

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E303 OF 2023
As consolidated with Petition E026 of 2023

BETWEEN

JOHN GITHONGO1ST
PETITIONER
KATIBA INSTITUTE.....2ND
PETITIONER

VERSUS

STATE CORPORATIONS ADVISORY
COMMITTEE.....1ST RESPONDENT
ATTORNEY
GENERAL.....2ND
RESPONDENT

AND

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

J U D G M E N T

Introduction

1. The Petition dated 18th August 2023 is supported by the 1st Petitioner's affidavit in support of similar date and a further affidavit dated 20th September 2023. The Petition was consolidated with Petition E026 of 2023 by the order of this Court issued 23rd May, 2024. The other Petition is dated 23rd August 2023 and is substantially based on the same facts and circumstances as the lead Petition and essentially seeks similar orders.
2. The Petition assails the 2nd Respondent's Advisory letter dated 27th July, 2023 and the subsequent circular issued by the 2nd Respondent's anchored on the said advisory dated 8th August, 2023. The Petitioner contends that the aforesaid documents violate Article 234 of Constitution as they amount to usurpation of the 1st Interested Party's constitutional mandate.
3. On this basis, the Petitioners seeks the following relief against the Respondents:
 - i. A declaration do issue that the advisory letter dated the 27th July 2023 Ref. No. AG/CONF/2/C/31 VOL VI from the office of the Attorney General is unconstitutional, unlawful, and violates Articles 2(2), 3, 10, 149, 232, 234 and 249 of the Constitution.***
 - ii. A declaration that the letter dated 8th August 2023 Ref No. OP/SCAC 9/21/2 II/(31) from the State Corporations Advisory Committee is ultra vires of its function and powers under Section 27 of the State Corporations Act and***

by its endorsement and promotion of the contents of the advisory letter from the Attorney General dated 27th July 2023 Ref. No. AG/CONF/2/C/31 VOL VI it is contrary to the law and to the provisions of Articles 2(2), 3, 10, 232, 234 and 249 of the Constitution.

- iii. An order do issue quashing both the advisory letter dated the 27th July 2023 Ref. No. AG/CONF/2/C/31 VOL VI from the office of the Attorney General and the SCAC letter dated 8th August 2023 Ref No. OP/SCAC 9/21/2 II/(31) and declaring them void and of no legal effect.**
- iv. This Court do declare that the Public Service Commission has the mandate under Section 234(2)(a), subject to any limiting provisions of the Constitution and legislation, to establish and abolish offices within the public service, which offices include offices in State Corporations and Public Universities.**
- v. This Court do declare that State Corporations and Public Universities fall under the umbrella of the public service and are subject to the mandate of the Public Service Commission under Article 234 of the Constitution, and under the provisions of the Public Service Commission Act and Public Service Commission Regulations.**
- vi. This Court do declare that the Public Service Commission has the mandate to monitor, evaluate, report and investigate personnel activities in the public service.**
- vii. A declaration do issue that the Public Service Commission's mandate includes approving Human Resource Instruments**

(organizational structure, staff establishment, Human Resource Manual and Career progression guidelines) for public offices including in State Corporations and Public Universities.

- viii. This Court do declare that the Public Service Commission Act, the Public Service Commission Regulations and the mandate of the Public Service Commission under Article 234 of the Constitution binds all State Corporations and Public Universities.**
- ix. This Court do declare that the Salaries and Remuneration Commission's constitutional mandate under Article 230(4)(b) of the Constitution to advise on the remuneration and benefits of public officers must be directed to the Public Service Commission.**
- x. This Court do declare that the Salaries and Remuneration Commission cannot directly advise State Corporations and Public Universities under the provisions of Article 230(4)(b) of the Constitution.**
- xi. This Court do declare that the role of the State Corporations Advisory Committee is purely advisory and does not extend to the issuance of guidelines on Human Resource management or the issuance of Human Resource instruments to State Corporations.**
- xii. This Court do declare that in view of the provisions of Article 249(2)(b) of the Constitution advisories given by the Attorney General are not binding upon constitutional commissions and independent offices.**

Petitioners' Case

4. The 1st Petitioner states that by a letter addressed to the Board Chairpersons, and all State Corporations copied to the Prime Cabinet Secretary, the Chief of Staff and Head of Public Service, the AG, all Cabinet Secretaries and all Principal Secretaries, the 1st Interested Party, the 2nd Interested Party, the Auditor General and Chief Executives of all State Corporations titled *determination of terms and conditions of service in state corporations* dated 8th August 2023, the 1st Respondent stated as follows:

- a)** *'The attention of the SCAC was brought to the directions issued and circulated to State Corporations by PSC with regard to determination of terms of service in State Corporations;*
- b)** *The Government determined the terms of service for board members and State corporations and issued as Guidelines in 2004 under section 7(1) of the State Corporations Act. Other terms of service for each state corporation are contained in the State Corporation Act specifically the organizational structure and staff establishment, career guidelines and Human resource policy and procedures manual;*
- c)** *The Government purported to revise the 2004 guidelines culminating into a technical committee in which the PSC is a member, to generate harmonized guidelines;*
- d)** *The committee began sittings however; the PSC took the view that jurisdiction over State corporations was contentious because courts of law have issued varied verdicts. The AG was requested to provide a legal opinion binding all*

parties. Thus, the AG issued a legal opinion which is guiding the finalization of the guidelines; and

- e)** *The office of the AG as established under Article 156 of the Constitution and the OAG Act, 2012 stipulates that the AG is the principal legal advisor to the government and therefore any other views and directions contrary to the AG's opinion should not be honoured'.*

5. This communication was in reaction to the 1st Interested Party's letter also dated 8th August 2023 which required its approval for all the Human Resources Instruments. The 1st Interested Party's letter had also been addressed to all authorised officers, vice Chancellors of Public Universities, Chief Executive Officers of State Corporations. It was titled "*Guidelines for Development and Review of Human Resource Management Instruments for State Corporations and Public Universities*".
6. For context, the 1st Petitioner informs that prior to this, the 1st Interested Party had through a circular letter ref No. PSC/GEN/22/III/ (18) dated 12th June 2023, requested for stakeholders' views on *draft guidelines for Development and Review of Human Resource Management Instruments for State Corporations and Public Universities*. Upon receipt of these views, the same were considered and incorporated into the Draft Guidelines. It is noted that these Guidelines were issued pursuant to Article 234 of the Constitution and decided cases.

7. Accordingly, it is asserted that the 1st Interested Party's intention was to ensure that any developed or reviewed Human Resource Management Instruments or proposals for establishment of new offices or abolition of offices, should comply with these Guidelines with effect from 8th August 2023. Moreover the same were to be submitted to the 1st Interested Party for consideration and approval.

8. It is stated that in the process, the 2nd Respondent issued an Advisory letter dated 27th July 2023 titled *Guidelines on Management and Terms And Conditions Of Service For Board Members And Staff Of State Corporations*. This was made on the request of the Prime Cabinet Secretary on the issue of jurisdiction concerning State Corporations, the constitutional powers of the 1st Interested Party in relation to the human resource function in State Corporations and other contentious issues. In a nutshell, the 2nd Respondent is said to have advised as follows in the letter:
 - a) *The PSC has power to on its own initiative or upon request by an authorized officer make recommendations on the conditions of service relating to public officers to the Cabinet Secretary. There is no express provision conferring power to PSC to make recommendations directly to public bodies.*

 - b) *State Corporations are vested with the power to manage their Human Resource under their respective legislation and the State Corporations Act;*

- c) *Both the Constitution and the PSC Act limit the power of PSC to reviewing and making recommendations and do not confer upon the PSC the power to determine and approve the terms and conditions of public service officers, any code of conduct or qualifications;*
- d) *The PSC has the power to investigate, monitor and evaluate the organization, administration and personnel services of public service. This mandate is limited to monitoring, evaluating and reporting and does not extend to approving the relevant Human Resource Instruments;*
- e) *The PSC is vested with the power to develop human resources in the public service under Article 234(2)(f) of the Constitution. The Commission is further empowered by Section 65(1) of the PSC Act to review and issue human resource training and development policy and guidelines and prescribe procedures and instruments governing the development of human resources in public service;*
- f) *There is no obligation for the approval of human resource instruments by the PSC. State Corporations should liaise with the PSC in developing Human Resource development instruments to ensure consistency and harmony within the public service;*
- g) *Section 5(3) of the State Corporations Act empowers State Corporations to employ the chief executive officer and other staff and also to determine their terms and conditions of service. A review of the State Corporations Act shows that State Corporations are vested with the power to manage their human resource under their respective legislation and the State Corporation's Act;*

- h) *The SRC's mandate with respect to public officers is to advise the national and county governments on the remuneration and benefits of all other public officers; and*
- i) *The PSC's power to establish and abolish offices in the public service is subject to Constitution and legislation meaning that the power can be taken away by legislation in some instances.*

9. Soon thereafter, it is averred that the 1st Interested Party on 7th August 2023 sent a letter to the 2nd Respondent titled *Guidelines on Management And Terms And Conditions Of Service For Board Members And Staff Of State Corporations* in reaction to its advisory. In its letter, the 1st Interested Party underscored that the 2nd Respondent had erroneously relied in Section 5(3) of the State Corporations Act without paying regard the decisions in **Manyara Muchui Anthony vs Communication Authority & 3 Others [2022]eKLR** and **Consumer Federation of Kenya (COFEK) vs National Social Security Fund Board of Trustees & 2 Others [2022]eKLR** which determined that the same are inconsistent with its mandate. It was stressed that these decisions were binding and had not been appealed against.
10. Equally, the 1st Interested Party stated that the 2nd Interested Party cannot make recommendations directly to State Corporations as State Corporations Boards have no power to determine the terms and conditions of service of public officers serving in State Corporations. While also accentuating its mandate, the 1st Interested Party averred

that the role of the 1st Respondent under Sections 5(3) and 27 of the State Corporations Act is purely advisory and thus it has no power to issue guidelines to State Corporations on management of human resource or to approve human resource instruments for State Corporations as this same violates Articles 2(2) and 234 of the Constitution.

