall. These are the private sector, the public sector which includes Ministries, State owned corporations, enterprises, businesses, industries, organisations, Non-Governmental Organisations (NGOs) and Community Based Organisations (CBOs). State Corporations, including the 1st respondent, collectively fall within the government of the Republic of Kenya. the definition of "public service" under article 260 of *the Constitution* which defines the Public Service as the collectivity of all individuals, other than state officers, performing a function within a state organ/ which is clear that State corporations are State owned and which, as per the definition of a State, comprise the government of the Republic under *the Constitution* are part of the public service.

74. Further, the remuneration of officers in State Corporations is payable either from money provided by Parliament through the national annual budget or funds retained by the State Corporation pursuant to the provisions of article 206(1)(b) which empowers State organs to retain money that they receive for purposes of defraying expenses as empowered by an Act of Parliament. Counsel relies on the case of *KUDHEHIA v SRC* where the court held that;

...any other finding would be absurd, illogical and impractical given the design and structure of our Constitution.

75. Article 233 of *the Constitution* establishes the 3rd respondent with functions and powers provided for in article 234. The article gives the 3rd respondent the constitutional mandate to manage human resource in the entire public service save for the excluded public offices and public officers stated in article 234(3) of *the Constitution*. Whereas the various legislations establishing State Corporations give power to Boards of the said State Corporations to appoint persons, no legislation gives the Board of any State Corporation power to establish offices in the State Corporation. As such, the only entity that is constitutionally and legislatively mandated to establish offices in State Corporations and specifically offices in the 1st respondent is the Public Service Commission. Consequently, the 3rd respondent has authority over State Corporations, including the 1st respondent, in as far as management of human resources is concerned including the establishments of offices and appointment of persons to hold those offices to the extent that is not otherwise provided by *the Constitution* and legislation.



76. Section 27 of the *PSC Act* reiterates the Constitutional function and power of the 3rd respondent to establish offices in the public service and sets the requirements precedent to the 3rd respondent establishing offices in the public services.
77. From the provisions of sections 26 and 27 of the *PSC Act* it is clear that an office in the public service falling within the mandate of the 3rd respondent cannot be established without the approval of the 3rd respondent. In light of the provisions of section 26 of the *PSC Act*, as read together with section 58(1) the development or review of the organization structure of a public service entity such as the 1st respondent should be approved by the 3rd respondent before implementation. The implementation of any establishment, organisation structure or qualifications without the approval of the 3rd respondent is unconstitutional and unlawful for violating the express provisions of article 234(2)(a)(i) of *the Constitution* and sections 26, 27 and 58(1) and 55 of the *PSC Act* and we urge the court to allow the petition to this extent.

Determination

78. The following issues are outlined for determination;
- Whether positions held in state corporations are in the public service subject to regulation by the 2nd or 3rd respondent;
 - Whether section 31 of the Public Service Act is in conflict with articles 232, 233, 234, 235 and 236 (in respect of the Public Service and Public Service Commission) of *the Constitution* and the same is declared null and void;
 - Who should regulate the human resource of state corporations?
 - The reliefs to grant.
79. Before delving into the issues above, the 1st respondent challenged the standing of the petitioner to file this petition or seek the reliefs outlined. That the petitioner lacks sufficient interest in law to urge this petition and the Court of Appeal in the case of *Alfred Njau & 5 others v City Council of Nairobi* [1983] eKLR that;

The term *locus standi* means a right to appear in Court, and consequently, as is stated in *Jowitt's Dictionary Law*, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.

80. Indeed under section 12(2) of the *Employment and Labour Relations Court Act*, 2011 the law provides for employment and labour relationships which give court jurisdiction to address save in the preamble to the Act, the provisions extend to for connected purposes.
81. The court is given a constitutional mandate to hear and determine all employment and labour relations disputes. This mandate is defined in various cases before this court and the Court of Appeal in the case of *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR;

... [the Employment and Labour Relations Court has] jurisdiction to enforce labour rights in article 41 and the jurisdiction to interpret *the Constitution* and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only article 41 rights but



also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.

82. In this regard, the petition herein is anchored under the provisions of various articles of the Constitution particularly article 22, 23, and 258 of the Constitution, 2010. Under these provisions, a petitioner is allowed to file a petition to vindicate the rule of law and get the unlawful conduct stopped. In doing so, The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives standing to any member of public acting *bona fide* and having sufficient interest in instituting an action for redress of public wrong or public injury. The public good is clear.

Article 258 of the Constitution provides as follows:

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) A person acting on behalf of another person who cannot act in their own name;
 - (b) A person acting as a member of, or in the interest of, a group or class of persons;
 - (c) A person acting in the public interest; or
 - (d) An association acting in the interest of one or more of its members.

83. At the core of this petition, the petitioner is seeking various declarations, reliefs and particularly that section 31 of the Public Service Act is in conflict with articles 232, 233, 234, 235 and 236 of the Constitution in respect of the public service and Public Service Commission and the same is declared null and void. Such a determination will therefore go to the mandate of the 1st respondent in managing its human resource *visa-a-vis* the mandate of the 2nd and 3rd respondents. These are matters which call on the court to address the constitutionality of various statutes looked at together with the constitution and make a finding.

84. The Court of Appeal in the case of Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR that;

By article 22(1) as read with article 22(3) and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 - Legal Notice No 117 of 2013, the Bill of Rights is enforced by filing a petition in the High Court and by article 23(3), the court may grant appropriate relief including a declaration of invalidity of any law that violates the Bill of Rights. The Employment Act, 2007 as revised in 2012 – after the coming into operation of the current Constitution, indicates in the preamble that one of its objects is to declare and define the fundamental rights of employees. Section 3 thereof provides that the Act applies to all employees employed by an employer under a contract of service except the classes of employees specified therein.

The employment and Labour Relations Court Act stipulates the procedure for the enforcement of employment rights.

85. The petitioner has defined himself as a citizen of Kenya and has filed the petition herein on his own behalf and on behalf of the entire Kenyan public as the issues addressed affect and are likely to affect and entire country. Such matters addressed in the petition give the petitioner proper standing before



this court. See *Okiya Omtatah Okioti & another v Anne Waiguru, Cabinet Secretary, Devolution and Planning & others* Petition No 42 of 2014.

86. On whether positions held in state corporations such as the 1st respondent are in the public service subject to regulation by the 2nd and or the 3rd respondent, such matter has been the subject of litigation and fundamentally the constitutional threshold is article 260 of *the Constitution* defines “public officer” as follows:
- Public officer means –
- (a) any State officer; or
 - (b) any person, other than a state officer, who holds a public office.
87. It defines „public office as follows:
- “Public office means an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament”
88. On the other hand „public service is defined as follows;
- “public service means the collectivity of all individuals, other than State officers, performing a function within a State organ”
89. The „collectivity of public service and being a public officer are all interlinked into public service. the only exception is state officers performing a function within a state organ. All other persons serving the People of Kenya are in the public service. This is the constitutional definition.
90. This collectivity in public service is further given meaning pursuant to section 2 of the *Public Officer Ethics Act* that defines a public officer as follows;
- Public officer means any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following-
- a) the Government or any department, service or undertaking of the Government;
 - b) the National Assembly or the Parliamentary Service;
 - c) a local authority;
 - d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;
 - e) a co-operative society established under the *Co-operative Societies Act*;
91. The courts in addressing the issue of whether employees of state corporations are public officers within the meaning of article 260 of *the Constitution* have affirmed the same and given emphasis to the fact of service to the Kenyan public as a collective.



92. In *National Union of Water & Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 others* [2013] eKLR the court held that;

“The employees of Mathira Water and Sanitation Company may therefore be viewed as public servants, as they are working for an agent and instrumentality of a Public Authority. They are public servants, though not in the traditional public service, controlled directly by Government Ministries. Their employer is a private company, rendering public service. The Water Bill proposes that the water agents may conduct their functions through a public-private partnership. Persons drawn in as partners of the water agents will themselves be new forms of employers, and their employees would not easily fit in the public servant-private employee dichotomy. In the view of the court, employees of the water companies are vaguely public servants, going by the definition given by Oxford Dictionary at paragraph 25 above. The characterization is a matter of qualitative judgment, rather than quantitative measurement.”

93. In *Rogers Mogaka Mogusu v George Onyango Oloo & 2 others* [2015] the court held that;

“If LBDA receives funds from the Parliament of Kenya and its Chairman gets paid from such funds, can it properly be said that he is not a public officer? I think not and the law as expressed above bears me out.

It also follows that the circular dated July 4, 2013 by the Registrar of Political Parties has captured the law well and ought to be implemented otherwise perceived partisan, non-impartial officials of political parties will also play important roles in public entities, a situation that cannot be proper in our new and settling constitutional dispensation.

It is my finding therefore that as Chairman of LBDA, the 1st respondent is a public officer and it is untenable that he should continue holding the position of Secretary-General of TNA

94. In *Katiba Institute & another v Attorney General & another* [2020] eKLR, a bench comprising of three Judges held that;

“As we have already stated, public service is the collectivity of all individuals, other than state officers, performing a function within a State organ; while State organ is either, a commission, office, agency or other body established under *the Constitution*. That means, the collectivity of the individuals must be performing a function within a state organ established under *the Constitution*. It is clear to us that offices in state corporations and parastatals are not commissions, offices, agencies or other bodies established under *the Constitution*. They are, therefore, not state organs within the meaning of *the Constitution*.

67. Regarding remuneration and benefits, our reading of the law is that this is not directly drawn from the Consolidated Fund or directly provided by Parliament. Under section 11 of the *State Corporations Act*, state corporations are required to prepare and submit to the line minister and the Treasury for approval, yearly estimates of their revenue and expenditure accompanied by proposals for funding of the projects they are to undertake, or implement during the financial year. This is testimony to the fact that state corporations and parastatals generate their own revenue for expenditure, and their funding is not necessarily wholly provided for by Parliament.



68. To answer the first issue in this petition, we find and hold that positions of chairpersons and members of boards of state corporations and parastatals are not offices in the public service."
95. And the Supreme Court of Kenya in *Frederick Otieno Outa v Jared Oduyo Okello & 4 others* [2014] eKLR held that;
- "It is my understanding, therefore, that the definition of public officer⁶ cannot be strictly confined to the singular definition clause in article 260; there are other constitutional stipulations, and statutory and common law provisions that speak to the definitions, values, principles, and the institutional framework of public service that must apply. This therefore calls for *the Constitution* to be read in a holistic manner when it comes to the interpretation of any one clause."
96. The Court further stated that before determining whether an individual is a public officer and in line with the provisions of article 259, the court must consider the following questions;
- a) Is the person concerned in an office in the national government, the county government or the public service?
 - b) Does that person receive remuneration or benefits payable by the consolidated fund or directly by moneys provided by Parliament?
 - c) Does that person perform a function within a state organ or a state corporation?
97. In *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhebia Workers) v Salaries and Remuneration Commission* [2014] eKLR the court held that;
- "What I gather from the above definition is that the criteria for determining whether one is a public officer is quite clear and requires no more than a literal interpretation. First, the person must hold an office either in the national government, county government or public service; secondly, the remuneration and benefits of that officer must be payable directly from the Consolidated Fund or directly out of money provided by Parliament."
98. The convergence is that officers and persons serving/working in state corporations are public officers within the meaning of article 260 of *the Constitution*.
99. Therefore, article 260 of *the Constitution* gives an explicit definition of public service, as;* the collectivity of all individuals, other than State officers, performing a function within a state organ.
100. A body corporate established under an Act of Parliament is a State corporation within the meaning of that Act, and therefore subject to *the Constitution*. All State Corporations have national outreach by nature and design, fall squarely under the auspices of the National Government. This also means that the 1st respondent is also a public service institution that was in existence under the former constitution and its officials and employees would be considered public officers under it. The effect of the transitional clause in section 31 of schedule 6 of the current *Constitution* applies with regard to the 1st respondent employees.
101. In the written submissions, the 1st respondent has heavily relied on the three-Judge Bench in the case of *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021] eKLR with the view that state corporations are not regulated and its officers are not within the meaning of public officers and do not hold office in public service. however, such



matter, in my appreciation of the facts related to the appointment of Board Chairpersons and Board Members thereof and not with regard to persons employed on contract to work and serve under the Board. An employee in a parastatal or a state corporation and a board member appointed under the *State Corporations Act* by the President hold different positions in fact and in law. The two cannot be equated and placed under the same legal regime. One is under an appointment by the President and subject to removal under the same mandate whereas an employee is recruited and appointed under terms and conditions of service to perform a public service in the state corporation.

102. State corporations are agencies of the Government.
103. As stated by Mr Chiloba in his replying affidavit, the 1st respondent has been in existence since the year 1999 regulating the communications/ICT sector in Kenya, a resource that belongs to the people of Kenya, the public, held in trust for them by the Government. The employees of the 1st respondent are paid from public funds, not private funds.
104. All other Public Officers⁴ must include all shades of public servants, including employees of the State Corporations, which like the 1st respondent are agents and instrumentalities of the Government. The involvement of the Public Service Commission, 3rd respondent with regard to all other Public Officers,⁵ must however, be limited to advising the Government and its Agencies in the human resource policy, not defining and running the process.
105. In *Rogers Mogaka Mogusu v George Onyango Oloo & 2 others* [2015] eKLR the court referenced the case of KUDHEIHA, cited above and the findings that;

“It cannot be denied therefore that in the above context, Moi Teaching and Referral Hospital as well as Kenyatta National Hospital are State Corporation established under section 3 of the *State Corporations Act*. Public Universities such as Moi University, University of Nairobi, and Egerton University etc are established by Acts of Parliament as public universities. Although these institutions do not receive monies from the consolidated fund, they are empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations receive funds from Parliament through their respective Ministries and fit the description in Article 260 regarding funds from Parliament.

Further Public fund⁶ has the meaning assigned to it by the *Exchequer and Audit Act* (cap 412 Laws of Kenya). Public money is said therefore to include; revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not. Given that definition of public funds and given that the Petitioner’s members work for institutions, parastatals or corporations that provide a public function, then to my mind they are properly within the public service category and therefore state corporations and their employees fall within the meaning of public office and public officers, and I so find.”

106. In the case *National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 others* [2013] eKLR, cited above, the court held that;

“The employees of Mathira Water and Sanitation Company may therefore be viewed as public servants, as they are working for an agent and instrumentality of a Public Authority. They are public servants, though not in the traditional public service, controlled directly by Government Ministries. Their employer is a private company, rendering public service. ...”



