

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
OF KENYA AT NAIROBI
PETITION NO. E170 OF 2025

**IN THE MATTER OF ARTICLES 22 (1) AND 258 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE CONTRAVENTION OF
ARTICLES 10, 47, 73,129, 130 &232 OF THE CONSTITUTION**

-BETWEEN-

MERCY AUMA OCHIENG..... PETITIONER

- VERSUS -

ROBI MBUGUA NJOROGE..... 1ST RESPONDENT

ANTI-COUNTERFEIT AUTHORITY..... 2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Wednesday 17th December,

2025)

JUDGMENT

1. The petitioner filed the petition dated 04.09.2025 through Deogratius Omondi Advocate. The petitioner prayed for reliefs as follows:

- a) A declaration that the 1 respondent was ineligible for recommendation to a third term in office by the board of directors of the 2nd respondent to the Cabinet Secretary for renewal of contract or reappointment on account, inter alia, of having served two terms under section 45 of the Public Service Commission Act and having not met other prerequisites of the circulars and guidelines like evaluation by the board of directors of the 2nd respondent
- b) A declaration that the board of directors of the 2nd respondent had no authority to enter into a contract with the 1st respondent and were indeed precluded from entering into any contract of service reappointing or renewing the term of the 1st respondent on 30th January 2025 on account of public policy exemplified by: -

- (i) The Cabinet decision and resolution of 21st January 2025 suspending renewal of contracts for chief executives of state corporations earmarked merger.
 - (ii) (ii) The absence of prior written approval for renewal of contract or reappointment from the Head of Public Service.
- c) A declaration that the failure by the board of directors of the 2nd respondent, Cabinet Secretary for Investments, Trade and Industry, the Cabinet Secretary for the National Treasury and the Head of Public Service to implement the Cabinet decision and resolution on non-renewal of contract of the 1st respondent is unconstitutional, illegal, amounts to insubordination of Cabinet and the President and is null and void.
- d) A declaration that the alleged contract of service entered between the 1st respondent and the 2nd respondent on 30th January 2025 is unconstitutional for violating, inter alia, the national values and principles of governance under article 10 of the Constitution.

- e) A declaration that the 1st respondent, having no contract for renewal of term or reappointment or having a contract of service that is for all intents and purposes null, void and unenforceable, is ineligible to occupy and perform the functions of executive director of the 2nd respondent and is illegally in office.
- f) A permanent injunction restraining the 1st respondent from acting, purporting to act or performing the functions and responsibilities of the executive director of the 2nd respondent and further restraining the board of directors of the 2nd respondent from facilitating or recognizing the 1st respondent as the executive director of the 2nd respondent.
- g) An order of mandamus compelling the 1st respondent to refund all monies out of public funds received, expended or utilized from 1st August 2025 until the date of judgment herein as determined by a special audit of the Inspector General of State Corporations under section 18 of the State Corporations Act within a period of sixty (60) days from the date of this judgment.

h) Any other relief that this Court may deem just and expedient to grant.

2. The petition was based upon the supporting affidavit of the petitioner sworn on 04.09.2025. The petitioner stated and urged as follows:

a) The petitioner brings this petition in the public interest under the provisions of articles 22(1) & 258(1) & 2(c) of the Constitution to prevent the contravention of inter alia, articles 10, 73 and 232 of the Constitution. The petition is also brought in the public interest to ensure conformity with statutory provisions and policies in the nature of circulars and guidelines that have constitutional and statutory underpinning.

b) The petitioner brings this petition to challenge the continued holding of a public office by the 1st respondent contrary to the constitution, statute and public policy.

c) The 1st respondent is a male adult of sound mind and disposition and presently he occupies the office of executive director of the 2nd respondent, a public remunerated office

from public funds, created under section 10 of the Anti-Counterfeit Act.

- d) The 1st respondent is sued as an employee of the 2nd respondent under section 12(2) of the Employment and Labour Relations Court Act.
- e) The 2nd respondent is a statutory body created under section 3 of the Anti-Counterfeit Act and is the employer of the 1st respondent through its board of directors that is created under section 6 of the Anti-Counterfeit Act. It is alleged that by failures on the part of the 2nd respondent, the 1st respondent continues to occupy public office illegally.
- f) The 3rd respondent is a creature of article 156 of the Constitution and is the principal advisor to the government mandated to represent the national government in all civil proceedings. The 3rd respondent is being sued on behalf of the Head of Public Service, the Cabinet as established in Article 152 of the Constitution and with functions and duties per Article 153 of the Constitution and section 9 and 10 of the National Government Co-ordination Act, the

National Treasury as tasked to implement the Cabinet's decisions of 21.01.2025 on state corporations' reforms per subsequent National Treasury circular of 05.02.2025 addressed to 1st and 2nd respondents, and, the Cabinet Secretary for Investments, Trade and Industry charged with implementation of government policies and circulars and Cabinet guidelines and decisions in the Ministry.

