

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT  
MOMBASA**

**PETITION NO. E007 OF 2025**

**JULIUS OGOGOH ..... PETITIONER**

**VERSUS**

**PUBLIC SERVICE COMMISSION ..... 1<sup>ST</sup>  
RESPONDENT**

**KENYA FISHING INDUSTRIES CORPORATION ..... 2<sup>ND</sup>  
RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF MINING, BLUE ECONOMIC AND  
MARITIME AFFAIRS ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**DR. MIKAH O NYABERI ..... INTERESTED  
PARTY**

**JUDGMENT**

The petitioner is an adult, a public-spirited individual, and a human rights defender. The 1st respondent is established under article 233 of the constitution. The 2nd respondent is a state corporation. The 3rd respondent is the cabinet secretary. The interested party is an adult.

The petitioner is seeking the following:

- a) A declaration that keeping the interparty in an acting capacity as the Chief Executive Officer (CEO) of the 2nd respondent for a period of over 4 months is unconstitutional and unlawful.
- b) A declaration that the interested party should be deemed to have been lawfully appointed to the position of CEO of the 2nd respondent upon the expiry of 6 months from the date of his appointment in an acting capacity on 3 March 2021.

- c) A declaration that causing the interested party to serve as the CEO of the 2<sup>nd</sup> respondent beyond the lawful acting period amounted to constructive confirmation of the interested party as the substantive CEO.
- d) An order of mandamus be issued compelling the respondent to forthwith confirm the interested party as the CEO of the 2<sup>nd</sup> respondent with effect from 3 March 2021.
- e) A declaration that keeping the interested party in an acting capacity as CEO of the 2<sup>nd</sup> respondent for a period of 4 years violated the interested party's rights to fair labour practices and fair remuneration under article 41 of the constitution.
- f) A declaration that since the date of his appointment to act as the acting CEO of the 2<sup>nd</sup> respondent, the interested party has performed equal work as the substantive holder and is thereby entitled to equal remuneration payable to the substantive CEO backdated to the date of his appointment.
- g) An order directing the respondents to pay and compensate the interested party for the salary underpayments in the sum of Ksh. 17,718,720 for the period he has acted as the CEO of the 2<sup>nd</sup> respondent.
- h) Damages for violation of the interested party's rights to fair labour practices and fair remuneration under article 41 of the Constitution, right to human dignity in violation of article 28 of the Constitution and the right to equal protection and benefit of the law under article 27 of the Constitution.
- i) Interest on 5 above at court rates from the date of judgment until payment in full.

### **Petition**

The petition is that the appointment of the CEO of a state corporation is central to its corporate governance. The 2<sup>nd</sup> respondent is a public entity, and the petitioner is allowed under Article 22 of the Constitution to petition the court on issues relating to its governance.

Section 34(5) of the Public Service Act requires that an officer may be appointed in an acting capacity for a period of at least 30 days but not exceeding 6 months. The office of the CEO of the 1<sup>st</sup> respondent fell vacant in 2021 but has not been filled with a substantive officer holder.

It has come to the petitioner's attention that on 3 March 2021, the interested party was appointed as CEO of the 1<sup>st</sup> respondent in an acting capacity, pending the filling of the position. Since 2021, the interested party has been performing the duties of the substantive officeholder that the CEO is supposed to undertake. The interested party has therefore been reappointed several times in an acting capacity for over six months, the maximum period

permitted under the law. The interested party's most recent appointment was on 8 November 2022 for a further six months.

The petition contends that during the period the respondent employed the interested party as acting CEO, he was denied the full pay and benefits to which the substantive CEO was entitled. This violates fair labour practices under Article 41 of the constitution. The 1st respondent has acted by denying the interested party fair remuneration that corresponds to the CEO position of the 1st respondent. At the time of his appointment, the interested party was earning Ksh. 120,860 and now earns Ksh. 172,360, instead of the Ksh. 480,000 salary owed to the substantive office holder.

The employment of the interested party in an acting capacity for such an extended period, while denying the interested party the remuneration due, amounts to unfair labour practice, and the interested party is subjected to unreasonable working conditions.

The petition states that in 2022 and 2023, the 2nd respondent interviewed candidates to fill the CEO position, with the interested party being the candidate considered for the role. Due to the respondents' continued failure to confirm the interested party's appointment as CEO, a false impression has been created that he has not been successful in the interviews and is therefore unqualified for the position. As a result, the interested party has suffered a disadvantage by being placed in an acting capacity while performing the duties of the CEO of the 1st respondent for a prolonged period. For four years, the interested party has served as acting CEO and holds a legitimate expectation of being confirmed to the position after six months.