107. The constitutional threshold for regulation of public service is a mandate of the 3rd respondent. Under article 234(2) directs in mandatory terms that;
- (2) The Commission shall—
 - (A) subject to this Constitution and legislation--
 - (i) Establish and abolish offices in the public service; and
 - (ii) Appoint persons to hold or act in those offices, and to confirm appointments;
108. Pursuant to article 234(d) to (h) of *the Constitution*, the 3rd respondent is directed to evaluate all organisation in the public service; ensure efficiency; develop human resources; review and make recommendations to the national government in respect of conditions of service; and evaluate and report to the President and Parliament on the extent to which the principles and values of article 10 and 232 are complied with in the public service;
- (d) Investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
 - (e) Ensure that the public service is efficient and effective;
 - (f) Develop human resources in the public service;
 - (g) Review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
 - (h) Evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in articles 10 and 232 are complied with in the public service;
109. This is therefore the repository of all public service regulation in terms of terms and conditions of service in its collectivity. It is a constitutional mandate.
110. In this regard, there exists the *State Corporations Act* and in its preamble provides that;
- “An Act of Parliament to make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes.”
111. The control and regulation of state corporations is therefore statutory.
112. Pursuant to section 5(3) of the *State Corporations Act*, the Board of a state corporation is allowed to employ staff on terms and conditions of service as the Minister in consultation with the Committee may approve.
- (3) A state corporation may engage and employ such number of staff, including the chief executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve.
113. This is in contradiction of article 234(2) read together with article 260 of *the Constitution* on regulation of public service and definition of who a person in the public service is.
114. The entity given constitutional authority to employ, issue terms and conditions of service, review, audit and advice with regard to public service is the 3rd respondent. Employees in the service of the 1st respondent Authority are subject to the constitutional mandate of the 3rd respondent.



115. I take cognisance of the Legal Opinion issued by the 4th respondent dated December 17, 2012. With respect, the advisory/Legal Opinion should translate into legislation giving effect/force to the provisions of article 234 of *the Constitution*. That is to ensure the intentions of the People of Kenya in stating that the Public Service Commission is in charge of the public Service is not negated by other statutory provisions in force as at August, 2010.
116. The 4th respondent must address such matter with urgency and harmonise the legislation with *the Constitution* as without giving a proper framework, litigations such as the instant petition shall continue to be filed out of great need to streamline public service applied by different agencies due to the nature of the statutory mandate specific to each authority, agencies, state corporations and parastatals.
117. A common thread should flow from the 3rd respondent as currently mandated under *the Constitution*. Without it, authorities such as the 1st respondent will continue to err for no fault of their own.
118. In the replying affidavit of Ms Wakogi she avers that the court in the cases of *Chemilil Sugar Company Limited, Muboroni Sugar Company Limited and South Nyanza Sugar Company Limited v Kenya Union of Sugar Plantations and Allied Workers* Cause No 1882 of 2014 and in the case of *Kenya Union of Commercial, Food and Allied Workers v Salaries and Remuneration Commission & 2 others* [2015] eKLR the court held that state corporation staff are not officers in the public service and are outside the mandate of the Salaries and Remuneration Commission save the constitutional mandate of the Salaries and Remuneration Commission in addressing remuneration for public officers and giving advisory to public service is fundamentally and foundationally different from that of the 3rd respondent who is given constitutional authority to;
- (i) Establish and abolish offices in the public service; and
 - (ii) Appoint persons to hold or act in those offices, and to confirm appointments;
119. The 4th respondent shall take forward the Legal Opinion addressed above and give it the force of law. The diverse state corporations under the mandate of the 2nd respondent particularly the 1st respondent will benefit in terms of the law, policy and human resource instruments now in force.
120. The 3rd respondent is also given constitutional authority under article 234(2)(d) to;
- (d) Investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
121. Such call for a proactive Commission. By standing aside to wait for state corporations to make requests for investigation, monitor and evaluation is not sufficient. It may never happen taking note of the elaborate measures taken by the 1st respondent to review its HR instruments in consultation with the 2nd respondent and the Minister has since approved the same for implementation. Such demonstrates inaction on the part of the 3rd respondent and an abdication of its constitutional mandate.
122. The petitioner is therefore correct in his assertion that the 3rd respondent has failed to investigate the practices of the 1st and 2nd respondents as provided for under section 60 of the *Public Service Commission Act*. The withdrawal of the delegated authority issued to the 1st respondent is not sufficient. It is imperative that pursuant to article 234(2) of *the Constitution*, the 3rd respondent in conjunction with the 4th respondent should ensure legislative changes in managing public service. This will build harmony and cohesion under one constitutional commission, the 3rd respondent by taking charge over public service.



123. This is the essence of article 234(2)(g) and (h) of *the Constitution* that the 3rd respondent should review and make recommendations to the national government on conditions of service, qualifications of officers and evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in article 10 and 232 are complied with in the public service. Unless the 3rd respondent is able to draw from these provisions and address on priority basis, petitions such as the instant one will continue to be filed.
- (g) Review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
 - (h) Evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in articles 10 and 232 are complied with in the public service;
124. The complaint received from the petitioner should have moved the 3rd respondent into action. They have opted to blame the 1st and 2nd respondents. Such does not benefit the People of Kenya in any way. It only frustrates persons in the public service for lack of a proper legislative framework supported by policy and HR instruments that are streamlined under the Public Service Commission, the 3rd respondent.
125. Pursuant to section 27 of the *State Corporations Act*, the 1st and 2nd respondent are under the law allowed to review and investigate the affairs of the Authority and make recommendations and upon advice review the establishment and reorganise its functions; and where necessary, advise on the appointment, removal or transfer of officers and staff in the following terms;
27. Functions of the Committee
- (1) The Committee shall advise on the matters and perform any functions it is required by this Act to perform and in addition shall—
 - (a) With the assistance of experts where necessary, review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary;
 - (b) In consultation with the Attorney-General and the Treasury, advise the President on the establishment, reorganization or dissolution of state corporations;
 - (c) where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;
 - (d) Examine any management or consultancy agreement made or proposed to be made by a state corporation with any other party or person and advise thereon;
 - (e) Examine proposals by state corporations to acquire interests in any business or to enter into joint ventures with other bodies or persons or to undertake new business or otherwise expand the scope of the activities and advise thereon.
126. Under this legal framework and as outlined by the Director General in the replying affidavit of Mr Chiloba, the 1st respondent in consultation with the 2nd respondent and the Minister have reviewed its human resource and policy instruments and advertised for various positions internally and externally,



now the subject of this petition. Such is done in recognition of the existing laws and in adherence to the provisions therefrom.

127. As outlined above, such challenge would not have arisen had the 3rd respondent been proactive in undertaking its mandate. The 1st respondent is bound to follow the law as it is. The advertisements posted are within law and the HR Instruments approved for use by the 2nd respondent and the Minister pursuant to section 27 of the *State Corporation Act*.
128. The relief sought to declare the powers of the 2nd respondent in approving the HR instruments for use by the 1st respondent shall not issue. The 1st and 2nd respondents have adhered to the law as it is.
129. On whether section 31 of the *Public Service Act* is in conflict with articles 232, 233, 234, 235 and 236 of *the Constitution* in respect of the Public Service and Public Service Commission, the petition is that the 3rd respondent in a letter dated 30th July, 2018 delegated some human resource functions to the authorised officers seeking information on various matters. Section 31 of the *Public Service Commission Act* allows the 3rd respondent to delegate its functions in writing but such Section is in conflict with articles 232, 233, 234, 235 and 236 with regard to the public service and the Public Service Commission under *the Constitution* and such section should be declared null and void.
130. The court reading of section 31 of the Public Service Act would be incomplete if not read together with article 234(5) of *the Constitution* which provides that;
 - (5) The Commission may delegate, in writing, with or without conditions, any of its functions and powers under this article to any one or more of its members, or to any officer, body or authority in the public service.
131. Section 31 of the Public Service Act on the other hand provides that;
 31. (1) The Commission may, where appropriate and in writing, delegate any power or assign a duty conferred to it under *the Constitution* or this Act to its members, an officer, body or authority in the public service.
132. The Public Service Commission as an independent constitutional Commission is empowered under article 234(5) of *the Constitution* to delegate its functions and powers.
133. Delegation of function and power does not negate the power held by a principal. Responsibility lies with the principal. Delegation does not imply parting with powers by the person who delegates but confers authority to do things which otherwise the person delegating would have to do himself.
134. A power to delegate further can only arise where it is within the scope of the primary delegate's authority. See *Okiya Omtatah Okoiti & another v Anne Waiguru, Cabinet Secretary, Devolution and Planning & others* Petition No 42 of 2014, cited above.
135. The Court of Appeal in addressing the question what is delegation in the case of *Attorney General & 2 others v Independent Policing Oversight Authority & another* [2015] eKLR held that;

“What then amounts to delegation?

Delegation is the assignment of responsibility or authority to another person usually one's subordinate, or another officer of a lower rank. It is instructive however that the person delegating must remain fully accountable for the outcome of the delegated work. One can delegate authority but not responsibility. If a person delegates both authority and responsibility, then this becomes abdication of duty or denudation of authority and it is not acceptable.



Where delegation is underpinned in statute, and there is a requirement that the delegation be in writing, then such delegation must be in writing. There must be an instrument clearly defining the extent of the delegated authority and the duties involved. In such a case, if the person delegating power does so verbally contrary to the statute allowing him to delegate, then such delegation becomes null and void for all intents and purposes.”

136. It is constitutional and lawful for the 3rd respondent to delegate any of its functions to any of its members, officer, body or authority in the public service on condition that this is done in writing, with or without conditions. The 3rd respondent had issued such authority and delegated its powers to the 1st respondent by letter dated July 30, 2018 save such matter has since been recalled by letter dated September 30, 2019.
137. On the issue as to who should regulate the human resource of state corporations, the issue addressed above, and the constitutional mandate is vested in the 3rd respondent.
138. Various statutes, policies and practices still exist to date which gives the 2nd respondents various duties and responsibilities to regulate state corporations which should be addressed by the 3rd and 4th respondents accordingly to avoid further petitions in this regard.
139. In the 3rd respondents review and report to the President and Parliament, such matters can well be addressed for the Executive and Parliament with expert advice from the 3rd respondent responsible for public service in consultation with the Government Principal Legal Advisor, the 4th respondent to address and ensure adherence to article 234(2)(h) of *the Constitution*. There are far-reaching implications in the failure by the 3rd respondent inaction that should carry an investigation and audit of all state corporations, including the 1st respondent pursuant to article 234(2)(d) of *the Constitution* to ensure that the public service is efficient and effective towards the development of human resources in the public service.
140. This can only be achieved through concerted efforts between all the listed respondents.
141. The 1st respondent’s Human Resources policies and guidelines prescribed and approved by the 2nd respondent shall remain in operation and application until the 3rd and 4th respondents address as above directed.
142. On the orders sought by the petitioner, the 3rd respondent shall address and investigate and audit the 1st respondent HR instruments, policies and practices within 365 days from the date of this judgement and issue appropriate recommendations. The 3rd respondent shall report to this court on the measures undertaken to harmonise the law to meet the constitutional threshold pursuant to article 234 of *the Constitution* as directed.
143. The 1st respondent has been granted operational autonomy by the 2nd respondent. This is lawful and valid and as directed above such shall suffice pending action by the 3rd and 4th respondents in the next 365 days.
144. Orders above shall run concurrently with the 3rd respondent undertaking an investigation of the organisation, administration and personnel practices of the 1st respondents and address accordingly.
145. The 1st respondent shall proceed to use and apply and or implement the approved Human Resource policies and guidelines prescribed and approved by the 2nd respondent for the next 365 days which is a reasonable time and space to engage and ensure a streamlined public service through the 3rd respondent.



146. In this regard, the orders sought with regard to issuance of an injunction stopping the recruitment of Director Frequency Spectrum Management and director Competition Management of the 1st respondent is done in the context of existing legislation out of no fault of the 1st and 2nd respondents. The recruitment of such officers shall proceed as advertised in application of approved HR policies and guidelines applicable to the 1st respondent.
147. To ensure completeness and taking into account the date the advertisements were closing the same was stopped by the court for good cause and to allow for the hearing of the petition, the 1st respondent shall post and publicise a new date for receipt of all applications. This will give interested and eligible applicants a reasonable opportunity to put in their applications.
148. With regard to the internal advertisement for various vacant positions of the 1st respondent, every employer has the prerogative to manage its internal affairs save such should not be used to deny any eligible employee a deserved promotion on the basis of fair competition and merit. Where the 1st respondent has developed tools to ensure fairness and reward merit, with advantage of expertise drawn from the 2nd respondent, the internal advertisement for various positions is well addressed. Mr Chiloba in his replying affidavit has well addressed the rationale and parameters for such a decision to recruit internally for various positions and interested employees ought to indicate interest and motivations in the individual applications.
149. The core objective of article 232 of *the Constitution* is to ensure that all public/state institutions make all appointments and promotions on the basis of fair competition and merit and an advertisement is meant to promote fair competition among eligible candidates.
150. Article 232 of *the Constitution* requires that;
- (1)
 - (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
 - (h) representation of Kenya's diverse communities; and
 - (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.
 - (2) The values and principles of public service apply to public service in—
 - (a) all State organs in both levels of government; and
 - (b) all State corporations.
 - (3) Parliament shall enact legislation to give full effect to this Article. to ensure completeness, the 1st respondent shall re-issue the internal invitation for applications for vacant positions closing on October 19, 2021 within a reasonable time from the date of this judgement.
151. Inherently, there exists no law which requires an employer to confirm an officer in a vacant position on account of having acted in such position whatever the period of service. the parameters of article



232 of *the Constitution* apply. every eligible candidate must be given a reasonable opportunity to apply and fairly compete with others.