3. The petitioner's case is further pleaded as follows:

- a) The petition is premised on documents and information obtained in the public domain like court records from decided cases in court and from stakeholders of the 2nd respondent whose identity is protected by the whistle blowing provisions of the 2nd respondent's Human Resource Policy and Procedures Manual at paragraph 10:34 and also external stakeholders.
- b) The 1st respondent was engaged by the 2nd respondent's board of directors on a term of one year non-renewable with effect from 1st August 2022 as the 2nd respondent's executive director.

- c) The 1st respondent's engagement was pursuant to a public advertisement and the said advertisement was clear that it was fixed for one year and non-renewable.
- d) The 1st respondent on joining the 2nd respondent only had a legitimate expectation that he would serve a one-year fixed term and exit and nothing more. He was not imbued with a legitimate expectation that he would have the term's extension. He acquiesced to the one term contract and therefore waived his right to any longer or extended term of service. It was expected through the advertisement that the 1st respondent was to exit or cease from occupying the office of executive director on 31st July 2023. However, he secured a second term of two years that ran from 1st August 2023 and was therefore expected to exit or cease from occupying the office of executive director of the 2nd respondent on 31st July 2025.
- e) The petitioner's case is that the 1st respondent therefore served two terms and was ineligible for reappointment to a third term and the board of directors of the 2nd respondent

had no power or authority to purport to entertain the 1st respondent for a third term particularly in view of regulation 4 of the Anti-Counterfeit regulations and section 45 of the Public Service Commission Act. The said regulation 4 states, “The Executive Director shall hold office for a period of three years, and shall be eligible for re-appointment for one further term.” The said section 45 of the Act about service on contract terms provides as follows,

“(1)A person may be engaged on a term of contract, for a period of at least twelve months but not exceeding five years.

(2)A person may be engaged on a term of contract if the following requirements are met—

(a) the office where such a person is to be deployed has been created by the Commission;

(b)the office where such a person is to be deployed exists in the contractual establishment;

(c)the person has expressed the desire to serve on a term of contract;

(d)there is no other public officer performing the function; and,

(e)the person does not qualify to be employed under any other terms of service.

(3)The extension of a term of contract may be allowed by the Commission or other appointing authority if—

(a) the workload justifies further engagement;

(b) the performance of the public officer is satisfactory;

(c)the public officer has expressed, in writing, the willingness to engage for a further term of service;

(d)the decision shall in no way disadvantage any public officer employed on permanent terms; and,

(e)the decision is made at least three months before the expiry of the affected public officer's term of contract.

(4)The Commission shall regulate the employment of persons on a term of contract as contemplated under this section.”

f) Thee 1st respondent through illegal, irregular and *ultra vires* acts of omission and commission in collusion with the board of directors of the 2nd respondent and the Cabinet Secretary for Investments, Trade and Industry, purported to procure a third term on 30th January 2025 that is to run from 1st August 2025.

g) The petitioner's case is that the term of the 1st respondent was to expire on 31st July 2025 and indeed expired on 31st July 2025 and the 1st respondent was not eligible for reappointment or renewal of the contract term on account of public policy as comprised in the following reasons:

i) The Cabinet at its meeting on 21st January 2025 resolved to have specific state corporations merged.

Among the state corporations to be merged was the 2nd respondent. That was pursuant to a report of 2013 on State Corporations Reforms.

ii) As part of the conditions that the Cabinet resolved tied to the merger was that there would be no renewal

of contracts for chief executives of state corporations earmarked for merger.

iii) The 2nd respondent being one of the state corporations earmarked for merger and with the suspension of contract renewal or reappointment for those on contract, the board of directors of the 2nd respondent did not have capacity to purport to reappoint or renew the contract of the 1st respondent.

iv) The decisions and resolutions of the Cabinet of 21st January 2025 became public knowledge due to a dispatch from the Cabinet on 21st January 2025 and was widely reported in the public media, both print and electronic on 21st & 22nd of January 2025. The 1st & 22nd respondents therefore knew or ought to have known of the decision of Cabinet on 21st January 2025 from print, electronic and social media and at the latest 22nd January 2025 to which the 1st respondent is a subscriber at public expense.

v) The decisions and resolutions of the Cabinet of 21st January 2025 were communicated the same day to the 3rd respondent and all Cabinet Secretaries and Principal Secretaries and consequently the 1st & 2nd respondents with their Cabinet Secretary being part of the Cabinet meeting and decision and their principal secretary informed in writing the same day, they are deemed to have been aware of the decision on suspension of renewal of reappointment of contracts of the 1st respondent and any actions thereafter to the contrary was illegal, unenforceable and amounted to insubordination of the President.