11. On the foregoing basis, the Petitioners assert that the 2nd Respondent's impugned advisory letter violates Articles 156(6), 232 and 249 of the Constitution as it undermined the rule of law. In essence, this is since operation of Sections 5(3) and 27 of the State Corporations Act have been determined to be inconsistent with Article 234 of the Constitution. Consequently, in issuing the said letter, the 2nd Respondent is argued to have created confusion and disharmony within the public service and undermined the 1st Interested Party's powers and functions to develop human resource management instruments for state corporations.
12. The 1st Petitioner further argued that the 1st Respondent's letter dated 8th August 2023 is ultra vires of its statutory powers and functions under the State Corporations Act as it purports to issue a directive to the Board chairpersons of all state corporations which usurps the 1st Interested Party's constitutional mandate and elevates the 2nd Respondent's advice above the Constitution and the cited Court decisions.

13. The Petitioners as well aver that their annexed documents are adduced by the 1st Interested Party in its Replying Affidavit and thus the same cannot be raised as an issue. Additionally, it is asserted that press reports concerning the affairs of the 1st Interested Party and welfare of the nation are matters of general notoriety that a Court takes judicial notice of. Nonetheless, it was argued that striking out of the documents would not resolve the glaring issues and confusion that has been caused by the 1st Respondent's usurpation of the 1st Interested Party's mandate.

1st Respondent's Case

14. The 1st Respondent filed its Replying affidavit sworn on 18th September 2023 by its Secretary Simon Indimuli.
15. On a preliminary note, he informs that the 1st Respondent was established following the enactment of the State Corporations Act in November 1986 under Section 26(1). He states that the 1st Respondent's functions are set out under Section 27 and additional functions provided 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.

16. He informs that the terms and conditions of service for Board members and staff of state corporations, were initially 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.
17. He states that the process of reviewing these Guidelines commenced after a wide consultative process which culminated in the establishment of a Technical Committee to generate draft harmonized guidelines. He depones that the Technical Committee was established vide a circular letter dated 24th May 2023 to generate draft harmonized Guidelines. He informs that the Technical Committee comprised of members from the office Prime Cabinet Secretary, the office of the Chief of Staff and Head of Public Service, the National Treasury, Ministry of State for Public Service, the 1st and 2nd Interested parties, 1st Respondent, Inspectorate of State Corporations and government delivery services.
18. He states that the 1st Interested Party postulated that the meetings of the Technical Committee be first suspended to allow the 2nd 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 2nd Respondent's advisory was issued on 27th July 2023 and circulated to all the government agencies.

19. He alleges that the 2nd Respondent's advisory letter affirmed the long-held knowledge of the 1st Respondent's mandate under Sections 5(3) and 27(1) (c) of the State Corporations Act. Considering this, he maintains that all state corporations are required to operate within the terms and conditions enacted under these two provisions as approved by the Cabinet secretary. Once approved he avers that it is the prerogative of the President in line with Sections 7 (1) and (2) of the State Corporations Act to give effect to those directives.
20. Similarly, he notes that the Court in **Okiya Omtatah Okiiti V Attorney-General & 2 Others; Francis K. Muthaura (AMB) & 5 others (interested parties) (2019) eKLR** held that the State Corporations Act is the primary Act on the establishment of State Corporations. For this reason, he states that the orders sought by the Petitioners are untenable.
21. Furthermore, he claims that the documentation adduced by the Petitioners including the 2nd Respondent's advisory opinion were improperly obtained. He notes that the Petitioners did not disclose how the same came into their possession thereof rendering the Petition bad in law.

22. Moreover, he argues that the 1st Interested Party's Guidelines seek to standardize human resources instruments without appreciating the uniqueness of their various segmentations and diverse business dynamics. This action he claims has caused an uproar and apprehension in State Corporations as seen in the Article by Samson Osero who was a former Chief Executive Officer as published in the Business Daily Newspaper dated 16th August 2023.
23. He contends that the Petitioners herein seek to re-write the Constitution and the law. He argues there is no provision in either the Constitution or the Public Service Act which confers power to the 1st Interested Party to determine or approve the terms and conditions of public officers. Particularly, he argues that Article 234(2) (g) of the Constitution as read with Section 53(2) of the Public Service Commission Act make it clear that the 1st Interested Party 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. As such, he argues that policy making for government is the purview of the Executive and thus cannot be exercised on its behalf by an independent constitutional commission such as the 1st Interested Party.
24. Equally it is argued that Article 234(2)(f) of the Constitution, contrary to the Petitioners allegation does not define what

constitutes the development of human resources and neither is the 1st Interested Party granted the power to do so. Likewise, he states that the 1st Interested Party's power to abolish offices in the public service and appoint persons is subject to the Constitution and legislation.

25. He as well avers that the constitutionality of the impugned Sections were not pleaded in the cases of **Manyara Muthui Anthony**(supra) and **COFEK case**(supra) as alleged by the Petitioners and neither is the Employment and Labour Relations Court competent to determine their constitutionality. He adds that there is a pending appeal in the two matters.
26. To this end, he argues that, the Petition lacks merit as is grounded in hearsay and speculations which should not be considered by this Court.

2nd Respondent's Case

27. In reaction to the Petitioners' case, the 2nd Respondent filed Grounds of Opposition dated 11th September 2023 on the basis that:
- i. The application is premised on improperly obtained correspondence not addressed to the Petitioners which the Petitioners do not disclose how they came into possession thereof rendering the entire Petition bad in law.*

- ii. *The Petitioners have failed to disclose the source of their information contrary to Order 19 Rule 3 of the Civil Procedure Rules.*
- iii. *The Petition is premised on newspaper reports which is of no probative value.*
- iv. *The allegation of creation of confusion, anxiety and disruption within State Corporations and Public Universities is a bare allegation not supported by any evidence from any person engaged in any of the said state corporations and public universities.*
- v. *Legal advisories by the Attorney-General to client ministries, departments or any other public body is privileged communication that may not be a basis of any action without leave of disclosure.*
- vi. *In any event, it is perfectly within the constitutional remit of the Attorney-General to issue an advisory to any public body as the principal legal adviser to the Government.*
- vii. *Independent constitutional commissions are part of government.*
- viii. *Neither the Petitioners nor the Court may substitute its opinion with that of the Attorney-General exercising his constitutionally and statutorily conferred discretion on the content of his legal advisories.*
- ix. *A legal advisory is substantively a matter of opinion and is not amenable to be quashed; one may either agree or disagree with it but it is not amenable to be quashed.*
- x. *The Employment and Labour Relations Court in the case of **Okiya Omtatah Okiiti V Attorney-General & 2 others; Francis K. Muthaura***

(AMB) & 5 others (interested parties) (2019) eKLR held that by dint of Article 249 (2) (a) of the Constitution, the 1st Interested Party's function and power to establish and abolish offices in the public service, appoint persons to hold or act in those offices and to confirm appointment can be limited by statute or all together taken away by statute.

- xi. The Court went further to state that Parliament by dint of the provisions of Article 234 (2) (a) of the Constitution is at liberty to legislate on matters auxiliary or supplementary to establishment and abolition of offices, appointments, recruitment and selection procedures, promotional criteria and generally all matters incidental to establishment and abolition of offices.
- xii. The **Employment and Labour Relations Court in the case of Okiya Omtatah Okoiti V Attorney-General & 2 others; Francis K. Muthaura (AMB) & 5 others (interested parties) (2019) eKLR** held that the State Corporations Act is the primary Act on the establishment and governance of state corporations.
- xiii. The Employment and Labour Relations Court did not issue any declaration that the provisions of Section 5(3) of the State Corporations Act is unconstitutional in the case of **Consumer Federation of Kenya (COFEK) v National Social Security Fund Board of Trustees and others (2002)eKLR**.
- xiv. The issue of constitutionality or otherwise of the provisions of Section 5(3) of the State Corporations Act was not pleaded as an issue for determination in the case of **Consumer Federation of Kenya (COFEK) v National Social Security Fund board of trustees and**

others (2002)eKLR before the Employment and Labour Relations Court which Court in any event lacked the jurisdiction to determine the constitutionality or otherwise of the said statutory provision; that being an issue falling within the exclusive jurisdiction of the High Court as expressly provided under Article 165 (3)(d) (i) of the Constitution.

- xv. Further there is a pending appeal before the Court of Appeal in respect to the '**COFEK case**' that is **Nairobi Civil Appeal No. 566 of 2022; NSSF, Hon. Attorney-General and another; Cabinet Secretary for Labour-vs- COFEK** therefore the issues therein are sub-judice.
- xvi. Similarly the constitutionality or otherwise of the provisions of Section 5(3) of the State Corporations Act was neither pleaded as an issue for determination nor did the Employment and Labour Relations Court issue a declaration that the said section was unconstitutional in the case of **Manyara Muthui Anthony v Communications Authority and 3 others (2022) eKLR.**
- xvii. Further there is a pending appeal before the Court of Appeal in respect to the '**Manyara case**' that is **Nairobi Civil Appeal No. E549 of 2022; Hon. Attorney-General & another; SCAC-vs-Manyara Mucui Anthony, CAK & another;** therefore, the issues therein are sub-judice.
- xviii. In the Employment and Labour Relations Court in the case of **Okiya Omtatah Okoiti V Attorney-General & 2 others; Francis K. Muthaura (AMB) & 5 others (interested parties) (2019) eKLR** it was held by the very same court that Section 27(c) of the State Corporations Act is not unconstitutional and not invalid.