152. On the other reliefs sought in the petition, the petitioner is seeking to have and be provided with certified copies of Delegated instrument and revocation/withdrawal thereof of any delegated authority to the 2nd respondent to carry out human resource powers and functions of the Public Service Commission. Mr Rotich in his Replying Affidavit to the petition has confirmed under oath that a letter of delegated authority was issued and dated July 30, 2018 and which was recalled by letter dated September 30, 2019. Such matter is not controverted in any manner. The facts as stated are now part of the court record.
153. Before conclusion, the petitioner has challenged the practice of the 1st respondent in conversion of employment terms and conditions from permanent and pensionable to contract terms. He relied on a consent filed under ELRC Cause No 128 of 2015 – *Juma Kiprono Kandic & 2 others v Communications Authority of Kenya* said to be related to the facts therein. A consent filed in a different suit in the year 2015 cannot apply in perpetuity to regulate the employment of all employees of the 1st respondent particularly with regard to conversion of employment status from permanent and pensionable to contract terms even where the law permit and the subject employee has given consent pursuant to section 13 of the *Employment Act, 2007*.
154. An employer has the prerogative to issue employment terms and conditions to each employee based on the business need and operational requirements save where the employer seeks to change such terms from one employment regime to the other, such matter must be brought to the attention of the employee and who should give consent in writing. Conversation of employment terms and conditions is lawful and a legitimate practice at the shop floor sachet to adherence to the subject law, agreement or private treaty with the employee or the representative trade union or employers organisation/ association.
155. Section 13 (1) of the *Employment Act, 2007* directs that;
- (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change. ...
 - (2) ...
156. In this regard section 10(5) of the *Employment Act, 2007* requires that any change to the employment contract be made in consultation with the subject and affected employee and upon the revision of the contract of service, this must be done in writing and the subject employee(s) must signify his/her consent to the change/revision;
- (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
157. In this case, where indeed the respondent has made changes, revised and or reviewed the terms and conditions of employment of any employee, there is need for interrogation as to whether written consent and approval was obtained and if so, whether the subject employee is aggrieved by any matter and if not, the matter must rest as the consent entered into in any other matter between another employee(s) and the 1st respondent must be looked at in its own merits. At the end of the day, employment is personal and specific and every employment contract must be addressed on its terms and conditions.



158. On costs, the court finds the petition herein is filed in with good foundation and responsible and the petitioner has brought to the fore constitutional and legal matters which require the 3rd and 4th respondent to address as directed above. With good foundation, each party should bear own costs.
159. Accordingly, judgement is hereby entered and the following orders issued;
- a) Pursuant to article 234(2) of the Constitution the 3rd respondent shall review, audit and make recommendations with regard to the 1st respondent human resource policies and practices of its officers/employees and report to the court within 365 days;
 - b) The 3rd respondent shall undertake an investigation of the organisation, administration and personnel practices of the 1st respondents and report its recommendations within 365 days;
 - c) The 3rd respondent is hereby directed to develop Human Resource Policies and guidelines for the 1st respondent in strict compliance with the Constitution and the law based on orders (a) and (b) above;
 - d) The 1st respondent shall re-issue the internal and other public advertisements for filling of vacant positions and allow receipt of applications within the next 14 days without placing to a disadvantage those who had already applied and those likely to apply in the extended period; the 1st respondent shall apply existing approved tools until receipt of recommendations of the 3rd respondent in accordance with (a) and (b) above; and
 - e) As the petition is made on good foundation, each party shall bear own costs.

DELIVERED IN COURT AT NAIROBI THIS 25TH DAY OF JANUARY, 2022.

M. MBARU

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: OKODOI

..... **AND**





REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E003 OF 2022

(BEFORE HON. JUSTICE DR. JACOB GAKERI)

IN THE MATTER OF: AN APPLICATION UNDER ARTICLES 1, 2, 3, 10, 22, 23, 34, 35, 46,
75, 156, 165, 201, 232, 233, 234, 235, 236 AND 258 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF: NATIONAL SOCIAL SECURITY FUND ACT

AND

IN THE MATTER OF: PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF: EMPLOYMENT ACT, 2007

BETWEEN

CONSUMERS FEDERATION OF KENYA (COFEK) Suing Through Its Officials Namely
STEPHEN MUTORO, EPHRAIM KANAKE AND HENRY OCHIENG.....PETITIONER

VERSUS

NATIONAL SOCIAL SECURITY FUNDBOARD OF TRUSTEES.....1ST RESPONDENT
HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

CABINET SECRETARY,

MINISTRY OF LABOUR AND SOCIAL PROTECTION.....INTERESTED PARTY

JUDGMENT

1. Consumer Federation of Kenya (herein after the Petitioner) brought a petition dated 5th January 2022 against the National Board Security Fund (NSSF) Board of Trustees, the Attorney General and the Cabinet Secretary, Ministry of Labour and Social Protection as Interested Party.

2. The petition challenges the composition of the Board of the NSSF as well as the validity of its new human resource instruments and the advertisement by which NSSF invited eligible persons to apply for the position of General Manager established by the new human resource instruments.

3. The Petitioner seeks the following reliefs:

a. Declaration that the Respondents have failed in their duty to uphold the rule of law, the Constitution and to protect public interest;

b. Declaration that the petition a public litigation matter;

c. Declaration that the 1st Respondent has no legal power or mandate whatsoever to prescribe or to approve Human Resource policies and guidelines for the 1st Respondent or for any other public body;

d. Declaration that the 1st Respondent's Human Resource policies and guidelines prescribed and approved by the 1st Respondent null and void;

e. Permanent injunction against the 1st Respondent from adopting, implementing or in any other way whatsoever dealing with the Human Resource policies and guidelines without approval of the Public Service Commission, public participation and views of its staff;

f. Order compelling the 1st Respondent to ensure career progression and promotions of its diligent and honest long serving employees;

g. Permanent injunction stopping the recruitment of General Managers of the 1st Respondent whereof invitations for applications closed on 15th January 2022 or any other date that the status quo be maintained until such a time a legitimate recruitment process will be conducted in accordance with the law;

h. Respondents to pay costs of the Petition.

4. The petition is supported by a verifying affidavit deposed by Mr. Stephen Mutoro, the Secretary General of the Petitioner.

5. The Petitioner avers that the current Chairperson of the NSSF Board of Trustees is in office illegally because appointments vide Gazette Notices 10702 and 10703 were quashed in Petition No. 236 of 2018. That the Board of Trustees of the 1st Respondent was barred from conducting board meetings and operations.

6. Similarly, it is averred that advertisement for the positions of general managers dated 23rd December 2021 was issued pursuant to the new human resource instruments which were prepared without compliance with the Constitution, Public Service Act, NSSF Act and public participation and the 1st Respondent's actions were capricious, unreasonable, unfair, unjust, discrimination, illegal and an infringement of the Constitution.

7. It is also averred that adoption of the new human resource policies by the 1st Respondent was effected without public participation, presence of a representative of COTU, consent of the Public Service Commission and contravened the Constitution, Public Service Commission Act and Section 6(d)(ii) of the NSSF Act. That new employees could only be enlisted when the NSSF

Board of Trustees and the human resources committee were properly constituted after gazette of the COTU representative who the Interested Party failed to gazette.

8. That the Respondent's human resource instruments were adopted without public and stakeholder participation, was characterised by non-disclosure and that NSSF employees' contributors and stakeholders were not aware.

9. It is the Petitioner's case that the new structure was not approved by Parliament and was not budgeted for and thus contravened Section 68(1)(a) and 2(j) of the Public Finance Management Act.

10. That Section 55 of the Public Service Commission Act (PSC Act) gave the commission the sole mandate to review and recommend to the Cabinet Secretary qualifications relating to public office as well as categories of public offices or public officers in public bodies.

11. It is contended that under Article 234 of the Constitution, only the Public Service Commission was mandated to prescribe human resource policies and guidelines unless the Commission delegated the mandate under Section 33 of the PSC Act.

12. That the 1st Respondent had developed illegal human resource instruments designed to lock out long serving, diligent, honest and deserving employees from promotion and locking out qualified members of the public from applying of vacant positions.

13. It is the Petitioner's case that the 1st Respondent established new positions of general managers in violation of Sections 25, 26 and 27 of the PSC Act and did not involve interested and affected persons such as professional bodies as provided by Section 55(3) of the PSC Act or consult the Kenya National Qualifications Authority (KNQA).

14. It is averred that Section 31 of the PSC Act gave the Commission power to delegate, in writing any powers conferred upon it by the Constitution or the Act. Reliance is made is on Articles 1, 2, 3, 4, 10(1), 22, 22, 23, 73, 232(1) and (2), 234(2) and 283(1) and (2) of the Constitution.

15. Finally on the issue of *locus standi* the Petitioner relies on Articles 3(1), 10, 22(2), 159, 160(1), 165 and 258 of the Constitution.

16. In its further affidavit dated 1st February 2022, the Petitioner depones that the impugned decision of the 1st Respondent was not approved or sanctioned by its Board of Trustees.

17. That if the petition is not heard and determined urgently, the Petitioner, public and employees of the 1st Respondent stand to suffer irreparable loss and damage.

1st Respondent's Case

18. In response, the 1st Respondent filed a replying affidavit of Anthony Opare Omerikwa, the Managing Trustee/CEO of NSSF dated 26th January 2022 who avers that the 1st Respondent is a creation of the NSSF Act, 2013 and the Board of Trustees is responsible for directing and managing the fund. That Section 10 of the Act sets out the powers and responsibilities of the NSSF

19. The deponent avers that contrary to the Petitioner's averments, the responsibility for the development of human resources in state corporations is statutorily vested in the State Corporations Advisory Committee (SCAC). Specifically, Section 5(3) and 27(c) of the State Corporations Act, that Boards of Directors develop the human resource instruments, submit the instruments to the relevant ministry for approval which forwards the instruments to SCAC for approval. That SCAC is empowered to review and investigate the affairs of state corporations and make recommendations to the President under Section 27 of the Act. It also advises the President on appointments, nomination and revocation of appointments of Board members including constitution of a new board.

20. It is further averred that Sections 5(3) and 27(c) of the State Corporations Act mandates SCAC to facilitate advisories to the cabinet secretaries on matters germane to human resource in state corporations.

21. It is averred that the 1st Respondent is neither constitutionally nor legally required to seek approval of the National Assembly in the discharge of its mandate.

22. The 1st Respondent avers that at its board meeting held on 17th August 2018, the board approved the terms of reference for the hiring of a consultant to carry out a job evaluation as budgeted for in the 2018/2019 financial year and the firm of KPMG was procured on 21st December 2018. It is further averred that phase 2 of the consultancy involved the organisational structure review and design and the board approved the final report on 29th May 2019. That the consultant worked with the job evaluation committee and the project management team through consultative meetings and members of staff were notified and involved in the job evaluation exercise and kept abreast on the approved organisational structure through circulars dated 29th December 2020 and 17th March 2021.

23. The deponent avers that the human resource instruments were forwarded to SCAC on 23rd June 2020 but returned via letter dated 12th November 2020 for rectification and approval by the Cabinet Secretary. That the instruments were approved by SCAC in May 2021. A copy of the approval letter was not attached.

24. That from 2018 to 2021 when the process commenced and concluded, the board was fully constituted and included a representative of COTU and the board relied on the approved structure to advertise for the positions of General Managers and invited all prospective applicants including those acting in the positions and the budget had been approved by the Board of Trustees as per letter dated 29th November 2021 on Revised Rationalised Budget.

25. The deponent avers that Section 11(2) of the NSSF Act provides for quorum for Board meetings which is two thirds () of whom one shall be a representative of employees and one a representative of the employers.

26. That the Board of Trustees has quorum even as it awaits the appointment of the 2nd representative of employees to the Board.

27. The deponent contends that by a circular no. OP/CAB9/IA dated 1st October 2019, the Head of Civil Service advised that the Public Service Commission had no role in the frame work of state corporations other than setting of values and standards and was not involved in the running of state corporations and had no role in human resource management in state corporations.

28. It is also averred that the powers and functions of the Public Service Commission under Article 234(2) of the Constitution are subject to the Constitution and legislation.

29. The decision in **Katiba Institute & another v Attorney General & another [2020] eKLR** is relied upon to urge that the Public Service Commission had no role in respect of state corporations.

30. Similarly, the decisions in **Chemilil Sugar Company Limited & 2 others v Kenya Union of Sugar Plantation and Allied Workers [2014] eKLR** as well as **Kenya Union of Commercial, Food and Allied Workers v Salaries and Remuneration Commission & 2 others [2015] eKLR** are relied upon to urge that employees of state corporations are not officers in the public service and are invariably outside the purview of the Public Service Commission.

31. That the Petitioner has not demonstrated violation of constitutional rights by the Respondent or isolated any constitutional issue with precision as enunciated in **Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154** and the orders sought should not be granted.

32. The Respondents and the Interested Party filed grounds of opposition stating that the application had not met the threshold for grant of interlocutory injunction and stay established by **Giella v Cassman Brown [1973] E.A 358**.

33. That the Petitioner stands to suffer no irreparable injury or prejudice if the orders are not granted and being public interest, the orders sought be declined as set out in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**.

34. That the process conducted by the 1st Respondent is consistent with the constitutional principles of openness competitiveness, inclusiveness, democracy and fairness.

35. That the Petitioner has no interest or stake on the matter and has not shown how its interests are affected by the promotion of constitutional principles.

Petitioner's Submissions

36. The Petitioner submits that the 1st Respondent prepared and adopted the human resource instruments without stakeholder and public participation and without approval of the Public Service Commission which is statutorily and constitutionally mandated to review qualifications relating to a public office category of public officers or all public officers in a public body as per Section 55 of the PSC Act.

37. The Petitioner identifies five issues for determination whether:

i. The Petitioner has *locus standi*;

ii. The 1st Respondent has failed in its duty to uphold the rule of law and protect the constitution;

iii. The 1st Respondent has legal power or mandate to prescribe human resource policies and guidelines;

iv. The human resource policies and guidelines prescribed by the 1st Respondent should be declared null and void and implementation stopped.

v. Section 31 of the PSC Act should be declared unconstitutional.

38. On the first issue, it is submitted that the Petitioner has the requisite standing by virtue of Article 258 of the Constitution since the Constitution has been contravened and the petition has been brought to ensure observance of the rule of law. The decision in **Daniel N. Mugendi v Kenyatta University & others [2013] eKLR** is relied upon as are Articles 3(1) and 22 of the Constitution of Kenya.

39. As regards the second issue, it is submitted that 1st Respondent has failed in its obligation to uphold the rule of law and protect the Constitution because the human resource instruments it prescribed have hindered the career progression of employees.

40. It is the Petitioner's submission that the 1st Respondent had not taken its staff for training in supervisory and senior management courses but made the same mandatory.

41. It is submitted that some members of staff were trained in supervisory and management courses prior to closure of the internal advertisement. That the 1st and 2nd Respondents have failed to uphold the rule of law and the constitution, specifically Articles 1, 232(1) and (2), 21 and 73 of the Constitution.

42. As to whether the 1st Respondent has power to prescribe or approve human resource instruments, it is submitted that this is the most substantive issue for determination in this petition.

43. The rest of the submission on this issue mistakenly assumes that the Public Service Commission is the 3rd Respondent which is not the case and reliance is made on Articles 234 and 260 of the Constitution of Kenya as well as Section 27 of the State Corporations Act as well as the Mwongozo Code of Governance for state corporations. It is submitted that employees of state corporations are public officers. The decision in **National Union of Water & Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 Others [2013] eKLR** is relied upon to buttress the submission.

