



Law Society of Kenya v Attorney General (Sued on Behalf of the President of Kenya) & 6 others; Katiba Institute (Interested Party) (Petition E273 of 2024) [2025] KEHC 15858 (KLR) (Constitutional and Human Rights) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E273 OF 2024
LN MUGAMBI, J
NOVEMBER 7, 2025**

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

ATTORNEY GENERAL (SUED ON BEHALF OF THE PRESIDENT OF KENYA) 1ST RESPONDENT

CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE 2ND RESPONDENT

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

SALARIES AND REMUNERATION COMMISSION 4TH RESPONDENT

CABINET SECRETARY, MINISTRY OF PUBLIC SERVICE, PERFORMANCE AND DELIVERY MANAGEMENT 5TH RESPONDENT

CABINET SECRETARY, THE NATIONAL TREASURY 6TH RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE 7TH RESPONDENT

AND

KATIBA INSTITUTE INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 3rd June 2024 is supported by the Petitioner’s Chief Executive Officer, Florence Muturi’s affidavit in support of even date.



2. The Petition assails Executive Order No. 3 of 2024 that promulgated ‘Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations’ pursuant to Gazette Notice No. 6265 Vol. CXXVI- No. 70 dated 24th May, 2024. The Petitioner alleges that these guidelines contravene Article 234 of the Constitution and the provisions of the Statutory Instruments Act. Further, the Petition impugns the constitutionality of Section 5(3) and 27 of the State Corporations Act on which the Guidelines are founded.
3. On this premise the Petitioner seeks the following relief against the Respondents:
 - a. A declaration be made that the Executive Order No 3 of 2024 promulgating the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024 contravene and violate Articles 1, 2, 10, 129 (1) and (2), 130 (1), 131 (1) (a) and (2) (a), 232 (1) and (2) and 234(2) of the Constitution and the decision and action thereto contained in Gazette Notice No. 6265 Vol. CXXVI- No. 70 dated 24th May, 2024 is invalid, null and void ab initio.
 - b. A declaration be issued that the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024 are unconstitutional for violating the powers and functions of the Public Service Commission under Article 234(2) of the Constitution.
 - c. A declaration be issued that by issuing Executive Order No. 3 of 2024 dated 24th May, 2024 and promulgating the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024, the President and the Chief of Staff and Head of the Public Service have encroached on the constitutional, statutory and Regulatory mandate of the Public Service Commission as outlined in Article 234 of the Constitution, the PSC Act and the PSC Regulations.
 - d. A declaration be issued that by issuing Executive Order No. 3 of 2024 dated 24th May, 2024 and promulgating the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024, the President and the Chief of Staff and Head of the Public Service have infringed on the constitutional independence of the Public Service Commission contrary to Article 249 of the Constitution.
 - e. A declaration be issued that the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024 are unconstitutional and unlawful for having been promulgated in contravention of the Statutory Instruments Act.
 - f. A declaration be issued that the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024 are ultra vires the Powers and Functions of the Public Service Commission under Parts vii, viii, ix, x and xi of the Public Service Commission Act, 2017 and Parts iv, v, vi, vii and viii of the Public Service Commission Regulations, 2020 and are therefore illegal, null and void.
 - g. A declaration be issued that under the current constitutional dispensation, the President, the Chief of Staff and Head of the Public Service, the State Corporations Advisory Committee or any other person or authority do not have the authority to develop, promulgate and/or issue any guidelines on management of terms and conditions of service in the public service without the authority and/or approval of the Public Service Commission pursuant to Article 234(2) of the Constitution, the PSC Act and PSC Regulations.



- h. A declaration be issued that Sections 5(3) and 27 of the *State Corporations Act* are unconstitutional for being in contravention of Article 234(2) of the *Constitution*.
- i. A declaration be issued that State Corporations and Public Universities, being part of the public service, are subject to the constitutional and statutory mandate and control of the Public Service Commission as outlined in Article 234 of the *Constitution*, the PSC Act and the PSC Regulations.
- j. A declaration be issued that the State Corporations Advisory Committee (SCAC) being a public entity in the public service is subject to the constitutional and statutory mandate and control of the Public Service Commission as outlined in Article 234 of the *Constitution*, the PSC Act and the PSC Regulations.
- k. A declaration be issued that the mandate of the State Corporations Advisory Committee only extends to enforcement of governance issues within State Corporations and not the regulation of human resources within State Corporations and Public Universities.
- l. A declaration be issued that the National Treasury lacks the legal competence and authority to exercise the powers and functions bestowed upon SRC by Article 230 of the *Constitution* and the SRC Act.
- m. A declaration be issued that by keeping quiet when their mandate is being encroached the PSC and SRC have abdicated their constitutional mandate and obligation.
- n. An order of judicial review by way of certiorari be issued calling into this Court and quashing Executive Order No. 3 of 2024 dated 24th May, 2024 in so far as the same relates to the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024.
- o. An order of judicial review by way of certiorari be issued calling into this Court and quashing the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024.
- p. An order of prohibition be issued restraining the Respondents either by themselves, agents or officers/persons acting under their instructions from implementing the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024.
- q. A permanent injunction be issued barring the Respondents either by themselves, agents or officers/persons acting under their instructions from encroaching on the constitutional and statutory mandate of the Public Service Commission.
- r. A permanent injunction be issued barring the Respondents either by themselves, agents or officers/persons acting under their instructions from encroaching on the constitutional and statutory mandates of the Salaries and Remuneration Commission.
- s. A permanent injunction be issued barring the President, the Chief of Staff and Head of the Public Service, the State Corporations Advisory Committee or any other person or authority from developing, promulgating and/or issuing any guidelines on management of terms and conditions of service in the public service without the authority and/or approval of the Public Service Commission pursuant to Article 234(2) of the *Constitution*, the PSC Act and PSC Regulations.



- t. Any other relief and/or order(s) the Court deems appropriate, just and/or fit to grant pursuant to Article 23(3) of the Constitution.
- u. The costs of this Petition be provided for.

Petitioner's Case

4. On 24th May 2024 through Gazette Notice No.6265 Vol. CXXVI –No.70, the Guidelines on Management and Terms and Conditions of Service for Board Members and Staff of State Corporations were notified to the Public. These guidelines were expressed to have been formulated under Section 5(3) of the State Corporations Act.
5. The President of Kenya, H.E. Dr. William Samoei Ruto directed that the terms and Conditions of Service for Board Members and Staff of State Corporation be as set out in the impugned Guidelines and required all boards of state corporations and Cabinet Secretaries to ensure full implementation of the said Executive Order No. 3 of 2024.
6. As a consequence, the 2nd Respondent convened a forum for all 330 State Corporations, Universities and Boards on 4th June, 2024 with a view to launch the impugned guidelines.
7. The Petitioner asserts that Section 5(3) of State Corporations Act relied upon by the Respondents had by then been declared unconstitutional for being inconsistent with Article 234 of the Constitution as read with Article 260 of the Constitution, on regulation of the public service and definition of who a person in the public service is, in *Manyara Muchui Anthony -vs-Communications Authority of Kenya & 3 Others*, [2022]eKLR. On this basis, the Petitioner avers that the impugned Regulations are null and void.
8. Furthermore, the Petitioner contends that the impugned Guidelines being Statutory Instrument were made in breach of the requirements of the Statutory Instruments Act, 2013 as there was no public participation conducted and no Parliamentary approval was sought as required by the said Act.
9. Equally, the Petitioner avers that the impugned Guidelines are a direct affront on the constitutional independence and autonomy of constitutional Commissions, contrary to Article 249 of the Constitution. In this case, the Petitioner asserts that the impugned Guidelines contravene Articles 230 and 234 of the Constitution as they usurp the constitutional functions and powers of the 3rd and 4th Respondent and give them to the 7th Respondent and the National Treasury.
10. The Petitioner adds that the functions of the 7th Respondent under Section 27 of the State Corporations Act as outlined in the impugned Guidelines are in direct conflict with the constitutional and statutory mandate of the 3rd Respondent in view of Article 234(2) of the Constitution, the PSC Act and PSC Regulations as well as the cases of *Manyara Muchui Anthony (supra)* and *Consumer Federation of Kenya (COFEK) -vs- National Social Security Fund Board of Trustees & 2 Others* [2022]eKLR.
11. The Petitioner stresses that determination of terms and conditions of service for public officers is exclusively vested in the 3rd Respondent by dint of Article 234(2) (g) of the Constitution since State Corporations form part of Public service. Equally, the proposed establishment of State Corporations Coordination Units in Ministries under the impugned Guidelines are said to violate the 3rd Respondent's constitutional mandate.
12. In light of the foregoing, the Petitioner argues that the impugned Guidelines are a direct usurpation by the Executive of the functions of the 3rd Respondent and establishment of a parallel public service which is an affront to the Constitution.