- xix. *As was held by the Court of Appeal in the case of **National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022) KECA 80 (KLR)** the Employment and Labour Relations Court is not competent to determine questions on whether any law is inconsistent with or in contravention of the Constitution that jurisdiction having been specifically conferred upon the High Court under Article 165 (3) (d) (i) of the Constitution.*
- xx. *Independent constitutional commissions cannot be directed by any person or authority including the Court in the exercise of their functions.*
- xxi. *Independent constitutional commissions are subject to the Constitution and statute law as expressly provided in Article 249 (2) (a) of the Constitution.*
- xxii. *The mandate of the 1st Interested party is subject to the Constitution and the law including the State Corporations Act.*
- xxiii. *Parliament in the exercise of its legislative authority under Article 94 (1) of the Constitution has enacted several laws establishing offices with defined appointing authority including the State Corporations Act which is expressly provided to make provision for the establishment of state corporations, for control and regulation of state corporations and for connected purposes.*
- xxiv. *The provisions of Article 232 (2) of the Constitution which specifically singles out state corporations from state organs in both levels of government points to constitutional appreciation of their differentiation.*

- xxv. *The provisions of Article 234 (2) (g) of the Constitution provides that the 1st Interested party shall 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; deliberate choice of the term recommend as opposed to set is instructive.*
- xxvi. *The provisions of Article 234 (2) (g) dovetails with the provisions of Section 5 (3) of the State Corporations Act.*
- xxvii. *Similarly there is no provision in either the Constitution or the Public Service Act which confers power to the 1st Interested Party to determine or approve the terms and conditions of public officers, any code of conduct or qualifications.*
- xxviii. *The Public Service Commission Act does neither negates nor was it enacted to negate the scheme of other Acts providing for the establishment and abolition of public offices and matter incidental thereto.*
- xxix. *It is improper for deponents supporting the Petition to ignore the solemn admonition of the provisions of Order 19 Rule 3 of the Civil Procedure Rules by not confining themselves to matters prescribed therein and instead proceed to depone to matters of hearsay, argumentative matters and copies of extracts from newspapers.*
- xxx. *The Petition is speculative and bad in law.*

1st Interested Party's Case

28. The 1st Interested Party in reply filed its Replying Affidavit through its then Chief Executive Officer, Dr. Simon Totich sworn on 29th August 2023.
29. On the onset, he stresses that despite the findings of the Courts that Section 5(3) and 27 of the State Corporations Act are in conflict with Article 234 of the Constitution, the 1st Respondent has adamantly continued to disregard the pronouncements and violate the Constitution, a case in point being its circular and communication dated 21st August 2023. He argues that this has caused confusion and anxiety in State Corporations and public universities and affected service delivery.
30. He states that the 1st Interested Party established under Article 233 with functions set out under Article 234(2) of the Constitution, guides the development of human resources instruments and approves and issues the developed instruments. These instruments are: *organization structure and staff establishment; career progression guidelines and the human resource manual which contains the terms and conditions of service*. In addition, the 1st Interested Party issues other policies and guidelines to the public service.
31. By way of background, he avers that following the promulgation of the Constitution, there was doubt as to

whether State Corporations and Public Universities form part of the public service. He notes that this position was settled 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 public service.

32. 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.**
33. Following this affirmation, he depones that the 1st Interested Party embarked on enforcing its mandate over State Corporations and Public universities as detailed in the affidavit. In a nutshell, the 1st Interested Party first issued a delegation instrument to the 1st Respondent on 14th December 2015 to undertake its functions in state corporations and public universities.
34. Furthermore, it appointed a Taskforce to review terms and conditions for chairpersons, chief executive officers, chancellors and vice chancellors of public universities, board members, management and unionisable staff of state

corporations vide Gazette Notice No.3757 dated 24th April 2019. He notes that the Taskforce comprised of officials from itself and the 1st 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 1st Interested Party's constitutional mandate.

35. He depones that these Guidelines were forwarded to the Office of the Head of Public Service vide a letter dated 12th November 2019. He notes however that these Guidelines were not acted upon by the Head of Public Service and neither did they receive a response over the same. Equally, he stresses that the 1st Interested party did not delegate its mandate to establish or abolish offices or appoint to the 1st Respondent.
36. He states that the 1st Interested Party later on found out that the 1st Respondent had been without its authority, had been unlawfully establishing and abolishing offices in State Corporations through the approval and issuance of organizational structures and staff establishments. Likewise,

the 1st Respondent did not issue its quarterly reports as required. In light of this, the 1st Interested Party revoked the delegation vide a letter dated 30th September 2019. He avers that despite this revocation, the 1st Respondent continued to exercise the 3rd Respondent's mandate.

37. He contends and reiterates that the Courts have in various decisions in addition to **Manyara Muchui** (supra), **COFEK** (supra) affirmed the 1st Interested Party's mandate. He highlighted these cases as **Nairobi ELRC Petition No. E149 of 2022, Enos Namasaka & Others -vsKEMSA & Others** and **Mombasa ELRC Judicial Review Application No. E001 of 2022, Republic -v Kenya Ports Authority Board of Directors & 2 Others and Public Service Commission as Interested Party Ex Parte Commission for Human Rights Justice.**

38. In view of these cases, he depones that the 1st Interested Party went ahead to make recommendations for amendments to the State Corporations Act and forwarded the same to the 2nd Respondent vide a letter dated 25th April 2023, in which it also proposed the constitution of a multi-agency committee of stakeholders to consider the proposed amendments. He informs that no reply was made to its letter. Instead, the 1st Respondent in a response dated 4th May 2023 declined to have the Act amended and also refused to participate in any discussions on the same.

39. He points out that this displays the 1st Respondent's plain disregard for the Constitution, the rule of law and contempt for the Court decisions. Additionally, he asserts that the 1st Interested Party has been clear and consistent on its constitutional and statutory mandate and has continued to clarify the same.
40. He depones that on 11th January 2023, the Prime Cabinet Secretary wrote a letter to the 1st Interested Party 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 in reply it informed that the issue of oversight had been settled by the Court, as belonging to it.
41. He avers that this answer did not illicit a response instead the Prime Cabinet Secretary in a letter dated 16th May 2023 issued it with a document titled *Guidelines on management and Terms and Conditions on Service for Board Members and Staff of State Corporation*. He claims that in this document, the functions of the 1st Interested Party had been conferred on the 1st Respondent. This was protested to by the 1st Interested Party in its letter dated 22nd May 2023. In light of this, he avers that the Prime Cabinet Secretary directed that the Guidelines be reviewed by participation of all relevant stakeholders.

42. He states that, the 1st Interested Party also received the 2nd Respondent's advisory letter dated 27th July 2023 on 28th July 2023. The Advisory relied on Section 5(3) of the State Corporations Act. 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.
43. Particularly, the advisory letter directed State Corporations to ensure that their human resource instruments are approved by the responsible cabinet secretary in consultation with the 1st Respondent, this is despite there not being any existing legislation granting them this power. In summary the 2nd Respondent advised as follows:
- a)** *The Commission has no power to determine terms and conditions of service for State Corporations and that its power was only limited to advising the Cabinet Secretary on the same.*
 - b)** *The approval of terms and conditions for State Corporations is by the Cabinet Secretary in consultation with SCAC which should play an advisory role.*
 - c)** *The Commission has no power to establish offices in State Corporations.*
 - d)** *The Commission has no power to issue Human Resource Instruments and Human Resource Development Policies in State Corporations.*

- e)** *The Commission's role in State Corporations is only on promotion of Values and Principles in the public service.*
- f)** *The scope of the application of the public service under the Public Service Commission Act is confined to Article 260 of the Constitution and only covers State organs.*
- g)** *The Salaries and Remuneration Commission (SRC) has power to advise State Corporations on Terms and Conditions of Service.*

44. He depones that the 1st Interested Party, considering this, communicated to the 2nd 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.*

45. He avers that its communication was counteracted by the 1st 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 1st Interested Party's communication. He avers that in response to its letter, the 2nd Respondent in its letter dated 16th August 2023, communicated that it maintained its position as communicated in its initial advisory letter. The 2nd Respondent as well issued another circular of even date affirming its position.

46. He stresses that the 2nd Respondent's position is legally flawed as outlined in detail therein. He adds that this was not the first time the 2nd Respondent had issued an advisory contrary to the 1st Interested Party's mandate. He avers that for instance on 21st August 2014 the 2nd respondent issued an advisory opinion where it advised that state corporations are not part of the public service. He contends that the Court in **Manyara Muchui** (supra) and **COFEK** (supra) found these advisories to be in contravention to the Constitution. He in light of this argues that the 1st Interested Party's circulars issued following this were unlawful and unconstitutional.
47. In view of the foregoing, he asserts that the Constitution created independent commissions and offices to guard against abuse of power. He claims that the actions of the Respondents is evidence of the bad faith and intention on their part as they continue to subvert the 1st Interested Party's constitutional mandate and disregard the numerous issued Court decisions. He maintains as well that 2nd Respondent's advisories which are unlawful are a clear attack on the 1st Interested Party's mandate. On this basis, he urges the Court to allow this Petition.