44. Relatedly, the decisions in **Fredrick Otieno Outa v Jared Odoyo Okello & 4 others [2014] eKLR** as well as **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudheih Workers) v Salaries and Remuneration Commission [2014] eKLR** are relied upon to demonstrate that employees of state corporations are public offices and the 1st Respondent is a public service institution.

46. It is further submitted that the Public Service Commission has the overall mandate to regulate the public service as mandated by the Constitution of Kenya.

46. The Petitioner appeared to have abandoned the other two issues listed above.

Respondent's Submissions

47. The Respondent identifies seven issues for determination, namely whether:

i. Petitioner has *locus standi*;

ii. The matter is public interest;

iii. The Petitioner has met the threshold for interlocutory injunction;

iv. The 1st Respondent has legal mandate to prescribe human resource policies and guidelines and role of Public Service Commission;

v. The 1st Respondent complied with the applicable laws, regulations and human resource policy;

vi. The Petitioner has demonstrated with precision how its rights and fundamental freedoms have been violated or threatened;

vii. The NSSF Chairperson is legally in office.

48. On standing, it is submitted that the Petitioner has no standing to commence proceedings under Articles 22 and 258 of the Constitution of Kenya 2010. The decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** is relied upon for the proposition that "*the standard guide for locus standi must remain the command in Article 258 of the Constitution*".

49. Articles 23 and 258 of the Constitution are also cited to urge that the Petitioner ought to demonstrate an interest and that the parties affected by the decision cannot act by themselves and the Petitioner had not shown any interest. That the issue is a private matter between an employer and employees.

50. The decision in **Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others [2018] eKLR** is cited for the proposition that a person who wishes to enforce the Constitution must fit into one of the categories set out in the two Articles and state the capacity in which they have come to Court under either of the two Articles.

51. Section 12 of the Employment and Labour Relations Court Act is also relied upon to contextualize the jurisdiction of this Court. It is submitted that the Court has no jurisdiction in this case.

52. As regards public interest litigation, it is contended that the Petitioner is a consumer rights lobby group pursuing public interest yet the issue before the Court was in the private law arena. That the public stands to suffer no prejudice since the advertisement was open to every Kenyan including NSSF employees and the same promoted the attendant constitutional principle of openness, competitiveness and fairness. That the Petitioner stands to suffer no disadvantage. The decision in **Communication Workers Union & another v Communication Authority of Kenya [2015] eKLR** issued to urge that employment is a matter of private law.

53. As regards the threshold for grant of interlocutory injunction, it is urged that the Petitioner has not demonstrated a *prima facie* case with a probability of success or that it will suffer irreparable injury which cannot be compensated by way of damages.

54. The decisions in **Stek Cosmetics Limited v Family Bank Limited & another [2020] eKLR**, **Mrao Ltd v First American**

Bank of Kenya Ltd & 2 others [2003] eKLR, Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR and Nken v Holder 556 U.S. 418 [2009] are relied upon to espouse the principles applicable in the grant of interlocutory injunction.

55. It is submitted that the balance of convenience is not in favour of maintaining the status quo to avoid unnecessary expenditure of public funds.

56. As regards the 1st Respondent's mandate to prescribe human resource policies and guidelines and the role of the Public Service Commission, reliance is made on the NSSF Act on the establishment and mandate of the 1st Respondent as well as Section 10 of the Act on powers of the Board on the basis of which the 1st Respondent had advertised positions under its new human resource instruments prepared in accordance with the Constitution.

57. Section 5(3) and 27(c) of the State Corporations Act are cited to urge that the board of each state corporation is mandated to develop the human resources of the particular corporation and the impugned human resource instruments and guidelines were issued by the 1st Respondent in accordance with Section 27 of the State Corporations Act.

58. That the Act and provisions of Mwongozo empower the Cabinet Secretary and the SCAC to exercise oversight authority over state corporations within their docket and offer policy direction. Section 5(3) of the Act is cited on the power of state corporations to hire staff.

59. The procedure on preparation and approval of human resource instruments under Section 5(3) and 27(c) of the State Corporations Act is reproduced for emphasis and to urge that the impugned human resource instruments are lawful.

60. That the assertion that the Public Service Commission is the only body mandated to review and make recommendations to the Cabinet Secretary on qualifications to a public office category of public officer in a public body such as the 1st Respondent is erroneous and the functions and powers of the Public Service Commission under Article 234(2) of the constitution are subject to the Constitution and legislation and the State Corporations Act is the *lex specialis* legislation. That state corporations are "*special purpose vehicles to serve specific strategic public purpose governed by principles of corporate governance and espousing common features as are applicable to private sector entities.*"

61. It is submitted that the provisions of the State Corporations Act oust the mandate of the Public Service Commission over the affairs of state corporations. The advisory of the Attorney General dated 12th August 2014 is also relied upon as is the Head of Public Service circular Ref. No. OP/CAB.9/A dated 1st October 2019. The decision in **Katiba Institute & another v Attorney General & another [2020] eKLR** and others are relied upon to urge that offices in state corporations are not offices in the public service.

62. That not all offices in the public service fall under the purview of the Public Service Commission. That the Court should therefore not interfere with the mandate of the 1st Respondent to prescribe human resource policies and guidelines with approval of SCAC.

63. It is further submitted that an injunction would curtail the statutory duty and function of the 1st Respondent. The decision in **Republic v Commissioner of Customs Services Ex-Parte Africa K-Link International Limited [2012] eKLR** is relied upon as is the decision in **Manyara Muchui Anthony v Communications Authority of Kenya & 3 others [2022] eKLR** to urge that the 1st Respondent had indeed complied with the law as it was.

64. As regards compliance with applicable laws regulations and human resource policy, it is submitted that the 1st Respondent is not legally required to seek approval from the National Assembly in the discharge of its mandate germane to human resource. That this allegation has not been substantiated. That the Board of Trustees meeting on 17th Augusts 2018 was quorate and COTU had a representative.

65. That the management team held meetings with the consultant and input from stakeholders and employees of NSSF was discussed and incorporated. In addition, the members of the Evaluation Committee were drawn from management, staff union and other staff.

66. That employees as stakeholders, were involved in the job evaluation and notified of the new human resource instruments.

67. Further, the Respondents submit that the allegation that the new structure had not been budgeted for is unfounded since the budget had been approved by the Board of Trustees.

68. The decision in **Okiya Omtatah Okoiti v Head of Public Service & 5 others [2018] eKLR** is relied upon to urge that the government as an employer should subject to the Constitution and statute retain discretion in the management and control of its human resource function.

69. As regards violation of fundamental rights under the bill of rights, it is submitted that although the Petitioner quotes an array of Articles of the Constitution, it has not demonstrated with precision how any or all of them have been violated. No evidence has been adduced in support.

70. It is submitted that the Petitioner has not established any violation of the Constitution as required by Article 22. It is further submitted that constitutional rights are specific and the Petitioner is obligated to set out some level of particularity of the right(s) allegedly breached as enunciated in **Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154** and echoed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra)**.

71. The sentiments of the Court in **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR** are also relied upon to buttress the submission that the party suing must state the provisions allegedly infringed, in relation to them, manner of infringement as well as the nature and extent of the infringement and the nature and extent of the injury suffered.

72. It is also submitted that the petition does not meet the threshold of a constitutional petition.

73. Finally, as to whether the Chairperson of the NSSF Board of Trustees is illegally in office as alleged by the Petitioner, courtesy of the decision **Katiba Institute & another v Attorney General & another (supra)**, it is submitted that the decision was in fact stayed by the Court of Appeal in **Nairobi Civil Application E184 of 2021 - Attorney General v Katiba Institute & 2 others** in a ruling delivered on 23rd September 2021.

74. The Respondents pray for dismissal of the petition with costs.

Determination

75. After careful consideration of petition, replying affidavit and grounds of opposition, further affidavit, submissions by Counsel and the law, the issues for determination are whether: -

i. The Petitioner has standing to commence these proceedings;

ii. The 1st Respondent had the mandate to prescribe its human resource instruments;

iii. The 1st Respondent acted in accordance with the applicable and relevant law

iv. The Petitioner is entitled to the reliefs sought.

76. Before delving into the issues listed herein above, the Petitioner alleged that the Chairperson of the 1st Respondent was in office illegally by virtue of the decision in **Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties) [2021] eKLR** by which a three Judge bench of the High Court quashed Kenya Gazette Notice numbers 5569 to 5620 of 5th June 2018 and numbers 5622 to 5623 of 7th June 2018 on appointments of Chairperson and board members of several state corporations including the 1st Respondent's Chairperson.

77. The position is however different. After the judgment was delivered on 27th May 2021, the Attorney General filed a notice of

appeal and subsequently a notice of motion seeking stay of execution of judgment and decree pending the hearing and determination of the intended appeal. The Court of Appeal granted a stay by its ruling delivered on 23rd September 2021.

78. The Court is in agreement with the submission of the 1st Respondent on this issue. The Petitioner's allegation falls by the wayside.

79. As to whether the Petitioner has standing to commence these proceedings, the Court proceeds as follows:

80. According to **Black's Law Dictionary 10th Edition 2014**, standing means –

“A party's right to make alleged claim or seek judicial enforcement of duty or right.”

81. The 1st Respondent contends that the Petitioner has not demonstrated that it has sufficient interest in law to urge the petition. Needles to emphasise, the Employment and Labour Relations Court derive its jurisdiction from Article 162(2)(a) of the Constitution of Kenya, 2010 and the provisions of Section 12 of the Employment and Labour Relations Court Act, 2011. Section 12(2) of the Act provides *inter alia* that:

The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

82. It is instructive to note that this provision is not exhaustive. Moreover, the preambular provision of the Employment and Labour Relations Court Act states that it is:

An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.

83. In **Daniel N Mugendi v Kenyatta University & 3 others (supra)** the Court of Appeal stated that:

“... the Employment and Labour Relations Court has jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.”

84. In **Public Service Commission & 4 others v Cheruiyot & 32 others (Civil Appeal 119 & 139 of 2017 (Consolidated) [2022] KECA 15 (KLR) (8 February 2022) (Judgment)** the Court of Appeal stated as follows –

“This is therefore to mean that the jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the Court can also determine any constitutional violations of the rights of any party arising from an employee-employer relationship. However, for the court to entertain a petition premised on the breach of a party's fundamental rights under the Constitution, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under section 12 of the Act. Our view is fortified by the preamble to the Employment and Labour Relations Court Act, 2011”

85. The petition before the Court is hinged on an array of Articles of the Constitution of Kenya, including 10, 22, 23, 73, 232, 234 and 258.

86. Article 258 of the Constitution of Kenya, 2010 provides that:

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

threatened with contravention.

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

a. a person acting on behalf of another person who cannot act in their own name;

b. a person acting as a member of, or in the interest of, a group or class of persons;

c. a person acting in the public interest; or

d. an association acting in the interest of one or more of its members.

87. Under clause (1) above every person has locus standi to file a claim on alleged or threatened contraventions of the Constitution. Relatedly, Article 260 of the Constitution states that “*person*” includes a company, association or other body of persons whether incorporated or unincorporated.

88. It is not in dispute that the Petitioner is a registered society and is thus a person within the meaning of Article 260 of the Constitution of Kenya, 2010.

89. Finally, the sentiments of the Court of Appeal in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR as instructive:

“By Article 22(1) as read with Article 22(3) and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 - Legal Notice No. 117 of 2013, the Bill of Rights is enforced by filing a petition in the High Court and by Article 23(3), the Court may grant appropriate relief including a declaration of invalidity of any law that violates the Bill of Rights. The Employment Act, 2007 as revised in 2012 – after the coming into operation of the current Constitution, indicates in the preamble that one of its objects is to “declare and define the fundamental rights of employees”. Section 3 thereof provides that the Act applies to all employees employed by an employer under a contract of service except the classes of employees specified therein.

The employment and Labour Relations Court Act stipulates the procedure for the enforcement of employment rights.”

90. The Petitioner states that it is a duly registered society and a consumer rights lobby group in Kenya and operates as a non-political, non-profit and nondenominational and urges the Court to consider the sensitivities, consumers and public interest raised by the Petitioner.

91. Among the reliefs sought are declarations that the 1st Respondent did not observe the rule of law or the Constitution or public interest in the process leading to the advertisement for positions of General Managers. Others touch on the mandate of the Public Service Commission and State Corporations Advisory Committee and their determination impact on the mandate of the State Corporations Advisory Committee and are invariably issues of public interest.

92. For the above reasons, it is the finding of the Court that the Petitioner has standing to file and prosecute the petition.

93. As to whether the 1st Respondent had the legal mandate to prescribe human resource instruments and guidelines, while the Petitioner urges that it had no mandate to do so by virtue of Article 234 of the Constitution of Kenya, 2010, the Respondents contend that it acted in accordance with the applicable law and practice at the time.

94. Article 234 of the Constitution provides as follows:

1. The functions and powers of the Commission are as set out in this Article.

2. The Commission shall—

a. subject to this Constitution and legislation—

i. establish and abolish offices in the public service; and

ii. appoint persons to hold or act in those offices, and to confirm appointments;

b. exercise disciplinary control over and remove persons holding or acting in those offices;

c. promote the values and principles referred to in Articles 10 and 232 throughout the public service;

d. investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;

e. ensure that the public service is efficient and effective;

f. develop human resources in the public service;

g. review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;

h. evaluate and report to the President and Parliament on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the public service;

i. hear and determine appeals in respect of county governments' public service; and

j. perform any other functions and exercise any other powers conferred by national legislation.

3. Clauses (1) and (2) shall not apply to any of the following offices in the public service—

a. State offices;

b. an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic;

c. an office or position subject to—

i. the Parliamentary Service Commission;

ii. the Judicial Service Commission;

iii. the Teachers Service Commission;

iv. the National Police Service Commission; or

d. an office in the service of a county government, except as contemplated in clause (2)(i).

4. The Commission shall not appoint a person under clause (2) to hold or act in any office on the personal staff of the President or a retired President, except with the consent of the President or retired President.

5. The Commission may delegate, in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.

95. There are sufficient constitutional, statutory provisions and judicial articulations to the effect that employees of state corporations are public officers in the public service. Article 260 of the Constitution of Kenya, 2010 states that “*public officer*” means –

a. any State officer; or

b. any person, other than a State Officer, who holds a public office;

96. “*Public office*” on the other hand is defined as –

an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament;

97. “*Public service*” is defined as –

“the collectivity of all individuals, other than State officers, performing a function within a State organ.”