The delay in filling the substantive position of CEO of the 1st respondent has thereby predisposed the respondent to unfair labour practices and unfair administrative actions, making them unlawful and unprocedural. The Cabinet recommended the dissolution of the 2nd respondent, which will deny the interested party the right to be confirmed as the substantive CEO of the 2nd respondent and the benefits that accrue to him by virtue of holding that position.

The 1st respondent, as the entity duly mandated to provide competent human resources and promote good governance under Article 156 of the Constitution, has acted contrary to the law. The 3rd respondent, as the parent Ministry, has failed to carry out its mandate in formulating sound policies related to the corporate governance of the 2nd respondent.

The petition is based on the provisions of articles 10, 1, 2, 19, 20, 21, 22, 23, 24, 27, 48, 73, 156, 232, and 259 of the Constitution. The petitioner seeks to establish that an employee employed in an acting capacity for an extended period has a legitimate expectation to be confirmed in the substantive position they were acting in. Failing to prove the employee after working in an acting capacity for four years contravenes fair labour practice. The act of an employer having an employee serve in an acting capacity for over four years without a valid reason is unlawful and a violation of the employee's rights.

The petitioner's affidavit supports the petition.

In response, the 1st respondent, the Public Service Commission, filed Grounds of Opposition on 14 April 2025. By Notice dated 30 April 2025, these grounds were withdrawn.

The 1st respondent (PSC) filed the Replying Affidavit of Paul Famba, the secretary and CEO, who avers that the PSC is established under Article 233 of the Constitution and is given powers under Article 234(2) of the Constitution, which include establishing and abolishing offices in the public service, appointing persons to hold public office, and exercising disciplinary control. Under article 234(2) and 252(a) (d) of the constitution, the PSC is allowed to make provisions regarding the functions, powers, and administration of the public service, including the law and policy on acting appointments.

Acting appointments can only be made in accordance with all the approved human resource instruments and section 34 of the Public Service Commission Act. Such an acting position is only valid for 6 months. When it comes to the attention of the PSC that an authorised officer has purportedly made an acting appointment or assignment in contravention of the law, corrective action is taken.

Famba aver that the appointment of the interested party as acting CEO of the 2<sup>nd</sup> respondent for a period exceeding the statutory period of 6 months is unlawful. The interested party has a duty as a public officer to decline an unlawful appointment, such as an acting appointment, that exceeds the statutory requirements.

Famba states that, under Section C.14 of the Human Resource Policies and Procedures Manual for the Public Service, when an officer is eligible for appointment to a higher position, they are entitled to an acting allowance at the rate of 20% of their substantive basic salary. Such acting allowances should not be paid beyond six months. The payment of acting allowances should be subject to recommendation by the Ministerial Human Resource

Management Advisory Committee and approval by the authorised officer. A draft advertisement for the substantive officer holder should accompany the appointment as the acting officer.

The interested party has been enjoying the benefits under Section C.14 (1) and (7) of the Human Resources Policies and Procedures manual; therefore, the petitioner cannot allege that he should be paid the salary of a substantive CE of the 2<sup>nd</sup> respondent. There was no advertisement attached to his acting appointment. This is to facilitate fair, competitive, and merit-based recruitment and appointment, as outlined in Article 232 of the Constitution. The orders sought by the petitioner are without merit.

The petitioner filed a Further Affidavit and states that the duty of the 1<sup>st</sup> respondent is to take corrective action to remedy the anomaly in the appointment of the interested party for a period exceeding the statutory limit of six months, by virtue of Section 34(6) of the Public Service Commission Act. The Human Resource Policies and Procedures Manual for the public service should be based on the Employment Act and the Constitution. He therefore cannot override the law or the Constitution. The employment of the interested party as acting CEO for 4 years is ultra vires Section 43(3) of the Public Service Commission Act.

The petitioner avers that, during the period the interested party held the acting role, he was denied full pay and benefits. This violates his constitutional rights to fair labour practices. The court should apply the equitable principle as held by the Court of Appeal in **International Investment Corporation & Another v Laxnab Keshra & others [1978] KLR**. The interested party should be deemed the substantive CO of the 2<sup>nd</sup> respondent.

Only the petitioner filed his written submissions.

The petitioner's central argument revolves around the Interested Party, Dr. Mikah O. Nyaberi, being kept in an acting capacity as the Chief Executive Officer (CEO) of the Kenya Fishing Industries Corporation, 2<sup>nd</sup> Respondent. The petitioner argues that this situation is unconstitutional and unlawful.

