

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

CAUSE NO. E009 OF 2024

JOSEPH JUMA OJODE CLAIMANT

VERSUS

**KENYA NATIONAL SHIPPING LINE LIMITED 1ST RESPONDENT
BOARD OF DIRECTORS,**

KENYA NATIONAL SHIPPING LINE LIMITED 2ND RESPONDENT

JUDGMENT

Issues in Dispute

- Unfair Labour Practices.
- Complaint against Unilateral Disciplinary Measures.
- Salaries outstanding as a Result of Prolonged Acting Appointment.

The Claimant is a male adult. The 1st Respondent is a parastatal duly incorporated as a Limited Liability Company under the Companies Act. The 2nd Respondent is the multi-sectoral Board of Directors in Charge of governance, strategy and policy-making for the 1st Respondent.

The Claimant has been an employee of the 1st respondent since 19 March 1999. Through a letter dated 19 March 1999, the Claimant was employed by the 1st Respondent as an Accountant, and has risen through the ranks to his current designation as Chief Accountant.

The claim is that in January 2012, while serving as Chief Accountant of the 1st Respondent, he was appointed, through a letter dated 23 January 2012, as the Acting Managing Director of the 1st Respondent, a role that lasted for 9 months. Again, from July 2013, this acting role was extended, and he continued to hold it at the time of filing suit.

The policy of the 1st Respondent is that an acting appointment should not exceed six months. However, once an acting appointment is made, it shall not cease until the higher post is substantively filled.

The claim is that the 1st Respondent has never filled the post of Managing Director, despite multiple attempts, and is currently in the process of recruiting a substantive holder for the said position. During the entirety of the Claimant's service as Acting Managing Director, this appointment and remuneration were determined and approved by his employer through its Board of Directors as governed by the policies then in place or as determined by the Salaries and Remuneration Commission (SRC) and communicated through the various Resolutions of the Board so passed. The Claimant would subsequently be issued with a letter notifying him of any changes to his salary, benefits, allowances and or emoluments.

The Claimant avers that sometime in 2022, an audit was conducted by the Office of the Auditor General, following which it issued a letter dated 26 October 2023 citing irregularities in the 1st Respondent's remuneration scheme as well as the prolonged acting appointment of the Claimant in the role of Acting Managing Director. Following the audit queries, the Management of the 1st Respondent issued an explanation to the Office of the Auditor General, attaching documents indicating the source of salary determination, after which the 2nd Respondent sat and deliberated, coming up with resolutions:

- i) *The amounts paid to the Claimant in his salary were beyond what the SRC had determined, and that it be recovered from the Claimant by way of surcharge until payment.*
- ii) *The salary, telephone and housing allowance of the Acting Managing Director, which have been earned for over seven years, are to be reworked and revised downwards.*

The Claimant decried the Board's resolution to the extent that it is unfair, unlawful, and unjust, as well as being in direct and blatant disregard of his constitutional rights to fair labour practices, the right to property, and a violation of the principles of natural justice and fairness. The Board Resolution on recovery by way of surcharge was resolved to be submitted to the SRC and the States Corporation Advisory Committee for guidance. However, through an email dated 26 January 2024, the 2nd Respondent sought the implementation of the said resolutions without the input of these state agencies and without hearing the Claimant. Furthermore, under the 1st Respondent's policies, a surcharge is a disciplinary measure imposed against an employee who has unlawfully or irregularly appropriated funds or property of the 1st Respondent, or who has personally caused a loss of funds and property to the 1st Respondent.

The claim is that the decision to deploy a surcharge against the Claimant is a disciplinary issue and imputes wrongful conduct on his part, and is unfair, unjust, and unlawful and

serves to punish him for the actions of the 1st Respondent and its Board of Directors. It was a decision imposed upon him without any due process or hearing.

The Claimant received the salary and allowances due to him, believing the same to be lawful. What was rightfully due to him, and any mistakes in the said payment of wages and allowances are not attributed to him. The imputation of wrongful conduct against the Claimant by way of surcharge significantly hinders his career progression prospects, including automatically excluding him from the Managing Director's ongoing recruitment process. The actions of the 1st Respondent serve as threats of grave violations of the Claimant's constitutional right to property, as the unilateral decision to surcharge him amounts to a forceful denial of his property right.