2nd Interested Party's Case

48. The 2nd Interested Party filed its response in the Grounds of Opposition dated 12th February 2025 on the grounds that:

- i. The SRC takes no position on the declarations under prayers 1, 2, 3, 4, 5, 6, 7, 8, 10 and 11 as it does not affect its mandate.*
- ii. SRC opposes prayer 9 and 10 in the Petition to the extent that they restrict its mandate.*
- iii. The mandate under Article 230 of the Constitution is wide and all encompassing. The mandate is to advise the collectivity of institutions.*
- iv. A purposive interpretation of Article 230 of the Constitution means that SRC's mandate entails advising on remuneration that is paid to public officers and all institutions under National and County Government. That, a "public officer" has been defined in Article 260 as any State Officer or any person, other than a State Officer, who holds a public office. On the other, hand, a "public office" is defined as an office in the national government, county government or the public service if the remuneration are paid directly from the Consolidated Fund or out of money provided by Parliament.*
- v. Section 11 of the Salaries and Remuneration Commission Act provides for the functions and powers of the Commission as follows;*
- vi. Inquire into and advise on the salaries and remuneration to be paid out of public funds.*
- vii. Keep under review all matters relating to the salaries and remuneration of public officers.*
- viii. Advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector.*

- ix. *Conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices.*
- x. *Determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation.*
- xi. *Make recommendations on matters relating to the salary and remuneration of a particular State or public officer.*
- xii. *Make recommendations on the review of pensions payable to holders of public offices; and*
- xiii. *Perform such other functions as may be provided for by the Constitution or any other written law.*
- xiv. *Therefore, SRC's mandate, as established by Article 230 (4)(b) of the Constitution and Section 11 of the Salaries and Remuneration Act, is to advise on the remuneration and benefits of public officers, and this does not preclude it from providing advice directly to State Corporations and Public Universities when necessary. The criteria is that SRC will advise on remuneration that is paid out of public funds be it a state officer or a public officer.*
- xv. *On this basis, SRC urges this Court not to allow prayer 9 and 10 in the Petition as it seeks to restrict the mandate of the Salaries and Remuneration Commission.*

3rd Interested Party's Case

49. The 3rd Interested Party filed its Replying Affidavit by its Chief Executive Officer, Florence Muturi's affidavit sworn on 29th August 2023.
50. She avers that in her understanding this Petition primarily revolves around the dispute, *whether State Corporations are part of the public service and therefore under the regulation of the Public Service Commission (PSC) in so far as the exercise of human resource functions is concerned, interpretation of Article 234 of the Constitution on the powers and functions of the Public Service Commission specifically on the issuance of human resource instruments in the public service, specifically in State Corporations; whether the State Corporations Advisory Committee (SCAC) has the power to develop and approve human resource instruments governing public officers in State Corporations and whether the opinions of the Attorney General (AG) legally wrong or right, are binding.*
51. She states that the 3rd Interested Party is aware of the long-standing dispute whether State Corporations or parastatals form part of the public service. She recaps that in 2014, the Court in **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers)** (supra) determined that state corporations are part of the public service and thus employees of State corporations are public servants and subject to all laws governing such persons.

Subsequently, the Court of Appeal in **Public Service Commission -vs- Katiba Institute & Others, Nairobi Civil Appeal No. E638 of 2021** also affirmed that state corporations and parastatals form part of the public service.

52. She states that the Constitution under Article 234 provides that public service is regulated by the 1st Interested Party. As such, it is for this reason, the entire government relies on the policies, circulars, guidelines and directions issued to the service by it. In this regard, she postulates that a holistic interpretation of the Constitution yields the result that being part of the public service, state corporations/parastatals are subject to the regulation of the service by the 1st Interested Party.
53. It is further deponed that owing to the many state corporations and the 2nd Respondent enforcing the 1st Interested Party's mandate, court suits have been filed as a result such as in **Manyara Muchui Anthony**(supra) wherein the Court reiterated that State corporations are part of the public service and therefore under the regulation of the 1st Interested Party. She points out that this suit was not challenged in the Court of Appeal.
54. A similar finding was also made in **Consumer Federation of Kenya (COFEK)** (supra). The Court added that the State Corporations Act is yet to be aligned with the provisions of the Constitution especially with respect to the powers and

functions of the 1st Interested Party and that the 1st Respondent has been exercising powers and functions it has never had in the first place. Correspondingly, it is argued that the Court in **Judicial Review Application No. E013 OF 2022; R -vs- Kenya Rural Roads Authority Ex Parte Samson Nzivo Muthiani** observed that the internally-generated Human Resource Policies and Procedures Manual of State Corporations cannot oust the minimum norms and standards for human resource practice in the Public Service and that Public Service Manual presents the minimum norms and standards for human resource practice.

55. In sum, she maintains that it is within the constitutional mandate of the 1st Interested Party to approve human resource instruments for state corporations and issue guidelines to the public service and state corporations on the general issues affecting the public service. Likewise, Section 5(3) and 27 of the State Corporations Act which conflict with the 1st Interested Party's mandate must be applied in accordance with Section 7 of Schedule 6 to the Constitution.
56. In view of the foregoing, she argues that the circulars issued by the 1st Respondent violated the 1st Interested Party's constitutional mandate. Equally, she notes that the 2nd Respondent in advising the government ought to be alive to the constitutional principles and offer an unbiased and informed legal guidance. As such, she stresses that it is not

in public interest when the 2nd Respondent issues an advisory opinion that fuels discord in the running of affairs of the public service.

Petitioners' Submissions

57. The Petitioners filed two sets of submissions. The first set was filed by Behan and Okero Advocates on 19th November 2024 while the second set was filed by the 2nd Petitioner on 24th February 2025.

58. Counsel in the first set of submissions recapping the averments in the Petition and responses, submitted that it was evident that there is considerable confusion in the development of human resource instruments for state corporations notwithstanding the clarity issued in **Manyara Muchui Anthony** (supra) and **Consumer Federation of Kenya (COFEK)** (supra). In these decisions, Counsel noted that the Courts affirmed the primacy of Article 234(2) of the Constitution over Sections 5(3) and 27 of the State Corporations Act. Counsel stressed that the Respondents arguments otherwise are rooted in deliberate misconstructions of legal principles and interpretation of these decisions.

59. Counsel referring to the production of the impugned letters submitted that this Court observed in its Ruling dated 31st October 2024 that the impugned letters were produced by the 1st Interested Party under annexures SKR1, SKR4, SKR14, SKR15, SKR16, SKR17, SKR18 and SKR19 and thus were validly on record.
60. Counsel in view of this, urged the Court to allow the Petition so as to preserve constitutional order and protect the proper observance and operation of Article 234(2) from encroachment by the Respondents and uphold public interest.
61. Counsel Joshua Malidzo in the next set of submissions begun by stating that it has been held time and again that laws enacted prior to the promulgation of the 2010 Constitution must be construed with the alterations, adaptation and qualifications necessary to bring it into conformity with the Constitution and where the same cannot be done, such a law is unconstitutional. This was held in **LNW v Attorney-General & another; Kenya National Commission on Human Rights (KNCHR) (Amicus Curiae); Law Society of Kenya (Interested Party) [2016] KEHC 7266 (KLR)**.
62. Counsel outlined the issues for discussion as: *interpretation the Constitution, the place of Article 20(3) of the*

Constitution, history as a tool of Constitutional Interpretation; understanding the Public Service Commission, interpretation of statutes enacted before the 2010 Constitution, the mandate of PSC on recruitment and remuneration of staff of state corporations and the functions of the PSC vis-à-vis the functions of the SRC.

63. On the first issue, Counsel submitted that the Constitution directs the manner in which it should be interpreted. First Article 20(3) requires that when applying a provision of the Bill of Rights, a Court shall adopt an interpretation favouring the enforcement of a right or fundamental freedom and second under Article 259(1) it requires that it be interpreted to promote its purposes, values and principles and advance the rule of law, human rights, and fundamental freedoms in the Bill of Rights. Accordingly, Counsel submitted that the Constitution frowns upon a narrow, rigid and pedantic interpretation. Reliance was placed in **the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR** where it was held that:

“But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is a 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 the

light of its history, of the issues in dispute, and of the prevailing circumstances.”

64. Like dependence was placed in **George Bala v Attorney-General [2017] eKLR**, and **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others [2014] eKLR**.
65. Counsel as well urged in the second issue that the Court in interpreting the Constitution in this matter should adopt a holistic approach by also considering the history of this Country in this regard. Reliance was placed in **Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney-General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR)** where it was held that:

“History is a great revealer of intent of passing laws and events inspire laws and public processes. She further held that “at the heart of these laws and processes are shortcomings to be remedied, crises to be averted...”

66. Comparable reliance was placed in **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd. & 5 Others (2014) eKLR**.
67. Referring to the Constitution of Kenya Review Commission (CKRC) Report, Counsel noted that the Committee established that the people desired re-establishment of

principles of public service neutrality, impartiality, and independence. Equally, people were dissatisfied that public service appointments were often based on criteria other than merit, competence or relevant experience. Owing to this, the 1st Interested Party was established as an independent commission.

68. On the next issue, Counsel submitted that Article 20(3)(a) of the Constitution imposes an explicit constitutional mandate on judges to develop the laws. Counsel noted that the Court of Appeal in **Initiative for Strategic Litigation in Africa (ISLA) v Federation of Women Lawyers Kenya (FIDA - Kenya) & another [2024] KECA 181 (KLR)** guided that this means that the *impact of our all-pervasive Constitution must penetrate all areas of the law, including laws that existed before the promulgation of the 2010 Constitution.*
69. Equal dependence was placed in **Godfrey Ngotho Mutiso V Republic [2010] eKLR** and **Absa Bank Kenya PLC (ABSA) vs Kenya Deposit Insurance Corporation, Commercial Case No E411 of 2023.**
70. As such, Counsel argued that laws that are out of touch with the Constitution must, be developed by Courts so that they are brought into conformity with the Constitution. Correspondingly, that the Court must ensure that no law remains incongruent with the constitutional scheme.