13. The Petitioner postulates that the consequence of the Executive Order and impugned Guidelines is that all state Corporations and public universities will be moved to the office of the President and their terms and conditions of service determined and reviewed contrary to the Articles 1, 2, 10, 19 (1) And (3), 21 (1), 27 (1), 41, 47, 73(2) (b), 129 (1) and (2), 130 (1), 131 (2) and (e), 156(2), 230(4)(b), 232 (1), (2), 234(2) and 249 of the Constitution as read together with Section 3 of the Public Service Commission Act No 10 of 2017 and Regulation 3 (a) of The Public Service Commission Regulations, 2020. To this end, the Petitioner maintains that the impugned Guidelines should be declared unconstitutional.

1st, 2nd, 5th, 6th and 7th Respondents' Case

14. In reaction to the Petitioner's case, these Respondents' filed their Grounds of Opposition dated 20th September 2024 on the basis that:

- i. The powers of the 3rd Respondent under Article 234(2) of the Constitution are subject to the Constitution and the law. The State Corporations Act being *lex specialis* legislation grants mandate and function to various institutions and governance structures including the Office of the President and the 7th Respondent.
- ii. Article 234(2)(g) of the Constitution confers upon the 3rd Respondent the power to review and make recommendations to the national government regarding conditions of service, code of conduct and qualifications of officers in the public service.
- iii. The Public Service Commission Act, in particular, Section 53(2) unpacks Article 234(2)(g) of the Constitution by clarifying the import of the provision to the effect that the 3rd Respondent may on its own initiative or upon request by any authorized officer, make recommendations on the conditions of service relating to public officers to the Cabinet Secretary (responsible for public service).
- iv. Article 234(2)(g) of the Constitution as read with Section 53(2) of the Public Service Commission Act and Section 5(3) of the State Corporations Act are premised on the constitutional architecture that matters of policy promulgation are reposed on offices exercising ministerial responsibilities.
- v. The Petitioner has not demonstrated that the 3rd Respondent undertook a review of the terms and conditions of service of board members and staff of state corporations, which the 1st, 5th and 7th Respondents failed to consider. The 1st, 5th and 7th Respondents is legally bound under Article 234(2)(g) of the Constitution to take into account any such general or specific reviews and recommendation with regard to terms and conditions of service of board members and staff of state corporations, as it reviews and set the terms and conditions of service.
- vi. As detailed in the text of the impugned Guidelines, due process was followed in its development and approval, in light of the overriding governance need to cause the revision of the management, and terms and conditions of service for board members and staff of state corporations.
- vii. The Petitioner has miscomprehended the obtaining ratio decidendi in *Manyara Muchui Anthony –vs- Communications Authority of Kenya & 3 others* [2022] eKLR in light of the binding decision of the Supreme Court in *Republic v Karisa Chengo & 2 others* [2017] eKLR.
- viii. In view of (7) above, Section 5(3) of the State Corporations Act have full force of the law and therefore the impugned Guidelines issued pursuant to the Section were lawfully issued.



- ix. The object and purpose of the impugned Guidelines is in sync with the provisions of Articles 10, 232 and 259 of the Constitution.
15. In addition, the 7th Respondent filed its Replying affidavit sworn on 7th October 2024 by its Secretary Simon Indimuli.
16. On a preliminary note, he argues that the Petition is anchored on the wrong interpretation of Article 234(2) (g) of the Constitution and the cited Court cases adding that the Employment and Labour Relations Court does not have jurisdiction to declare a provision or Statute, unconstitutional.
17. Giving a historical background, he depones that the 7th Respondent was established following the enactment of the State Corporations Act in November 1986 under Section 26(1). He states that the 7th Respondent's functions are set out under Section 27 and additional functions provided for under Sections 5(3), 6, 7, 8 and 10 of the Act. Likewise, other functions are set out under the State Corporations (Performance Contracting Regulations), 2004 and the Mwongozo: The Code of Governance for State Corporations. He emphasizes that the provisions of Article 232(2) of the Constitution distinguish state corporations from state organs.
18. With reference to the impugned Regulations, he avers that these Guidelines had initially been formulated by the government and issued in 2004. He informs that these Guidelines provided the terms and conditions of service for the staff in each State Corporation as contained in the Human Resources Instruments.
19. He states that the process of reviewing these Guidelines commenced in 2017. He avers that this process underwent a wide consultative process which culminated in the establishment of an Inter-Agency Taskforce. The Taskforce submitted its recommendations to the President in May 2018. He states that the same was further reviewed by the 3rd Respondent, the 7th Respondent and also placed before the Cabinet for consideration.
20. In addition, he depones that public participation and consultations were conducted amongst different government agencies. He avers that vide a letter dated 28th September 2020, the 7th Respondent invited the Solicitor General to review the 2004 Guidelines and invited the latter for a consultative meeting. A similar communication was made to the Inspector –General (Corporations) on 8th October 2020. The recommendations were also shared by the 2nd Respondent to the 4th Respondent vide a letter dated 28th May 2021.
21. He depones that thereafter the 2nd Respondent vide a letter dated 26th October 2021, transmitted a Cabinet Memorandum on the revised Guidelines to the Cabinet Secretary and the National Treasury. In addition, vide a letter dated 9th December 2021, the 7th Respondent invited several State Corporations to a consultative meeting over the same.
22. He informs that vide a letter dated 17th June 2022, the 2nd Respondent forwarded to the 1st Respondent the revised Guidelines for signature to enable its placement before the Cabinet for consideration. The revised Guidelines were then forwarded to the Prime Cabinet Secretary on 30th January 2023.
23. He avers that, the Prime Cabinet Secretary sought further comments from all government ministries on the same. He claims that all the issued comments and views were all considered. Considering this, he argues that the impugned Guidelines have undergone rigorous public participation.
24. He depones that thereafter a Technical Committee was established vide a circular letter dated 24th May 2023 to generate draft harmonized Guidelines. Its Report was afterwards transmitted to the Office of the President on 2nd November 2023. Subsequently, the impugned Guidelines were approved by the



- Cabinet and issued by the President as Executive Order No. 3 of 2024. Bearing this in mind, he argues that the impugned Guidelines were enacted in accordance with the law.
25. He informs that the 3rd Respondent was involved in the process as part of the Technical Committee. He states that the 3rd Respondent postulated that the meetings of the Technical Committee be first suspended to allow the 1st Respondent issue an advisory with regard to the Terms and Conditions. This was communicated to the Prime Cabinet Secretary vide a letter dated 8th June 2023. The 1st Respondent's advisory was issued on 27th July 2023. Upon receipt of this advisory, it is stated that the 3rd Respondent raised a number of issues in a letter dated 7th August 2023.
 26. He maintains that as per the advisory letter and the terms of Section 5(3) and 27(1) (c) of the [State Corporations Act](#), all state corporations are required to be operate within the terms and conditions for staff as set out in these provisions and approved by the 7th Respondent.
 27. He asserts that allowing the Petition as pleaded being a function not provided under the [Constitution](#) or Statute, will create confusion, anarchy and usurpation of the functions and powers of cabinet secretaries in consultation with the 7th Respondent. He adds that the Petitioner herein seeks to re-write the [Constitution](#) and the law. Particularly, he argues that the import of Article 234(2) (g) of the [Constitution](#) as read with Section 53(2) of the PSC Act is that policy making for government is the purview of the Executive and thus cannot be exercised on its behalf by an independent constitutional commission. As such, the orders sought are argued to be untenable. It was urged that the Petition lacks merit as the impugned Guidelines were properly approved as required by the [Constitution](#).

3rd Respondent's Case

28. The 3rd Respondent in reply filed its Replying Affidavit through its Chief Executive Officer, Paul Famba, sworn on 22nd October 2024.
29. On the onset, he states that the 3rd Respondent did not approve the impugned Guidelines and in fact raised objections against it during the draft stage. He notes that the 3rd Respondent's concerns were ignored and not given consideration in the final Guidelines which are now being challenged. In addition, he notes that the 3rd Respondent advised on the unconstitutionality of Section 5(3) and 27 of the [State Corporations Act](#) to no avail.
30. He states that the 3rd Respondent became aware of the impugned Guidelines through Gazette Notice No.6265 dated 24th May 2024.
31. He depones that in reaction to the impugned Guidelines, the 3rd Respondent sent an advisory to the 2nd Respondent alerting that the same were in conflict with the [Constitution](#), the PSC Act and its Regulations and also the decided court cases.
32. Equally, being statutory instruments, the same ought to have been subjected to public participation and required the National Assembly's approval.
33. He depones that on 3rd June 2023, the 2nd Respondent convened a meeting which was attended by the 1st Respondent, the Chair and vice person and one commissioner and the then acting CEO of the 3rd Respondent, the Chairperson, secretary and two members of the 7th Respondent, the Deputy Presidents and Prime Cabinet Secretary's Chief of Staff and senior officers from the represented State Organs.