The claim is that the Claimant's rights to fair labour practices are severely threatened by the threat of downward revision of his salary, the forceful surcharge without a valid reason or grounds. The action of punishing the employee for the mistakes of his employer, and the attempt to ignore more than 10 years of service rendered in acting capacity by proposing to issue a fresh acting appointment letter, is unfair. The Claimant has served the 1st Respondent in an acting capacity for more than 10 years, rendering stellar service to the 1st Respondent and performing the substantive duties to the 1st Respondent, who enjoyed such services, without the accompanying benefits due to the holder of such a post under the guise of the Claimant being in an acting capacity. By prolonging his acting appointment, the 1st Respondent has hence enjoyed his services without the substantive remuneration due to the holder of the position, and the Claimant has been denied pay for actual work done as mandated by the statutory principle of equal pay for equal work done.

The claim is that for over 10 years, the Claimant has performed the substantive duties of Managing Director without the accompanying salary and benefits. The Respondents have enjoyed the said services at a discount through the machination of a prolonged acting appointment, which was unfair and denied the Claimant the commensurate salary lawfully owed to him for work done. As a result, the Claimant is owed a total sum of Kshs. 22,578,765/95 is the difference in salary between what was earned and what was due. During the entire period in which he worked in an acting capacity, he was paid an acting allowance at a lower rate than what is lawfully owed, and has an outstanding acting allowance of Kshs. 1,711,392.63.

The cumulative actions have violated the Claimant's constitutional and statutory rights, and, unless the Court intervenes by stopping the decision to surcharge the Claimant and revise his salary downwards, the Claimant shall suffer significant loss and shall be punished for the actions of other parties. The unfair labour practices and the acts of the Respondents aggrieved the Claimant:

- a) Paying the Claimant less acting allowance than what was due.
- b) Keeping the Claimant on a prolonged acting allowance without paying him the commensurate salary.
- c) Punishing the Claimant for the employer's own actions.
- d) Unilaterally passing punishment by way of surcharge against the Claimant without hearing or any disciplinary process.
- e) Conniving to lock the Claimant out of the recruitment exercise for a Managing Director by way of disciplinary action.
- f) Unilaterally deciding to vary the Claimant's terms of employment and salary without consultation.
- g) Attempting to implement the Board Resolutions prematurely without the involvement of the relevant State Agencies.

The Claimant prays for Judgment against the Respondents jointly and severally for compensation for their cumulative actions as hereunder;

- a) *Permanent injunction barring the Respondents from surcharging the Claimant or undertaking any other disciplinary action against the Claimant arising out of the salaries paid out during his tenure as Acting Managing Director.*
- b) *Kshs. 22,578,765.95 is the sum owed for services rendered by the Claimant; or*
- c) *Acting allowance arrears at Kshs. 1,711,393.63.*
- d) *General damages for unfair labour practices.*
- e) *Costs of this suit and interest.*
- f) *Any other relief the Court may deem fit to grant.*

The claimant testified that, through a letter dated 19 March 1999, he was employed by the 1st Respondent as an Accountant and rose to be the chief accountant. On 23 January 2012, the 1st Respondent appointed him as the Acting Managing Director for a period of nine months, and later, from July 2013, a position he continued to hold at the time of filing the suit.

The 1st Respondent made various extensions until 5 December 2014, when the 50th Board of Directors, in its meeting held on that date, resolved that the Acting Director shall act until the

post is substantively filled. The Company was undergoing restructuring, and the amount of consultation to be undertaken was challenging to determine at the moment, as it was unclear how much time it would take.

The claimant testified that the policy of the 1st Respondent is that an acting appointment should not exceed 6 months, but either way, once an acting appointment is made, it should not cease until the higher post is substantively filled. The long service of the claimant as Acting Managing Director arose in the 72nd Board Meeting of the Respondents held on 25 September 2020, to which the Representative informed the Board of the State inspectorate, Peter Rutere, that they were undertaking an exercise to identify cases of CEOs who had acted for a long time and recommend an appropriate way forward, including possible confirmations. The claimant was one such CEO.

The claimant testified that the 1st Respondent did not fill the post of Managing Director, despite multiple attempts. At the time of filing suit, his appointment and remuneration were determined and approved by the respondents through their Board of Directors, as governed by the policies then in place or as determined by the SRC, and communicated through various Resolutions.

In 2022, an audit was conducted by the Office of the Auditor General, following which it issued a letter dated 26 October 2023 citing irregularities in the 1st Respondent's remuneration scheme as well as his prolonged acting appointment in the role of managing director. Following the audit queries, the Management of the 1st Respondent issued an explanation to the Office of the Auditor General, attaching documents that indicated the sources of salary determination.