The petitioner submitted that, according to Section 34(3) of the Public Service Act, an officer may only be appointed in an acting capacity for a minimum of 30 days and a maximum of six months. The petitioner claimed that the Interested Party was appointed as the acting CEO around 4 March 2021, and has since been repeatedly reappointed for periods exceeding this legal limit. The petitioner noted that the Public Service Commission, the 1<sup>st</sup> Respondent,

admitted in their replying affidavit that appointing the Interested Party for a period longer than six months was unlawful.

The petitioner further claims that the Interested Party has suffered unfair labour practices and has been denied fair remuneration despite performing the duties of the substantive CEO. He submitted that, although the Interested Party's salary increased from Kshs 120,860 to Kshs 172,360, this salary is significantly less than the Kshs 480,000 salary for a substantive office holder. As a result, the petitioner seeks an order compelling the respondents to pay the Interested Party Kshs 17,718,720 for salary underpayment during the period he acted as CEO.

The petitioner cites several Articles of the Kenyan Constitution, including Article 41 on fair labour practices and fair remuneration, Article 28 on human dignity, and Article 27(1) on equal protection and benefit of the law. It also refers to Section 5(5) of the Employment Act, which mandates equal pay for equal work and argues that the Interested Party should be deemed to have been lawfully appointed to the CEO position upon the expiry of the six-month acting period.

To support his case, the Petitioner relied on the case of **Chase International Investment Corporation and another v Laxman Keshra and others [1978] KLR 907** to support the argument that the court should deem the Interested Party as the substantive holder of the CEO position due to the equitable principle that a plaintiff is entitled to succeed if the circumstances create an equity in their favor and the extent of that equity is known.

Further reliance was placed on the case of **Oyatsi v Judicial Service Commission (Petition E111 of 2021) [2022] KEELRC 3 (KLR)**, stating that the Interested Party's situation is similar to the one in this case. The Petitioner also cited the case of **Silas Kaumbuthu Mbutura v Meru Central Dairy Co-operative Union Limited [2015] eKLR**, to support the amount of compensation, arguing that the Court in this case awarded the sum of Kshs. 300,000 for unfair labour practices. However, he is proposing the sum of Kshs. 1,000,000, arguing that it is a reasonable figure, taking into account inflation.

Determination

It is a common cause that the petitioner is acting as a public-spirited individual seeking various declarations, including that the interested party be appointed as the substantive CEO of the 2nd respondent, a position he has held in an acting capacity since 3 March 2021. He is seeking that the interested party be paid the full salary, allowances, and benefits due to the substantive CEO after the acting position lapsed after 6 months.

The issues which therefore emerge for determination are whether the petition should be allowed.

Under section 34 of the Public Service Commission Act, a holder of a public office is allowed to take an appointment in an acting capacity. The requirements for such an arrangement are that the officer must have the capacity to hold the office in an acting capacity for a period ... **at least thirty days but not exceeding a period of six months.**

In this regard, section 34 (3) and (5) of the Public Service Commission Act defines an acting appointment to include;

*(3) An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.*

And, section 34(5) provides;

*(5)An acting appointment under subsection (4) shall—*

*(a)be in favour of a public officer who is duly qualified and competent to perform the duty; and*

*(b)not undermine the expeditious appointment or deployment of a competent person to the public office concerned.*

The acting role can only be held by a qualified person for up to 6 months, and the acting appointment should not be held to undermine the expeditious appointment of a competent person to the public office concerned.

These provisions are couched in mandatory terms.

In **Commission for Human Rights and Justice v Kenya Fishing Industries Corporation; Nyaberi & another (Interested Parties) [2025] KEELRC 377 (KLR)**, the petition, supported by an Affidavit of Julius Odogoh, the executive director of the petitioner, and the instant petitioner indirectly addressed similar matters as herein. The petition claimed that the

current holder of the position of CEO of the 2nd respondent has been occupying the role in an acting capacity for over six months, which is the maximum period permitted by law, as per Section 43 of the Public Service Commission Act. The petitioner sought information to address the legal and constitutional breaches by the respondent.

In the case of **Malaya v Masinde Muliro University of Science and Technology (Petition 5 of 2023) [2023] KEELRC**, the court held that engaging an employee in an acting capacity for 7 years violates the employee's right to fair labour practice.