34. He depones that at the meeting it was established that the 7th Respondent can only perform the human resource management functions contained in the impugned Guidelines if delegated to it by the 3rd Respondent.
35. Considering this, a committee was formed to consider the impugned Guidelines and to identify the functions the 3rd Respondent can delegate to the 7th Respondent. This was done with the view of amending the impugned Guidelines. Considering this the 3rd Respondent's genuine expectation that the launch of the impugned Guidelines set for 4th June 2024 would not take place.
36. However, contrary to what had been agreed in the said meeting, the impugned Guidelines were launched by the 2nd and 7th Respondent at a ceremony attended by all chairpersons of Boards of all State Corporations and Public Universities together with their CEOs' and senior officers.
37. He depones that, the 2nd and 7th Respondent's actions in proceeding to launch the impugned Guidelines, raised concerns about the role of the 3rd Respondent in management of human resource in State Corporations as the same was not addressed in the said Guidelines.
38. According to the 3rd Respondent therefore, it is not in public interest to allow the impugned Guidelines to be implemented, while there are grave constitutional issues that have been raised on their validity and also bearing in mind the financial implication.
39. The 3rd Respondent reiterated that the Court found Section 5(3) and 27 of the State Corporations Act to be in conflict with Article 234 of the Constitution and declared them unconstitutional yet the impugned Guidelines are formulated on the strength of the said provisions.
40. On whether State Corporations and Public Universities form part of the public service the 3rd Respondent averred that this position was clarified by the Court in Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission (2014) eKLR wherein it was held that State Corporations are part of the public service.
41. He states that this issue has also been subsequently affirmed by the Court of Appeal in Nairobi Civil Appeal No.E638 of 2021: Public Service Commission v Katiba Institute & others and recently, Nairobi Civil Appeal No.156 of 2016: Salaries and Remuneration Commission v National Hospital Insurance Fund and 2 others. This is in addition to the cases cited by the Petitioner among others. The 3rd Respondent thus stated that these authorities affirm the 3rd Respondent's mandate over State Corporations.
42. As such, the 3rd Respondent has been enforcing its mandate over State Corporations and Public universities in various ways as detailed in the affidavit. In a nutshell, the 3rd Respondent appointed a Taskforce to review terms and conditions for chairpersons, chief executive officers, chancellors and vice chancellors of public universities, board members, management and unionizable staff of state corporations vide Gazette Notice No.3757 dated 24th April 2019. He notes that the Taskforce comprised of officials from the 3rd and 7th Respondent, the office of the President, the national economic and social council and the National Treasury. He avers that the Taskforce developed the Guidelines on Terms and Conditions of Service for Chairpersons, Chief Executive Officers, Chancellors and Vice-chancellor of public Universities, Board Members, Management and Unionisable Staff of State Corporations dated August 2019 which aligned with the dictates of the Constitution and reflected the 3rd Respondent's constitutional mandate.
43. He depones that these Guidelines were not published to the 2nd Respondent and neither did the 3rd Respondent receive a response on the same.



44. The 3rd Respondent maintained that it did not delegate its mandate to the 7th Respondent. The 3rd Respondent discovered that the 7th Respondent had been without its authority, been unlawfully establishing and abolishing offices in State Corporations by approving organizational structures and staff establishments. Likewise, the 7th Respondent did not issue its quarterly reports as required.
45. In light of this, the 3rd Respondent revoked the delegation vide a letter dated 30th September 2019 yet despite the revocation, the 7th Respondent continued to exercise the 3rd Respondent's mandate.
46. In view of the Manyara Muchui case (*supra*), he depones that the 3rd Respondent went ahead to make recommendations for amendments to the State Corporations Act and forwarded the same to the 1st Respondent vide a letter dated 25th April 2023. He informs that no reply was received concerning this letter. Instead, the 7th Respondent in a response dated 4th May 2023 declined to have the Act amended and refused to participate in any discussions on the same.
47. He points out that this displays the 7th Respondent's plain disregard for the Constitution, the rule of law and contempt for the Court decisions. Additionally, he asserts that the 3rd Respondent has been clear and consistent on its constitutional and statutory mandate and has continued to clarify the same.
48. The 3rd Respondent depones that on 11th January 2023, the Prime Cabinet Secretary wrote a letter to the 3rd Respondent requiring it to revive the Multi-Agency Consultative Committee which had been set up to resolve the issue on oversight of the human resource function within State Corporations. He states that the 3rd Respondent in reply informed that the issue of oversight had been settled by the Court as belonging to it.
49. The 3rd Respondent averred that this answer did not elicit a reaction; instead, the Prime Cabinet Secretary in a letter dated 16th May 2023 forwarded a document titled Guidelines on management and Terms and Conditions on Service for Board Members and Staff of State Corporation. In this document, the functions of the 3rd Respondent had been conferred on the 7th Respondent. This was protested to by the 3rd Respondent in its letter dated 22nd May 2023. In light of this, the Prime Cabinet Secretary directed that those Guidelines be reviewed by participation of all relevant stakeholders.
50. In the process, the 3rd Respondent learnt of the 1st Respondent's advisory letter dated 28th July 2023 to the Prime Cabinet Secretary which relied on Section 5(3) of the State Corporations Act which had already been declared unconstitutional. He avers that the advisory letter did not offer clarity with regards to the human resource instruments applicable in public service yet the same are contained in the PSC Act and PSC Regulations which are applicable to State Corporations. In particular, the advisory letter directed State Corporations to ensure that their human resource instruments are approved by the responsible cabinet secretary in consultation with the 7th Respondent yet there was no legal provision that granted them that power. He informs that this Advisory letter was stayed by this Court in Petition No. E303 of 2023, John Githongo and Katiba Institute vs State Corporations Advisory Committee & Attorney General, which is still pending determination.
51. He depones that the 3rd Respondent, considering this, communicated to the 1st Respondent vide a letter dated 7th August 2023 and concurrently issued a Circular dated 8th August 2023 containing Guidelines for Development and Review of Human Resource Management Instruments for State Corporations and Public Universities. He avers that its communication was counteracted by the 7th Respondent's letter also dated 8th August 2023, informing all the Chairpersons of Boards of State Corporations to instead comply with the 1st Respondent's advisory letter and ignore the 3rd Respondent's communication. With a view to understand the issues, he avers that the Deputy



President met the 3rd Respondent on 11th August 2023. In the end, the Deputy President informed that he would call a stakeholders meeting which he states has never been done.

52. Furthermore, 3rd Respondent avers that in response to its letter, the 1st Respondent in its letter dated 16th August 2023 maintained its position as communicated in its initial advisory letter. The 3rd Respondent maintained that the 1st Respondent's position is legally flawed as outlined therein. It added that this was not the first time the 1st Respondent had issued an advisory contrary to the 3rd Respondent's mandate. In fact, he contends that the Court in *Manyara Muchui* (supra) and *COFEK* (supra) found these advisories were contrary to the Constitution. The 3rd Respondent urged this Court to find that the 7th Respondent's circulars were unlawful and unconstitutional.
53. In view of the foregoing, the 3rd Respondent asserts that the Constitution created independent commissions and offices to guard against abuse of power. The 3rd Respondent described the actions of the 1st, 2nd and 7th Respondent as laced with bad faith with the intention of subverting the 3rd Respondent's constitutional mandate in disregard of numerous Court decisions.
54. The 3rd Respondent maintains that the impugned Guidelines as pronounced in the impugned Executive Order No.3 of 2024 are unlawful and unconstitutional. Further that the 1st Respondent's advisories are unlawful and a clear attack on the 3rd Respondent's mandate.
55. On this basis, the 3rd Respondent urges the Court to allow the Petition.

