

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**ELRC PETITION NO. E102 OF 2024**

**KENNETH OLUOCH NYAMOLO.....PETITIONER**

**VERSUS**

**NATIONAL SYNDEMIC DISEASES  
CONTROL COUNCIL (NSDCC).....RESPONDENT**

**JUDGMENT**

The amended petition dated 8<sup>th</sup> February 2024 is by Kenneth Oluoch Nyamolo, the Petitioner, against National Syndemic Diseases Control Council (NSDCC) seeking an order in the following terms:-

- (a) The declaration that the purported disciplinary process that the Petitioner supposedly underwent was unlawful, unconstitutional, null and void and violated the Petitioner's right to fair disciplinary and labour practices.
- (b) This Honourable Court be pleased to grant an order of mandamus compelling the Respondent to pay the Petitioner the difference in salaries and allowances for the time he acted as the Deputy Director Finance and Administration amounting to Kshs. 6,815,294.00 without break in service as tabulated below:

<b>CLAIM</b>		
1	Basic Salary (NACC 2 – NACC3)	4,017,774.00
2	House Allowance	82,000.00
3	Remunerative Allowance	528,000.00
4.	Gratuity (31% of Basic Pay)	1,449,520.00
	<b>TOTAL</b>	<b>6,815,294.00</b>

- (c) This Honourable Court be pleased to grant an order of mandamus compelling the Respondent to reinstate the Petitioner in his current position as the Acting Deputy Director Finance and Administration and Head Finance or its equivalent in the new organizational structure.
- (d) This Honourable Court be pleased to grant an order of mandamus compelling the Respondent to confirm the Petitioner in the position of Deputy Director Finance and Administration or its equivalent in the new organizational structure having acted in that position longer than the period stipulated in its Human Resource Procedures Manual, Section 34 of the Public Service Act 2017 and in compliance with the Article 41(1) and (2) of the Constitution.
- (e) This Honourable Court be pleased to award damages for breach of the Petitioner's rights and unfair termination.
- (f) A declaration be hereby made that the Respondent acted Ultra vires in purporting to 'step aside' the Petitioner from lawful employment without due process.
- (g) A declaration that the Respondent's decision are unfair, discriminatory, arbitrary, inconsistent, contradictory, malicious and capricious and offend the principles of natural justice and fair administrative processes as enshrined in the Constitution.
- (h) A declaration that the Petitioner's rights under Article 41, 27, 28, 47 were breached by the Respondent.
- (i) A declaration that the Board's decision to pick the Chairperson of the Committee for the Institutional Asset Disposal Committee for

disciplinary actions was discriminator and amounted to punishment contrary to the provisions of Articles 27 and 236 of the Constitution.

- (j) A declaration that the Respondent breached the Petitioner's contract of service that requires notification of 3 months before expiry of the contract.
- (k) A declaration that Respondents failure to issue contract renewal notification threatened the Petitioner's economic and social rights under Article 43 of the Constitution.
- (l) A declaration that the Petitioner's contract of service be deemed to have automatically been renewed when the Respondent failed to issue notification within the stipulated contract time.
- (m) A declaration that the Respondents' decisions were made for an illegal, improper motive and or for selective extraneous purpose failing to take into account relevant factors and provisions of the law or due process on the right to a just and fair hearing.
- (n) The Petitioner be granted an order of certiorari to bring into this court and quash the decision of Board contained in the letter dated April 16, 2024 purporting to step aside and further quash all decisions and recommendations made by the Respondent with regard to the contents of the letter thereafter.
- (o) The Petitioner be granted an order of certiorari to bring into this court and quash and expunge from all records, including minutes and report of the special Board meeting and its committees all references and inferences adverse to the Petitioner based on the false and unsubstantiated allegations on the alleged breach of gross misconduct.

- (p) The Petitioner be granted an order of prohibition directed to the prohibiting and restraining it from implementing the decisions in the letters dated April 12, 2024 and April 16, 2024, purporting to make him step aside and deny him access to the precincts of the Respondent for the period, including any other proceedings and resolutions adopted thereafter.
- (q) The costs of the suit be borne by the Respondent.
- (r) The interest at court rates thereon be borne by the Respondent from the date of judgment till payment in full.
- (s) The Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstances.

### **Cause of action**

The Petitioner was employed by the Respondent as the Acting Deputy Director Finance and Administration, Head Finance and the chairperson for the Institutional Asset Disposal Committee vide a letter of appointment dated 14<sup>th</sup> December 2020.