71. On the following issue, Counsel highlighted that the 2nd Respondent’s advisory letter had relied on Section 5(3) of the State Corporations Act, which gave the power of approval of terms and conditions for state corporations to the Cabinet Secretary in consultation with the 1st Respondent. Counsel pointed out that this Act was assented to in 1986 while in 2010, the 1st Interested Party was established and among its functions tasked to develop human resources in the public service.
72. To resolve these issues, Counsel submitted that the Constitution under Section 7 of the 6th Schedule of the Constitution guides how a statute such as the State Corporations Act should be construed as was done in the **COFEK case** (supra). Likewise, Counsel submitted that the 2nd Respondent ought to have applied these principles prior to issuing the impugned Advisory letter. Accordingly, Counsel stressed that Section 5(3) of the State Corporations Act should, therefore, be interpreted taking into consideration Article 234 of the Constitution.
73. Reliance was placed in **Communications Commission of Kenya & 5 others** (supra) where it was held that:

“We do, thus, have a reliable jurisprudential basis for proposing the principles to serve as a guide, in interpreting constitutional provisions in the transitional framework, especially as regards the Fifth Schedule, and Section 7 of the Sixth Schedule to the Constitution

of Kenya. Our perception is set out in specific terms as follows:

- I. The Constitution of 2010 came into operation being cognizant of existing legislation. Flowing from the Constitution's supremacy clause, it was imperative to provide a formula by which old legislation would transit into the new constitutional dispensation, without creating a vacuum. Section 7(1) of the Sixth Schedule, therefore, is vital as a medium for ensuring harmonious transition.*
- II. The Fifth Schedule gives a time-frame within which Parliament ought to act by amending or repealing old legislation, or enacting new law, so as to give effect to particular Articles of the Constitution.*
- III. All laws in force immediately before the promulgation of the Constitution remain in force, but subject to Section 7(1) of the Sixth Schedule.*
- IV. In construing any pre-Constitution legislation, a Court of law must do so taking into account necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with the Constitution.*
- V. Where it is not possible to construe an existing law in accordance with (iv) above, so as to bring it into conformity with the Constitution, that is to say, where a law cannot be conditioned through judicial intervention without usurping the role of Parliament, such a law is invalid for all purposes."*

74. In the fifth issue, Counsel submitted that Article 234 of the Constitution gives the 1st Interested Party the power to subject to the Constitution and legislation establish and abolish offices in the public service, appoint persons to hold

or act in those offices, and confirm appointments. The 1st Interested Party also develops human resources in the public service, reviews and makes recommendations to the national government concerning conditions of service, code of conduct and qualifications of officers in the public service. Considering this, Counsel contended that Section 5(3) of the State Corporation Act takes away functions of the 1st Interested Party which has previously been held to be contravention of the Constitution as is seen in **Manyara Muchui** (supra). Counsel contended therefore that since state corporation employees are public servants, the power to determine the terms and conditions of service of state corporations' vests in the 1st Interested Party thus the 2nd Respondent's advisory letter was unconstitutional.

75. Similar dependence was placed in **Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others [2024] KECA 419 (KLR)** and **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission [2014] eKLR**.
76. On the final issue, Counsel pointed out that the 2nd Interested Party misunderstood the Petition and went ahead to respond to uncontested issues. Counsel submitted that its mandate to advise on remuneration and benefits which is binding is not contested. Counsel stated that the key

contention was, upon finding that the human resource function belongs to the 1st Interested Party, the 2nd Interested Party's advice should be addressed to it and not the 1st Respondent. Counsel argued that the 2nd Interested Party's mandate should be read alongside the other provisions of the Constitution. Counsel stressed that to bypass the 1st Interested Party, it would amount to usurping its role.

77. On this point, reliance was also placed on **Muthuuri & 4 others v Attorney-General & 2 others (Petition 15 (E022) of 2021) [2023] KESC 52 (KLR)** where the Supreme Court held that:

“Whereas article 230(4)(b) integrated SRC in the determination of matters relating to remuneration and benefits of public officers, this provision must be read alongside other provisions of the Constitution which confer power to some of the chapter fifteen commissions to review and make recommendations on the conditions of service of public officers under them. For instance, article 234(2)(g) empowers the Public Service Commission (PSC) 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” with the exception of state offices, an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic.”

Respondents' Submissions

78. Deputy Chief State Counsel, Thande Kuria filed submissions dated 14th March 2025.
79. Counsel on the onset submitted that the State Corporations Act is an Act of Parliament that makes provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes. He notes that the Act under Section 5(3) provides that a state corporation may engage and employ such number of staff including the chief executive on such terms and conditions of service as the Cabinet Secretary may, in consultation with the Committee, approve. Further that under Section 3 of the Act, the President may by order, establish a state corporation as a body corporate to perform the functions specified in that order.
80. In light of this, Counsel submitted that State Corporations, Semi-Autonomous Government Agencies and public funds established and governed by an Act of Parliament or Legal Notice are legal entities that have been created by the National Government to undertake specific strategic functions that would otherwise had been done by the Government.
81. As such, Counsel argued that these entities are distinct legal entities that are operated autonomously from government. Counsel added that these entities operate under Ministries,

State Departments and agencies that have overtime been operationalized through Presidential Executive Orders and as per Section 91 of the Public Finance Management Act (PMFA), government linked corporations are entities where the national government or a National Government entity is a shareholder with less than 50% of the share capital of the corporation.

82. According to Counsel, the PSC Act and its Regulations are statutes of general application applicable to the general public service while the State Corporations Act is specific to state Corporations established by various Statutes and Legal Notices/orders from the executive as opposed to the general public service.
83. Counsel further submitted that despite the provisions of Article 234 of the Constitution, Section 51 (1) of the Interpretation and General Provisions Act and Section 5 (1) of the State Corporations Act give the president and cabinet secretaries the power to revoke appointments of Board members of a Board of a state corporation. Likewise, Counsel pointed out that Section 7(3) of the State Corporations Act informs that the President can revoke an appointment of any member of the Board.
84. It was emphasized therefore that where the legislature intended officers in the main service to be involved in the

affairs of state corporations, the State Corporations Act has expressly provided so without ambiguity. Particularly, this is made manifest under Section 18(4) and 22(5) of the Act.

85. Furthermore, Counsel submitted that whereas the Constitution at Article 132(4)(a) gives the President the function of establishing an Office in the Public Service with the recommendation of the 1st Interested Party, the State Corporations Act is specific to creation and formation of State Corporations which is self- executing and not offices. To this end, Counsel submitted that the State Corporation Act does not in any way encroach on the constitutional powers of the 1st Interested Party.

86. Reliance was placed in **Okiya Omtatah Okiiti (supra)** where it was held that:

“The Order establishing the Hospital was made in exercise of the powers conferred upon the President under section 3(1) of the State Corporations Act, Cap.446. The section provides that the President may, by Order, establish a state corporation as a body corporate to perform the functions specified in that Order. It is true as submitted for the petitioner that the section was enacted prior to the promulgation and coming into operation of the Constitution of Kenya, 2010. Section 7(1) of the 6th Schedule on Transitional and Consequential Provisions to the Constitution of Kenya 2010 provides, “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 the Constitution.” However, parties will

need to make proper pleadings and submissions for a finding whether section 3(1) of the State Corporations Act is unconstitutional or needs to be interpreted one way or the other.”

87. On the same question, the 1st Respondent relied on the case of **Republic v Chief of Staff & Head of the Public Service & 2 others Ex-parte George A. O. Magoha [2018] eKLR.**
88. Counsel as well submitted that the President, the designated Cabinet Secretaries and the 1st Respondent had acted in good faith and in accordance with the prevailing law in respect to approval of the human resource instrument for state corporations. Counsel therefore urged the Court in its determination to be guided by the rule of integration that found in the maxim *“generalialia specialibus non derogant”* meaning general things do not derogate from specific things.
89. Counsel similarly argued that contrary to the arguments put forth, the Constitution contemplates instances where a Statute may provide for powers to create offices to other agencies other than the 1st Interested Party. Actually, Counsel submitted that the Constitution under Article 234(2) (a) uses the phrase *“subject to this constitution and legislation”*. As such, Counsel submitted that the Constitution provides and recognize that Parliament may legislate under Article 94(5) of the Constitution and enact a

statute akin to the State Corporations Act. Counsel therefore submitted that this aspect needs to be interpreted holistically.

90. On this premise, Counsel submitted with reference to the impugned advisory letter and directive by the 1st Respondent that the 1st Interested Party ought to refrain from encroaching on the sphere of State Corporation as created the State Corporations Act. The advisory letter is argued to have been based on sound legal parameters. To this end, Counsel urged the Court in its finding to uphold the constitutionality of Section 5(1) and 27 of the State Corporations Act.

1st Interested Party's Submissions

91. The 1st Interested Party's Counsel, Jacqueline Manani filed submissions dated 24th February 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.*
92. Counsel submitted that the 1st Interested Party'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.”

93. 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 1st Interested Party 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.

94. Counsel further submitted that Sections 5(3) and 27 of the State Corporations Act which impugned actions 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.”

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

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."

96. 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

continued insistence of the 1st Respondent to exercise the functions under Sections 5(3) and 27 of the State Corporations Act amounts to total disregard of the Court findings. Counsel maintained that the 1st Interested Party'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.

97. 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. Considering this, Counsel contended that nowhere in the State Corporations Act is the 1st 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 under Sections 26 and 58 of the PSC Act.
98. 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 1st Respondent does not have power to determine the number and kinds of offices in a State Corporation and to create those offices.

99. 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 and second, Section 7 of the Sixth Schedule to the Constitution precludes the 1st Respondent from exercising powers that were transferred to 1st Interested Party on promulgation of the Constitution.
100. 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).”