4th Respondent and Interested Party's Case

56. These Parties responses and submissions are not in the Court file or Court Online Platform (CTS).

Petitioner's Submissions

57. Oira and Bosire Advocates for the Petitioner filed submissions dated 16th March 2025 and outlined the issues for discussion as: whether the Petition is merited and whether the relief sought should be granted.
58. On the first issue, Counsel answered in the affirmative. Counsel emphasized that the whole foundation of enactment of the Constitution in 2010 was to protect against misuse of executive authority and ensure accountability in executive departments. Counsel stated that one of the ways this was achieved was creation of independent offices and Commissions.
59. Counsel submitted thus that the impugned Guidelines are unconstitutional, unlawful, illegal, un-procedural, null and void ab initio as were made in total disregard of the substantive and procedural, constitutional and statutory requirements applicable in public service. This is in light of Article 232(2) (b) and 234 (3) of the Constitution which provides that State Corporations form part of public service and are under the 3rd Respondent.
60. Additionally, Counsel submitted that the impugned process was anchored on Section 5(3) of the State Corporations Act, which was found to be in conflict with the Constitution in *Manyara Muchui Anthony* (supra). Similar sentiments were echoed in *Consumer Federation of Kenya (COFEK)* (supra) were it was held as follows:

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



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

61. Counsel stressed that the powers and functions of the Inspector of State Corporations as outlined in the impugned Guidelines are the powers and functions of the 3rd Respondent envisaged under Article 234(2)(d) of the Constitution to wit to investigate, monitor and evaluate the organization, administration and personnel practices of the public service. Counsel postulated that the set values and principles of public service are critical safeguards against non- inclusivity, discrimination, usurpation of executive authority, despotism, among other similar vices in public employment.
62. Accordingly, Counsel argued that the impugned actions and Guidelines usurp the 3rd Respondent’s constitutional mandate as the impugned process failed to meet the constitutional threshold. Consequently, Counsel argued that without a constitutional amendment granting the President such authority, his actions purporting to override the constitutional prerogatives of the 3rd Respondent are null and void.
63. On the second issue, Counsel submitted that the Petitioner having demonstrated the unconstitutionality of the impugned Guidelines and directive, the orders sought are merited and so should be granted. Counsel submitted that this Court is empowered under Article 165 (3) of the Constitution to issue the necessary orders.

1st Respondent’s Submissions

64. Deputy Chief State Counsel, Kaumba S.O. filed submissions dated 6th May 2025 and underscored the issues for discussion as: whether Sections 5(3) and 27 of the State Corporations Act had been declared unconstitutional by Court in Manyara Muchiri Anthony (supra), whether Sections 5(3) and 27 of the State Corporations Act are unconstitutional?, whether the content of the Guidelines usurp the functions and powers of the Public Service Commission hence unconstitutional? and whether the impugned Guidelines are unconstitutional for want of public participation and want of Parliamentary approval?
65. On the first issue, Counsel submitted that the Petitioner who seeks to have Section 5(3) and 27 of the State Corporations Act declared unconstitutional fails to provide a basis for this order as does not particularize its particulars on the issue in the Petition. Reliance was placed in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where it was held that:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

However, our analysis cannot end at that level of generality. It was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting.” Yet the principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court.”



66. Additional dependence was placed in Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR.
67. Counsel turning to the case of Manyara Muchiri Anthony (supra) submitted that the Court contrary to the Petitioner’s allegation did not declare Section 5(3) and 27 of the State Corporations Act to be unconstitutional and neither was the issue even pleaded by the parties therein. Counsel submitted that the Court observed as follows:
- “ 110. In this regard, there exists the State Corporations Act and in its preamble provides that; “An Act of Parliament to make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes.”
111. The control and regulation of state corporations is therefore statutory.
112. Pursuant to section 5(3) of the State Corporations Act, the Board of a state corporation is allowed to employ staff on terms and conditions of service as the Minister in consultation with the Committee may approve.(3)A state corporation may engage and employ such number of staff, including the chief executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve.
113. This is in contradiction of article 234(2) read together with article 260 of the Constitution on regulation of public service and definition of who a person in the public service is.
114. The entity given constitutional authority to employ, issue terms and conditions of service, review, audit and advice with regard to public service is the 3rd respondent. Employees in the service of the 1st respondent Authority are subject to the constitutional mandate of the 3rd respondent.”
68. Counsel equally noted that the constitutionality of these Sections were also not pleaded in the case of Consumer Federation of Kenya (COFEK) (supra) and neither were they declared unconstitutional. In both, Counsel noted that the appeals are pending before the Court of Appeal.
69. According to Counsel, many Court decisions have affirmed the constitutionality of Sections 5(3) and 27 of the State Corporations Act such as in Okiya Omtatah Okoiti V Attorney-General & 2 Others; Francis K. Muthaura (AMB) & 5 Others (Interested Parties) (2019) eKLR where it was held that the State Corporations Act is the primary Act on the establishment and governance of state corporations.
70. On the second issue, Counsel submitted that Sections 5(3) and 27 of the State Corporations Act are constitutional and in fact are in sync with Article 234 of the Constitution. Counsel relying in Ndyababo vs Attorney General [2001] EA 495 submitted that there is a general presumption that every Act of Parliament is constitutional and thus the burden of proof lies with the person who alleges otherwise. Counsel similarly urged the Court to be guided by the principles of statutory interpretation as outlined in R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 and U.S vs Butler, 297 U.S. 1[1936].
71. Counsel submitted that the test of the constitutionality of Section 5(3) of the State Corporations Act lies in the power of state corporations to employ staff and secondly, the power of Cabinet Secretary in consultation with 7th Respondent to approve terms and conditions of such employment.



72. Counsel noted that Article 234 of the *Constitution* bestows the mandate of Human Resource Management to the 3rd Respondent. Counsel postulated that this provision subjects the establishment of public offices and appointment of public officers to the *Constitution* and legislation, wherein clause (2) recognizes the specialized regime of human resource management on establishing offices and recruiting officers with regard to offices established under law.
73. Counsel submitted that taken in context, the *Constitution* establishes a number of offices with defined recruitment criteria for key officers. With regard to legislation, and based on a historical and contextual approach, Counsel averred that Parliament which has legislative authority under Article 94(1) of the *Constitution* has enacted a number of laws establishing offices with a defined appointment authority including the *State Corporations Act*. Counsel noted that this Act expressly provides for the establishment of state corporations, control and regulation of state corporations and connected purposes. In fact, Counsel stated that Article 232 (2) of the *Constitution* singles out state corporations from state organs in both levels of government which indicates the *Constitution*'s appreciation of their distinction.
74. To buttress this point reliance was placed in *Okiya Omtatah Okoiti V Attorney-General & 2 Others; Francis K. Muthaura (AMB) & 5 others (interested parties)* (2019) eKLR where it was held that:
- “The functions and powers of the Public Service Commission were provided under article 234 (2) of the *Constitution*. Those functions and powers could be delegated in writing by the Public Service Commission to any one or more of its members, or to any officer, body or authority in the public service. The Board of KRA was a body to which those functions and powers could be delegated.
- Under article 249 (2) (a) of the *Constitution*, the Public Service Commission was subject to the *Constitution* and the law. It had power to establish and abolish offices in the public service and appoint persons to hold or act in those offices and to confirm appointments, as per the provisions of article 234(2) (a) of the *Constitution*. The powers to establish and abolish offices in the public service, to appoint persons to hold or act in those offices and to confirm appointments could be limited by statute or all together taken away by statute. It was not uncommon for legislation to create public bodies and offices or to make appointment to public offices by designating public office holders as duly appointed.
- Parliament could legislate on matters that were within the functions of the Public Service Commission. Such matters would include recruitment and selection procedures, promotional criteria, transfer and deployment criteria, work load analysis and parameters to consider in the establishment and abolition of offices and generally all matters incidental to establishment and abolition of offices, appointments and confirmation of appointments.
- Parliament was entitled to enact section 7(3) of the *State Corporations Act*. That provision empowered the President to revoke the appointment of a board of a state corporation and to appoint another board in its place. In enacting the provision Parliament transferred the power to initiate appointments in that regard by way of nominations to the President from the Public Service Commission. Article 234(2) (a) of the *Constitution* provided that the Public Service Commission's function and power to appoint was subject to legislation.”
75. Like dependence was placed in *South India Corporation(P) Ltd vs The Secretary, Board of Revenue Trivandrum & Another* [1964 AIR 207], and *Punjab Sikh Regular Motor Service, Moudhapar vs. The Regional Transport Authority, Raipur and Another* [1966 AIR 1318].



76. Counsel further submitted that it was imperative to interpret the term “subject to” that creates the conflict in this matter as guided by the Supreme Court in the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1[2014] eKLR as follows:

“...But what is meant by a holistic interpretation of the *Constitution*? It must mean interpreting the *Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the *Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

77. Counsel submitted moreover that the establishment of the PSC Act, did not negate the scheme of Section 5(3) of the *State Corporations Act*. Counsel pointed out that Section 36(1) of the PSC Act provides that ‘in selecting candidates for appointment or promotions, the Commission or other lawful appointing authority shall have regard to’ meaning that the Parliament had a clear intention that the power of the 3rd Respondent with regard to exercise of appointments, promotions and transfers are subject to law as envisaged under Article 234 (2) of the *Constitution*.