The main duty of the Petitioner was a safeguard and optimize utilization of the Respondent's time and financial resources and timely production of financial information among other related functions contained in the job description.

That the Petitioner continuously performed the function of the office of Deputy Director Finance and Administration for more than 3 years, but was not paid salary differential between his substantive position and the Acting

position in the sum of Kshs. 6,815,294.00 as set out at paragraph 37 of the petition.

That performance appraisal for the Petitioner for the period 1/7/2022 to 30/6/2023 was rated at 94.56% and the previous rating was at 88%.

The contract for the Petitioner was coming to an end on 31/10/2024. The Petitioner wrote a request for the renewal of the contract on 9/2/2024 in accordance with the provisions of the contract.

That the Respondent was obliged to notify the Petitioner of the decision to renew or not to renew the contract 3 months before the expiry of the contract which dated fell on 30/6/2024. That the Respondents failed to notify the decision within the 3 months period which conduct violated the Petitioner's rights under Article 41 and 43 of the Constitution of Kenya 2010.

The Petitioner applied for 25 days annual leave on 19/3/2024.

On 22/3/2024, the Petitioner received a letter from his supervisor titled "Explanation of non-fulfilment of responsibilities: Assets Disposal Committee" requiring the Petitioner to submit a report to the Chief Executive Officer for review for a Board presentation on 28/3/2024. The Petitioner had been appointed the Chairperson of the Asset Disposal Committee on 8/7/2022 and the tenure was extended by a letter dated 26/2/2024. The Petitioner was scheduled to commence his leave on 11/4/2024.

The Petitioner prepared a report to the CEO as requested and prepared a Board paper on the same matter dated 26/3/2024.

On 3/4/2024, the CEO returned the Disposal Committee recommendations dated 27/3/2024 with two instructions:-

- (i) Disposal list approved and
- (ii) follow up with Mechanical Engineer Chief to dispose the vehicles by including cost of repair as the basis.

On 4/4/2024, the Petitioner received another letter stating that his explanation was unsatisfactory and he should respond by 11/4/2024 with clear timelines on how the Disposal of the undisposed Assets would be concluded. The Petitioner convened the Disposal Committee on 8/4/2024 and a further report was submitted on 7/4/2024 with a schedule for disposal of furniture, fittings and ICT equipment but recommended that since the user department did not identify any vehicle for disposal, the committee could not dispose off the motor vehicle as it would contravene Article 227 of the Constitution, Section 164 of the Public Procurement and Asset Disposal Act and Regulation 34(a) of the 2020 Regulations.

The Petitioner then proceeded on leave on 11/4/2024 having delivered the report by 9/4/2024.

On 16/4/2024, the Petitioner while on leave at his rural home received a telephone call from the Administration Assistant that he had two letters to

be delivered to him. The Petitioner instructed that the two letters be delivered to his spouse at Nairobi to forward the same to him.

One of the letters was dated 12/4/2024 referenced – Communication to Board Members while the 2<sup>nd</sup> letter was dated 16/4/2024 referenced – stepping aside to facilitate investigations.

The Petitioner was alleged to have committed gross misconduct by communicating to the Board the Disposal Committee report on 26/3/2024 and had failed to adhere to lawful instructions by employer or appointing authority with the pervuew of his roles. This was in respect of the decision not to dispose of the motor vehicles by the Disposal Committee. The Petitioner posits that he was being victimized for failing to implement unlawful instructions to dispose of government motor vehicles without a certificate from the Chief Government Mechanical Engineer.

That the Petitioner had previously suffered similar unlawful instructions set out at paragraph 56 of the petition including demands of cash from office for unclear purposes, processing monthly salaries payment without a contract of employment upon expiry of contract, verbal demands and threats for refunds of self-procured items including payment of tips using government funds and verbal demands and physical threats for processing of travel allowances without clearance letters for non NSDCC staff on diverse dates stated therein.

The Petitioner was subjected to numerous verbal abuses telephone calls past working hours and actual threats of termination of his employment as evidenced on 2019/2022 resulting in unreasonable working conditions in breach of Article 41(2) (b) of the Constitution.

These threats impeded the renewal of the Petitioner's contract which was due on 31/10/2024 and the alleged disciplinary action was pretentious amounted to unlawfully getting rid of the Petitioner for nefarious reasons.