However, the Board of Directors thereafter sat and deliberated, coming up with resolutions:

- i) The amounts paid to the claimant in salary were beyond what the SRC had determined, and that it should be recovered by way of surcharge until full repayment.
- ii) The salary, telephone and housing allowance of the Acting Managing Director earned for over seven years should be reworked and revised downwards.

The claimant testified that the respondent's resolutions were unfair, unlawful, and unjust, as well as being in direct and blatant breach of his constitutional rights to fair labour practices, and the right to property, as well as a violation of the principles of natural justice and

fairness. Recovery through surcharge was resolved to be submitted to the SRC and the States Corporation Advisory Committee for guidance.

Through an email dated 26 January 2024, the 2nd Respondent sought the implementation of the said resolutions without consulting the state agencies or hearing the claimant on the matter. He only learnt of the matter through the board resolutions for implementation. This was contrary to the internal policies and procedures of the 1st respondent.

The claimant protested the resolution in a letter dated 29 January 2024. He presented the matter during the 89th Board Meeting, held on 25 January 2024, and a subsequent Board Resolution affirmed the same. Still, there was no response from the Respondents, thus necessitating the institution of these proceedings.

The claimant testified that the decision and power to appoint and negotiate or approve the salaries of senior officers of the Respondent are vested in the Board of Directors through resolutions. The Board on the premises proceeded to resolve and approve the salaries of the then Managing Director; the payment of a consolidated salary of Kshs 500,000 per month as negotiated and itemised as follows;

- a) salary of Kshs 400,000,
- b) House Allowance of Kshs 60,000.00 and
- c) Other remunerative Allowances of Kshs 40,000.

The decision to rework and review the claimant's Salary and allowances downwards offends the basic Salary Structure for the Respondent's Institution as approved by the SRC in its 42nd Job Evaluation meeting held on 9 November 2017 and communicated vide the Commission's Letter dated 15 December 2017, where the Commission was emphatic in the implementation notes for the basic structure. *For jobs whose current salaries are above the basic wage, retain the existing salary structure with annual increments until the following review.*

Regarding the house allowance, the decision to rework and review it downwards contravenes the SRC's guideline on the Review of Allowances in the Public Service, dated 10 December 2014. *The public Servants whose existing rates of house allowances are above the rates provided shall retain at existing levels until or unless otherwise reviewed by the Commission. In contrast, public Servants whose existing House allowances are below the approved rates shall adopt new rates.*

Further, under the 1st Respondent's policies, a surcharge is a disciplinary measure deployed against an employer who has appropriated funds or property of the 1st Respondent unlawfully or irregularly, or who has personally occasioned loss of funds or property to the 1st Respondent. The decision to therefore deploy a surcharge against the claimant was a disciplinary issue and imputes actions of the Respondents without any due process or hearing.

The claimant testified that he received his salary and allowances, believing them to be lawful and what was rightfully due to him. Any mistakes in the payment of salary and allowances are not attributable to him. The imputation of wrongful conduct by way of surcharge greatly hindered his career progression prospects, including serving to automatically lock him out from the ongoing recruitment process of the Managing Director. The Respondent's actions serve as threats of grave violations of his constitutional right to property, as the unilateral decision to surcharge me amounts to a forceful denial of my right to property, and the orders sought should be issued.

Response

In response, the respondents denied the claims and argued that they are premature and should be dismissed.

The Claimant's grievances allegedly stem from the resolutions passed by the 2nd Respondent at the 89th Board of Directors Meeting, following the receipt of the Auditor General's report regarding the financial statements of the 1st Respondent for the year ended 2022. The 1st Respondent is a state corporation and, under the Public Service Commission Act, as a public body, it is a corporation whose controlling majority of shares are owned by an entity that is a public body, the Kenya Ports Authority, which holds 53% of the total shares of the 1st Respondent.

The Claimant's service at the Respondent is within the meaning of public service as stipulated under the provisions of Article 232 (2)(b) and 260 of the Constitution, as read together with section 2 of the Public Service Commission Act. The 2nd Respondent asserts that it is the statutory body responsible for managing the affairs of the 1st Respondent, as stipulated under the provisions of the State Corporation Act. The 2nd Respondent is also the authorised officer within the meaning of the Public Service Commission Act and is empowered under the Act to make appointments and to exercise disciplinary control over public officers. Consequently, the response is that in matters touching on disputes arising from the process of making appointments at the 1st Respondent, the payment of remuneration

and provision of other conditions of service and general exercise of the 2nd Respondent's disciplinary control over the Claimant, the Court does not have original jurisdiction but has an appellate jurisdiction as stated under the provisions of section 12 (5) of the Employment and Labour Court Relations Act.