vi) The decision of the Cabinet of 21st January 2025 was further communicated to the 1st & 2nd respondent on 5th February 2025 by the National Treasury.

vii) The 1st respondent and the board of directors of the 2nd respondent in spite of being aware of the resolution of Cabinet on or about 21st & 22nd January 2025,

gerrymandered to purport to reappoint the 1st respondent on January 2025.

viii) The 1st & 2nd respondents cannot and have no power to override or ignore the resolution and decision of the Cabinet.

ix) The Cabinet Secretary for Investments, Trade and Industry is a member of the Cabinet and by knowing on 21st January 2025 that a decision on non-renewal of the contract of the 1st respondent had been made, the 1st & 2nd respondents were constructively aware of the said decision and resolution and consequently their actions were illegal, irregular and contrary to public policy and therefore null and void.

x) The aforesaid decision of the Cabinet was further reemphasized on 16th May 2025 to the entire public service by the Head of Public Service.

xi) The 1st & 2nd respondents therefore knew that the term of service of the 1st respondent could not extend beyond 31st July 2025.

xii) Neither the 1st respondent nor the 2nd respondent had the capacity in law or fact in the face of the Cabinet decision to purport to enter into any contract.

xiii) In any event the 1st respondent had a contract with the 2nd respondent that was to run up to 31st July 2025 and consequently at the material time, the 1st & 2nd respondents could not have two concurrent and enforceable contracts.

4. The term of contract of the 1st respondent expired on 31st July 2025 and his continued stay in office is additionally illegal contrary to public policy in view of the following:

a) The renewal respondent or reappointment of chief executives of state corporations like the 2nd respondent is a matter of public policy contained in various circulars and guidelines.

b) The renewal or reappointment is first of all initiated by the 1st respondent at least six months prior to the expiry of the term by applying to the board of the 2nd respondent.

- c) The next step is that the board of directors of the 2nd respondent receive the application for renewal of contract or reappointment.
- d) Upon receipt the board of directors of the 2nd respondent is then expected to meet and evaluate the 1st respondent applicant for purposes of the application for renewal of contract or reappointment.
- e) If the board of the 2nd respondent finds that the 1st respondent has achieved at least a score of 70%, then the board of directors of the 2nd respondent may recommend to the line Cabinet Secretary the renewal of contract or reappointment.
- f) The 1st respondent was never evaluated by the board of directors of the 2nd respondent and has never been evaluated and consequently the 1st respondent was ineligible to be recommended to the line Cabinet Secretary for renewal of contract or reappointment.
- g) The line Cabinet Secretary is then expected to either reject or accept the appointment.

- h) If the Cabinet Secretary declines, then the application dies a natural death but if the Cabinet Secretary concurs then the said Cabinet Secretary is expected to forward the concurrence to the Head of Public Service who then concurs or rejects.
- i) If the Head of Public Service concurs or rejects, the said decision is communicated back to the 2nd respondent in writing through the Cabinet Secretary.
- j) If the Head of Public Service concurs in writing, then the 1st respondent would then have a written contract entered into with the 2nd respondent.
- k) The 1st respondent purported to enter into an illegal, clandestine, irregular and void contract with the chairman of the 2nd respondent.
- l) The 1st respondent did not receive the concurrence of the Head of Public Service for the renewal of his contract but purportedly went ahead, without authority, to enter into a contract with the chairman of the board of directors of the 2nd respondent on 30th January 2025.

5. The petitioner's case is that the continued stay in office of the 1st respondent after 31st July 2025 is illegal, null and void and he has no contract to stay in office after 31st July 2025 and even if he has any such contract the same is contrary to public policy, null and void.
6. The Head of Public Service has the following functions under section 8(6) of the National Government Co-ordination Act, thus:
- a) support the President in facilitating the organization and execution of Government business;
 - b) be the Chief of Staff to the President and the administrative head of the Executive Office of the President; and,
 - c) perform such other functions as may be assigned by the President.
7. The Head of Public Service is the administrative head of the Presidency and consequently his concurrence is grounded and underpinned in law and signifies the concurrence of the

President as the Head of the Executive. Such concurrence is underpinned in law and is binding.