In **Moturi v National Social Security Fund [2023] KEELRC 1463 (KLR)**, the court observed the excessive duration taken by the employee and held that;

*... inordinate acting periods was unfair labour practice in violation of Article 41 of the Constitution of Kenya, 2010. However, an employee who is held in an acting position for an inordinate long period ought to bring suit before Court while that position is still persistent so that it be deemed a continuous injury within the meaning of Section 90 of the Employment Act.*

The court further held that;

*... [in that petition] the cause of action arose after expiry of six (6) months from December 1, 2013 the date the appointment of acting Finance Manager position commenced according to the pleadings and evidence adduced by the claimant.*

In this case, the petitioner argues that the interested party was appointed acting CEO on 3 March 2021 and has subsequently held the office in an acting capacity for the last four years. Holding the acting position for a period beyond 6 months is contrary to section 34(3) of the Public Service Commission Act, and the 2nd respondent, in failing to expedite the appointment or deployment of a competent person to hold the office of the CEO, has acted unlawfully.

At the heart of the petition is the acting CEO role held by the interested party. He is a public officer, hence was found fit and competent to have the CEO role, although in an acting capacity.

The interested party is bound under the Constitution and the Public Service Commission Act to act within constitutional and legal provisions. Flowing with the current to continue holding an acting role beyond the legal threshold of 6 months is both unlawful and invalid.

The petitioner's position that the rights of an interested party have been violated and, hence, that due salaries, allowances, benefits, and damages should be awarded cannot be upheld. The interested party cannot benefit from an unlawful arrangement. The 2<sup>nd</sup> respondent continued the appointment and kept the interested party in an acting capacity, resulting in both breach and loss to the public. The Board and the line ministry should address the issue of waste to public resources and remuneration of the interested party with acting allowances beyond 6 months as required under Article 226(5) of the Constitution;

***(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.***

Liability also lies with the 2<sup>nd</sup> respondent.

Under section 34(6) of the Public Service Commission Act, the PSC has failed in addressing the continued holding of an acting position by the interested party. No corrective action has been taken since 2021. Such inaction is not justified, and being the constitutional holder for organising public service under Article 234 of the Constitution, the PSC is liable. See **Republic v Ethics & Anti-Corruption Commission; Monari (Interested Party); Ringera (Ex parte) (Anti-Corruption and Economic Crimes Judicial Review 1 of 2021) [2023] KEHC and Ethics and Anti-Corruption Commission v Judith Marilyn Okungu & another [2017] KECA 413 (KLR).**

Regarding the orders sought to declare the interested party the substantive CEO of the 2<sup>nd</sup> respondent, as correctly submitted by the petitioner, the Employment Act and the Constitution govern employment matters. The interested party has been unlawfully holding the acting CEO position in the 2<sup>nd</sup> respondent and cannot benefit from it. He held his substantive role before the acting role, which he ought to have retained and been remunerated for upon the lapse of 6 months from 3 March 2021. Continued acting outside section 34(3) of the Public Service Commission Act is invalid. No benefit accrues thereof.

Regarding the acts of omission and commission by the respondents jointly and severally in failing to appoint a substantive CEO or take corrective action by the first respondent, the petitioner cannot justify a declaratory order in favour of the interested party being appointed as CEO. An invalid action does not confer any benefit. This position is supported by

Noorbegum Fazal (suing as a holder of power of attorney for **Nadra Hussein Fazal v Diamond Trust Bank [2015] KEHC 2816 (KLR)**), which states that abetting illegality does not confer any benefit or defence upon a person seeking to avoid the consequences of his default. The interested party, as the purported beneficiary of the petition and the orders sought, has done nothing to secure his rights, as held in **Moturi v National Social Security Fund [2023] KEELRC 1463 (KLR)**. When the interested party's acting role was not addressed after six months and he continued to benefit by earning an acting allowance, the respondents' inaction should have prompted him to assert and secure his rights in employment before the six-month period lapsed. Since September 2021, the interested party has neglected to assert his rights.

The petitioner seeks an order compelling the respondents to pay the interested party for work performed as the substantive CEO of the 2nd respondent. As noted above, the interested party cannot profit from illegality. Issuing such an order would legitimise an illegality and bypass the legal framework applicable to public officers holding acting positions for no more than six months, which was the law governing public service at the relevant time. This would contravene section 34(3) of the Public Service Commission Act. See **Kenya Pipeline Company Limited v Terra Craft (K) Limited [2020] KEHC 9928 (KLR)**.

Therefore, order the respondents to pay the interested party the sum of the underpayment of Ksh. 17,718,720 would not foster public policy and interests. This is not justified.

Regarding whether the rights under Articles 41, 28, and 27 of the Constitution for the interested party have been violated, the petition addressed above, the findings outlined above, shall suffice.

**Accordingly, the petition is declined. The petitioner has addressed critical public matters of concern that the respondents ought to address. To foster such intentions in securing good practices in the public service, no orders on costs.**

Delivered in open court at Mombasa this 25th day of September 2025.

M. MBARŪ  
JUDGE

In the presence of:

Court Assistant: Japhet

..... and .....