The response is that a dispute arising from the exercise of disciplinary control by the Respondents over the Claimant is subject to appeal to the Public Service Commission, as provided under Section 74 of the Public Service Commission Act. Such decisions of the Public Service Commission are further open for review before the same Commission under the provisions of section 75 of the Act. The jurisdiction of the PSC to hear and determine appeals arising from decisions of the 2nd Respondent is a specialized jurisdiction under the provisions of Article 234 of the Constitution. The Claimant was capable of raising his complaints before the PSC under section 60 of the PSC Act.

Regarding the claims, the response is that the making of appointments at the 1st Respondent is a prerogative of the 2nd Respondent. The SRC determined the claimant's remuneration under Article 230 of the Constitution, not the 2nd Respondent as alleged. In any event, even in instances in which the 2nd Respondent had to determine the remuneration of the Claimant, the same had to be done in accordance with the law.

Claimant was called upon to act in the higher position of acting managing director of the 1st Respondent while he was at the time employed in the position of the chief accountant. However, the Claimant did not possess the requisite qualifications for the position of Acting Managing Director of the 1st Respondent. He was appointed to a job group that was two levels higher than the chief accountant's job group. The 2nd Respondent resolved to pay the Claimant a special duty allowance at an increased rate of 15% of his basic salary as the chief accountant of the 1st Respondent, payable to the Claimant monthly, effective 1 January 2015. The decision of the 2nd Respondent to pay the Claimant special duty allowance was in line with the terms of clause C. 15 of the Human Resource Policies and Procedures Manual for the Public Service.

The response is also that the Claimant has admitted to an ongoing recruitment process for qualified persons to fill the vacant position of Managing Director of the 1st Respondent. However, no appointment has been made by the 2nd Respondent to fill the vacant position of the managing director of the 1st Respondent to warrant the premature intervention of the

Court in the exercise of a mandate bestowed upon the 2nd Respondent under the provisions of section 5 (3) of the State Corporations Act or part VI of the Public Service Commission Act.

Matters informing the passing of the board resolutions by the 2nd Respondent at the 89th Board of Directors Meeting were issues which arose from the observations made in the report dated 29 June 2023, prepared by the Auditor-General in respect to the financial statements of the 1st Respondent for the year ending 30 June 2022. The Respondents, by a letter dated 23 October 2022, addressed to the Claimant in his capacity as the acting Managing Director of the 1st Respondent, the Auditor General, stated that the Claimant was serving as the Chief Accountant and the Acting Managing Director of the 1st Respondent and that he was receiving a house allowance of Ksh. 60,000 contrary to the SRC Circular Ref No. SRO/ADM/CIR/ 1/13 Vol. III (126) dated 10 December 2014, which set the payable house allowance to civil servants in the same job group as the Claimant to be a sum of Kshs. 25,000.

The Auditor General further noted that the Claimant was overpaid a sum of KSh. 34,000 per month since his appointment as the acting managing director of 1st Respondent. It was further observed in the letter dated 23 October 2022 that there were irregular payments of telephone allowances of KSh. 40,000 per month is being paid to the Claimant. The Auditor General noted that there was no justification for the payments of the telephone allowance, as they were made contrary to the provisions of Section 1.1 of the Salaries and Remuneration Commission Act.

The Auditor General further observed in the letter dated 23 October 2022 that there was an overpayment of salaries to the Claimant in the amount of KSh. 87,383 per month, contrary to the aforesaid SRC Circular. Consequently, the Auditor General recommended that the 2nd Respondent should recover the overpayments of the house allowances and basic salary together with the irregular payments of telephone allowances made to the Claimant in the period he served as the acting managing director of the Respondent.

The Response is that sections 65 and 67 of the Public Audit Act allow the Auditor General to recommend to the 2nd Respondent that an employee of the 1st Respondent be surcharged upon being established by his office that there has been any deficiency in respect to public funds. The Auditor General is also empowered to disallow expenditure where he deems that any payment is being made without due authority.