8. State corporations are part of the Executive arm of government and are bound by the policy directions and guidelines issued by the Executive arm of government including the Cabinet and the Presidency.
9. The 1st respondent is in office illegally and his continued stay in office and purported exercise of functions of the office are null and void and has no contract of service and even if he is holding one then the same is null and void, unenforceable and he is liable to exit the public office.
10. The purported stay in office of the 1st respondent and the alleged support by the board of directors of the 2nd respondent is an act of defiance of the Executive arm of Government that has the popular and constitutional mandate to govern and is a serious affront to the rule of law and the national values and principles of governance.
11. The petitioner urges that the 1st respondent's appointment by the 2nd respondent violated Article 10 of the Constitution on

values and principles of national governance and also breached the Cabinet communication of 21.01.2025 as well as the National Treasury circular no. DGIPEA/A/1/85 “A” (53) dated 02.02.2015 and Head of Public Service circular no. OP/CAB.9/1A of 16.05.2025. it was urged that the government moratorium on renewal of the 1st respondent’s contract by the 2nd respondent’s board had been ignored and the 1st respondent had continued in office unlawfully and contrary to public policy.

12. The petitioner also pleaded that the circulars requiring concurrence of the Head of Public Service had been ignored by the 1st and 2nd respondents in the appointment or renewal of appointment of the 1st respondent and being, circular Ref: OP/CAB. 9/1A dated 20th April 2022; circular Ref: OP/CAB. 9/1A dated 3rd April 2023; circular Ref: OP/CAB. 9/1A dated 25th November 2022; and, circular Ref: OP/CAB. 9/1 dated 8th April 2025. The 1st respondent’s was without a written concurrence of the Head of Public Service so that the contract could not be concluded in the manner it was done.

13. The petitioner pleaded that the appointing or renewal of appointment of the 1st respondent was in violation of Article 47 of the Constitution requiring that an administrative action is lawful, reasonable and procedurally fair. It was pleaded that the board of the 2nd respondent failed to ensure that in the purported grant of a contract to the 1st respondent the same was lawful, reasonable and procedurally fair. The particulars of violation were pleaded as follows:

- a) Failed to ensure that the 1st respondent was evaluated by the board of the 2nd respondent prior to recommendation to the line Cabinet Secretary. That was illegal and procedurally unfair.
- b) Failed to inform the line Cabinet Secretary and indeed suppressed the fact that after making an application for extension for contract, the 1st respondent was never evaluated by the board of directors of the 2nd respondent.
- c) Failed to secure the written approval of the Head of Public Service prior to execution of the contract. That was illegal and contrary to public policy.

- d) Failed to ascertain that the 1st respondent was eligible for contract extension in the face of the fact that he had served two terms.
- e) Failed to abide the suspension of renewal of extension of contract of the respondent based on the Cabinet resolution and decision of 21st January 2025.
- f) Proceeded irregularly to enter into a contract of service without the prior written approval of the Head of Public Service.

14. The petitioner also pleaded that the actions of the 1st respondent and the facilitation by the board of directors of the 2nd respondent concerning the impugned contract of service of 30th January 2025 and continued occupation of the public office of executive director violates the requirements of leadership and integrity under Article 73 of the Constitution. Further, 1st respondent in clinging to the office of executive director after the expiry of his term and the 2nd respondent through its board of directors in facilitating the 1st respondent to remain and cling to office have violated the values and

principles of public service in article 232 of the Constitution by failing to maintain high standards of professional ethics; failing to be accountable for administrative acts; failing to act in a transparent manner; failing to obey and observe government circulars and guidelines; and, by engaging in gerrymandering.

15. The petitioner pleaded that the petition had been filed in the public interest and will serve to eliminate the following mischiefs:

- a) Erosion of good governance, the accountability in the conduct of public affairs. rule of law, transparency and
- b) Breakdown of constitutionalism and the rule of law if public officers routinely violate government directives.
- c) Serious affront to the rule of law which is the foundation of the country.
- d) Erosion of the rule of law if public policy decisions are ignored and disobeyed.
- e) Erosion of good governance if the rule of law is not complied with.

- f) Erosion of the authority of good governance and government if government decisions that have constitutional and statutory underpinning are ignored.
- g) Chaos and disorder in government if government decisions are routinely ignored.
- h) Illegal occupation of offices by public officers contrary to government directives and guidelines.
- i) National values and principles of governance and the values and principles of public service will be rendered superfluous.

16. The 1st respondent filed a notice of preliminary objection dated 13.10.2025 and through CSA Advocates and it was stated as follows:

- a) The Honourable Court lacks jurisdiction to hear and determine the suit.
- b) The petitioner lacks locus standi to commence the proceedings against the respondents herein and in any event the petition is speculative and does not meet the

threshold for public interest litigation as contemplated under Articles 22 and 258 of the Constitution.

- c) The petitioner has failed to exhaust the mandatory statutory dispute resolution mechanisms and fora before instituting these proceedings.
- d) The petition is premature, and untenable as it is predicated on hypothetical or anticipatory dispute.
- e) The petition offends the well set out principles in **Anarita Karimi Njeru vs. The Republic (1976-1980) KLR 1272**

17. The 1st respondent also filed his replying affidavit sworn on 03.11.2025. it was stated as follows:

- a) He is the Executive Director of the 2nd respondent. The office of Executive Director is created under section 10 of the Anti-Counterfeit Act, Cap 510 laws of Kenya the 2nd respondent is mandated under the Act to set and determine the terms and conditions of service of the Executive Director through the instrument of appointment or in writing.