101. Counsel additionally submitted that the 1st Interested Party 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. Correspondingly, Counsel noted that the 1st Interested Party can delegate its powers and functions under Article 234(5) of the Constitution. In spite of the glaring irregularity and Court’s recommendations, Counsel argued that the 1st Respondent had refused to comply with this while the 2nd Respondent had ignored the 1st Interested Party’s communication with reference to the recommendations made in **Manyara Muchui** (supra).

102. In the same breath, Counsel referring to the impugned advisory opinions argued that the 2nd Respondent has no power to interpret the Constitution with a binding effect. Furthermore, Counsel added that the 1st Interested Party could not comply with an erroneous advisory as the same would be contrary to the Constitution.

103. Correspondingly, Counsel submitted that the 1st Interested Party 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 1st 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 because that power was expressly transferred to 1st Interested Party in Article 234(2)(g) of the Constitution.

104. 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 1st Respondent cannot continue undertaking a function that is the constitutional mandate of the 1st Interested Party.

105. Counsel submitted moreover that Sections 5(3) and 27 of the State Corporations Act is inconsistent with the Constitution and therefore the 2nd 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.”*

106. On the same question, the 1st interested Party relied on **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)**.

2nd Interested Party’s Submissions

107. Manyonge Wanyama and Associates LLP filed submissions dated 24th February 2025 and outlined the single issue for discussion as: *whether the Salaries and Remuneration Commission's mandate under Article' 230(4)(b) of the Constitution to advice on remuneration and benefits of State Corporations and Public Universities must be directed to the Public Service Commission.*

108. To commence with, Counsel submitted that the 2nd Interested Party established under Article 230 of the Constitution is an independent institution. Furthermore,

Section 11 of the Salaries and Remuneration Commission Act states that it has powers to inquire into and advise on the salaries and remuneration to be paid out of public funds and make recommendations on matter relating to salary and remuneration of a particular public officer.

109. Counsel noted that the 2nd Interested Party's mandate was affirmed in **Judicial Service Commission v Salaries and Remuneration Commission and another [2018] KEHC 4765 (KLR)** where it was held that under Article 230(4)(a) of the Constitution, the 2nd Interested Party's mandate is to set and regularly review the remuneration and benefits of all state officers and to advise the national and county governments on the remuneration and benefits of all other public officers. A similar position was held in **Kudhehia workers case** (supra) which was also relied upon.
110. Accordingly, Counsel submitted that state corporations are entities in the public sector and thus the 2nd Interested Party has the mandate of advising the government at both levels on the remuneration and benefits for all public officers. Considering this, Counsel submitted that contrary to the arguments otherwise, the 2nd Interested Party can be directed to state corporations and public universities directly and the advice is binding upon these institutions.

111. Reliance was placed in **Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others [2024] KECA 419 (KLR)**

where it was held that:

“62. We are fortified in this finding because a Constitution does not contain mere advice; it does not contain provisions that would not have a binding force and obligation of law; everything in the Constitution must have the force and binding obligation of law; nothing can be put in a constitutional instrument in the form of mere advice with no binding obligation and be placed in the company of other binding articles. A Constitution cannot contain mere advice, incapable of being enforced and whose violation is attendant with no legal consequences. Unless expressly stated, the 2010 Constitution does not contain articles or provisions that are without force of law and whose binding nature is discretionary. Except as otherwise stated in the Constitution, article 259(11) removes all discretionary power and by so doing, the Constitution contains binding provisions.

63. The seeking of advice does not violate the principle that Independent Commissions are not subject to direction or control by any person or authority. The binding advice given by SRC is mutually complementing the role of all state organs and Independent Commissions in ensuring sustainable development as a constitutional value embodied in article 10(1)(d) of the Constitution. The advice given by SRC is binding as the advice is not merely an opinion, it is advice that has a constitutional underpinning. The advice is binding as it emanates from a constitutional organ with exclusive constitutional mandate to determine fiscal

sustainability of the total public compensation bill. Further, the advice is binding as the principle of effectiveness require that all provisions of the Constitution must be given effect. SRC advice is not advice in personam, it is advice in rem as it limits and determines remuneration rights and entitlements of public officers. Being an advice in rem, SRC's advice binds all persons, state organs and independent commissions."

112. On the other hand, Counsel submitted that the 1st Interested Party under Article 234 of the Constitution as read with Section 53(2) of the PSC Act is specifically mandated 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. In light of this, Counsel emphasized that the 1st Interested Party's mandate does not extend to making recommendations on remuneration and benefits relating to a public officer.

3rd Interested Party's Submissions

113. Theuri Wesonga and Company Advocates for the 3rd Interested Party filed submissions dated 21st February 2025 and highlighted the issues for discussion as: *whether State Corporations are part of the public service and therefore under the regulation of the Public Service Commission in so far as the exercise of human resource functions is concerned, whether the State Corporations Advisory Committee has the power to develop and approve human*

resource instruments governing public officers in State Corporations and whether legal opinions issued by the Attorney General are binding.

114. Counsel submitted that Article 232(2) of the Constitution upholds that State Corporations fall within the purview of the public service, as they are instruments of the national government and are staffed by public officers. Counsel recapping the authorities cited in the 3rd Interested Party's affidavit submitted that this position has been affirmed by the Courts severally. Being the case therefore, Counsel emphasized that the 1st Interested Party has the overall authority over human resource instruments state corporations and to hold otherwise would create an absurdity where public service employees within state corporations are excluded from constitutional oversight, in direct contravention of Article 234 of the Constitution.

115. On the second issue, Counsel submitted that the 1st Respondent is a statutory body established under the State Corporations Act and its functions confined to an advisory function. As such, it was submitted that it does not possess constitutional or statutory authority to issue binding directives on human resource matters in public service institutions. Counsel noted that this position was upheld by the Court in **Manyara Muchui Anthony** (supra). Counsel argued thus that the 1st Respondent's action of dictating

human resource matters in State Corporations is not only unlawful but also in direct usurpation of the 1st Interested Party's constitutional mandate.

116. On the final issue, Counsel answered in the affirmative. Counsel noted that while the 2nd Respondent is the principal legal advisor to the government his opinions are not binding. Counsel noted that this position was confirmed in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR**, where the Supreme Court observed that while the Attorney General plays a key role in advising government entities, such advice cannot override the Constitution or decisions of the Courts.

117. Counsel in light of this submitted that the 2nd Respondent's advisory is contrary to the 1st Interested Party's decision which is binding across the public service. Accordingly, Counsel stressed that the deliberate disregard of the Court pronouncements by the Respondents is an affront to the rule of law and constitutional governance.

Analysis and Determination

118. It is my considered take that the issues that arise for determination in this matter are as follows:

- i. Whether the 1st Respondent's Circular dated 8th August 2023 and 2nd Respondent's Advisory letter dated 27th July 2023 are unconstitutional.***

ii. Whether the Petitioners are entitled to the relief sought.

Whether the 1st Respondent's Circular dated 8th August 2023 and 2nd Respondent's Advisory letter dated 27th July 2023 are unconstitutional.

119. This issue requires the Court to evaluate if the advisory by the 2nd Respondent is in consonance with the Constitution. The Court must thus be guided by the relevant principles on constitutional interpretation in resolving the dispute. At the outset are the guiding principles on interpretation of the Constitution which are contained in the Constitution itself. Article 259 of the Constitution provides as follows:

- (1) *This Constitution shall be interpreted in a manner that--*
 - a)** *promotes its purposes, values and principles;*
 - b)** *advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*
 - c)** *permits the development of the law; and*
 - d)** *contributes to good governance.*
- (2) *If there is a conflict between different language versions of this Constitution, the English language version prevails.*

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking...

120. The Supreme Court elaborating further states as follows in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR:**

“(86)” ... The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

[87] In Article 259(1) the Constitution lays down the rule of interpretation as follows: “This Constitution shall be interpreted in a manner that - (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.” Article 20 requires the Courts, in interpreting the Bill of Rights, to

promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

[88] ... Article 10 states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

[89] It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation."

121. This Petition primarily questions the Constitutionality of the advisory issued by the 2nd Respondent in the capacity as the Attorney General of the Republic. Under Article 2 (4) of the Constitution, not only is the law that is inconsistent with the Constitution invalid but also, is any act or omission done in contravention of the Constitution. Further, under Article 165 (3) (d) (ii) this Court is conferred with jurisdiction to determine the question whether anything said to be done

under the authority of the Constitution or any law is inconsistent with, or is in contravention of the Constitution.

122. The doctrine of legality is embodied in the rule of law principle which is part of the national values and principles of governance under Article 10 (2) (a) of the Constitution. The Constitutional Court of South Africa in **Masethla vs. President of the Republic of South Africa 2008 1 BCLR 1 (CC)** explained the principle of legality as follows:

“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”... The second constraint of rationality requires the decision to be rationally related to the purpose for which the power was given.”

123. The Court in **Republic v Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okoiti [2018] KEHC 9435 (KLR)** echoing a similar position 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. Put differently, a failure

to exercise power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the Rule of Law.”

124. In the grounds of opposition, ground **(ix)**; the Attorney General (2nd Respondent) contends that her advisory opinion is not amenable to review by the Court. She states:

“A legal advisory is substantially a matter of opinion and is not amenable to be quashed: one may agree or disagree with it but is not amenable to be quashed”

125. This Court finds this assertion by the Attorney General to be fundamentally flawed and a regrettable misconception of the constitutional role of the office. Firstly, in discharging the duty of advising, the Attorney General is performing a Constitutional obligation under Article 156 (4) (a) as the principal legal advisor to the Government. Under Article 165 (3) (d) (ii), this Court has jurisdiction to question whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or contravention of the Constitution hence the Attorney Generals advice is not exempt from Court’s scrutiny.