That the Petitioner has suffered job loss, violation of his terms of contract and constitutional rights enshrined in the constitution. The contract of employment of the Petitioner was predictably not renewed and was unlawfully terminated on by a letter dated 16/10/2024.

The disciplinary process was concluded without the Petitioner appearing before any Disciplinary panel through a letter dated 15/10/2024. The Petitioner never received a copy of the investigation report of the Disciplinary Committee to date.

The entire disciplinary process lacked procedural fairness and due process and was massively opaque.

The Petitioner received two letters through his postal address on 26/11/2024 dated 15/10/2024 and 16/10/2024. The postage stamp on the envelope is dated 2/11/2024 and was brought to the attention of the Petitioner on 2/12/2024, a clear and deliberate abuse of the postal rule.

The letter dated 15/10/2024 is titled “conclusion of Disciplinary Process” indicating that the disciplinary process leading to issuance of the show cause letter dated 29/7/2024 had been concluded and the Petitioner was to be paid his half-held salaries and benefits.

The Petitioner notes that the Respondent invited the Petitioner for a disciplinary hearing on 15/10/2024, a day when the Petitioner was appearing before this court and a reschedule requested dated 3/10/2024 was made by the Petitioner through his advocates which letter was never responded to by the Respondent. A follow up letter was written to the Respondent on 16/10/2024 to know the status following the request to reschedule the meeting, which letter was also not responded to.

The Petitioner states that the Respondent has resulted in falsification of documents, altering and back dating of documents to defeat the ends of justice. That the letter from the Head Legal Services and the letter from the CEO stripping her off her functions for refusing to sit in the impugned disciplinary process are evidence of the aforesaid unsavoury tactics adopted by the Respondent.

The Petitioner responded to the show cause letter dated 29/7/2024 without being given the requested documents including investigation report and other requested documents.

The Petitioner has never been availed the investigation reports and disciplinary committee report to-date despite requests vide emails dated 25/11/2024 and 2/12/2024. The Petitioner has also not been paid his

terminal dues but same were attached unlawfully and paid to Hazina Sacco despite clear instructions from the Petitioner on how his terminal dues were to be disbursed in the said two emails dated 25/11/2024 and 2/12/2024. The Respondent did not provide any details of amounts paid to Hazina Sacco to date.

The letter dated 16/10/2024 communicated non-renewal of contract to the Petitioner and that his last working day was 31/10/2024.

The letter dated not indicate when the Board met to make that decision and no reasons were given for the non-renewal.

That the Petitioner had legitimate expectation for his contract renewal having been renewed since 2011 where he was employed as Grants Accountant and served up to 16/4/2024 when he was requested to step aside.

The Petitioner had four (4) contract renewals and had worked with the Respondent for 12 years and his annual appraisals were above 85% score.

That failure by the Respondent to give the Petitioner at least 3 months notice of non-renewal before the expiry of his contract made the decision unlawful especially in view of the appraisal for the period 1/7/2022 to 30/6/2023 rated at 94.56% and the immediate review at 88% both of which were consistent with a renewal of the contract and not otherwise.

## **Rights violated**

The Petitioner outlines the provisions of the constitution violated by the Respondent including Articles 2(1); 10(2); 27(1); 28, 41(1) (2), 43, 47 and 50(1) of the Constitution of Kenya 2010 as set out in Chapter F paragraph 86 to 128 in the body of the petition.

Reasons wherefore the Petitioner prays to be awarded as prayed.

### **Replying Affidavit**

The Respondent filed a replying affidavit of Dr. Ruth Laibon Masha the Chief Executive Officer of the Respondent who deposes that the Petitioner was the Head of Finance of the Respondent and not the Acting Deputy Director Finance and Administration as alleged.

That the Petitioner was then appointed as a Grants Accountant NACC – 4 on 4/5/2011 with effect from 6/6/2011. He was confirmed to the position on 13/4/2012 on a 3-year contract upon completion of probation period on 7/5/2012.

That the contract was renewed for a period of three (3) years on similar terms effective 6/2/2014 to 1/6/2017 as Grants Accountant, NACC – 4.

The Petitioner was later appointed as Acting Head Finance by a letter dated 9/6/2014 and was paid Acting Allowance. The letter and pay change advise are attached marked R.C.M. – 4A and R.C.M – 4B.