The 2nd Respondent passed several resolutions at its 89th Board of Directors meeting seeking to implement the said recommendations among them being the issue of reworking the salary and allowances of the acting managing director to reflect the current legal framework, advertisement of the position of the managing director by 30 January 2024 and that the issue of surcharge be recommended to the SRC and the State Corporations Advisory Committee (SCAC) for guidance and consultation. The 2nd Respondent shared the board resolutions with the Claimant as the head of management of the 1st Respondent and required the Claimant to report on the progress of implementing the resolution to rework the salary and allowances of the acting managing director to reflect the current legal framework.

The Claimant responded to the 2nd Respondent's board resolutions on 29 January 2024, together with the details alleging that the decision to rework his salary and to surcharge him for the overpayment of salary and allowances was motivated by the impending recruitment of the managing director of the 1st Respondent. On the three resolutions passed at the 89th Board of Directors Meeting, the Claimant was only required to report on the progress of implementing one of the resolutions aimed at reworking the salary and allowances of the acting managing director to reflect the current legal framework. The issue of imposition of a surcharge against the Claimant was referred to the SRC and SCAC, to which the 2nd Respondent awaits their advice and recommendations.

The Claimant, having served as the acting managing director and accounting officer of the 1st Respondent for a period of over 10 years, cannot absolve himself of all responsibility for wrongfully receiving payment of salaries and allowances from public coffers, which he had been severally informed were unlawful. He failed to plead or provide evidence in the claim herein, which demonstrates that he has applied for or is among the applicants for the position of managing director of the 1st Respondent. The Claimant is seeking to halt an employment process in which he is neither an applicant nor a participant.

Having failed to apply for the position of the managing director of the 1st Respondent and further having illegitimately served in the same position for the last 10 years, the Respondents, the Claimant cannot file the claim herein seeking to stop the ongoing recruitment process of the same position. Such conduct by the Claimant is grossly misconceived because the provisions of section 34 (5)(b) of the Public Service Commission Act, in making such an acting appointment, are not aimed at undermining the expeditious appointment of a competent person to the public office concerned.

The report dated 29 June 2023 was not the first time the Auditor General had raised the issue of the acting allowance being paid to the Claimant in error. The issues of overpayment of the Claimant's salary and telephone allowance, and the issue of the acting allowance were also part of the observations made by the Auditor General in a report dated 16 November 2021 on the 1st Respondent for the year ending 30 June 2020 and the report dated 21 March 2019 on the Respondent for the year ending 30 June 2018. The Claimant has been aware of the issues of overpayment of his salaries and allowances, as well as the issue of prolonged payment of the acting allowance, but took no action for the period of over 10 years he occupied the position of acting managing director. The Claimant, as the accounting officer of the 1st Respondent, is required under the provisions of section 31 of the Public Audit Act, to meet with the Auditor General annually for purposes of auditing the accounts of the 1st Respondent. The Claimant is also central to the preparation of the annual financial statements of the 1st Respondent, and he has to append his signature to the statements before the conduct of the audit by the Auditor General.

The Claimant was capable of raising the alleged matters arising from the resolutions made by the 2nd Respondent before the Auditor General himself for the conduct of investigations as guided under the provisions of sections 31 of the Public Audit Act and section 53 thereof which imposes a duty upon the Claimant as the accounting officer of the 1st Respondent to take the relevant steps to implement the recommendations flowing from a report made by the Auditor General on the financial statements of the Respondent. In the exercise of his duties as the acting managing director and accounting officer of the 1st Respondent, the claimant had the option of seeking advice and recommendations from the SRC in respect of the matters raised by the Auditor General touching on his remuneration at the 1st Respondent and pursuant to the exercise of the functions and powers of the SRC.

Additionally, the Claimant is a sitting member of the 2nd Respondent, whose procedures are well known to him. The Claimant is aware that under the provisions of section 8 (1)(d) of the State Corporations Act, a notice of at least 14 days has to be issued to the members of the 2nd Respondent before a meeting is held. It is the Claimant in his capacity as head of management who proposes relevant issues to the 2nd Respondent for the 2nd Respondent to exercise their decision-making mandate. The Claimant, therefore has equal responsibility as the other members of the 2nd Respondent, with the only difference being that the Claimant lacks the voting rights at the 2nd Respondent's meetings. The Claimant is also aware that the resolutions passed at the 2nd Respondent's board meetings and minutes prepared thereto have to be ratified at the next board meeting of the 2nd Respondent to be implemented. Under

section 8 (2) of the State Corporations Act, the Claimant, while present at the 89th Board of Directors Meeting in his capacity as the acting managing director of the 1st Respondent, had the right to require his opinion on the meeting's agenda to be recorded in the minutes of the said meeting in which the impugned resolutions were passed. The Claimant failed to state in his claim that he made any attempts to exercise such a right at the meeting, and the same was denied by the 2nd Respondent.