126. Further, the Attorney General is also the protector of public interest as per 156 (6) of the Constitution.

127. As a defender of public interest, the advice of the Attorney General need not resonate with the interests of the Government of the day since she is required to ensure public interest is promoted and protected. In that regard, the Attorney General's advice can be questioned in Court if it can be demonstrated that the advice given is inimical to her role as the defender of public interest.
128. The relationship between the Attorney General and the Government is thus not contractual like that of a private practitioner and a client. The relationship and functions of the office are constitutional obligations.
129. The advice of the Attorney General thus carries constitutional weight in a working constitutional democracy and, may not, be superficially rejected by those advised without cogent, rational and publicly explicable and proportionate reasons that demonstrably outweigh the rule of law considerations articulated by the Attorney General. State or public officers who opt to take the defiant route put themselves at the grave risk of personal liability for their actions should they proceed against the clear advice from the Attorney General and the matter blowbacks on them. The Attorney General in a constitutional democracy symbolizes the legal conscience of the State to abide by the rule of law in any proper constitutional democracy hence capricious disregard of Attorney General's advice implies

that the Government is disinclined to subject its actions to independent legal scrutiny. This undermines the constitutional principle of rule of law and the constitutionalism, to which the Government is bound, at the expense of political expediency. It amounts to direct transgression of Article 2 (1) and 10 (2) of the Constitution, particularly the principle of rule of law and good governance that binds all, including the government. By casually suggesting that the advice of the Attorney General can be treated as 'optional' the Attorney General is actually degrading the principle of constitutionalism. That assertion by the Attorney General portends a danger to our Constitutional architecture. The Attorney General must appreciate that the mandate of her office strikes at the very heart of constitutionalism and the rule of law, and the legal advisories emanating from the office carry full constitutional weight as the principal legal advisor to the Government under Article 156 (4) (a) of the Constitution. It is thus unfortunate that the Attorney General can take the regressive view that her legal opinions can be disregarded at pleasure. That is to encourage the culture of impunity, not legality as envisaged by the Constitution. It amounts to a veiled attack on the rule of law, the bedrock of our constitution.

130. Against this background, I must now carefully evaluate the assertion made by the 1st interested Party (PSC) in its submissions which was rendered as follows concerning the mandate of the Attorney General:

“The AG has no power to interpret the Constitution with a binding effect. The responsibility of interpreting the Constitution and legislation vests in the Judiciary. Once the Courts have interpreted provisions of the Constitution and legislation, the AG like all other State Organs and public entities is bound by Court’s findings. The AG cannot give contrary opinions.”

131. On their part, the Petitioners plea to this Court was to make the following orders against the Attorney General:

“This Court do declare that in view of the provisions of Article 249(2)(b) of the Constitution advisories given by the Attorney General are not binding upon constitutional commissions and independent offices”

132. Firstly, I must say that in resolving this question, the Court will be guided by the principle that 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.

133. The Supreme Court of Kenya elucidated the principle of holistic interpretation in **in the Matter of Kenya National Commission on Human Rights (2014) eKLR** as follows:

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

134. First, I want to affirm that the Court retains the final say on Constitutional Interpretation. That is what Article 165 (3) of the Constitution is all about. Echoing a similar position, the Constitutional Court of South Africa in **Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11** stated as follows:

“... Courts are required by the Constitution ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. This Court ‘has been given the responsibility of being the ultimate guardian of the Constitution and its values.’”

135. The Supreme Court in **Speaker of National Assembly -vs- Attorney General and 3 Others (2013) eKLR** on the same question stated:

“...Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a solution in plebiscite, is only the Courts.”

136. It follows therefore when a Court has pronounced itself on an issue, that becomes the binding decision on that matter all persons, State organs including the Attorney General are bound.

137. However, what of a legal conflict situation within Government that has not been determined by the Court or is yet to reach Court? Government here does not mean just the Executive, Government means the three arms and including the independent commissions and other agencies. The Attorney General is not the principal legal advisor of the Executive. Article 156 (4) (a) designates the Attorney General as the principal legal advisor to the Government. The independent Commissions are part of the Government. How then does one reconcile Article 156 (4) (a) and Article

249 (2) (b) where there is a difference of opinion between the Attorney General and an Independent Commission on their understanding of a legal matter?

138. The legal opinion rendered by the Attorney General within Government in my view would be the authoritative guidance on that legal matter unless and until that position is judicially overridden since the Attorney General is the principal legal advisor to the Government. It means, therefore, that once the AG has rendered an opinion within Government on a non-litigated matter that has been referred to that office for legal advice, all organs of Government have an obligation to respect that legal opinion by the AG and to act accordingly unless by judicial intervention, that position is reversed.

139. The advisory by the Attorney General is thus public duty function and as such is a justiciable issue that is amenable to review by the Court if it can be demonstrated that in rendering the advice, the Attorney General acted irrationally, unlawfully or contrary to the rule of law or the public interest. That is where Article 165 (3) (d) (ii) of the Constitution comes in, basically, to determine the question of whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of, this Constitution.

140. The other argument that the 2nd Respondent raised was in respect of the correspondence relied upon by the Petitioners. The 2nd Respondent's contention was that they were illegally obtained as the Petitioners did not disclose how they obtained them. The 2nd Respondent maintained that its advisories to the Ministries and departments of Government are privileged and could not be the basis of a suit without obtaining the requisite leave on disclosure.

141. This argument is without merit and fails for one reason, these are the same documents that were relied on by the 1st Respondent and the 1st Interested Party. They were directed to them hence they were voluntarily produced by those advised (clients) from their proper custody. Once produced in Court, they became evidence in the trial and any Party could thus rely on them in pursuit of justice in the matter.

142. This now takes me the most significant issue, the constitutionality of the 2nd Respondent's advisory of 27th July, 2023. This was a letter reference AG/CONF/2/C/31 VOL VI dated 27th July addressed to the Prime Cabinet Secretary, Hon. HE Dr. Musalia Mudavadi, EGH, titled '*GUIDELINES ON MANAGEMENT AND TERMS AND CONDITIONS OF SERVICE FOR BOARD MEMBERS AND STAFF OF STATE CORPORATIONS*'

143. The legal advisory identified 3 thematic areas:

- a)** *The mandate of the Public Service Commission under Article 234 (2) of the Constitution in particular:*
 - i) Whether the Commission has power to determine the terms and conditions of service, including remuneration and benefits*
 - ii) The power of the Commission in the establishment and dissolution of State Corporations*
 - iii) The powers of the Commission in relation to investigation, monitoring and evaluation of organization, administration and personnel practices of the public service*
 - iv) Whether the approval of human resource instruments is a function of the Commission under Article 234 (f)*
- b)** *The role of State Corporations Advisory Committee under Section 5 (3) and 27 of the State Corporations Act (Cap 446) and;*
- c)** *The role of the Salaries and Remuneration Commission with respect to State Corporations.*

144. In a nutshell, the 2nd Respondent rendered its opinion on the three areas.

145. Concerning the mandate of the Public Service Commission under Article 234 (2) of the Constitution, the 2nd Respondent noted that Article 234 (2) (g) of the Constitution confers upon Public Service Commission (PSC) 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. It also referred to Section 53 (2) of the Public Service Commission Act, 2017 which gives the PSC power to make recommendations on conditions of service relating to public officers to the Cabinet Secretary. *By dint of section 2 of the Act- conditions include appointment, standards of conduct, working hours, leave, grievance, disciplinary control, medical care, water, welfare, working environment, housing, and pension benefits.* That further, under Section 54, the Commission may, on its own initiative, or request by any authorized Officer, or professional body, review and make recommendations on any code of conduct applicable to any public body, category of public officers or all public officers in a public body. The Commission is also required, from time to time, to take measures to review the codes of conduct.

a) After the above detailed review, the 2nd Respondent concluded:

*i) While Public bodies are defined to include State Corporations under Section 2; there is no express provision conferring power to the Commission to make recommendations directly to public bodies. **The recommendation is to Cabinet Secretary.***

ii) The power of PSC does not conflict with the power of the Cabinet Secretary to approve number of staff and terms and conditions of service under Section 5 (3) of the State

Corporations Act Cap 446 which provides as follows:

- (3) *A State Corporation may engage and employ such number of staff, including Chief Executive on such terms and conditions of service as the Minister may, with consultation with the Committee, approve.*

146. I find it necessary to evaluate the legal correctness of the above conclusion that was conveyed by the 2nd Respondent. It is obvious that the Committee referred to in Section 5 (3) is the State Corporations Committee established under the State Corporations Act, Cap 446.

147. While the descriptive aspects of the Constitutional provisions and the PSC Act cited by the 2nd Respondent are accurate on the role of PSC as the body mandated by of Article 234 (2) (g) of the Constitution as read with Section 53 (2) and 54 of the Public Service Commission Act, to either on its own initiative or on request of the authorized to review and make recommendations on **any code of conduct applicable to any public body, category of officers or all public officers in a public body** and, that **it is required to take measures to review the codes of conduct from time to time**, and while 2nd Respondent further acknowledges, that **under Section 2 of the PSC Act, the definition of Public body includes State Corporations**, this Court

wonders how this very clear legal exposition can reconcile with the conclusion reached by the 2nd Respondent as regards **Section 5 (3) of the State Corporations Act** which excludes PSC on the matter of making recommendations and terms of service in respect of State Corporations and by legislation substituting it for the State Corporations Committee (SCAC).