98. The Court is in agreement with the sentiments of Mbaru J. in *Manyara Muchui Anthony v Communications Authority of Kenya & 3 others (supra)* as follows –

“The collectivity of public service and being a public officer are all interlinked into public service, the only exception is state officers performing a function within a State Organ. All other persons serving the People of Kenya are in the public service. This is the constitutional definition.”

99. In *Fredrick Otieno Outa v Jared Odoyo Okello & 4 others [2014] eKLR* the Supreme Court expressed itself as follows:

“And thus, the proper meaning of “public officer” currently is:

i. the person concerned is a State officer; or

ii. any other person who holds “public office” – an office within the national government, county government, or public service;

iii. a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.”

100. Similarly, in the words of Lenaola J. (as he then was) in *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission [2014] eKLR*

“Further ‘Public fund’ has the meaning assigned to it by the Exchequer and Audit Act (Cap 412 Laws of Kenya). Public money is said therefore to include: revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not. Given that definition of public funds and given that the Petitioner’s members work for institutions, parastatals or corporations that provide a public function, then to my mind they are properly within the public service category and therefore state corporations and their employees fall within the meaning of public office and public officers, and I so find.”

101. The foregoing demonstrates beyond peradventure that employees of state corporations are public officers, perform public service, are remunerated by monies provided by Parliament and belong to the Government.

102. While the Petitioner contends that the Public Service Commission “*is the repository of all public service regulation in terms of conditions of service*”, the 1st Respondent relies on the provisions of the State Corporations Act, Cap 446 and the Code of Governance for State Corporations (Mwongozo) exclusively to urge that powers conferred by Sections the 1st Respondent exercised the 5(3) and 27(1) of the States Corporations Act.

103. Further reliance is made on several decisions such as **Katiba Institute & another v Attorney General & another (supra)** which was premised on board positions not employees. Others include **Kenya Union of Commercial, Food and Allied Workers v Salaries and Remuneration Commission & 2 others (supra)**.

104. Significantly, the functions and powers of the Public Service Commission under Articles 234(1) and (2) do not apply to the offices identified in Article 234(3). The list of exemptions does not include officers in the state corporations, a fact the framers of the Constitution of Kenya, 2010 must have been aware of.

105. For the foregoing reasons, it is the finding of the Court that the Public Service Commission has the constitutional mandate to exercise the powers and functions under Article 234 of the Constitution over the public service, the Attorney General’s legal opinion No. AG/CONF/4/127 Vol. II of 21st August 2014 notwithstanding.

106. On the other hand, the preamble to the State Corporations Act states that it is –

An Act of Parliament to make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes.

107. On the power to hire, Section 5(3) of the Act provides that:

A state corporation may engage and employ such number of staff, including the chief executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve.

108. Finally, the State Corporations Act establishes a committee, the State Corporations Advisory Committee whose functions are set out in Section 27(1) of the Act. Section 27(1) of the Act provides as follows:

1. The Committee shall advise on the matters and perform any functions it is required by this Act to perform and in addition shall—

a. with the assistance of experts where necessary, review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary;

b. in consultation with the Attorney-General and the Treasury, advise the President on the establishment, reorganization or dissolution of state corporations;

c. where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;

d. examine any management or consultancy agreement made or proposed to be made by a state corporation with any other party or person and advise thereon;

e. examine proposals by state corporations to acquire interests in any business or to enter into joint ventures with other bodies or persons or to undertake new business or otherwise expand the scope of the activities and advise thereon.

109. As the name of the Committee suggests, it is primarily an advisory committee.

110. While Section 5(3) of the State Corporations Act requires the Minister to consult the SCAC in the process of approval of terms and constitution of service of employees of state corporations, Section 27(2) of the Act accords the committee advisory and other specific powers which do not include approval of human resource instruments of state corporations.

111. The committee appear to have been exercising powers it did not have *ab initio*.

112. More importantly, the Court is also guided by Section 7 of the 6th Schedule of the Constitution of Kenya, 2010 which provides guidance on how a statute such as the State Corporations Act should be construed. The Section provides as follows:

1. All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

2. If, with respect to any particular matter—

a. a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

b. a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

113. What the Court gathers from these provisions is that because the responsibility of issues of human resource in state corporations is now specifically vested in the Public Service Commission as a constitutional imperative, the provisions of Article 234 of the Constitution prevail over Sections 5(3), 27 or any other provisions of the State Corporations Act. Finally, a cursory glance of the Act reveals that it is yet to be aligned to the provisions of the Constitution of Kenya, 2010.

114. To push the matter further, the provisions of the Public Service Commission, Act, No. 10 of 2017 are also explicit on the mandate of the Public Service Commission.

115. The preambular provision of the Act states that it is an Act of Parliament to make further provisions as to the functions, powers and administration of the Public Service Commission established under Article 233 of the Constitution, **to give effect to Article 234 of the Constitution** and for connected purposes.

116. Secondly, Section 3 of the Public Commission Act, provides that –

Subject to Articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 252(1) of the Constitution and section 28 of the Kenya Defence Forces Act, this Act shall apply to all public bodies and persons holding office in the public service.

117. Section 2 of the Public Service Commission Act provides that “*a public body*” includes:

a. any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;

b. a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition;

c. statutory public bodies; or

d. any public body brought under the jurisdiction of the Commission by an Act of Parliament for a specified function to the extent of that function;

118. Finally, Article 234(2)(c) of the constitution provides that:

The Commission shall perform any other functions and exercise any other powers conferred by national legislation.

119. Bearing in mind that the Public Service Commission Act was enacted in 2017 and came into operation on 20th April 2017, it is the Court's view that its provisions were intended to reinforce the provisions of Article 234 of the Constitution of Kenya, 2010 and underscore its preeminent character.

120. In nutshell, these constitutional and statutory provision demonstrate that the Public Service Commission is the only body with constitutional authority to approve human resource instruments of state corporations and other state bodies.

121. In simple parlance, the Board of Directors of a state corporation is the policy making body of the corporation and provides the strategic direction. It is the decision maker on all matters of policy.

122. Section 5(1) of the NSSF Act 2013 provides that

There is established a body to be known as the National Social Security Fund Board of Trustees which shall, inter alia, be vested with the responsibility of directing and managing the Fund.

123. Section 5(2) of the NSSF Act itemises the powers of the Board of Trustees. It is a body corporate with perpetual succession and a common seal, and can sue or be sued in its name.

124. Under Section 6, the Board of Trustees consists of eleven (11) members including the Managing Trustees who is an *ex officio* member.

125. Section 10 of the Act sets out the powers and responsibilities of the Board of Trustees.

126. Section 10(1) provides that the Board shall exercise all the powers necessary for the proper performance of its responsibilities under this Act.

127. Section 10(2) provides that without prejudice to the generality of subsection (1), the Board may –

a. ...;

b. ...;

c. lay down such policies and guidelines as may be necessary for the proper operations and management of all the contributions and funds collected by the Fund and for any other matter concerning the Fund;

d. ...;

e. approve contracts, undertakings, hiring of senior staff and other activities entered into by the Management or otherwise undertaken in the name of the Fund whose value requires Board approval;

f. ...;

g. ...;

h. ...;

i. ...;

j. exercise such other powers as may be conferred upon the Board by this Act or any other written law.

128. Section 10(3)(b) of the Act states that the Board shall be responsible for enforcement of good corporate governance practices within the Board and senior management:

129. These provisions clearly demonstrate that the 1st Respondent had the mandate and justification to originate its human resource instruments subject to compliance with the Constitution and the NSSF Act. However, it did not comply with the provisions of the Constitution. The instruments were not submitted to the Public Service Commission for consideration and approval and are therefore inoperable.

130. On public and stakeholder participation in the preparation of the human resource instruments, the Petitioner did not lead evidence on who was not involved or did not participate in the process and cited no law that required public participation in the preparation of the initial instruments other than employees who are the intended stakeholders.

131. On quorum of the 1st Respondent when it made the decision in question, the Petitioner led no evidence of which of the meeting(s) had no quorum. The Respondent submitted that at all material times the 1st Respondent was quorate as provided by Section 11(2) of the NSSF Act which provides that:

The quorum for the conduct of the meetings of the Board shall be two thirds of the Trustees of whom one shall be a representative of employees and one a representative of employers.

132. As regards budgetary provision for the positions advertised by the 1st Respondent, the Petitioner adduced no evidence to demonstrate that the requisite budgetary allocation had not been made while on the other hand the 1st Respondent led evidence showing that the 1st Respondent engaged the National Treasury in the process leading to the rationalised budget 2018/2019 as well as evidence of the 2021/2022 Revised Rationalised Budget of Kshs.14,402,750,000/-.

133. It is the finding of the Court that the 1st Respondent had the requisite budgetary allocation for the positions it had advertised.

134. The foregoing analysis disposes of issues nos (ii) and (iii).

Reliefs

a. A declaration that the Respondent have failed in their duty to uphold the rule of law, the Constitution and public interest

135. Having found that the 1st Respondent did not comply with the provisions of the Constitution in the preparation and approval of human resource instruments, a declaration is hereby issued that the 1st Respondent did not uphold the rule of law and the Constitution.

b. A declaration that the petition is a public interest litigation

136. Granted that the purpose of the petition is to secure observance and compliance with the rule of law and the Constitution of Kenya, 2010, a declaration that the petition is public interest litigation is hereby issued.

c. A declaration that the 1st Respondent had no legal power or mandate whatsoever to prescribe or to approve human resource policies and guidelines for the 1st Respondent or any other public body

137. Although the 1st Respondent has the mandate to originate the human resource instruments, it has not power to approve the same for implementation.

d. A declaration that the 1st Respondent's human resource policies and guidelines prescribed and approved the 1st Respondent are null and void

138. Having found that the 1st Respondent had legal mandate to originate the human resource instruments but were not approved by the Public Service Commission, the instruments are ineffectual until approved by the Commission.

e. Permanent injunction against the 1st Respondent from adopting, implementing or in any other way whatsoever, dealing with the human resource policies and guidelines without approval of the Public Service Commission, public participation and views of its staff

139. The Petitioner led no evidence that it will suffer any irreparable injury or loss not compensable by damages if the injunction is not granted. In the absence of the specific loss or injury to be suffered, the declaration is **declined**.

f. An order compelling the 1st Respondent to ensure career progressions and promotions of its diligent, honest and long serving employees

140. The Petitioner laid no foundation for such an order. No evidence was led to show or demonstrate that honest, diligent and long serving employees of the 1st Respondent ought to be catered for or had been discriminated and how.

141. Career progression and promotions should be equitable and all-inclusive subject to the fulfilment of the prescribed criteria. Long service, dedication and honesty are but some of the parameters considered. The level of education, relevant training since employment, initiative and demands for the higher office are relevant considerations too. The entire milieu is taken into consideration.

142. Having observed that the prayer lacks the necessary factual background and foundation, it is **declined**.

g. A permanent injunction stopping the recruitment of general managers of the 1st Respondent whereof invitation for applications close on 15th January 2022 or any other date and that the status quo be and is hereby maintained until such time a legitimate recruitment process will be conducted in accordance with the law

143. Having found that the 1st Respondent's human resource instruments are ineffectual until approved by the Public Service Commission with or without modification for implementation, **recruitment of general managers advertised on 23rd December 2021 shall remain in abeyance until the instruments are approved by the Public Service Commission.**

144. Finally, the 1st Respondent shall within 21 days present draft human resource instruments to the Public Service Commission for review, for the Commission to satisfy itself that the instruments were prepared in conformity with the Commission's policies and guidelines for purposes of approval with or without any modifications.

145. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF APRIL, 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the

Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE



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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR OF KENYA COURT AT MOMBASA

JUDICIAL REVIEW APPLICATION NO. E001 2022

REPUBLIC APPLICANT

VERSUS

KENYA PORTS AUTHORITY BOARD OF DIRECTORS 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF TRANSPORT 3RD RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

COMMISSION FOR HUMAN RIGHTS JUSTICE EX PARTE APPLICANT

JUDGMENT

The *ex parte* applicant, Commission for Human Rights Justice, is a registered non-governmental organisation. The 1st respondent is a statutory body pursuant to Kenya Ports Authority Act. The 2nd respondent is the government legal advisor. The 3rd respondent is a government agency.

In a Notice of Motion dated 19 May 2022 the *ex parte* applicant is seeking for orders that;

1. *This court be pleased to grant the ex parte applicant herein an order of certiorari to remove into this court and quash the decision of the 1st respondent vide resolution dated 20 April 2022 to purportedly implement the proposed revised Human Resource Instruments of the Kenya Ports Authority and effect new staff appointments/deployments.*
2. *This court be pleased to grant the ex parte applicant herein an order of prohibition to remove into this court and prohibit the 1st respondent to*

implement through a resolution dated 20 April 2022 the proposed revised Human Resource Instruments of the Kenya Ports Authority and effect new staff appointments/deployments.

3. Costs of this application be provided for.

The application is premised on the Statutory Statement and Supporting Affidavit, Further Affidavit, Further Replying Affidavit sworn by Caleb Ngwena.

The application was opposed by the 1st respondent through the Replying Affidavit of Elijah Kitur.

The *ex parte* applicant's case is that on 20 April 2022 the 1st respondent through a resolution of the 400th Special Board Meeting approved 38 staff appointments and deployments within the Kenya Ports Authority. The said considerations and approval were based on a letter dated 11 May 2021 from the Cabinet Secretary, National Treasury and Planning addressing the request of approval of the Kenya Ports Authority Human Resource Policy Instruments.

The Public Service Commission (PSC) is mandated in law to provide new approvals for any human resource instruments including amended policies with regard to state corporations and therefore the letter by the Cabinet Secretary, is irregular and *ultra vires*. The letter proffers a conditional approval based on an assessment to be undertaken by the 1st respondent to determine costs benefit value of a medical scheme to inform the proposed revised Human Resource Structure.

In a letter dated 5 July 2021 addressed to the General manager Human Resource and Administration following a meeting convened by the CS National Treasury, the letter raised concerns that the new approved organisation structure of the 1st respondent may be suffering from fundamental flaws which may negatively affect the business of the 1st respondent and negatively affect the morale of the staff members. Among the concerns the CS noted were that the changes would strain the financial position of the 1st respondent.

The board in the 395th Meeting noted the flaws in the proposed structure. In a letter dated 18 October 2021 the board addressed concerns and noted the need to re-examine the approved organisation structure with a new view of identifying structural

and legal flaws. It noted the need to seek reviews consultations with the parent Ministry and relevant government agencies. But the 1st respondent refused, failed and ignored to carry out the necessary consultations as recommended, carry out public participation and fixing the fundamental flaws before formulation and presentation for approval of the said proposed revised Human Resource Policy instruments thus denying the process legitimacy, trust and cohesiveness.