- b) Regulation 4 of the Anti-Counterfeit Regulations limits the tenure of the Executive Director to 2 terms of 3 years.
- c) The Mwongozo Code of Governance (2015) mandates the Board to hold an oversight authority over the position of the Executive Director and mandates performance evaluation before renewal of contracts. Circular ref. no. OP/CAB.9/1A dated 11.03.2020 by the Head of Public Service reinforced that position of the Code.
- d) He was initially appointed to the position of Executive Director of the 2nd respondent for a period of one year and reported for duty effective 01.08.2022. his first assignment was to finalize the 2nd respondent's strategic plan (2022-2027) which had been commenced by his predecessors. He also engaged to motivate staff and helped complete the 2nd respondent's policies and procedures.
- e) The 2nd respondent's board noted the milestones he attained and at the board meeting of 30.08.2022 unanimously decided to review his employment tenure to 3 years in accordance with the Anti-Counterfeit Act and

Regulations thereto. The affidavit states that the minutes of the meeting are duly exhibited but the Court observes that they are actually not exhibited at all. Instead exhibit RMN 2 are minutes of the board meeting held on 24.01.2023.

f) By letter dated 20.09.2022, the board sought the concurrence of Cabinet Secretary with the decision to review the terms of service from 1 year to 3 years. The letter duly exhibited starts thus “We write in respect of the above matter and a letter Ref. OP/CAB.9/247A dated 18.10.2021 approving the recruitment of the Executive Director (ED) for a period of one year pending the completion of the envisaged merger process.” The letter further stated that the board had invited qualified candidates to apply for the Executive Director’s post in February 2022 and competitive interviews held on 22.04.2022. Dr. Robi Mbugua Njoroge King’a, the 1st respondent, emerged as a top candidate and appointed as he reported on 22.08.2022. The letter further stated thus, “Dr. Njoroge has demonstrated admirable attitude and

aptitude to handle the demanding tasks and calling of the office. He has exhibited fortitude and skills by offering the much needed leadership at the Authority during this critical transition period.

Within the short period he has been with the Authority, Dr. Njoroge has jump started the finalization of Strategic Plan (2022-2027), reinvigorating staff morale and he is at the cusp of finalizing policies and procedures which are necessary for execution of the Authority's mandate.

Against this backdrop, ACA Board in its 83rd meeting held on 30th August 2022, unanimously resolved to review the employment contract period of the Executive Director from one year to three years as per Anti-Counterfeit Act, 2008 and approved Human Resource instruments.

The Board's decision is premised on the fact that the envisaged merger process is yet to be completed, the need to provide the office holder with assurance and confidence while providing leadership and realization that the one-

year period is insufficient to positively influence the performance of the organization.

This is therefore to request your good office to give a concurrence to the Board's decision in order to actualize this intent." The letter was signed by Flora Mutahi, the Chairperson of the Board and addressed to Ms. Betty Maina, CBS, Cabinet Secretary, Ministry of Industrialization, Trade & Enterprise Development.

g) By the letter dated 14.09.2022 Ref. No. MoITED/CS/ACA/VOL.II the Cabinet Secretary sought advice from the Executive Office of the President, State Corporations Advisory Committee and the Committee concurred to review of the term to three years by the letter of 14.10.2022 Ref. No.OP/SCAC1/63/2/1 addressed to the Cabinet Secretary. The letter specifically noted the Cabinet Secretary's concerns thus, the anticipated merger process involving the Anti-Counterfeit Agency(ACA) had hampered the recruitment of required staff leading to a human resource capacity gap; there had been a high turn-

over of staff due to career growth stagnation and work overload; and, hiring staff including the Chief Executive Officer, on short term contracts of one year had proven unattractive and inefficient. SCAC then observed and advised as follows:

- i) It is not the intention of Government to create human resource capacity gaps and challenges in Agencies that are candidates for reform.
- ii) The object has however been to exercise caution while recruiting to fill vacant posts in the support functions since in the event of a merger, such functions could be unitary and therefore bloated.
- iii) There is no harm in ACA undertaking the normal career progression for serving staff as provided in the approved Human Resource (HR) Policy and Procedures Manual to avoid stagnation and any exposure to legitimate expectation.
- iv) There would be no material risk in granting the staff appointed on contract, appointments that are for the

conventional duration (as stipulated by law or HR policy). Such contracts should thus be for the conventional duration or until the merger takes place, whichever is the earlier. The CEO's contract should also be well guided by this principle.