The Claimant has therefore failed to exhaust the internal methods available before the 2nd Respondent. He failed to establish in his pleadings that the above statutory mechanisms and legal remedies are not available and/or that the Claimant has encountered an impediment in pursuing the said mechanisms and remedies and/or that the said mechanisms and remedies cannot be deemed to be adequate or sufficient in addressing his complaints in totality. The claim contravenes the provisions of Section 9(2) of the Fair Administrative Action Act, or the mechanisms available under the provisions of the Public Service Commission Act regarding the claims of Kshs. 22,578,765.95, alleged to have cumulated in the period of 10 years in which the Claimant was serving as the acting managing director of the Respondents, is without merit.

Determination

Based on the pleadings, evidence, and submissions, the issues that emerge for determination are whether the claim is premature and filed contrary to Section 15(e) of the Employment and Labour Relations Court Act, whether there are constitutional and statutory violations against the claimant, and whether the reliefs sought should be issued.

On 23 January 2012, the respondents appointed the claimant as the acting managing director. On 5 December 2014, the 50th Board of Directors, in its meeting held on that date, resolved that the Acting Director shall act in the post until it is substantively filled. This appointment was thus reviewed in writing over time until he filed suit.

The respondents reasoned that there was an ongoing restructuring at the 1st respondent, hence the need for an acting managing director.

On the issue of whether the suit is premature, the respondents' case is that a dispute arising from the exercise of disciplinary control by the Respondents over the Claimant, an appeal lies to the Public Service Commission, as provided under Section 74 of the Public Service

Commission Act. The claimant has therefore moved the court herein without jurisdiction, and the claim is premature.

The respondents also referred to the provisions of Section 15(e) of the Employment and Labour Relations Court Act, to the effect that the suit is premature. The court lacks jurisdiction to hear and determine the matter, which should be addressed initially by the Public Service Commission.

Indeed, it is not contested that the claimant is an employee of the 1st respondent, a state corporation. Its employees are in the public service, and under such mandate, the claimant was appointed the Chief Accountant and then acting managing director.

Under section 65(2)(a)(i) to (v) of the Public Service Commission Act, the PSC is allowed to exercise disciplinary control within the public service, including a reprimand and stoppage of a public officer's pay or salary.

However, the PSC mandate only takes effect upon the due process of the subject state agency, such as the first 1st respondent pursuant to sections 66 and 68 of the Public Service Commission Act. The subject public officer and employee must be taken through the due process of the law and internal procedures.

In this case, the claimant moved the court to seek protection and assert his constitutional and statutory rights. His case is that the respondents appointed him as the acting managing director and approved his salary and allowances thereto. However, following the Auditor General's report, they have proceeded to surcharge him without giving him a hearing. His argument is that this is a breach of his constitutional rights to fair labour practices, the right to property, and statutory rights under the Employment Act.

Whereas, all disciplinary matters relating to public officers should be addressed at the shop floor in the first instance, then proceed to the PSC before moving to the court, where the employee's constitutional rights are invoked, the court is the primary forum. In response to the claim, the respondents assert that they acted on the recommendations of the Auditor General's report, which directed that the claimant be surcharged for overpaid salaries and allowances while acting as managing director. Based on the report, there was no requirement to hear the claimant's representations.

The respondents are regulated under the State Corporations Act. The employees of the 1st respondent are also subject to the Public Service Commission Act and its regulations. Under the Human Resources policy and the Act, a surcharge, whether applied correctly or incorrectly, is defined as a disciplinary measure.

This then becomes a question of interpreting both the constitutional and statutory rights of the claimant within the respondent's employment. This is particularly so under his employment as the chief accountant and the acting managing director roles. While the PSC has an organisational and disciplinary mandate over public officers, the interpretation of employment rights under the Constitution and the law can only be addressed by the court.

The claim is filed before the correct forum.

The respondents have admitted that they appointed the claimant to the higher position of acting managing director of the 1st Respondent while at the time employed in the position of the chief accountant. This was two levels down. The Claimant did not possess the requisite qualifications for the position of Acting Managing Director of the 1st Respondent because he was appointed to a Job Group that was two levels higher than the Job Group of the chief accountant.