In terms of the letter of Acting appointment dated 9/6/2014, the Petitioner was to be paid an Acting Allowance at a rate of 15% of his basic salary until the position is substantially filled.

The payment instruction dated 12/6/2014 was instruction to start payment of Kshs. 20,064.82 per month as Acting Allowance from 4/7/2014.

The Respondent states that the Acting appointment lapsed on 31/7/2022 as per the letter dated 1/2/2022 marked R.C.M. 13.

That the request for extension of Acting appointment by the Petitioner was tabled before the full council on 27/9/2022 which resolved to decline extension of the appointment as per annex 15. The Respondent referred to the resolution to stop payment of acting allowance to the Petitioner with effect from 1/8/2022 upon lapse of the acting capacity. Payslips showing payment of acting allowance are also before court.

The Respondent states that the performance appraisal for the Petitioner for the period 2022-2023 was 67% and not 94.56% as alleged by the Petitioner. The Respondent produced annex 19 being a copy of the said appraisal.

The Respondent stated and produced the Board resolution reassigning the function of the Departments of Finance and Administration and did not approve staff to remain in acting capacity. Heads of affected Division reported directly to the CEO.

The Respondent produced letter dated 1/11/2022 by the Petitioner to the CEO regarding under payment of Acting Allowance and a claim for the same.

The Petitioner also complained of lack of clarity on segregation of duties. The Petitioner stated that despite withdrawal of Acting capacity, he confirmed to be assigned functions of Deputy Director Finance and Administration CEO clarified in a letter dated 1/11/2022 to the Chairperson of the Board that the Petitioner was now only performing the role of Head of Finance as directed by the Board and not acting capacity came to an end on 3/7/2022.

By a letter dated the 17/1/2022, the Petitioner raised the issues of lack of clarity and segregation of function of Head of Finance since he still performed the function of Deputy Director Finance and Administration since 4/12/2020.

The CEO produced letter dated 2/11/2022 to the Petitioner titled “clarification on Acting appointment” in the letter the CEO stated that the rate for acting appointment is outlined in the Public Service Human Resources Policy 2016 and the Board adopted the new rates on 7/9/2022 for implementation moving forward (Emphasis made).

The Respondent acknowledged the letter by the Petitioner dated 9/2/2024 requesting renewal of the contract as the Head Finance. That the letter was submitted to the Council as per the NSDCC Human Resources and

Administration Policy and Regulation 2009. Respondent states that clause 21.12 which provides that the employee shall within three (3) months give notice indicating whether or not they desired to have the contract renewed. That the council shall make the decision whether to renew or not the contract at least three (3) months before the end of the contract.

The Respondent stated that clause 1(ii) of the employment contract dated 22/10/2014 provided for a request of renewal at least six (6) months before the end of the three (3) year contract period and the council will communicate decision to renew or not renew the contract three (3) months before the end of the contract.

The Respondent stated that they were still within the timeline within which to respond to the request for contract renewal. This replying affidavit was sworn on 16/8/2024 and the last date of the contract was 31/10/2024.

The Respondent admit that it appointed the Petitioner as Chairperson of the Assets Disposal Ad-hoc Committee by a letter dated 10/7/2022 and reappointed him by a letter dated 26/2/2024.

That the Petitioner as the Chairperson, failed to convene meetings and did not sufficiently meet expected output hindering completion of assigned tasks within the required timelines.

That a notice to show cause dated 22/3/2024 was sent to the Petitioner and all members of the committee.

That the explanation by the Petitioner was deemed unsatisfactory by a letter dated 4/4/2024 and Petitioner was asked to provide clear time-lines within which to dispose the assets and this to reach the Respondent by 11/4/2024. That the Petitioner did not demonstrate completion of the Tasks of the Adhoc committee while he was the Chairperson for a period of one year and nine months.

That the Petitioner in his explanation dated 26/3/2024 copied the same to the Board members vide email dated 26/3/2024 hence breaching the established communication protocols as produced in NSDCC Human Resources and Administration Policy and Regulation 2009 hence necessitate the Respondent to initiate disciplinary actions. That the request for explanation had been copied to the Chairperson of the Board only and not all members as alleged by the Petitioner.