78. Equally, Counsel submitted that the Terms and Conditions of Service in state corporations are approved within the framework envisaged under Section 5(3) and 27(1)(c) of the *State Corporations Act* and that there is no provision in either the *Constitution* or the PSC Act which confers power to the 3rd Respondent to determine or approve the terms and conditions of public officers. According to Counsel, the import of Section 53(2) of the PSC Act buttresses Article 234(2)(g) of the *Constitution* which provides that the 3rd Respondent may on its own initiative or upon request by any authorized officer, make recommendations on the conditions of service relating to public officers. This is said to be equivalent to Section 5 (3) of the *State Corporations Act*.

79. On the third issue, Counsel submitted that being that Section 5(3) and 27 of the State Corporations Act is constitutional, it is evident that the impugned Guidelines do not usurp the functions and power of the 3rd Respondent. Furthermore, it was argued that issuance of these Guidelines is not a function specifically conferred on the 3rd Respondent.

80. In the following issue, Counsel submitted that the impugned Guidelines were in essence meant to communicate the position of the existing legislation by providing for operational and administrative procedural aspects, and thus the Guidelines did not add any regulatory aspect, to necessitate public participation. Likewise, that the impugned Guidelines, were executive in character and did not amount to a statutory instrument as such did not require public participation. Nonetheless, Counsel submitted that public participation as evidenced in the 7th Respondent’s affidavit was adhered to.

81. Reliance was placed in *Omtatah v Head of Public Service & 2 others* [2024] KEHC 198 (KLR) where it was held that:

“40. The Respondents contention was that the Circulars in issue was not a statutory instrument within the meaning of Section 2 of the *Statutory Instruments Act*. That the circular is executive in nature anchored on constitutional and statutory provisions that empower the President to direct and coordinate the functions of ministries and government departments. That the circular was thus made for administrative purpose and was in no way or form a legislative in nature as to fall within what is contemplated under Section



2 of the statutory instruments. Section 2 of the *Statutory Instruments Act*, 2013 defines ‘statutory instruments’ as: “Any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.”

41. The Court in the case of *Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi* [2019] eKLR made an attempt to elaborate on the scope of Section 2 of the statutory instruments: “From the definition given above of statutory instruments, and the powers granted to the Respondent, it is therefore the case that not all the guidelines, orders, or directions given by the Respondent are legislative in character and therefore statutory instruments. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation of standards in laws and policies... It is thus my finding that the said circular was not made in exercise of the legislative powers granted to the Respondent, and that its purpose was clearly stated to be explanatory. It is therefore not a statutory instrument as envisaged by the *Statutory Instruments Act*, and was therefore not subject to the procedure set out in the said Act as regards enactment of statutory instruments, including the requirements of consultation and publication.”
42. This means that if the purpose of the circular is merely elaboratory and is based on what already exists, then it is a statutory instrument. It is purely an administrative tool issued for purposes of guiding implementation of existing policies... It is the considered view of this Court that the circular in question was an amplification of what was already in law and policy (consortium procurement). The circular was not a statutory instrument within the scope of Section 2 of the *Statutory Instruments Act* in the circumstances. It did not require public participation.”

82. Additional dependence was placed inter alia in *Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae)* [2024] KESC 63 (KLR), *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, *Law Society of Kenya v Office of the Attorney General & another; Kenya Meat Commission (Interested Parties) & another* [2021] KEHC 9067 (KLR), *Richard Owuor & 2 others (suing on behalf of Busia Sugarcane Importers Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 others* [2021] eKLR, and *Commission for Human Rights & Justice v Board of Directors, Kenya Ports Authority & 2 Others; Dock Workers Union (Interested Party)* [2020] eKLR.

3rd Respondent’s Submissions

83. The 3rd Respondent’s Counsel, Jacqueline Manani filed submissions dated 18th March 2025 and sought to demonstrate the constitutional and statutory functions and powers of the PSC with regard to management of human resource in State Corporations and public universities and why the impugned



Gazette Notice No. 6265 together with the impugned Guidelines is unconstitutional and a violation of Article 234 of the Constitution.

84. Counsel submitted that the 3rd Respondent's mandate under Article 234 of the Constitution is to manage human resource in public service save for the public service that is expressly excluded from its mandate under Article 234(3) of the Constitution. Counsel noted that State Corporations and Public Universities are not excluded in this category. Counsel stressed that the question whether, State Corporations and Public Universities are part of the public service has long been settled in a number of court decisions including recently by the Court of Appeal in Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others [2024] KECA 419 (KLR) where it was held as follows:

“It is our view that the convergence is that officers and persons serving/working in state corporations are public officers within the meaning of Article 260 of the Constitution. Therefore, article 260 of the Constitution gives an explicit definition of public service, as; the collectivity of all individuals, other than State officers, performing a function within a state organ. The 1st respondent is a body corporate established under an Act of Parliament as a State corporation within the meaning of that Act, and therefore subject to the Constitution.”

39. All State Corporations have national outreach by nature and design, and fall squarely under the auspices of the National Government. This also means that the 1st respondent is also a public service institution that is in existence under the Constitution and its officials and employees would be considered public officers under it. It is obvious that State Corporations are agencies of the Government and from our understanding, there are four sectors in our Country upon which all organizations, institutions, enterprises and businesses may fall. These are the private sector, the public sector which includes ministries, State-owned Corporations, enterprises, businesses, industries, organizations, Non-Governmental Organizations (NGOs) and Community-Based Organizations (CBOs). State Corporations, including the 1st respondent, collectively fall within the Government of the Republic of Kenya, and as captured under the definition of “public service” under article 260 of the Constitution this means the 1st respondent cannot separate itself from the public sector.

40. Further, it is clear that the remuneration of officers in State Corporations such as the 1st respondent is payable either from money provided by Parliament through the annual national budget or funds retained by the State Corporation pursuant to the provisions of article 206(1)(b) which empowers State organs to retain money that they receive for purposes of defraying expenses as empowered by an Act of Parliament. In Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) vs. Salaries and Remuneration Commission (supra) the High Court Lenaola, J. held that State Corporations such as the 1st respondent, “that any other finding would be absurd, illogical and impractical given the design and structure of our Constitution”. We agree fully with that holding.”

85. Counsel emphasized further that the wording in Article 234 of the Constitution as read with Section 2 of the PSC Act is clear that the 3rd Respondent exercises its functions and powers over the public



service which follows that the same apply to State Corporations and Public Universities, having been found to be part of the public service.

86. Counsel further noting that the impugned Guidelines overlooked the 3rd Respondent's mandate, submitted that Sections 5(3) and 27 of the *State Corporations Act* which they are anchored on have been found by Courts to be inconsistent with the *Constitution* and therefore unconstitutional. Reliance was placed in *Manyara Muchui Anthony* (supra) where it was held that:

- “ a) Section 5(3) of the *State Corporations Act* is in conflict with Article 234(2) as read together with Article 260 of the *Constitution* on regulation of the public service and definition of who a person in the public service is.
- b) The entity given constitutional authority to employ, issue terms and conditions of service, review, audit and advice with regard to public service is the Public Service Commission. Employees in the service of the Communications Authority are subject to the constitutional mandate of the Public Service Commission.
- c) The regulation of the human resource of state corporations fall squarely under the constitutional mandate of the Public Service Commission.”

87. Equally Counsel noted that the Court in *Consumer Federation of Kenya (COFEK)* (supra) observed as follows:

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

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

If, with respect to any particular matter—

- a. a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and
- b. a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

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

(119) Bearing in mind that the *Public Service Commission Act* was enacted in 2017 and came into operation on 20th April 2017, it is the Court's view that its provisions were intended to reinforce



the provisions of Article 234 of the Constitution of Kenya, 2010 and underscore its preeminent character.”