As outlined above, the 1st respondent, being a state corporation, is subject to regulation under the law. Equally, the 2nd respondent is bound under the State Corporation Act to apply the law. In matters relating to the regulation of employees, the Public Service Commission Act and the Human Resource Policies for public officers apply.

In appointing the claimant as the acting managing director, the respondents were bound under Section 34 of the PSC Act. Under Section 34(2) and (5) of the PSC Act,

(2) A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.

...

(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.*

Being unqualified to hold the position of managing director at the time rendered it unlawful and invalid. It cannot be justified for expediency that there was an ongoing restructuring process within the 1st respondent.

In the case of **Malaya v Masinde Muliro University of Science and Technology (Petition 5 of 2023) [2023] KEELRC** the court held that an acting appointment under subsection Public Service Commission Act should be in favour of a public officer who is duly qualified and competent to perform the duty; and not undermine the expeditious appointment or deployment of a competent person to the public office concerned.

In the case of **Nyaga, Justina Mutitu v Kenya Civil Aviation Authority, Cause 2229 of 2014; [2017] KEELRC 405 (KLR)**, the court examined the claims for acting allowances and held that these must have accrued in accordance with the law.

This position is reaffirmed in the case of **Gikenyi B & another v Nakhumicha & 2 others; Amoth & 58 others (Interested Party) [2023] KEELRC 3222 (KLR)**, where the court held that an acting capacity must at all times strictly comply with the provisions of section 34 of the Public Service Commission Act and other relevant provisions in the human resource manuals.

In the case of **Ondo & another v Ethics and Anti-Corruption Commission & 2 others; Acting Deputy Chief Executive Officer of Ethics and Anti-Corruption Commission & another (Interested Parties); Njenga (Exparte) (Petition E113 of 2021 & Judicial Review Application E019 of 2021 (Consolidated)) [2022] KEELRC** the court held that Section 34 of the Public Service Commission Act does not provide that where an employee acts in excess of the prescribed period, such employee will be confirmed to the position. Subsection (6) thereof provides that whenever it comes to the attention of the PSC that an authorised officer has made an acting appointment or assignment in contravention of the Section, it shall take corrective measures, including substantively filling the position. This was not done.

The appointment of the claimant as the acting managing director was unlawful and contrary to Section 34 of the Public Service Commission Act, as well as the Human Resource manuals.

The unlawful appointment, even though sanctioned by the respondents through various written letters, cannot be sanctioned by claiming any payments under it.

On whether the claimant is entitled to the claims for Ksh 22,578,765 for services rendered while serving as the acting managing director, the justification for these claims is that he was denied the substantive appointment of the managing director despite acting for over 6 months. That under section 34 of the Public Service Commission Act, he ought to have been appointed as the substantive managing director by the respondents.

On their part, the respondents assert that, following the auditor general's recommendations and letters, the claimant was earning a higher salary and allowances beyond the SRC recommendations. That the Claimant was serving as the Chief Accountant and the Acting Managing Director of the 1st Respondent, and that he was receiving a house allowance of Ksh. 60,000 contrary to the SRC Circular Ref No. SRO/ADM/CIR/ 1/13 Vol. III (126) dated 10 December 2014, which set the payable house allowance for civil servants in the same job group as the Claimant to be a sum of Kshs. 25,000. Therefore, the Auditor General noted that the Claimant had been overpaid a sum of Ksh. 34,000 per month since his appointment as the acting managing director of 1st Respondent. Furthermore, in the letter dated 23 October 2022, it was stated that there were irregular payments of telephone allowances amounting to Ksh. 40,000 per month to the Claimant. The Auditor General noted that there was no justification for the payments of the telephone allowance and that the same were made contrary to the Salaries and Remuneration Commission Act.

It is common cause that the SRC is the constitutional body with the mandate to set the salaries and remuneration of public officers, including the employees of the 1st respondent, as held in **Salaries and Remuneration Commission v Kenya Union Commercial Food and Allied Workers & 2 others (Civil Appeal E489 of 2020) [2025] KECA**. This position is reiterated in [Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others \[2024\] KECA 419 \(KLR\)](#).

With this background, the respondents' case is that the Auditor General, through a letter dated 23 October 2022, directed that due to an overpayment of salaries to the Claimant in the amount of KSh. 87,383 per month, contrary to the aforementioned SRC Circular, they should

recover the overpayments of house allowances and basic salary, together with the irregular payments of telephone allowances made to the Claimant during the period he served as the acting managing director of the Respondent.