The Respondent states that it complied with clause 5.4.2 of the HR policy Regulation on the procedure of conducting disciplinary hearing as follows:-

***“5.4.2 Reporting and investigation procedure for NACC 2-4***

***(a) All acts of misconduct shall be reported in writing to the Director either directly or through the HR and Administration Division.***

***(b) Upon receiving the report, the Director shall process the matter for consideration by the relevant council or a committee of the council.***

- (c) Where deemed necessary, the Director may request an investigation into the matter before submitting the same to the relevant council committee.***
- (d) The Council Committee shall determine the case and in so doing shall grant the employee the opportunity to be heard and call for any witness if necessary.***
- (e) Disciplinary cases shall be dealt with promptly and finalized within a period of six (6) months. Where the matter under investigation necessitates, an additional period shall be given by the Council.***
- (f) Upon receiving the recommendation of the Council Committee, the Council shall make a decision on the case.”***

The Respondent states that it adhered to the procedure set out under section 69(4) of the Public Service Act 2017; clause 5.4.2. of the HR Policy Manual and Regulation and clause 4.7 of the Public Service Commission Disciplinary Manual for Public Service, revised 2022.

That particulars of gross misconduct were listed in the letter dated 16/4/2024 (annex 29).

That the instructions by the Respondent for disposal of motor vehicles complied with section 104(9) of the Public Procurement and Asset Disposal Act, 2022 contrary to assertions by the Petitioner. That the Land Cruiser Motor Vehicles originally ear marked for disposal which did not have the certificate from the Chief Mechanical Engineer recommending disposal

were excluded from the list of items for disposal as per the Disposal Committee meeting minutes dated 25/3/2024 contrary to the allegations by the Petitioner.

That the Respondent has sound whistle blowing channels and allegations made by the Petitioner are inappropriate instructions are an afterthought. The CEO states that she has never verbally or physically abused the Petitioner as alleged or at all.

That the disciplinary process was devoid of any malice and was conducted in strict adherence to the law and HR Policy Manual and Regulations.

The Respondent cited the principle of constitutional avoidance as stated in the case of ***Gabriel Mutana and 2 others versus Managing Director Kenya Ports Authority and 2 others [2016] eKLR*** where the Court of Appeal sitting at Malindi cautioned against turning the constitution to a thorough fare for the resolution of every kind of common grievance.

The Respondent stated the Petitioner violated section 9(2) and (3) of the Fair Administrative Action Act 2015 on the principle of exhaustion of alternative dispute resolution/internal mechanism for appeal/review as was held in the case of ***Cortec Mining Kenya Ltd versus Cabinet Secretary Ministry of Mining and 9 others [2015] eKLR*** and ***Megawill Mining Company Ltd versus the Hon. Attorney General and Cabinet Secretary Ministry of Mining, Nairobi ELRC Mis. JR Civil Application No. 948 of 2015.***

## **Supplementary Affidavit**

The Petitioner filed a supplementary affidavit dated 29/7/2024 in which it reiterated its case as set out in the petition; traversed all allegations made in the replying affidavit in opposition to the petition; joined issues with the Respondent and put it to strict proof thereof. The Petitioner also filed submissions as the Respondent subsequently did which the court has carefully considered together with all the depositions and documents filed by the parties.

## **DETERMINATION**

The issues for determination are as follows:

- (i) Is the Petitioner guilty of violation of the principle of constitutional avoidance and exhaustion of internal remedies.
- (ii) Has the Petitioner proved threats to and/or violation of the human rights protected under the Constitution and set out in the petition.
- (iii) Is the Petitioner entitled to the reliefs sought?

We shall deal with the issues together.

The crux of this dispute is refusal by the Respondent to renew the employment contract of the Petitioner which expired on 31<sup>st</sup> October 2024. The Petitioner had by a letter dated 9/2/2024 requested for renewal of the contract. The letter for renewal was done more than seven (7) months from the date of expiry.

The terms of contract between the parties states at clause 1(ii) as follows:-

***“At least 6 months before the end of the three (3) year contract period, you shall give notice to terminate or renew the contract. The decision whether or not to renew the contract will be made by the council. The Council will communicate the decision of acceptance or rejection of such intent three (3) months before the end of the contract.”***

It has been proved by the Petitioner that the Respondent did not respond to his request dated 9/2/2024, which was more than six (6) months to the expiry of the contract until a letter not to renew his contract dated 16<sup>th</sup> October, 2024 was received by the Petitioner vide his postal address on 26<sup>th</sup> November 2024, which was 26 days from the date the contract expired on 30<sup>th</sup> October 2024.