148. Where is the consistency with Article 234 (2) (g), when the PSC is completely left out of the picture? SCAC has no constitutional role to play in discharging this particular function. Its role would arise if by Article 234 (5) of the Constitution, PSC delegates in writing, its authority to make such recommendation. In fact, even the words that the 'Minister may' are misplaced for it suggests that the Cabinet Secretary is at 'liberty generally' to disregard the recommendations. The recommendations of a Constitutional body such as PSC cannot be disregarded whimsically or at will without cogent, rational and proportionate reasons hence the wording of that Section, even if PSC were to replace SCAC would also be problematic.

149. The upshot of this is that Section 5 (3) of SCAC is unconstitutional, for it omits Constitutionally mandated PSC in the making of recommendations specified in Article 234 (2) (a) (ii) & 234 (2) (g) prior to the approval by the Cabinet

Secretary of staff numbers, the conditions or terms of service in State Corporations.

150. It is thus my finding that the position taken by the 2nd Respondent in this regard was Constitutionally infirm.

151. The next issue was on whether the approval of human resource instruments is a function of the Public Service Commission under Article 234 (2) (f). The 2nd Respondent went on to discuss the provisions of Article 234 (f) together with Section 56 (1) of the PSC Act which gives the gives PSC the authority to review and issue human resource training and development policy and guidelines and prescribe procedures in the public service. The 2nd Respondent concluded that that PSC is mandated to prescribe, review and issue human resource development in public service but then added: *'Even then, we note that the scope of application of public service is confined to Article 260 of the Constitution which covers state organs.'*

152. The issue is about the functions of the Public Service Commission in relation to public service. The question whether State Corporations constitute public service for which the PSC plays a role has been judicially considered and answered in various authorities. The i 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)

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.”

153. The Court after a reviewing several authorities concluded at paragraph 38 and 39 of the Judgment:

“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.”

154. In **Kenya Union of Domestic, Hotels, Education and Allied (Kudhehia Workers) v Salaries and Remuneration Commission & another (Constitutional Application 294 of 2013) [2014] KEHC 8148 (KLR) (Constitutional and Human Rights) (25 July 2014) (Judgment)** the Court explained:

“...Moi Teaching and Referral Hospital as well as Kenyatta National Hospital are State Corporations established under **Section 3** of the **State**

Corporations Act. Public Universities such as Moi University, University of Nairobi, Egerton University etc are established by Acts of Parliament as public universities. Although these institutions do not receive monies from the Consolidated Fund, they are empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations receive funds from Parliament through their respective Ministries and fit the description in **Article 260** regarding funds from Parliament.

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

155. The claim that the persons working in State Corporations are exempt from the jurisdiction of PSC yet they are public service employees who happen to work in State Corporations which are not State organs is thus misconceived. They are constituted in the definition of 'public service' and thus fall under PSC since they are not specifically excluded by dint of Article 234 (3) of the Constitution.

156. Being public service employees, they are subject to the jurisdiction of the Public Service Commission unless they belong to the exempted categories by dint of Article 234 (3) of the Constitution which excludes: *State officers, Diplomatic or Consular officers, employees of Parliamentary Service Commission, the Judicial Service Commission, the Teachers Service Commission, the National Police Service Commission or an office in the service of county government.* The rest of the collectivity of employees of the public service fall under the Public Service Commission.

157. As such, the question of whether their human resource instruments should be initiated through PSC should not arise. Article 234 (2) (g) grants the PSC power 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; meaning, the body constitutionally mandated to come up with and make recommendations to the national government is the PSC, not any other body or person. Any other interpretation is constitutionally impermissible.

158. The other issue that was brought about in the letter by the 2nd Respondent was in regard to Article 234 (2) (a) (i), (ii) and (iii) which mandates the PSC to establish and abolish offices in the public service and appoint persons to hold offices and to confirm appointments to PSC , particularly, the

meaning of the phrase '**subject to the Constitution and legislation.**'

159. According to the 2nd Respondent, this phrase means that the power of PSC under Article 234 (2) (a) (i), (ii) and (iii) is limited to the offices established by the Public Service Commission and under Article 234 (2) (i) does not extend to establishment of State Corporations, save where expressly provided for by specific pieces of legislation pursuant to Article 234 (2) (a) (i) of the Constitution. Indeed, at clause 3.3 of the letter, the 2nd Respondent states:

“Further, PSC needs to appreciate that its power to establish and abolish offices in the public service is “subject to the Constitution and legislation’ meaning the power can be taken away by legislation such as the State Corporations Act, Office of Attorney General Act, etc., in some instances”

160. This is an obvious misapprehension of the phrase '**subject to this Constitution and legislation'** under **Article 234 (2)(a)**. The phrase '**subject to this Constitution and legislation'** simply means that in discharge of its duties as specified PSC shall do so in conformity with the Constitution and legislation. The legislation contemplated by the Constitution must be that which complies with the Constitutional dictates and not that which derogates from it. Any legislation that that departs from the core of the

Constitution by dishing out the specific constitutional roles of PSC cannot be what is contemplated in the phrase ‘subject to Constitution and legislation’ as that would attract the wrath of Article 2 (4) of the Constitution which provides that *“Any law, including customary law, that is inconsistent with the Constitution is void to the extent of the inconsistency”*. The validity of such legislation will thus depend on its conformity with Article 234 of the Constitution.

161. **‘Subject to the Constitution’** also means while PSC observes its own Constitutional mandate, it must also comply with other Constitutional provisions that relate to the execution of its functions for instance, 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 concerns the 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 of the fiscal sustainability. That is a Constitutional command.

162. Any interpretation to the effect that specific PSC’s constitutional responsibilities can be reassigned by legislation to any other organ or body is thus incorrect. As

already pointed out, the responsibilities granted to PSC can only be delegated in writing under Article 234(5) of the Constitution.

163. On the same breath, I wish to comment on SRC's (2nd Interested Party) claim that in giving advice,

'SRC mandate to advice on remuneration and benefits can be directed to State Corporations and Public Universities directly and this advice is binding upon institutions.'

164. If this is not cheering anarchy in form of giving advice on remuneration, then I do not know how else to describe it. I do not have any issue with SRC consulting widely on a matter, but legally, I think it is bound to convey its decisions formally to the legally designated recipient. In my humble view, it is not permissible for SRC to by-pass PSC in any matter pertaining advice on the terms and conditions of the public service since it is the PSC that is both constitutionally and statutorily mandated to undertake that function. When SRC issues direct circulars to State Corporations, public universities or even ministerial departments pertaining to remuneration and benefits by claiming that it is at liberty to do so, such action undermines the constitutional scheme by overlooking the institutional safeguards put in place to ensure harmony and avoid duplication. It creates confusion and disorder in public governance thereby breaching Article 10 (2). Such decision is thus unconstitutional, unlawful and

of no legal effect. SRC must strive to ensure order thrives through conduct that promotes the rule of law and orderly conduct in public affairs. It is not a free-floating oracle to shower advisory circulars on remuneration and allowances randomly on every public entity it thinks of.

165. In view of the foregoing observations, it is crystal clear to me the advice given by the 2nd Respondent in regards to the functions of PSC (1st Interested Party) pursuant to the letter dated 27th July, 2023 does not meet the constitutional threshold hence is illegal, null and void and unconstitutional.

166. The orders that commend themselves for grant by this Court in this Petition are as follows:

a) A declaration is hereby issued that the advisory letter dated the 27th July 2023 Ref. No. AG/CONF/2/C/31 VOL VI from the office of the Attorney General is unconstitutional, unlawful, and violates Articles 2(2), 10 (2), 232, 234 of the Constitution.

b) A declaration is hereby issued that the letter dated 8th August 2023 Ref No. OP/SCAC 9/21/2 II/(31) from the State Corporations Advisory Committee is unconstitutional, unlawful, null and void ab-nitio and in particular, by endorsing and promoting the contents of the advisory letter from the Attorney General dated 27th July 2023 Ref. No. AG/CONF/2/C/31 VOL VI, it contravenes Articles 2(2), 10, 232, 234 of the Constitution.

- c) An order of certiorari is hereby issued quashing:**
- i) The advisory letter dated the 27th July 2023 Ref. No. AG/CONF/2/C/31 VOL VI by the Attorney General and,**
 - ii) the letter dated 8th August 2023 Ref No. OP/SCAC 9/21/2 II/(31) issued by the State Corporations Advisory Committee**
- d) A declaration is hereby issued that the mandate of the Public Service Commission under Article 234 of the Constitution binds and applies to all State Corporations and Public Universities as they constitute public service, in particular:**
- i) 234(2)(a), the mandate to establish and abolish offices within the public service (including offices within State Corporations and Public Universities) unless the mandate is specifically delegated to any other body or person in writing by the Public Service Commission under Article 234 (5) of the Constitution.**
 - ii) the power to monitor, evaluate, report and investigate personnel activities in the public service, including State Corporations and Public Universities.**
 - iii) the power to receive, consider and approve (or reject) human resource instruments (organizational structure, staff establishment, Human Resource Manual and Career progression guidelines) for public offices including in State Corporations and Public Universities.**

- e) **A declaration is hereby issued that any advice by the Salaries Remuneration Commission directly to the State Corporation or Public Universities on remuneration and benefits of public officers in by-pass of the Public Service Commission, is unconstitutional and unlawful for undermining the logical constitutional design contemplated by Article 230 (4) (b) of the Constitution as read with Article 234 of the Constitution, hence null and void ab-initio.**
- f) **It is hereby declared that legal advisories issued by the Attorney General to organs of Government, pursuant to Article 156 (4) (a) of the Constitution, in matters referred to that office which have not been judicially determined, are binding on all such organs until overridden by judicial determination.**
- g) **Each Party to bear its own costs.**

Dated, signed and delivered virtually at Nairobi this 5th day of December, 2025

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L N MUGAMBI

JUDGE