The effect of the resolution of the 1st respondent is that a few employees benefited from a non-inclusive process in an undeserving way casting away the traditional career progression and promotion using the all-competitive recruitment process. The numerous appointments were made in total contravention of the rule of law, specifically and not limited to the appointment of Anderson Mtalaki as the General Manager in charge of Engineering and yet he is not a registered engineer under the Engineers Act.

The *ex parte* applicant case is that if the irregularity carried out by the 1st respondent goes ahead unchecked, a trend will be set where the rule of law and laid down procedures in coming up with policies in public institutions will be disregarded and it is important for the court to issue the orders sought.

In reply, the 1st respondent through the Replying Affidavit of Elijah Kitur the head of board affairs regulatory compliance and governance aver that the 1st respondent is a state corporation established under the Kenya Ports Authority Act with mandate to develop, operate and manage ports in Kenya with its head office in Mombasa. It has offices in Nairobi, Kisumu, Uganda, Rwanda, Burundi, Democratic Republic of Congo, Ethiopia and Somalia with over 7,800 employees.

Prior to the 5 SCAC watermarked Kenya Ports Authority Human Resources Instruments approved for implementation on 20 April 2022 by the board, the same had been discussed by senior management and approved on 3 June 2021 by the 1st respondent. The *ex parte* applicant does not seek to quash the 5 SCAC instruments but to quash the decision that approved its implementation on 20 April 2022.

Pursuant to 1st respondent's board approval made on 20 April 2022 about 41 senior managers of the 1st respondent who are not parties herein were appointed to new positions. These appointments will be affected if the court were to quash the

resolutions of the 1st respondent's board which implemented the human resource instruments. The entire organisation structure of the 1st respondent would fall in limbo given that this structure was a culmination of a merger between the 1st respondent and the KFSL.

The instruments have already been implemented by the appointment of senior managers of the 1st respondent from resolution of the 1st respondent dated 20 April 2022 and an order of prohibition cannot issue. The senior managers of the KFSL who would be affected by the 5 SCAC instruments were consulted and participated in the formulation of the said instruments passed on 20 April 2022.

In February 2021 through a Cabinet Resolution, the government directed ferry operations at the Likoni Channel which was then operated by the Kenya Ferry Services Limited and the floating passenger bridge to be mutually operated by the 1st respondent. The effect was that the assets, liabilities, staff contract and other obligations of KFSL were to be transferred to the 1st respondent upon the dissolution of KFSL. Following consultations of all critical stakeholders and guidance of the 2nd respondent, the transfer to the 1st respondent was effected in line with Section 86 of the Public Finance Management Act read together with Regulation 216 of the Public Finance Management (National Government) Regulations, 2015. It was agreed that the ferry and floating bridge services be operated by the 1st respondent and SCAC approved the consolidation of the instruments for staff transition framework given on 19 April 2021. The 1st respondent was then required to develop new instruments and in consultations held in December 2020 and March 2021 from representatives of the defunct KFSL, SCC, Ministry of Transport and National Treasury and Planning, the 1st respondent developed the consolidated instruments.

The 1st respondent's board confirmed the appointments of senior staff under its mandate and the provisions of Section 58 of the Kenya Ports Authority Act read together with Article 232 of the Constitution, this was necessary to achieve government reform measures to streamline operations of the 1st respondent. The re-deployments, confirmations and appointments of senior management staff made by the board was largely lateral movements where staff members who had been holding those positions were retained, those on acting capacity were appointed and where the

structure created new positions that did not exist before, staff who had headed the Divisions which were elevated to departments were appointed.

The judicial review orders sought cannot issue since the *ex parte* applicant is not affected by any of the measures taken by the respondents.

The 2nd and 3rd respondents through the Replying Affidavit of Dr. Eng. Joseph Njoroge the Principal Secretary for the State Department of Transport in the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works aver that under Article 132(3)(b) of the constitution, the President in organising government, the 1st respondent was placed under the National Treasury and pursuant to Section 4 of the State Corporations Act, the recruitment of staff is a function of the board. The 2nd respondent was not involved as such would be illegal. The 2nd respondent is not privy to the subject matter herein and the application should be dismissed with costs.

The interested party filed the Replying Affidavit of Dr. Simon Rotich the secretary and chief executive officer and aver that the 1st respondent is a state corporation and a public entity established under Section 3 of the Kenya Ports Authority Act. The interested party is a constitutional commission established pursuant to Article 233 with functions under Article 234 over the entire public service save for the public service excluded in Article 234(3) of the Constitution.

Article 234 of the Constitution is given effect through the enactment of the Public Service Commission Act by making further provisions as to the functions, powers and the administration of the Public Service Commission and which Act applies to all public bodies and persons holding office in the public service. A corporation is one such body under the regulation of the interested party and applies to the Kenya Ports Authority.

Sections 26 and 27 of the Public Service Commission Act were enacted to give effect to Article 234 (2) of the Constitution and Section 26 of the Act defines the establishment of offices to mean the **determiantion and creation of the number and kinds of offices in the public service** while Section 27 of the Act reiterates the constitutional fucntion and power of the interested party to establish offices in the public service and sets the requirements precedent to the interested party establishing offices in the public service.

Dr. Rotich also aver that an office in the public service falling under its mandate cannot be established without approval. The development or review of the organisation structure of a public service body such as the Kenya Ports Authority should be approved by the interested party before implementation in terms of Section 26 and 58(1) of the Public Service Commission Act. Any implementation without such approval is unlawful and in violation of the express provisions of Article 234(2)(a)(i) of the Constitution.

Dr Rotich aver that the interested party did not receive a request to establish any new positions at the Kenya Ports Authority neither has it received any request to review the organisation structure and any that exists is unlawful and in violation of the Constitution. Without approval, the revised organisation structure cannot be implemented.

Determination

The issues at hand are whether the court should quash and prohibit the 1st respondent from implementing the revised Human Resource Instruments which effect new staff appointments/deployments *vides* resolution dated 20 April 2022 to implement the revised Human Resource Instruments of the Kenya Ports Authority.

Judicial review mandate of the court is time stipulated under the Law Reform Act read together with the Civil Procedure Act and the rules thereto (Order 53). The preliminary objections addressed by the court in the ruling delivered on 8 July 2022, the mandate of the court under Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 allow a party to move the court through a Memorandum of Claim and urge its case so as to allow the other parties address the same in a manner devoid of any technicalities;

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

The above put into account, the *ex parte* applicant ought to have moved the court well under the applicable rules of the court.

With regard to the substantive issues raised, on the decision of the 1st respondent resolution dated 20 April 2022 to implement the revised Human Resource Instruments of the Kenya Ports Authority and effect new staff appointments/deployments, the 1st respondent is a state corporation with mandate under the Kenya Ports Authority Act and as such bound in its operations as a public entity managing national resources hence subject to the constitutive Act and the Constitution. Operationally, even though run by a Board of Directors who ordinarily are appointed by the Cabinet Secretary, the essence of the 1st respondent is to provide a national service through its public officers.

The human resource instruments formulated by the 1st respondent with the effect of staff appointments and or deployments following a cabinet decision merging functions of KFS functions under the 1st respondent is evidence of its national character in its functions. Indeed, Mr Kitur for the 1st respondent in his Replying Affidavit to the instant application aver that, the Human Resource Instruments of the Kenya Ports Authority were approved by the Board in terms of Section 58 of the Kenya Ports Authority Act read together with Article 232 of the Constitution.

However, with that appreciation, the constitutional body with mandate to formulate national policy with regard to public service employees and employers in their terms and conditions including appointments and or deployments is situate under the Article 234 of the Constitution with the PSC, the interested party herein. The PSC has mandate to;

(2) The Commission shall—

(a) subject to this Constitution and legislation—

- (i) establish and abolish offices in the public service; and***
- (ii) appoint persons to hold or act in those offices, and to confirm appointments;***

It is therefore a constitutional imperative that while the PSC is undertaking such constitutional function to apply the values and principles of Article 10 and 232 of the Constitution stipulated under Article 234 (2) (c) of the Constitution which requires the PSC to ***promote the values and principles mentioned in Articles 10 and 232 throughout the public service*** and fundamentally under clause (g) thereof, to;

(g) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;

In the case of **Consumers Federation of Kenya (COFEK) suing through its officials namely Stephen Mutoro, Ephraim Kanake and Henry Ochieng v National Social Security Fund Board of Trustees & another; Cabinet Secretary, Ministry of Labour and Social Protection (Interested Party) [2022] eKLR** the court in addressing the import of Article 234 of the Constitution held that;

... the responsibility of issues of human resource in state corporations is now specifically vested in the Public Service Commission as a constitutional imperative, the provisions of Article 234 of the Constitution prevail over Sections 5(3), 27 or any other provisions of the State Corporations Act. Finally, a cursory glance of the Act reveals that it is yet to be aligned to the provisions of the Constitution of Kenya, 2010.

...

Bearing in mind that the Public Service Commission Act was enacted in 2017 and came into operation on 20th April 2017, it is the Court's view that its provisions were intended to reinforce the provisions of Article 234 of the Constitution of Kenya, 2010 and underscore its preeminent character.

In nutshell, these constitutional and statutory provision demonstrate that the Public Service Commission is the only body with constitutional authority to approve human resource instruments of state corporations and other state bodies.

The 1st respondent well situated as a state corporation and managed by the Board under the provisions of the Kenya Ports Authority Act, such retains the policy direction save, in matters that constitutionally are within the mandate of the PSC particularly the formulation, development and creation of standards of public service, this is it the body with authority to approve human resource instruments with regard to appointments and or deployment. The decision of the 1st respondent board on 20 April 2022 on the revised human resource instruments of the Kenya Ports Authority with regard to new staff appointments and deployments cannot be justified in the absence of the PSC approval. Any approval of these instruments outside the constitutional threshold is *ultra vires*.

As noted above, the *ex parte* application moved the court through judicial review proceedings which are time bound in nature. Following the decision of the 1st respondent on 20 April 2022 officers were appointed or deployed albeit under the belief that the Board had mandate to revise the instruments applied. This taken into account and to forestall service disruptions, the PSC has mandate to *promote the values and principles mentioned in Articles 10 and 232 throughout the public service* and in this regard investigate the public body and review and make recommendations in terms of Article 234(2)(d) to (g) of the Constitution;

(d) investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;

(e) ensure that the public service is efficient and effective;

(f) develop human resources in the public service;

(g) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;

It is therefore imperative for the court to invoke these provisions in this case.

Accordingly, the orders sought in the instant application addressed, the resolution of the 1st respondent on 20 April 2022 on the implementation of the Human Resource Instruments of the Kenya Ports Authority that effect new appointments and deployments shall be subject to an audit by the PSC, the interested party herein and who shall make recommendations that ensures efficiency and effective for approval as appropriate. This process shall be undertaken within the next six (6) months at the cost of the 1st respondent. The Public Service Commission shall report to the court for adoption as appropriate.

The *ex parte* applicant being a non-governmental organisation to bear own costs.

Mention on 30 November 2023 for progress report by Public Service Commission and further directions.

Delivered in open court at Mombasa this 13 day of July, 2023.



M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. E149 OF 2022

IN THE MATTER OF ARTICLES 1,2,3,20,21,22,23, & 258 OF THE
CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLES 1, 10, 27, 29, 47, 73, 232,
234 & 236 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF PROVISIONS OF EMPLOYMENT ACT: KEMSA ACT:
PUBLIC SERVICE COMMISSION ACT: PUBLIC SERVICE COMMISSION
REGULATIONS

BETWEEN

| | |
|------------------------------|-----------------------------|
| ENOS NAMASAKA..... | 1 ST PETITIONER |
| DR. JOHN ADUDA..... | 2 ND PETITIONER |
| DR. GEORGE WALUKANA..... | 3 RD PETITIONER |
| DR. ABDI HADUN..... | 4 TH PETITIONER |
| CATHERINE MUNERIA..... | 5 TH PETITIONER |
| NAHASHON WAIGANJO..... | 6 TH PETITIONER |
| DAVID MUTU..... | 7 TH PETITIONER |
| JAMES KILONZO..... | 8 TH PETITIONER |
| IGNATIUS KABURU MARITHI..... | 9 TH PETITIONER |
| GEOFFREY MWANGI..... | 10 TH PETITIONER |

VERSUS

| | |
|---|----------------------------|
| KENYA MEDICAL SUPPLIES AUTHORITY | 1 ST RESPONDENT |
| THE CABINET SECRETARY, MINISTRY OF HEALTH | 2 ND RESPONDENT |
| THE HON. ATTORNEY GENERAL..... | 3 RD RESPONDENT |

AND

| | |
|------------------------------------|----------------------------------|
| THE PUBLIC SERVICE COMMISSION..... | 1 ST INTERESTED PARTY |
| TERRY KIUNGE RAMADHANI..... | 2 ND INTERESTED PARTY |

JUDGMENT

1. Petition number 149 of 2022 was initially *consolidated* with Petitions Nos. Eo80 of 2022; Nelson Andayi Havi –vs- Kenya Medical Supplies

Authority and Others – Petition No. E089 of 2022; David Njoe Kithuka -vs- Kenya Medical Supplies Authority and Others; and Petition No. 243 of 2022 - Sheria Mtaani na Shadrack Wambui –vs- KEMSA and Others but upon reflection by the parties the matter was de-consolidated and is being handled separately.

2. The ten (10) petitioners in petition 149 of 2022 seek the following reliefs:-

- (a) **A DECLARATION THAT** the Petitioners 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, 232, 234 and 236 of the Constitution with regard to the contract of employment of the Petitioners.
- (b) **A DECLARATION THAT** the decision of the 1st Respondent contained in the Advert published on 26th July, 2022 in its website and Daily Newspapers on various dates including in the Standard Newspaper of 2nd August, 2022 for new expanded Management team of 31 vacancies (Job References; KEMSA/CSLS/2022/001002:KEMSA/HPT/2022/001-004: KEMSA/CS/2022/001-004:KEMSA/PRM/2022/001003:KEMSA/SP/2022/001-003:KEMSA/SCMS/2022/001-005:KEMSA/CSD/2022/001006& KEMSA/IARA/2022/001-004) is unconstitutional, null and void *ab initio*
- (c) **A DECLARATION THAT** the decision of the 1st Respondent to keep the Petitioners and other staff of the 1st Respondent away from their work stations at the 1st Respondent purportedly to work from home while their access to 1st

Respondent's ICT platform is denied is unconstitutional, null and void *ab initio*.