It has been established by the Petitioner that the Respondent did not comply with clause 1(ii) of the contract of employment.

In the replying affidavit dated 16<sup>th</sup> August 2024 the Respondent admitted the contents of clause 1(ii) of the contract of employment between parties aforesaid at paragraph 28 thereof. The Respondent in that affidavit acknowledged that they were bound to respond to the request for the renewal of the contact made by the Petitioner by 1<sup>st</sup> August 2024.

The Respondent filed a replying affidavit to the Petitioner dated 7<sup>th</sup> April 2025 to the amended petition and written submissions dated 5<sup>th</sup> June 2025 stating that the contract by the Petitioner came to an end by effluxion of

time and that by a letter dated 30<sup>th</sup> July 2024 marked annexure WB – 25 to the replying affidavit to the Petitioner, the Respondent had complied with clause 1(ii) of the contract of employment by indicating to the Petitioner that the decision on the renewal of contract had been placed in abeyance pending the conclusion of the disciplinary process. That at the time an investigation committee that had been put in place to investigate allegations of gross misconduct by the Petitioner had concluded investigations and issued its report dated 26<sup>th</sup> July 2024.

The Respondent submitted that it was prudent for the Respondent to await the conclusion of the disciplinary process as the outcome would directly inform the decision on whether to renew the Petitioner's contract. That the Respondent acted in good faith so as not to pre-empt the outcome of the disciplinary process.

That the Petitioner refused to appear before the disciplinary committee to safeguard his employment rights and so comes to court without clean hands by the fact of squandering his chance to explain the internal disciplinary mechanism.

The Respondent relies on the **case of Rajab Barasa and 4 others versus Kenya Meat Commission [2021] eKLR** to submit as was held in that case;

***“Once the event agreed to between an employer and its employee takes place or materializes, there would ordinarily be no dismissal. The law is that the expiry of the fixed term contract***

***of employment does not constitute termination of the contract by any of the parties. There is an automatic termination of the contract by operation of law and not a dismissal or unfair termination of employment.”***

The Respondent admitted the content of paragraph 80 of the amended petition that it wrote a letter dated 16<sup>th</sup> October 2024 to the Petitioner titled “response to your request for consideration for renewal of contract upon expiry of the existing contract indicating that the Board did not renew the contract and therefore the Petitioner’s last working day was October 31<sup>st</sup> 2024.

The Respondent stated that it was not obliged to give any reasons for non-renewal of a fixed term contract held by the Petitioner which was due to expire in 14 days’ time from the date of that letter.

The Respondent denied that the Petitioner had legitimate expectation for his contract to be renewed having been renewed since 2011.

The fact of the matter is that the employment of the Petitioner was not terminated for any fault on his part, arrived at upon following of due process by the Respondent. The Respondent breathes hot and cold in that on the one hand it relies on the expiry clause of the contract, by insisting that the contract, expired by effluxion of time while acknowledging that it did not give the Petitioner at least 3 months’ notice of the intention not to renew the contract. The letter dated 30<sup>th</sup> July 2024, written by the Respondent did not

comply with the requirements of clause 1(ii) of the contract. This clause is meant to prepare the Petitioner for the event of non-renewal and not the possibility on renewal or non-renewal to help the Petitioner to prepare for the exit by applying for alternative employment, if so desired and to prepare financially for the eventuality of the end of receipt of remuneration upon expiry of contract by effluxion of time.

The court finds that the failure by the Respondent to notify the Claimant of non-renewal within 3 months period violated the terms of the contract and the Claimant suffered loss and damage as a result thereof.

The failure by the Respondent did not nullify the eventuality of expiry of the contract, but it made the Respondent liable to pay damages for loss suffered by the Petitioner by fact of the breach of clause 1(ii) of the contract.

The court finds that this loss may be vindicated by an award of damages equivalent to three (3) months gross salary earned by the Petitioner as at the time of expiry of his contract of employment.

### **Acting Allowance**

It is not in dispute that the Petitioner was appointed to the position of Acting Deputy Director, Finance and Administration with effect from 15/12/2020 by a letter dated 14/12/2020. In terms of the said letter, the Petitioner was to be paid an Acting Allowance at the rate of 15% of his basic salary per month for the duration he was to remain in the acting capacity. By a letter dated 12/1/2021, the Petitioner was to be paid Kshs. 46,186.20 per month

being 15% of his basic monthly salary of Kshs. 307,908.00 per month. It is not in dispute that the Petitioner confirmed to have received the said amount over and above his gross monthly salary until the acting position was stopped by a letter dated 18/8/2022 with effect from 1/8/2022.