88. Counsel submitted that these two decisions have never been appealed against or set aside by the Court of Appeal or Supreme Court. On this basis, Counsel submitted that the impugned Executive Order and continued insistence of the 7th Respondent to exercise the functions in Sections 5(3) and 27 of the State Corporations Act amount to total disregard of the Court findings. Counsel maintained that the 3rd Respondent’s functions and powers provided for under Article 234 of the Constitution supersede the provisions in the impugned Guidelines which are anchored on Sections 5(3) and 27 of the State Corporations Act.
89. Counsel relying on Article 234(2)(a)(i) and 234(2)(j) of the Constitution as read with Section 26 of the PSC Act submitted that save for the President, no other organ is given powers to establish and abolish offices in the public service. It was noted that even if the President is granted this power under Article 132(4)(a), this power is subject to the 3rd Respondent’s recommendation and as such the President cannot unilaterally establish an office in the public service.
90. Considering this, Counsel contended that nowhere in the State Corporations Act is the 7th Respondent or any other entity given power to approve or recommend the establishment and abolition of offices in the public service or the organization of the public service in the manner defined in Sections 26 and 58 of the PSC Act. Further that unlike the PSC Act, the State Corporations Act does not define what is meant by “establishment, reorganization or dissolution of State Corporations. Our understanding of this provision therefore is that SCAC was given the function to advise on the establishment of a new State Corporation or re-organization or dissolution of State Corporations, as opposed to the recommendation on the number and kinds of offices in the State Corporation. Counsel stressed thus that the 7th Respondent does not have power to determine the number and kinds of offices in a State Corporation and to create those offices.
91. On this basis, Counsel submitted that the provisions of Section 27(1)(b) of the State Corporations Act is no longer applicable as first it is an outdated law having been overtaken by the new constitutional dispensation, second, Article 132(4)(a) of the Constitution transferred to the 3rd Respondent the power to make such recommendations to the President and third, Section 7 of the Sixth Schedule to the Constitution precludes the 7th Respondent from exercising powers that were transferred to 3rd Respondent on promulgation of the Constitution.
92. To buttress this point reliance was placed in Nairobi ELRC Petition No. E149 of 2022, Enos Namasaka & Others –vs- KEMSA & Others where it was held that:

“A plain reading of the General notice issued by KEMSA to its staff dated 4/1/2021 and re-issued on 10/6/2022 together with express deposition by 1st and 2nd interested parties in the replying affidavits and submissions, leads the court to the conclusion that KEMSA was involved in establishing and abolition of office within the meaning of Article 234(2) of the Constitution of Kenya 2010. The Public Service Commission was not involved by the 1st respondent and the 2nd interested party in the intended restructuring exercise which in the court’s considered finding constitutes establishment and abolition of office... To the extent that the intended exercise by KEMSA amounts to establishment and abolition of office, the action is ultra vires Article 234(2)(a) of the Constitution and is null and void ab initio. Indeed in Petition No. E161 of 2021, Manyara Muchui Anthony –vs- Communication Authority of Kenya and 3 Others, it was held that: “The Constitutional threshold for regulation of public service is a mandate of the 3rd respondent (Public Service Commission).”



93. Counsel additionally submitted that the 3rd Respondent is not only empowered to establish offices in the public service but also to appoint persons to hold the said offices in this case, State Corporations and Public Universities. Equally, Counsel noted that the 3rd Respondent can delegate its powers and functions under Article 234(5) of the Constitution. In view of this, Counsel submitted that the impugned Guidelines purport to provide for the Transfer and Secondment of Staff Between State Corporations yet this mandate is vested in the 3rd Respondent. Despite the glaring irregularity and Court’s recommendations, Counsel argued that the 7th Respondent had refused to comply with this while the 1st Respondent had ignored the 3rd Respondent’s communication with reference to the recommendations made in Manyara Muchui (supra).
94. In the same breath, Counsel referring to the impugned advisory opinions argued that the 1st Respondent has no power to interpret the Constitution with a binding effect. Moreover, Counsel added that the 3rd Respondent could not comply with an erroneous advisory as the same would be contrary to the Constitution.
95. Correspondingly, Counsel submitted that the 3rd Respondent by virtue of Article 234(2)(a)(ii), (b), (c), (f), (g) and (j) of the Constitution as read with Section 2 of the PSC Act and Regulation 46(2) of the PSC Regulations also has the power to determine the terms and conditions of service in the public service. For this reason, Counsel submitted that the 7th Respondent cannot continue to exercise the said function of recommending terms and conditions of service for State Corporations to Cabinet Secretaries as provided for in the State Corporations Act and the impugned Guidelines because that power was expressly transferred to 3rd Respondent in Article 234(2)(g) of the Constitution.
96. Similarly, it was argued that the provisions of Schedule 7 of the Constitution apply in this matter. An identical argument was also made in relation to Section 27 of the State Corporations Act. In light of this, Counsel emphasized that the 7th Respondent cannot continue undertaking a function that is the constitutional mandate of the 3rd Respondent. It was further noted that the impugned Guidelines ignored the PSC Act which gives effect to the PSC’s functions and powers in Article 234 of the Constitution.
97. In sum Counsel submitted that Sections 5(3) and 27 of the State Corporations Act is inconsistent with the Constitution and therefore the 1st Respondent’s advisory giving life to the said provisions is unconstitutional. Reliance was placed in Institute of Social Accountability & Another –v- National Assembly & 4 Other [2015] eKLR where it was held that:
- “Third, in determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.”
98. Like dependence was placed in Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10; others [2015] eKLR and National Environment Management Authority –v- Wabwoto & 3 Others; Law Society of Kenya & 2 Others (Interested Parties) [2025] KECA 276 (KLR).



Analysis and Determination

99. Having regard to the pleadings and arguments by Counsel in this matter, this Court finds the following as forming the pertinent issues for determination in this Petition:
- i. Whether the Executive Order No. 3 and the Guidelines therein are unlawful and unconstitutional.
 - ii. Whether Sections 5(3) and 27 of the State Corporations Act contravene Article 234(2) of the Constitution
 - iii. Whether the Petitioner is entitled to the reliefs sought.

Whether the Executive Order No. 3 and the Guidelines is unlawful and unconstitutional

100. A resolution of this nature invites the Court to interpret the Constitution hence application of relevant principles on constitutional interpretation in determining the issue will be necessary in guiding this Court.
101. There are various judicial decisions on these principles but I find it unnecessary to navigate through the multiple judicial decisions given that in *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others*; *Ayika* [2024] KEHC 2890 (KLR); the court took time to review and set out a very concise summary of these principles hence that decision is a sufficient reference point to aid this Court to arrive at a just resolution of the issues at hand. The Court stated:

- “ 111. The developing precedent on constitutional interpretation from the superior courts has now evolved and coalesced as follows;
- i. Article 259 of the Constitution as a mandatory principle obliges courts to protect and promote the spirit, purposes, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance while permitting development of the law.
 - ii. the Constitution must be construed holistically, liberally, purposively and in a broad manner so as to avoid a narrow and rigid interpretation tainted with legalism.
 - iii. the Constitution must be interpreted in a contextual manner, that courts are constrained by the language used and so cannot impose a meaning that the text is not reasonably capable of bearing. Furthermore, constitutional interpretation does not favour a formalistic or positivistic approach but a generous construction of the text in order to afford the fullest possible constitutional guarantees.
 - iv. In considering the purposes, values and principles while interpreting the Constitution, courts must take into account the non-legal phenomena by reflecting on the history of the text.
 - v. Constitutional interpretation demands that no one provision of the Constitution should be segregated from the others or be



considered alone. The provisions are to be interpreted as an integrated whole so as to effectuate the greater purpose of the Constitution.

- vi. Where there is an impugned provision in a Statute the same must as much as possible be read in conformity with the Constitution to avoid a clash.
- vii. The court ought to examine the object and purpose of the Act (Statute) and if any statutory provision read in its context can reasonably be construed to have more than one meaning the court must prefer the meaning that best promotes the spirit and purposes of the Constitution. See *Tinyefuza v Attorney-General Const Pet No 1 of 1996 (1997 UGCC 3)* and *Re Hyundai Motor Distributors (PTY) & others v Social No & others (2000) ZACC 12 2001(1) SA 545*.
- viii. The principles of interpretation require that the words and expressions used in a statute be interpreted according to their ordinary literal meaning in the statement and in the light of their context. See *Adrian Kamotho Njenga v Kenya School of Law (2017) eKLR* and *Law Society of Kenya v Kenya Revenue Authority & another (2017) eKLR*.”

112. When the constitutionality of a statute or provision of a statute is called to question, the court is under obligation to employ the constitutional mirror laying the impugned legislation or provision alongside the article(s) of the Constitution and determine whether it meets the constitutional test. The court must also check both the purpose and effect of the Section or the Act, and see whether any of the two could lead to the provision being declared unconstitutional. That is to say, the purpose of a provision or effect thereof, may lead to unconstitutionality of the statute or provision.”

102. Article 2 (1) the Constitution proclaims the supremacy of the Constitution by stating that it binds all persons and all state organs at both levels of government while Article 2 (2) underscores no person may claim or exercise state authority except as authorized under the Constitution. Indeed, Article 2 (4) makes it clear that any law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

103. In the instant this case, the Petitioner wants this Court to interrogate and determine the legality and constitutionality of the Executive Order No. 3 and the Guidelines contained therein.