- (d) **A DECLARATION THAT** that appointment by 2nd Respondent of John Ndiritu Muturi and Albert Memusi to the Board of Directors of the 1st Respondent vide Gazette Notice No. 9327 dated 5th August, 2022, violated Articles 10, 73 and 232 of the constitution and the same is null and void *abinitio*.
- (e) **A DECLARATION THAT** the appointment of Terry Kiunge Ramadhan as the Chief Executive officer by the Respondents violated Articles 10, 73 and 232 of the constitution and the same is null and void *ab initio*
- (f) **CONSEQUENTLY AN ORDER** of Certiorari to remove to this Honourable Court and quash the decision of the 1st Respondent contained in the Advert published on 26th July, 2022 in its website and Daily Newspapers on various dates including in the Standard Newspaper of 2nd August, 2022 for new expanded Management team of 31 vacancies (Job References; KEMSA/CSLS/2022/001-002:KEMSA/HPT/2022/001-004: KEMSA/CS/2022/001-004:KEMSA/PRM/2022/001-003:KEMSA/SP/2022/001-003: KEMSA/SCMS/2022/001-005:KEMSA/CSD/2022/001-006 & KEMSA/1ARA/2022/001004) and any other attendant and subsequent process and appointment thereof.
- (g) **CONSEQUENTLY, AN ORDER OF PROHIBITION** prohibiting the Respondents from pursuing the purported redundancy process at the 1st Respondent as contained in their letters of general redundancy and Internal Memos dated 4th November, 2022, 10th June, 2022, 15th July, 2022 and any other related letter by the 1st Respondent.
- (h) **CONSEQUENTLY, AN ORDER OF PROHIBITION** prohibiting the Respondents from keeping away the Petitioners and other staff from their work stations at the 1st

Respondent for purporting that they are working from home.

- (i) **CONSEQUENTLY, AN ORDER** of Mandamus to compel individual Board members and CEO of the 1st Respondent in their personal capacity to pay back to the consolidated fund all salaries paid to staff of 1st Respondent from the time they were sent to work from home while their access to 1st Respondent's ICT platform had been de-activated.
- (m) **CONSEQUENTLY, AN ORDER** of Certiorari to remove to this Honourable Court and quash the Respondents' decision of appointment of Terry Kiunge Ramadhan as the Chief Executive Officer of the 1st Respondent.
- (k) **CONSEQUENTLY, AN ORDER** of Certiorari to remove to this Honourable Court and quash the 2nd Respondent's decision contained in Gazette Notice No. 9327 dated 5th August, 2022 of appointment of John Ndiritu Muturi and Albert Memusi to the Board of Directors of the 1st Respondent.
- (l) **AN ORDER** be issued by this Honourable Court for just compensation by the Respondents to the Petitioners 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 feelings and dignity and exposing them to public ridicule and odium and possible prejudice as regards future National service in view of the requirements of Chapter 6 of the Constitution and occasioning them losses and damages.
- (m) **AN ORDER THAT** the costs consequent upon this Petition be borne by the Respondents in any event.

3. The brief facts of the case are that on 20th July, 2022, the 1st respondent abolished and/or declared redundant all Twenty four (24) managerial

positions held by petitioners and others on permanent and pensionable terms and in its place created new Thirty one (31) managerial positions that were advertised to the open market for interviews and since the managers - petitioners were also qualified/suitable, they were informed that they were at liberty to apply alongside any other interested person.

4. The 1st respondent on 4/11/2021 issued general redundancy notice addressed to all employees and copied to the Labour officer but none was issued or copied to the Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU), yet some employees are members of the said union.
5. Simultaneously on the said 4/11/2021, targeted employees for termination were sent to work from home and their access to ICT platform was denied for what respondents stated was ***“the nature of the ongoing reforms requires restricted access to the ICT Platform.”*** The employees could not work from home in those circumstances.
6. By a letter dated 5th July, 2023, written by Musyoka Murambi & Associates Advocates to the Court, the Court was advised that the petitioners and other officers were recalled back to their respective work stations and allowed access to ICT platform in the course of discharging their duties. The Court was informed that prayer number 3 in the petition dated 5/8/2022 is now spent.

7. That the sending of the employees to work from home was done despite the judgment of the Court in ELRC Petition No. 174 of 2021 delivered on 27/5/2022 where the Court held that; ***“the mass sending home of almost all employees even if on full salary is not provided for by any law.”*** The respondents have not justified any cause for sending all the employees to work from home.
8. The petitioners state that the current management of 1st respondent is made up of 34 positions occupied by the petitioners and others. The Board had stated in the general notice of redundancy that it had embarked on restructuring, redundancy and/or re-organization of 1st Respondent (KEMSA). The Board vide the said action abolished the 24 management positions and subsequently created the 31 advertised management offices.
9. That the said action was unlawful and outright illegal in that restructuring and/or re-organisation of public bodies is a constitutional mandate of the Public Service Commission under Article 234 (2) (a) of the Constitution which provides that:-
“The Public Service Commission shall:--subject to this Constitution and legislation—establish and abolish offices in the public service.”
10. Pursuant to the above constitutional mandate, Section 27(1) of the Public Service Commission Act, provides that:-
“The Commission may establish an office in the public service after receipt of a written request by an authorized officer of a public body if the Commission is satisfied that—
 - (a) *the request is based on comprehensive plans*

- (b) informed by the public body's workload analysis;
- (b) the financial implications of creating the office are indicated;
- (c) the office to be created relates to or supports the core functions of the public body;
- (d) the office to be created is to be domiciled in the requesting public body;
- (e) information on the current authorized establishment, level of grading, designation, extra posts required and evidence of optimum utilization of existing posts has been submitted;
- (e) the office including its level of grading, qualification and remuneration shall not disadvantage similar offices in the public service or occasion unfair competition for staff among public bodies;

and

- (f) the functions of the office to be established are consistent with the Constitution or any other legislation.

(2) The written request for establishment of an office shall include a statement by the respective authorized officer verifying that the conditions in subsection (1) have been met."

11. On the other hand, Section 28(1) of the Act provides:-

- "(1) The Commission shall abolish an office in the public service upon receiving a written request by an authorised officer.*
- (2) The Commission in making a determination as to Whether to abolish an office, shall satisfy itself that:-*
- (a) the office relates to the provision of public services that are no longer necessary in view of improved methods for service delivery;*
 - (b) the request is based on a comprehensive plan informed by the department's workload analysis;*
 - (c) there is an indication of the financial implications of abolishing the office, including savings to be made in relation to services relating to the office;*
 - (d) information on the current authorized establishment, level of grading, designation, and evidence of optimum utilization of existing posts is submitted;*
 - (e) the office when abolished shall eliminate duplication and overlaps of functions by public bodies; and*
 - (f) the functions of the office, if not abolished are inconsistent with the Constitution or any other legislation.*
- (3) Any decision by the Commission to abolish an office in the public service shall be subject to the due process of deployment, transfer, removing or retiring the affected public officer as prescribed*

under this Act or the terms and conditions applicable to the public officer.”

12. The petitioners depose that the respondent did not at all involve the staff of the respondent being key stakeholders, in the purported restructuring process of the 1st respondent.
13. The action by the respondents was not lawful and was not a genuine redundancy exercise but was solely and maliciously designed to get rid of the petitioners and other holders of the stated management positions and this is borne out by the fact that the Board of KEMSA declared the occupant of the position of Corporation Secretary redundant and immediately thereafter proceeded to advertise for the filling of the position of Corporation Secretary in the impugned advert. This position was created by Mwongozo Code of Regulations pursuant to Section 3 of the State Corporations Act and in KEMSA Act, Section 9 A (1) which provides:-

“There shall be Corporation Secretary of the authority who shall be competitively recruited by the Board and whose terms and conditions of service shall be determined by the Board upon the advice of the Salaries and Remuneration Commission in the instrument of appointment or otherwise in writing from time to time.”

14. Furthermore, in the impugned advert, some of the purported restricted new offices bear the same title, job description and qualification as the current offices, while the rest that bear slightly changed title contain the same job description and qualifications as current positions. That this exercise is not genuine and is a sham.

15. That the provisions of Section 40(1) of the Employment Act were not followed by the respondents. There was no genuine effort to mitigate the imminent loss of Permanent and Pensionable jobs on short notice to make the exercise humane and tenable.
16. That the petition has merit and it be allowed and the orders sought be granted.
17. The 1st respondent and the 1st interested party filed replying affidavits to the consolidated petition.
18. Mary Chao Mwandime, the Chairperson of KEMSA Board deposes at length to matters which according to her justified the restructuring exercise, abolition of office and declaration of redundancies as complained of by the petitioners.
19. The deponent states that whereas the 1st respondent had an establishment of 378 employees, KEMSA had employed 900 employees contrary to the Establishment and the current exercise of redundancy was to return KEMSA to the mandated staff compliment.
20. In further response, the 1st Interested Party Terry Kiunge Ramadhani deposes that the petitioners and others are not holders of office of the Public Service Commission in that the Public Service Commission was not involved in the recruitment of the petitioners and on boarding process and similarly the Commission is not required to be involved in the redundancy exercise being undertaken by the 1st respondent. That

the power to hire and fire staff on behalf of the Authority is vested in the Board of the Authority by the KEMSA Act.

21. That the Board carried out extensive consultations with the entire staff of the 1st respondent on various dates in compliance with Section 40(1) of the Employment Act, 2007. The employees were invited to air their concerns which were to be taken into account and factored in the decision to be taken by KEMSA on the redundancy exercise.
22. That the Redundancy exercise underway is being carried out by KEMSA pursuant to a Report by the KEMSA Reforms Implementation Committee "*the Reforms Committee*" which was established on 21/1/2021 which was mandated to work closely with the Board to implement a report by KEMSA. Immediate Action Plan and Medium Term Reforms Working Committee (KIAPRWC) which was set up to unravel the over-procurement by KEMSA in the COVID – 19 period between April 2020 and July, 2020 the result of which KEMSA was stuck with supplies worth over Kshs.6 billion which have strained the liquidity of KEMSA.
23. That to facilitate the reforms, a new Board was appointed vide Gazette Notice dated 28th April, 2021 with a clear mandate to overhaul KEMSA. The staff rationalization was commenced in earnest by the new Board accordingly. The process was started by the Acting Chief Executive Officer Mr. Edward Njoroge Njuguna by a Notice issued on 4/11/2021 in which all employees were informed of the potential redundancy taking place in line with Section 40 of the Employment Act.

24. Following the issuance of the general redundancy notice of 4/11/2021, three (3) petitioners filed ELRC Petition No. 173 of 2021. ELRC Petition No. E174 of 2021 and ELRC Petition No. 187 of 2021. That the said petitions were consolidated, heard and judgment delivered by Maureen Onyango, J. on 27/5/2022. The said notice was re-issued on 10/6/2022 after the judgment of the Court.
25. That the said judgment found *inter alia* that carrying out a redundancy was a prerogative of the employer subject to the provisions of the Employment Act with respect to “***notice, the procedure and the benefits payable.***”
26. The Court further found that, at the time the consolidated petitions were filed, KEMSA had only issued a general notice of redundancy and it had not taken any action that would be considered to be unlawful with respect to the procedure for redundancy as set out in Section 40 of the Employment Act.
27. The Court found the consolidated petition to be without merit and was filed to pre-empt the lawful process under Section 40 of the Employment Act, which had just commenced and the employment of the petitioners was still in place.
28. The 2nd Interested party deposes further that following the delivery of the said judgment, KEMSA on 10/6/2022 issued another General Notice of intended redundancy in which KEMSA informed its staff that in carrying out the redundancy exercise, it will engage all staff in consultations and thereafter make an informed decision on the

intended redundancy. It also informed the staff of the criteria it will be employing in the selection process of the employees affected to include seniority; skills and competence; merit; ability and reliability.

29. The 2nd Interested party deposes that extensive consultations were subsequently carried out with entire staff on various dates beyond the mandatory period of one month.
30. That it is true 31 management positions have been advertised but the exercise of restructuring and re-organisation being carried out by KEMSA is "aimed at achieving the established workforce of 378 as recommended by SCAC as against current workforce of 900" (**Emphasis added**). That the mechanics behind how this is being achieved is a Board prerogative that is being exercised in line with the provisions of the Employment Act, after all the petitioners are not holders of Public Service office having not been recruited by the Public Service Commission but by the Board.
31. Therefore, KEMSA is not carrying out an unfair termination clothed as redundancy as alleged by the petitioners or at all. That none of the petitioners or any other member of staff have had their employment terminated as alleged or at all.

Submissions

32. The petitioners filed written submissions in which the facts set out in the petition and supporting affidavit are summarized.

33. The petitioners submit that it was outright unlawful for the board to abolish all offices and positions which are underpinned by statute to discharge the functions of KEMSA under Section 4(1) of KEMSA Act. That the functions are set out under subsection 4(1) (a) to (e).
34. The petitioner submits further that the Board of management of KEMSA in 2014 approved the establishment of 341 workforce on permanent and pensionable terms and had on 15/10/2013 approved appointment of contractual staff from time to time on need basis which together explains the current combined employment of 754 workforce and so there is no excess of any staff and if any, then the respondents are at liberty not to renew the short contracts of service of the employees.
35. Furthermore, the needs of the year 2014 may not be similar to those of the present organization. That in any event creation and abolition of offices in public bodies is a constitutional and statutory mandate of Public Service Commission. That the current process is a clear usurpation of the mandate of Public Service Commission as set out under Article 234 (2) (a) and Section 25-30 of the Public Service Commission Act.
36. That advertising for the positions in public service in a purported redundancy exercise is a clear violation of the provisions of Section 40(1) (c) of the Employment Act and case law.
37. That the purported consultation conducted at a meeting constituted by the Chief Executive Officer on 20/6/2022 was not adequate since each

cohort of staff had 1 1/2 hour session with the Chief Executive Officer and the staff had not been informed in advance of the purpose of the meeting to which they were invited by a letter dated 17/6/2022. Furthermore, in the judgment of the Court dated 27/5/2022 in Petition No. 174 of 2021, the Court had quashed the appointment of the four (4) Board Members who had participated in the impugned restructuring exercise. The 2nd respondent in disregard to the guideline given in the said judgment went ahead to appoint two (2) new members to the Board without advertising, shortlisting and/or interviewing any candidates. Therefore, the two appointees were also appointed unlawfully vide Gazette Notice No.9327 of 5/8/2022 and the appointment should be quashed.

38. That the targeted employees have done no wrong so that even if there was a genuine reason to declare some of them redundant, this should be done without inflicting unnecessary pain on the employees while giving them opportunities for re-employment to other positions on priority basis. That the ongoing exercise is ill intended and is unlawful and unfair. That the petition be allowed and the orders sought be granted.