The Respondent produced a memo for the CEO to the Head Human Resources and Administration, communicating a decision of the Board to stop departmental heads of finance and Administration coordination and support and policy monitoring and research be reassigned within the Divisions of the said departments and the Heads of the affected Divisions report to the CEO. The resolution by the Board is dated 27/8/2022 and was communicated to the Heads including the Petitioner on 1<sup>st</sup> November 2022. The Respondent submitted that the stoppage of the Acting Allowance was in line with the Board resolution and that the claims by the Petitioner lacks merit.

The other contention by the Petitioner is that the Acting Allowance ought to have been in line with the Public Service Commission Regulations being the difference in salary between the substantive position held by the officer and the salary payable to the acting position held. The Petitioner claims the difference not paid to him in line with the public service regulations as set out in prayer b of the amended petition in the sum of Kshs. 6,815,294.00.

The Petitioner submitted that failure to pay the full acting allowance violated Article 41(2)(a) of the Constitution, section 34 of the Public Service Act, 2017, and section 3.4 of the Human Resource Policies and Procedure

Manual and the Human Resources Administration Policies and Regulation 2009 on Acting appointments.

The Respondent had no answer for the failure to implement the law and regulation in respect of the acting capacity by the Petitioner. The court finds that for the period not in dispute, when the Petitioner was in acting capacity in respect of the position of Deputy Director Finance and Administration being 1<sup>st</sup> February 2022 upto and including 1<sup>st</sup> August 2022, the Petitioner was entitled to payment of Acting Allowance as stated by the public service Regulations and the Respondent's own Human Resource manual and Regulations. Accordingly, the Petitioner is to be paid the said amount less the amount received monthly during the period at Kshs. 46,186.20 per month. The difference payable for the period to be computed accordingly.

The Petitioner has failed to prove that he remained in acting capacity after 1<sup>st</sup> August 2022 and that claim lacks merit.

It is the court's finding that this suit is properly founded in contract law. The conduct by the Respondent of non-payment of Acting allowance and failure to adhere to the contract notice for renewal need not have been elevated to constitutional dispute.

The court finds that the disciplinary process was not finalized and the Respondent did not rely on it to terminate the employment of the Petitioner. The process having aborted, the Petitioner failed to prove that his rights

under the Constitution of Kenya 2010 were violated as set out in the petition or at all.

### **Gratuity**

The contract of employment between the parties provided for terminal gratuity calculated at the rate of 31% of the basic salary for each completed year of service. The claim for unpaid gratuity is limited to the last 3 years contract and is to be calculated taking into account the basic salary which ought to have been for the acting position of Acting Deputy Director of finance between the period 15<sup>th</sup> December 2020 upto 31<sup>st</sup> July 2022. The arrear gratuity payable to be computed accordingly.

In the final analysis the court enters the following judgment in favour of the Petitioner against the Respondent:

- (a) General damages equivalent to three months' salary for breach of clause 1(ii) of the contract.
- (b) Salary arrears in respect of Acting Allowance for the period 1<sup>st</sup> December 2020 to 31<sup>st</sup> July 2022 for the position of Deputy Director Finance and Administration.
- (c) Gratuity arrears at 31% of earned salary per year from the period 1<sup>st</sup> December 2020 to 31<sup>st</sup> July 2022.
- (d) The contract having expired by effluxion of time and was not renewed no orders are issued with regard to reinstatement of the Petitioner to his previous position for lack of merit.
- (e) The termination of the employment of the Petitioner was not based on any proved misconduct and the court declares that the same came to

an end by effluxion of time and for no fault on the part of the Petitioner.

- (f) The amounts in (a), (b) and (c) above to be computed, filed and paid to the Petitioner within 60 days of this judgment.
- (g) Interest on (a), (b) and (c) at court rates from date of judgment till payment in full.
- (h) Costs of the suit to be borne by the Respondent.

Dated at Nairobi this **25<sup>th</sup> Day of September 2025.**

**Mathews Nduma**

**JUDGE**

**Appearance:**

Mr. Juma for the Petitioner

Mr. Kioko for Respondent

Mr. Kemboi – Court Assistant