The letter was copied to Dr. Joseph K. Kinyua, EGH, Head of the Public Service , Executive Office of the President; Amb. Johnson Weru, CBS, Principal Secretary, State Department fr Trade & Enterprise Development; and, Ms. Flora Mutahi, Board Chairperson, Anti-Counterfeit Agency.

- h) The Board evaluated the 2nd respondent's performance for 2022/2023 financial year as exhibited and his score was 95.53% and for 2023/2024 his score was 93.17% out of a maximum of 100%.
- i) In view of the Board evaluation and by letter dated 02.01.2025 the 2nd respondent requested the board for renewal of his employment as Executive Director for a final 2nd term of a tenure of three years as prescribed in the

cited regulation 4. The Board considered the request at the meeting of 10.01.2025 and unanimously resolved to renew the employment per minutes exhibit RMN9 of the replying affidavit.

j) Accordingly, the 1st respondent's tenure was reviewed to a second term of 3 years due to lapse in August 2025. The minutes show that the Board considered the 2nd respondent's performance record; the provisions of: the Anti-Counterfeit Act Cap.510, Circular OP/CAB.9/1A, circular OP/CAB.9/1 of 09.05.2008, the Mwongozo Code; and,, after deliberation resolved thus, "The Board unanimously approved the renewal of the Executive Director's contract of employment for a final term of three years effective August 1, 2025."

k) The Board thereafter sought for concurrence of the Cabinet Secretary in line with the established procedures which concurrence was accordingly issued by letter dated 14.01.2025 ref. no. MITI/CS/5/16 addressed to the Board CXhairperson. The letter by the CS was dated 14.01.2025

and it noted that there are plans to merge the Anti-Counterfeit Authority (ACA) with Kenya Industrial Property Institute (KIPI). The letter then concluded thus, “Nonetheless, in view of the excellent performance by the Chief Executive Officer, I hereby grant permission for the board to renew the contract of the current Chief Executive Officer, Dr. Robi Njoroge for three (3) years; or until the two institutions are merged, whichever will come earlier.”

18. The 1st respondent proceeded to respond to the petition in his replying affidavit as follows:

a) The renewal of his term as Executive Director by the 2nd respondent for the 2nd and final 3-years was undertaken on 10.01.2025 and concurrence given on 14.01.2025 and which was prior to the Cabinet meeting of 21.01.2025.

b) The contract allegedly entered into between the 1st and 2nd respondents on 30.01.2025 has not been produced at all.

c) He holds office as Executive Director

19. The 2nd and 3rd respondents also filed the replying affidavit of Josephat G. Kabeabea, the Chairperson of Anti-Counterfeit

Authority Board, and sworn on 03.11.2025, as filed through the learned Senior State Counsel Mary Mochoge for the Attorney General. The replying affidavit essentially repeated the evidence as per the 1st respondent's replying affidavit. It was stated that the initial appointment for one year, the review to three years and then the renewal for a 2nd term of three years were all done in accordance with the relevant provisions of the Constitution, statute and government policies as set out in the circulars.

20. The petitioner's supplementary affidavit sworn on 13.11.2025 repeated the petitioner's claims and allegations. The petitioner urged that the 1st respondent had failed to exhibit the contract between the 1st respondent and the 2nd respondent so that the Court should find that in such circumstances no contract exists and the petitioner must therefore vacate the office. The petitioner also filed his supplementary affidavit sworn on 12.11.2025 and urged that sections 77 and 78 of the Public Service Commission Act (but which essentially are the Regulations) invoked by the 2nd respondent did not apply

because his case was not about any of the issues listed in the sections.

21. The Court has considered the material on record and returns as follows.

22. To answer the **1st issue**, the Court returns that the petitioner had sufficient standing and sufficiently pleaded to show the provisions of the constitution he alleged had been violated and particularised the alleged manner of violation. As set out earlier in the judgment the petitioner went into details to specifically plead that the respondents had allegedly violated Articles 10, 47 73, and 232 of the Constitution and which he sought to enforce by way of the instant petition.

23. The **2nd issue** for determination is whether the petition was premature for want of exhaustion of prescribed statutory and alternative remedies or procedures as submitted for the respondents.

24. It was submitted for the 2nd and 3rd respondents thus,
“....Article 234 of the Constitution vests the Public Service Commission with the mandate to oversee appointments within

the public service and to ensure that all such appointments are conducted lawfully, competitively and on merit. Further, Regulations 77 and 78 of the Public Service Commission Regulations establish a clear complaints and investigation framework, empowering the Commission, either on its own motion or upon receipt of a complaint, to inquire into any matter relating to the exercise of its constitutional and statutory functions, including appointments to public offices. The petitioner did not invoke this statutory mechanism, yet it is the Commission that is constitutionally and legally vested with the first-line jurisdiction to investigate and make a determination on any alleged irregularity in an appointment process.”