104. According to the Black’s Law Dictionary 2nd Ed., an Executive Order is defined as:

“an order issued by or on behalf of the President, intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow.”

105. the Constitution demands that every decision made or action by the State and in fact, all persons must meet constitutional threshold. This Court has a constitutional duty under Article 165 (3) of the Constitution to ensure that the Constitution and its principles are adhered to by all. Article 3 of the



Constitution obliges every person to respect, uphold and defend the Constitution while Article 2 (4) declares that any law, act or omission done in contravention of the Constitution to be invalid.

106. In South African case of *Glenister vs. President of the Republic of South Africa & Others* Case CCT 41/08; [2008] ZACC 19 the Court underscored the central role of the Court in ensuring adherence to the Constitution by stating thus:

“In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.”

107. Further, the Constitutional court of South Africa in *Masetlha vs. President of the Republic of South Africa* 2008 1 BCLR 1 (CC) underscored the necessity of the President to comply with the Constitution by stating thus:

“Legality is an implicit principle in our constitutional ordering, requires the President, to act “in accordance with the law and in a manner consistent with the Constitution.” This means that the power conferred “must not be misconstrued.”

108. In our own context, the Court in *Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti* [2018] KEHC 9435 (KLR) emphatically stated:

“7. Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decision to be allowed to stand, it must be demonstrated that the decision is grounded on law. As such, the Respondents' actions must conform to the doctrine of legality...”

“(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law”

109. The bone of contention in this Petition is executive order number 3 of 2024 which was published on 24th May 2024 through Gazette Notice No.6265 Vol. CXXVI –No.70, in which it notified the public the Guidelines on Management and Terms and Conditions of Service for Board Members and Staff of State Corporations that had been developed under Section 5(3) of the State Corporations Act. The Petitioner faulted these guidelines by insisting that they are in contravention of Article 234 (2) of the Constitution as they usurp the role of the 3rd Respondent (Public Service Commission); further, they were developed in a manner contrary to the requirements of the Statutory Instruments Act because they were neither subjected to public participation nor was any parliamentary approval sought to sanction their formulation. Further, that they were expressed to be founded on Section 5(3) and 27 of the State Corporations Act which is unconstitutional given that there exists Court decisions that had declared



section 5 (3) of the *State Corporations Act* unconstitutional for non-compliance with Article 234(2) of the *Constitution*.

110. The 3rd Respondent supported the Petitioner's case.
111. The 1st, 2nd, 5th, 6th and 7th Respondent disputed these assertions maintaining that due process was followed in the development of these guidelines. They insisted that the Petitioner and 3rd Respondent had misconstrued the implication of Article 234 (2) (g) of the *Constitution*. They argued that the 3rd Respondent is authorized to make recommendations on conditions of service for public service to the Cabinet Secretary implying that that policy decisions are a preserve of persons exercising ministerial responsibility, not the 3rd respondent, as such, Section 53 (2) of the *Public Service Commission Act* unpacks Article 234 (2) (g) of the *Constitution* just like Section 5 (3) of the *State Corporations Act* does as both serve the purpose of helping the officer exercising Ministerial responsibility make an informed decision on policy. The 1st, 2nd, 5th and 7th Respondent opposed the contention that the Employment and Labour Relations Court (ELRC) had declared Section 5 (3) of the *State Corporations Act* unconstitutional arguing that the Court does not even possess jurisdiction to declare an Act of Parliament unconstitutional.
112. Article 233 (1) of the *Constitution* creates the Public Service Commission (3rd Respondent) and Article 234 (2) sets out its powers and functions as follows:
 - (2) The Commission shall—
 - a. subject to this Constitution and legislation—
 - (i) establish and abolish offices in the public service; and
 - (ii) appoint persons to hold or act in those offices, and to confirm appointments;
 - b. exercise disciplinary control over and remove persons holding or acting in those offices;
 - c. promote the values and principles referred to in Articles 10 and 232 throughout the public service;
 - d. investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
 - e. ensure that the public service is efficient and effective;
 - f. develop human resources in the public service;
 - g. review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
 - h. evaluate and report to the President and Parliament on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the public service;
 - i. hear and determine appeals in respect of county governments' public service; and
 - j. perform any other functions and exercise any other powers conferred by national legislation.
 - (3) Clauses (1) and (2) shall not apply to any of the following offices in the public service—
 - a. State offices;



- b. an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic;
 - c. an office or position subject to—
 - (i) the Parliamentary Service Commission;
 - (ii) the Judicial Service Commission;
 - (iii) the Teachers Service Commission;
 - (iv) the National Police Service Commission;

or
 - d. an office in the service of a county government, except as contemplated in clause (2)(i).
- (4) The Commission shall not appoint a person under clause (2) to hold or act in any office on the personal staff of the President or a retired President, except with the consent of the President or retired President.
- (5) The Commission may delegate, in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.
113. Article 234 (2) (g) of the *Constitution* explicitly provides one of the functions of the 3rd Respondent to as being to ‘review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service.’
114. A function that is specifically assigned by the *Constitution* cannot be redistributed, split or altered by legislation. The argument by the 1st, 2nd, 5th, 6th and 7th Respondent seems to suggest that the tenor of the phrase ‘subject to the *Constitution* and legislation means that ‘review and making of recommendations in respect of conditions of service for the public service’ can be assigned by legislation to any other body, person or authority in public service. The only way that can happen is by delegation in writing by the 3rd Respondent by dint of Article 234 (5) of the *Constitution* which provides that the Public Service Commission may “delegate, in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.”
115. The 1st, 2nd, 5th, 6th and 7th Respondent thus misconstrued the introductory phrase ‘subject to this Constitution and legislation’ in Article 234 (2)(a) to mean that by legislation, legislation can strip the Public Service Commission its constitutionally assigned mandate. Neither Parliament nor Executive has that kind of latitude given by the *Constitution*. The phrase ‘subject to this Constitution and legislation’ does not in my humble view permit a negation of the *Constitution*; the phrase simply means that PSC shall exercise its powers in conformity with the *Constitution* and legislation for so long as the legislation is consistent with the *Constitution* meaning that Parliament, under the guise of legislating cannot assume power that alters or derogates from the substance of the *Constitution*.
116. ‘Subject to the *Constitution*’ also means even as PSC observes its own Constitutional mandate, it must also comply with other Constitutional provisions that have a bearing on execution of its functions for instance, in the discharge of its role of ‘reviewing and making recommendations in respect of conditions of service... in the public service’ under Article 234 (2) (g) of the *Constitution*, the Public Service Commission must appreciate that where such review and/or recommendation has an implication on remuneration and benefits in the public service, Article 230 (4) (b) of the *Constitution*



as read with Section 11 of the Salaries and Remuneration Commission obligates it to seek the advice or concurrence of the Salaries and Remuneration Commission. That is a Constitutional imperative.

117. In the instant matter, there was not even an iota of evidence provided that SRC's advice was even sought by the 1st, 2nd, 5th, 6th and 7th Respondent after by-passing the Public Service Commission (3rd Respondent) yet there is very clear indication that these recommendations had made provisions on remuneration and benefits. That alone was sufficient to declare to find these guidelines to be unconstitutional.
118. The legislation might cover areas such as principles to be observed on recruitment, transfers, deployment, workload analysis or the procedures to be considered in the establishment and abolition of offices in public service and other supplemental matters but legislation or policies that meddle with these constitutionally conferred functions of the Public Service Commission cannot be countenanced.
119. Article 234 (3) specifically exempts public or state officers that are not subject to the authority of the 3rd Respondent in terms of its functions in relation to public service hence all other category of public officers in the public service not covered by this exemption remain under the purview of the 3rd Respondent in terms of functions prescribed under Article 234 (2). I say so because the meaning assigned to the word 'public service' under Article 260 of the *Constitution* means 'collectivity of all individuals, other than state officers, performing a function within a state organ'. Under Article 234 (2) (a) (i) it is the responsibility of the 3rd Respondent to 'establish and abolish offices in the public service.'
120. Any other organ, person or authority purporting that it can undertake this function without the delegation in writing by the 3rd Respondent under Article 234 (5) would be doing so unconstitutionally unless if of course, it falls within the exempted categories prescribed under Article 234 (3) of the *Constitution*.
121. The issue of whether or not officers in State Corporations are public officers was settled by the Court of Appeal in Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others (Civil Appeal 156 of 2016) [2024] KECA 419 (KLR) (26 April 2024) (Judgment) Neutral citation: [2024] KECA 419 (KLR) where it was held as follows:
- “ 28. ... The starting point would be to determine whether positions held by State Corporation's employees such as the 1st respondent are in the public service subject to regulation by the SRC. Fundamentally, the Constitutional threshold is Article 260 of the *Constitution* defines “public officer” as follows: “Public officer means –(a) any State Officer; or (b) any person, other than a State Officer, who holds a public office.”
122. The Court after conducting a review of several judicial decisions on this issue then concluded at paragraph 38 and 39 of the Judgment thus:
- “ 38. It is our view that the convergence is that officers and persons serving/working in state corporations are public officers within the meaning of Article 260 of the *Constitution*. Therefore, Article 260 of the *Constitution* gives an explicit definition of public service, as; the collectivity of all individuals, other than State officers, performing a function within a state organ. The 1st respondent is a body corporate established under an Act of Parliament as a State corporation within the meaning of that Act, and therefore subject to the *Constitution*.