Submissions by 2nd Interested Party

39. The 2nd interested party submits with regard to the intended redundancy by the 1st Respondent that the government of Kenya acting on its own motion and through the Ministry of Health and the National Assembly, and the Office of the Auditor General exercising its constitutional duties, had spear headed the preparation of various

reports pursuant to investigations and consultation. The following reports were prepared regarding the operations of the Respondent;

- (a) *The Auditor General's Special Audit Report on utilization of Covid 19 Funds by KEMSA for the period 13th March -31st July 2021.*
- (b) *Departmental Committee on Health Inquiry Report on utilization of Covid funds in the Ministry of Health with focus on KEMSA.*
- (c) *KEMSA Immediate Action Plan and Medium-Term Reforms Working Committee (KIAPRWC)*
- (d) *Delberg's KEMSA readiness for Universal Health Coverage Scale up report; and*
- (e) *USAID and Global Fund Review of the KEMSA Management Systems.*

40. It is argued that following the issuance of the general redundancy notice dated the 4th of November 2021, three Petitions were filed in the Employment and Labour Relations Court being ELRC Petition No. E 173 of 2021, ELRC Petition No 174 of 2021 and ELRC Petition No. 187 of 2021. The said petitions were consolidated, heard and judgment delivered on the 27th of May, 2022 by the Honourable Lady Justice Maureen Onyango who declined to interfere with the intended redundancy process initiated by the 1st Respondent. That the matter is thus *res judicata* and cannot be re-opened afresh before this Court.

41. The respondents and interested parties relied on the Court of Appeal decision in *Africa Nazarene University -vs- David Mutere and*

Others – C.A. No. 236 of 2015 and Thomas De la Rue (K) Limited -vs- David Opondo Omutelema - C.A. No. 65 of 2012
to argue that the redundancy process was lawful and fair.

42. The issues for determination are as follows:-

- (a) *Whether the action by the 1st respondent amounts to establishment and abolition of office and if so, whether the same action violates Article 234 of the Constitution.*
- (b) *If the answer to (a) is in the negative whether the intended exercise amounts to a redundancy which ought to be allowed to run its course being a lawful mandate of the 1st respondent.*
- (c) *Whether in any event the issues raised in this petition are res-judicata having been determined by the Court in a judgment delivered in ELRC consolidated petition No. E173 of 2021; ELRC Petition No. 174 of 2021 and ELRC Petition No. 187 of 2021 in a judgment delivered on 27/5/2022 by Lady Justice Maureen Onyango.*
- (d) *Whether the petitioners are entitled to the reliefs sought.*

Issue (a)

43. The Court has carefully considered the depositions by the respondents and interested parties, the documentation attached to the said depositions and submissions by the parties. In particular, the General notice of potential redundancy dated 4/11/2021 issued by Mr. Edward Njoroge Njuguna, the erstwhile Acting Chief Executive Officer of KEMSA and copied to the Labour office points the Court to the

intention of the 1st respondent as expressed in the said letter as follows:-

“The contemplated organizational restructuring will involve changes of the Authority to enable it effectively and efficiently discharge its statutory mandate. The changes will involve amongst other things re-examining the various roles played by each of its employees and re-designating those roles as to achieve the objective of the restructuring and align the roles to the approved staff members. The said exercise may lead to some or all positions as presently constituted being rendered redundant.”

44. The notice was re-issued on 10/6/2022 after the judgment of the Court in the consolidated petition delivered on 27/5/2022.
45. Upon issuance of the notice all the petitioners and other management staff were asked to work from home except for staff tasked with essential services with effect from 5/11/2021.
46. In the engagement meetings between the Chief Executive Officer and members of staff in which the intended action by the Board was discussed, the Chief Executive Officer presented new approved organization structure comprising of eight directorates as well as redefined roles and functions. This presentation clearly sets out the nature of the exercise conducted by the 1st respondent. It not only involved introduction of new officers but also entailed remodeling of old offices and abolition of others.
47. In addition, members of staff were to be declared redundant in line with the restructured organization, that had rendered their continued retention superfluous. The old staff were then given opportunity to

apply for employment in the new positions but to compete for the same positions with members of the public in an open recruitment process. The General notice was issued on 4/11/2021 and re-issued on 10/6/2022.

48. Section 2 of the Employment Act, 2007 define redundancy as follows:-
“Redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”(emphasis is added)
49. It is pertinent to note that the 1st respondent in the intended exercise and discussions with staff did not differentiate between the permanent and pensionable positions in the establishment said to be 378 positions and the rest of the positions filled by staff on fixed term contract. The Chief Executive Officer deposes that the total staff compliant was 900 against a permanent establishment of 378.
50. It is clear therefore that the exercise targeted both the permanent and pensionable positions and positions held on contractual basis.
51. A plain reading of the General notice issued by KEMSA to its staff dated 4/11/2021 and re-issued on 10/6/2022 together with express deposition by 1st and 2nd interested parties in their replying affidavits and submissions, leads the Court to the conclusion that KEMSA was involved in establishing and abolition of office within the meaning of Article 234(2) (a) of the Constitution of Kenya, 2010. The Public

Service Commission was not involved by the 1st respondent and the 2nd interested party in the intended restructuring exercises which in the Court's considered finding constitutes establishment and abolition of office.

52. The 1st and 2nd respondent and 2nd interested party expressly states that Public Service Commission had no business in the intended exercise for this was an exclusive preserve and mandate of KEMSA Board.
53. There is no evidence at all that Public Service Commission had delegated their mandate to establish and abolish office in KEMSA to the board.
54. Indeed, it is clear that KEMSA did not inform Public Service Commission at all of the exercise they were undertaking.
55. To the extent that the intended exercise by KEMSA amounts to establishment and abolition of office, the action is *ultra vires* Article 234(2) (a) of the Constitution and is null and void *ab initio*. Indeed in *Petition No E 161 OF 2021 Manyara Muchui Anthony -vs- Communications Authority of Kenya and 3 Others* it was held that:-
- “The constitutional threshold for regulation of public service is a mandate of the 3rd respondent (Public Service Commission).”*
56. To the extent that the intended termination of employment of staff was founded on unconstitutional and unlawful establishment of new offices and abolition of established offices, the intended termination on grounds of redundancy is unlawful, and unfair *ab initio*.

57. The said exercise cannot therefore be sanitized by purported subsequent compliance with the provisions of Section 40(1) of the Employment Act, 2007, the same having been tainted with gross illegality and violation of the Constitution of Kenya, 2010.
58. Furthermore, an intended redundancy if founded on lawful reasons is firstly an internal process guided by Section 40(1) of the Employment Act, 2007. It cannot involve abolition of office, creation of new similar or same offices and then open the filling up of the newly created offices to the public at large without giving priority to the existing staff.
59. The exercise intended by the 1st respondent which is common cause is clearly in violation of Section 40(1) of the Employment Act, and all known principles established by case law to guide separation of staff and employer on the basis of redundancy.
60. To this extent, the redundancy process underway is in violation of Section 40(1) of the Employment Act, 2007 and therefore is unlawful *ab initio*. This answers issue (b) as set out herein before.
61. With regard to issue (c), it is clear that this suit relates to an exercise commenced by the General notice dated 10th June, 2022 after the judgment of the Court delivered on 27/5/2022. The judgment of the Court had dismissed petitions intended to stop redundancy exercise commenced by a General notice dated 4/11/2021. The issues of establishment and abolition of office in violation of Article 234(2) (a) of the Constitution were not issues for determination in the consolidated petition determined on 27/5/2022. These are new issues

raised in this petition by different petitioners not parties in that consolidated petition. The 1st and 2nd interested parties were also not parties in the concluded consolidated petition.

62. The issues the Court has dealt with in this petition and in particular the legality or otherwise of establishment and abolition of office by KEMSA in violation of the constitutional mandate of Public Service Commission, the 1st interest party herein, were not issues heard and determined in that previous consolidated petition. Henderson versus Henderson 1843 ALL ER 378 Wigram VC held that:-

“where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

63. The Court of Appeal held in The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR), that:-

“For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- (a) *The suit or issue was directly and substantially in issue in the former suit.*
 - (b) *That former suit was between the same parties or parties under whom they or any of them claim.*
 - (c) *Those parties were litigating under the same title.*
 - (d) *The issue was heard and finally determined in the former suit.*
 - (e) *The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*
64. The Court finds therefore that the issues raised in the petition E149 of 2022 are not *res-judicata* and this Court has jurisdiction to determine them though the same are somehow related to matters canvassed in the earlier consolidated petition.
65. Accordingly, the Court finds that the petition has merit and is allowed and the following orders made in favour of the petitioners as against the respondents:-
- (a) *A Declaration is issued that the decision of the 1st Respondent contained in the Advert published on 26th July, 2022 in its website and Daily Newspapers on various dates including in the Standard Newspaper of 2nd August, 2022 for new expanded Management team of 31 vacancies (Job References;*

KEMSA/CSLS/2022/001002:
KEMSA/HPT/2022/001-004:
KEMSA/CS/2022/001-004
KEMSA/PRM/2022/001003
KEMSA/SP/2022/001-003:
KEMSA/SCMS/2022/001-
005:KEMSA/CSD/2022/001006&
KEMSA/IARA/2022/001-004)

- is unconstitutional, null and void ab initio*
- (b) An Order of Certiorari is hereby issued to remove to this Honourable Court and quash the decision of the 1st Respondent contained in the Advert published on 26th July, 2022 in its website and Daily Newspapers on various dates including in the Standard Newspaper of 2nd August, 2022 for new expanded Management team of 31 vacancies (Job References KEMSA/CSLS/2022/001-002: KEMSA/HPT/2022/001-004: KEMSA/CS/2022/001-004:KEMSA/PRM/2022/001-003:KEMSA/SP/2022/001-003: KEMSA/SCMS/2022/001-005: KEMSA/CSD/2022/001-006 & KEMSA/IARA/2022/001004) and any other attendant and subsequent process and appointment thereof.

- (c) An Order of Prohibition prohibiting the respondents from pursuing the purported redundancy process at the 1st respondent as contained in their letters of General redundancy and internal memos dated 10th June, 2022 and 15th July, 2022 and any other related letter by the 1st respondent as the process is tainted with illegality.

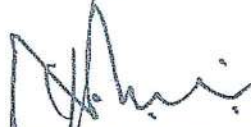
- (d) *Costs of the suit.*

66. For the avoidance of doubt, the Court makes no specific finding that the 1st respondent has violated rights and fundamental freedoms of the petitioners since that particular claim has not been sufficiently proved

based on the pleadings in the petition and evidence adduced before Court.

67. The Court therefore grants no orders with regard to this aspect of the petition.

Dated and delivered at Nairobi (*virtually*) this 27th day of July, 2023.



Mathews N. Nduma
Judge

Appearance

Musyoka Murambi & Co. Advocate for the Petitioner/Applicant

Titus Makhanu & Associates for the Interested Party

J.A. Guserwa for 1st Interested Party

Mr. Rabut for Chacha Odera for 1st respondent

Ekale - Court

PSC-5



PUBLIC SERVICE COMMISSION

Ref. No. PSC/GEN/22/II/(91)

8th August, 2023

All Authorized Officers
All Vice Chancellors of Public Universities
All Chief Executive Officers of State Corporations

GUIDELINES FOR DEVELOPMENT AND REVIEW OF HUMAN RESOURCE MANAGEMENT INSTRUMENTS FOR STATE CORPORATIONS AND PUBLIC UNIVERSITIES

Reference is made to the Public Service Commission Circular Letter Ref. No. PSC/GEN/22/II/(18) dated 12th June, 2023 vide which the Commission requested for stakeholder views on the draft Guidelines for Development and Review of Human Resource Management Instruments for State Corporations and Public Universities.

Subsequent to the said request, the Commission received and incorporated views from various stakeholders. The purpose of this circular is therefore to issue the approved Guidelines for Development and Review of Human Resource Management Instruments for State Corporations and Public Universities to the Service for implementation with immediate effect. These Guidelines are issued pursuant to Article 234 of the Constitution of Kenya and decided Court cases on management of Human Resource in State Corporations and Public Universities.

With effect from the date of this Circular, any newly developed or reviewed Human Resource Management Instruments, or proposal for establishment of new offices, or abolition of offices should comply with the Guidelines herewith and be submitted to the Commission for consideration and approval. Please note that any Human Resource Management Instruments released for implementation without prior approval by the Commission will be considered Null and Void as pronounced by the Courts.

The Guidelines may be accessed on the Commission website: www.publicservice.go.ke.

Take necessary action.

Dr. Simon K. Rotich, CBS
SECRETARY/CEO
PUBLIC SERVICE COMMISSION

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. E303 OF 2023

=BETWEEN=

JOHN GITHONGO 1ST PETITIONER
KATIBA INSTITUTE 2ND PETITIONER

=VERSUS=

STATE CORPORATIONS ADVISORY COMMITTEE 1ST RESPONDENT
ATTORNEY GENERAL OF KENYA 2ND RESPONDENT

=AND=

PUBLIC SERVICE COMMISSION 1ST INTERESTED PARTY
SALARIES AND REMUNERATIONS COMMISSION 2ND INTERESTED PARTY
LAW SOCIETY OF KENYA..... 3RD INTERESTED PARTY

IN COURT ON 21ST SEPTEMBER, 2023
BEFORE HON. JUSTICE L.N MUGAMBI

ORDER

UPON THIS MATTER coming up for mention for directions on 21.09.2023 before Hon. Justice L.N. Mugambi in the presence of counsel for the 1st Petitioner, counsel for the Respondents, counsel for the 1st Interested Party, counsel for the 2nd Interested Party and counsel for the 3rd Interested Party **AND UPON** hearing the parties' submissions;

IT IS HEREBY ORDERED THAT:

1. In the interim and pending the hearing of the present application the status quo be maintained; the effect being that the Respondent's letter of 27/07/2023 – AG/CONF/2/C/31 VOL.VI and the letter of 8/8/2023 ref. OP/SCAC/ 9/21/2 II/(31) are hereby stayed.
2. The Petitioners shall file and serve submissions to the application within the next seven (7) days.
3. Upon service, the Respondents and Interested Parties to file their responses to the application seven (7) days thereafter.
4. Petitioner may file a rejoinder to the submissions upon receipt of the responses within 3 days.
5. Parties that have not effected service to do so by close of business today.
6. Mention for further orders/directions on 25.10.2023.

GIVEN under my hand and seal of this Honourable court this 21st day of **September, 2023.**

ISSUED at Nairobi this..... 22nd day of..... September 2023.
Ref E303/2023

[Signature]
DEPUTY REGISTRAR
HIGH COURT OF KENYA, NAIROBI

DEPUTY REGISTRAR
HIGH COURT OF KENYA