The cited regulations provide as follows:

“77. (1) The Commission may, on its own initiative or on a complaint made by any person, investigate any issue relating to the Commission's constitutional or statutory functions and power and make such determination as may be just in the circumstances.

(2) The Commission, in conducting an investigation under

paragraph (1), shall afford every relevant party an opportunity to be heard before the Commission makes a determination in the matter.

78. (1) The Commission may, on its own initiative or on the request of any person, facilitate conciliation, mediation or negotiation in respect of any issue relating to the Commission's constitutional or statutory functions, and shall encourage the parties to arrive at an amicable resolution.

(2) The Commission in facilitating conciliation, mediation or negotiation under paragraph (1) shall ensure that every party to the conciliation, mediation or negotiation has an opportunity to make representations in respect of the matter.”

25. The Court has considered the provisions and returns that they amount to mechanisms established by the subsidiary legislation in the nature of optional dispute resolution (ODR) provisions. Such are mechanisms established by the law or international treaty that parties may choose or opt to use generally or such as by agreement in a contract to voluntarily submit a dispute for resolution using the provided optional

mechanism. The provisions like the ones cited herein are optional so that parties are not automatically compelled to use them unless they have specifically agreed by contract to do so by a relevant dispute resolution clause invoking such mechanism. The cited regulations use “may” showing that they are not imperative and a person with a dispute that may go to the Commission. Thereby retains the individual autonomy to invoke or not to invoke the permissible dispute resolution mechanism. The Court finds that the regulations use a discretionary language so that the dispute resolution mechanisms therein are optional as are elective. The petitioner was not therefore bound to follow the provisions. The submission made for the 2nd and 3rd respondents that the petitioner’s failure to lodge any complaint of irregularity with Public Service Commission is fatal to the Petition is accordingly found unsustainable.

26. To answer the 3rd **issue**, the Court finds that the 1st respondent was initially employed as the Executive Director for one year which was reviewed and regularised to three years per the statutory provision. The Court finds that such rectification

was consistent with the statutory provisions in regulation 4 of the Anti-Counterfeit Regulations and the 2nd respondent did not act unlawfully to seek concurrence from the Cabinet Secretary and the Executive Office of the President to grant the 1st respondent the first full three years term contract. The Court also finds that the respondents have established that the 1st respondent's second three year term was a renewal strictly in accordance with the law and policy circulars on approvals and concurrence by the Cabinet Secretary and the Executive Office of the President. The Court upholds the submission made for the 2nd and 3rd respondents that the allegation of a 'third term' was entirely unfounded because SCAC, acting within its mandate, regularized a non-standard one-year contract into the conventional three-year term, and the current appointment by a renewal of three years term, therefore, constituted the statutorily and policy-compliant second term. As was submitted, there was no breach of term limits, and, the petition appears to have no merits.

27. While making that finding, the Court upholds the advisory by SCAC to the Cabinet Secretary that the long running reorganisation of state corporations by way of anticipated mergers or dissolution must be understood not to adjourn constitutional or statutory safeguards, processes, procedures and accrued rights and obligations of the affected or concerned employees and employers. The Court upholds the advisory by SCAC's letter of 14.10.2022 Ref. No.OP/SCAC1/63/2/1 and in particular, the said moratorium throughout the reorganization, dissolution or merger of the targeted state corporations should be understood in the terms of SCAC's said advisory thus:

- a) It is not the intention of government to create human resource capacity gaps and challenges in agencies that are candidates for reform.
- b) The object has however been to exercise caution while recruiting to fill vacant posts in the support functions since in the event of a merger, such functions could be unitary and therefore bloated.

c) There is no harm in state corporations targeted for reforms undertaking the normal career progression for serving staff as provided in the approved Human Resource (HR) Policy and Procedures Manual to avoid stagnation and any exposure to legitimate expectation.

d) There would be no material risk in granting the staff appointed on contract, appointments that are for the conventional duration (as stipulated by law or HR policy). Such contracts should thus be for the conventional duration or until the merger takes place, whichever is the earlier. The contracts for Chief Executive Officers and other senior management staff of the state corporations targeted for reforms should also be well guided by the same principle.

28. While making the foregoing finding the Court holds that the said SCAC's advisory and as upheld by the Court herein soundly applies to past, current and future moratorium with respect to the contemplated reforms in the state corporations or other government or public agencies as may become necessary.