39. All State Corporations have national outreach by nature and design, and fall squarely under the auspices of the National Government. This also means that the 1st respondent is also a public service institution that is in existence under the Constitution and its officials and employees would be considered public officers under it. It is obvious that State Corporations are agencies of the Government and from our understanding, there are four sectors in our Country upon which all organizations, institutions, enterprises and businesses may fall. These are the private sector, the public sector which includes ministries, State-owned Corporations, enterprises, businesses, industries, organizations, Non-Governmental Organizations (NGOs) and Community-Based Organizations (CBOs). State Corporations, including the 1st respondent, collectively fall within the Government of the Republic of Kenya, and as captured under the definition of “public service” under article 260 of the Constitution this means the 1st respondent cannot separate itself from the public sector.”

123. By now, it is crystal clear that any attempt to give away the specific constitutional functions assigned to the Public Service Commission in relation to public service other than by way of delegation envisaged in Article 234 (5) of the Constitution is indefensible. Legislation can only clarify those roles or expand without derogating from the core content but it cannot claw back that which the Constitution has specifically assigned. It follows therefore that if the impugned guidelines were premised on unconstitutional statutory provisions, then they would fail the constitutional threshold.

124. This therefore takes me to the next issue, which is:

Whether Sections 5(3) and 27 of the State Corporations Act contravene Article 234(2) of the Constitution.

125. Section 5 of State Corporation Act provides for the powers of State Corporations generally. It states:

5. Powers generally of state corporations
 - (1) Subject to this Act, every state corporation shall have all the powers necessary or expedient for the performance of its functions.
 - (2) After the commencement of this Act and notwithstanding subsection (1), the power of a state corporation to borrow money in Kenya or elsewhere shall be exercised only with the consent of the Cabinet Secretary and subject to such limitations and conditions as may be imposed by the Treasury with respect to state corporations generally or specifically with respect to a particular state corporation.
 - (3) A state corporation may engage and employ such number of staff, including the chief executive on such terms and conditions of service as the Cabinet Secretary may, in consultation with the Committee, approve.
 - (4) A state corporation may, with the approval of the Cabinet Secretary in consultation with the Treasury and the Committee, establish pension, gratuity, superannuation, provident or other funds for the state corporation's employees and their dependants.

126. Section 27 on its part provides as follows:

Functions of the Committee



Section 27. The Committee shall advise on the matters and perform any functions it is required by this Act to perform and in addition shall—

- (a) with the assistance of experts where necessary, review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary;
- (b) in consultation with the Attorney-General and the National Treasury, advise the President on the establishment, reorganization or dissolution of state corporations;
- (c) where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;
- (d) examine any management or consultancy agreement made or proposed to be made by a state corporation with any other party or person and advise thereon;
- (e) examine proposals by state corporations to acquire interests in any business or to enter into joint ventures with other bodies or persons or to undertake new business or otherwise expand the scope of the activities and advise thereon.

127. When you put side by side the provisions of Sections 5 (3) and 27 (c) of the *State Corporations Act* as against the provisions of the *Constitution*, particularly Article 234(2) (a) (i) establish and abolish offices in the public service; (ii) appoint persons to hold or act in those offices, and to confirm appointments; (b) exercise disciplinary control over and remove persons holding or acting in those offices ; and (g) review and make recommendations to the national government in respect of conditions of service; it irrefutably becomes clear that the provisions in the *State Corporations Act* are an invasion of the mandate of the Public Service Commission (3rd Respondent) in relation to its constitutional functions in respect of public service.
128. This is without any hesitation; a direct infringement of the *Constitution* and is therefore unconstitutional.
129. The fact that these guidelines were issued as the Executive Order under the hand of the President cannot cure their unconstitutionality. Even in exercise of executive functions, the *Constitution* under Article 132 (4) allows the President to perform those executive functions in line with the *Constitution* or as authorized by national legislation. In establishing public offices, other than those the President is permitted by the *Constitution* to establish, the President can only do so upon recommendation of the Public Service Commission. This fortifies the centrality of the Public Service Commission in relation to public service.
130. As an Independent Commission, the Public Service Commission acts as the bulwark to protect the collectivity of public service from unwarranted intrusion or manipulation to ensure public service thrives on merit, professionalism, objectivity and impartiality. Permitting nibbling of its constitutionally protected mandate will increasingly weaken the Public Service Commission and leave it exposed to external interference yet the framers of the *Constitution* wanted a Public Service Commission that is independent with its specific functions ring fenced in the *Constitution* to shield them from encroachment. At this juncture it is important to reiterate what the Supreme Court said about ‘independent clause in relation to Constitutional Commissions’ In the Supreme Court



Advisory Opinion Reference no. 2 of 2014, in the Matter of the National Land Commission (2015) eKLR; it stated:

“It is a matter of which we take judicial notice, that the real purpose of the “independent clause,” with regard to the Commissions and Independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or Offices, by other persons, or institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency, since independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of individual. The Constitution established the several independent Commissions alongside the judicial branch, entrusting to them special governance mandates of critical importance in the new dispensation: they are the custodians of fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear, favour: this indeed, is the purpose of the independence clause.”

131. Allowing legislation such as Section 5 (3) or 27 (c) of the State Corporations Act to continue to operate in a manner that erodes the specific constitutional mandate of the Public Service Commission is antithetical to the spirit of Article 249 (2) (a) of the Constitution.

132. It is appreciated that these provisions are not new inclusions because they predate the present Constitution. The fact that they were there prior to the coming into force of the current constitution cannot excuse their operation especially now that they are inconsistent with the Constitution.

133. The cure lies in Section 7 of the Sixth Schedule to the Constitution which provides:

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

134. In the overall analysis therefore, this Court finds that Section 5 (3) and 27 of the State Corporations Act is unconstitutional and is thus satisfied that the instant Petition has merit. Consequently, the reliefs that commend themselves in this Petition and which I hereby grant are as follows:

- a. A declaration is hereby issued that Executive Order No 3 of 2024 promulgating the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024 contravene and violate Articles 2, (4), 132 (4) and 234(2), 249 of the Constitution and the decision and action thereto contained in Gazette Notice No. 6265 Vol. CXXVI- No. 70 dated 24th May, 2024 is invalid, null and void and unconstitutional.
- b. A declaration is hereby issued that the authority to develop and recommend guidelines on management of terms and conditions of service in the public service is vested on the Public Service Commission under Article 234 (2) unless delegated in writing to any officer, body or authority in the public service by the Public Service Commission by dint of Article 234(5) of the Constitution.
- c. A declaration is hereby issued that Sections 5(3) and 27(c) of the State Corporations Act are unconstitutional for being in contravention of Article 234(2) of the Constitution.



- d. A declaration is hereby issued that State Corporations and Public Universities, being part of the public service, are subject to the constitutional and statutory mandate and control of the Public Service Commission as outlined in Article 234 of the Constitution.
- e. A declaration is hereby issued that the State Corporations Advisory Committee (SCAC) being a public entity in the public service is subject to the constitutional and statutory mandate and control of the Public Service Commission as outlined in Article 234 of the Constitution on matters relating to public service.
- f. A declaration is hereby issued that the 6th Respondent, Cabinet Secretary, the National Treasury had no authority to exercise the powers and functions vested on Salaries and Remuneration Commission Under Article 230 of the Constitution as well as Salaries and Remuneration Commission Act.
- g. An order of judicial review by way of certiorari is hereby issued quashing Executive Order No. 3 of 2024 dated 24th May, 2024 in so far as the same relates to the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024.
- h. An order of judicial review by way of certiorari is hereby issued quashing the Guidelines on management and Terms and Conditions of Service for Board Members and Staff of State Corporations, May 2024.
- i. This being a public interest litigation, I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2025.

.....

L N MUGAMBI

JUDGE