The 2nd respondent has admitted that they resolved to pay the Claimant a special duty allowance at an increased rate of 15% of his basic salary as the chief accountant of the 1st Respondent, payable monthly, effective 1 January 2015. The basis of the decision of the 2nd Respondent to pay the Claimant special duty allowance was justified through the application of clause C. 15 of the Human Resource Policies and Procedures Manual for the Public Service.

However, as outlined above, the respondents acted unlawfully by appointing the claimant as acting managing director while he had not attained the required threshold. The admission that the claimant was two grades lower should have guided the respondents in issuing the letter of appointment to him. The acting role was extended over time under the guise of an ongoing restructuring.

This illegality is compounded by the fact that the acting appointments are extended, and payment of salary and allowances is made at rates above the SRC-recommended levels. The 2nd respondent, as the authority that initiated the illegalities, cannot turn around and impose a sanction against the claimant. There are various Board resolutions allowing the claimant to earn above the SRC-recommended rates. The claimant, an employee of the respondents, acted in accordance with these Board resolutions.

As the accountable entity, the 2nd respondent was bound under Article 226(5) of the Constitution. The constitution requires that persons who hold public office be liable for any loss arising from the unlawful approval or use of public funds. In **Ethics and Anti-Corruption Commission v Judith Marilyn Okungu & another** [2017] eKLR, the court held that:

Of greater significance is that the learned judge failed to grasp the essence of the appellant's argument before him. The appellant was not merely arguing that those sections did not absolve Government officers from personal tortious liability, as the preliminary objection had posed. Rather, the gist of the argument was that even were it to be conceded that government bears tortious liability for the acts of its servants who may perhaps be absolved their disclosed principal having borne liability and

been sued, the case herein was not merely tortuous but one where the 1st respondent is alleged to have exceeded her authority, acted in violation of the law and engaged in fraudulent acts in breach of her fiduciary duty. Such illegalities are not only null and void, they can only attach personally to the 1st respondent, and she may be sued therefor.

In the case of [Republic v Ethics & Anti-Corruption Commission; Monari \(Interested Party\); Ringera \(Ex parte\) \[2023\] KEHC 805 \(KLR\)](#), the court held that Article 226(5) of the Constitution stipulates that probity in the use of public funds is an individual responsibility. It states;

Suppose the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions. In that case, 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.

Whereas the claimant cannot claim under the invalid appointment of acting managing director, the paid salaries and allowances were sanctioned by the 2nd respondents through various Board resolutions. Under Article 226(5) of the Constitution, the subject Board members of the 2nd respondent are personally liable for the loss arising from the subject approvals. A surcharge against the claimant without following due process is an unjustified sanction that can only accrue where the claimant has gone against the Board's resolutions, which is not the case here.

The 2nd respondent cannot justify the position that they only applied the Auditor General's recommendations to surcharge the claimant. The Board members of the 2nd respondent acted outside the law. Under the constitution, they bear responsibility as held in [Muthui v Kenya Rural Roads Authority \(Kerra \[2022\] KEELRC 4024 \(KLR\)\)](#) and [Okiya Omtata Okoiti & Nyakina Wyclife Gisebe v Bidco Africa & 6 others \[2017\] KEHC 8712 \(KLR\)](#).

The Board members of the 2nd respondent who approved the payment of the salaries and allowances contrary to the SRC guidelines and the Public Service Commission Act are liable for any such loss.

Such payment shall not be applied to surcharge the claimant beyond the law. The respondents are liable for the approved payments to the claimant outside the SRC Rates. The written Board decisions and directions should be taken into account until the same are terminated.

See **Judicial Service Commission v National Assembly & 2 others** [2017] eKLR, where the court held that Article 226(5) of the Constitution serves as the basis for holding each accounting officer and other public officers directly and personally liable for any loss of public funds under their supervision.

Regarding the claim for payment of damages for unfair labour practices, the findings above do not permit the claimant to proceed under an invalid process. For work rendered, the claimant was remunerated accordingly. For any overpayments in salaries and allowances outside the SRC recommended rates, the respondents are accountable and responsible.

Accordingly, based on the above findings, the claims are without merit and are hereby dismissed. The Public Service Commission and the office of the Auditor General are at liberty to address as appropriate. Each party to bear its costs.

Delivered in open court at Mombasa, this 2nd day of October 2025.

M. MBARŪ
JUDGE

In the presence of:
Court Assistant: Japhet
..... and