That is more so because the Court holds that while government is entitled to initiate and implement reform policies such as merger, acquisition, divestment, dissolution, restructuring or reorganizing state corporations or other government agencies and departments, the same is subject to prevailing constitutional and statutory provisions that guide or safeguard public employment, and, is further subject to recognition as well as respecting the accrued rights of the affected public or state employees. In addition, during such reforms public interest should be upheld so that the affected state corporation or public entity is enabled to continue the proper discharge of its mandate until the reform initiative is subsequently fully realized.

29. In that regards, the submission made for the Attorney General is upheld thus,

“28. Section 10(1) of the Anti-Counterfeit Act expressly vests the power to appoint and reappoint the Executive Director in the Board. This statutory power is clear, unconditional, and is not made subject to any approval by HoPS or any other Executive office. As held in **Pevans East Africa Limited & another v**

Chairman Betting Control and Licensing Board & 7 others

[2017] KEHC 9684 (KLR),

“decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute.” Therefore, the administrative requirement in the HoPS Circular, which seeks to condition the Board's statutory power, is subordinate to the Anti-Counterfeit Act and cannot be used to invalidate a legally sound reappointment.

29.It is therefore our submission that the Petitioner's reliance on circulars to impose a precondition not contemplated by Parliament also violates the doctrine against fettering statutory discretion. Parliament conferred upon the Board the authority to appoint and reappoint the Executive Director. That power cannot be curtailed, limited, conditioned, or made dependent upon discretionary executive approvals that do not emanate from statute. To insist on HoPS concurrence where the enabling

statute, regulations, Mwongozo, and the State Corporations Act are silent is to unlawfully create new legal requirements and undermine the institutional autonomy of the Authority.”

30. To answer the **4th issue** and as submitted for the 1st respondent, the petitioner cannot shift her burden to adduce and prove that which she alleges to the respondents. It was submitted for the petitioner that the petitioner pleaded that there was not contract of employment between the 1st and 2nd respondents and whose tenure was 01.08.2025 to 31.08.2028 and that if any such contract existed, then it was null and void. It is further submitted that the 1st and 2nd respondents have failed to produce the contract of service which was to be in writing under the Employment Act. Thus, it was urged, the failure to produce the contract or letter of appointment in issue meant that the 1st respondent has admitted that no such contract existed because the burden is on the respondents per section 112 of the Evidence Act that states, “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.” For the

1st respondent, it was submitted that it is one who alleges the existence of a fact that must prove it per section 107 of the Evidence Act. The 1st respondent relied upon **Ben Chikamai & another v Peter Macithi Muigai & 2 others [2020] KECA 625 (KLR)** where the Court of Appeal (W. Ouko, (P), W. Karanja & S. Ole Kantai JJ.A) held thus,

“33. The appellant further posited that the Mwongozo was inconsistent with existing laws, therefore, that it would be a violation of such existing laws if the same were to be applied in the re-appointment of the 1st appellant. It is trite that he who alleges must prove. Section 107 of the Evidence Act is instructive that it lies with the party who desires any Court to give judgment as to any legal right or liability to show that the facts which his case depends upon exist. The same principle of law is echoed in the Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14 where it describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the

conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

34. The appellants have not specifically pointed out which provisions of the Mwongozo are inconsistent with the law. Further, they have not demonstrated how such provisions of the Mwongozo are inconsistent with the law if at all. Moreover, it is evident that the implementation of the Mwongozo was to be in tandem with existing laws but adhering to established constitutional principles which the Mwongozo intended to be aligned with.”

31. The Court is guided by the Court of Appeal and returns that it was out of step with the law for the petitioner to shift the

burden of proof to the respondents with respect to petitioner's alleged facts about the letter. If the letter was not in possession of the the petitioner but in that of the respondents, it was for the petitioner to serve an appropriate notice to produce per the established production procedures. In any event and on a balance of probability, the 1st and 2nd respondents have admitted that the appointment letter or contract as the 2nd and final three year term contract is in place effective 01.08.2025. it is the Court's finding that the petitioner filed the petition alleging employment relationship between the parties that was not compliant with policies in the circulars. The Court has found that that allegation has been established in the negative because the 1st and 2nd respondents have shown that the employment relationship substantially complied with the applicable law and circulars.

32. To answer the **5th issue**, the Court returns that the petitioner has failed to establish that the 1st and 2nd respondents violated the law, circulars and the Constitution as was alleged. Accordingly, the Court returns that the petitioner is not entitled to any of the reliefs

as was prayed for. The petition is liable to dismissal as urged and submitted for the respondents. The Court has considered that it was a public interest litigation with a significant growth of jurisprudence and each party to bear own costs of the proceedings. In conclusion judgment is hereby entered for the respondents for dismissal of the petitions and each party to bear own costs of the petition.

**Signed, dated and delivered by video-link and in court at Nairobi
this Wednesday 17th December, 2025.**

**BYRAM ONGAYA,
PRINCIPAL JUDGE**