

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

(Before Hon. Lady Justice Monica Mbaru)

PETITION NO. E020 OF 2025

JULIUS OGOGOHO.....PETITIONER

VERSUS

COAST WATER WORKS

DEVELOPMENT AGENCY..... 1ST RESPONDENT

KATANA DANIEL MWARINGA.....2ND RESPONDENT

HAMID MBARAK..... 3RD RESPONDENT

MOHAMED MASOUDI MWAHIMA.....4TH RESPONDENT

JUDITH WABOSHA MWAMBURI.....5TH RESPONDENT

GEORGE KARIUKI MAINA.....6TH RESPONDENT

EDWIN MURIMI.....7TH RESPONDENT

HAFSWA ABDALLA DELE.....8TH RESPONDENT

STATE CORPORATION ADVISORY COMMITTEE. .9TH RESPONDENT

VERSUS

MARTIN TSUMA.....1ST INTERESTED PARTY

SIMON MENZA CHARO.....2ND INTERESTED PARTY

MARY OKIOM.....3RD INTERESTED PARTY

HAMADI MWANZITO.....4TH INTERESTED PARTY

LEWA ZIRO.....5TH INTERESTED PARTY

PUBLIC SERVICE COMMISSION.....6TH INTERESTED PARTY

JUDGMENT

The Petitioner is seeking the following orders:

- 1. A declaration that the payment of gratuity to the 1st, 2nd, 3rd and 4th Interested Parties on 22nd November 2021 or any other date automatically and/or constructively terminated their contracts of service with the 1st Respondent.*
- 2. A declaration that the revision of the conditions of service of and/or the terms of service of the 1st, 2nd, 3rd, and 4th Interested Parties from contractual to permanent and pensionable terms on or about 23rd November 2021 and placing them in the position of the Deputy Director Human Resource and Administration, the Deputy Director Corporation Secretary and Legal Services and the Deputy Director Internal Audit respectively within the Coast Water Works Development Agency, the 1st Respondent herein instead of retiring them upon payment of gratuity was abdication and/or delectation of the statutory mandate bestowed upon the 2nd, 3rd, 4th, 5th, 6th, and 8th Respondents.*
- 3. A declaration that consenting and or deciding to pay gratuity to the 1st, 2nd, 3rd, and 4th Interested Parties was in breach of the fiduciary position*

and duty bestowed upon the 5th and 6th Respondents.

4. *A declaration that the payment of gratuity to the 1st, 2nd, 3rd, and 4th Interested Parties and the subsequent revision of their conditions of service and or conversion of their terms of service from contractual to permanent and pensionable terms instead of retiring them was in violation of Article 201 of the Constitution, Section 3 of the Public Finance Management Act.*
5. *A declaration that the decision to pay and or the continue paying salaries, allowances and benefits to the 1st, 2nd, 3rd, and 4th Interested Parties, in their capacities as the deputy director human resource & administration, the deputy director corporation secretary and legal services and the deputy director internal audit within the coastal water works development agency, the 1st Respondent herein upon their automatic and or constructive termination of their contract of service within the 1st Respondent of their gratuity is and or was in breach of the constitution and the Public Finance Management Act and thereby unconstitutional, illegal and unlawful.*
6. *An order directing the 1st, 2nd, 3rd, and 4th Interested Parties to refund all monies paid to them since November 2021 in the form of salaries, allowances, stipends, benefits or otherwise and or in the **alternative**, the 1st, 2nd, 3rd, and 4th Interested Parties be ordered to refund all the monies paid to them as gratuity.*

7. *An order directing the Respondents and 5th Interested Parties to recover any monetary benefits, including salaries, allowances, benefits and stipends earned and paid to the 1st, 2nd, 3rd, and 4th Interested Parties since November 2021 **and or in the alternative** recover all the monies paid to the 1st, 2nd, 3rd, and 4th Interested Parties as gratuity.*
8. *In default, this court be pleased to order that the 2nd to 8th Respondents and the 5th Interested Parties be surcharged to recover any monetary benefits including salaries, allowances, benefits and stipends earned and paid to the 1st, 2nd, 3rd, and 4th Interested Parties since November 2021 and or in the alternative the 2nd to 8th Respondents and the 5th Interested Parties be surcharged to recover all the monies paid to the 1st, 2nd, 3rd, and 4th Interested Parties in gratuity.*

Petition

The Petitioner is an adult, free-spirited person and a human rights defender, actuated by defense for the rule of law and promotion of democratic governance. The 1st Respondent is a state corporation established under the Water Act. The 2nd to 8th Respondents are adults. The 9th Respondent is a state corporation established under Section 26 of the State Corporations Act.

The 1st to 6th Interested Parties are all adults. The 7th Interested Party is a constitutional commission established under Article 233 of the Constitution.

The petition is that the 2nd to 8th Respondents were the chairperson and board members of the 1st Respondent, and were mandated to ensure good governance, transparency, and accountability in the prudent and responsible use of the 1st Respondent's public funds, pursuant to Article 201 of the Constitution and Section 3 of the Public Finance Management Act.

The 5th Interested Party is an accountant within the 1st Respondent. He was responsible for tabulating the PAYE to be deducted from the gratuity payable to the 1st to 4th Interested Parties. He therefore held a fiduciary position and had a mandate to ensure good governance and the prudent use of the 1st Respondent's public finances under Article 201 of the Constitution and Section 3 of the Public Finance Management Act.

The 1st Interested Party started employment with the 1st Respondent as a technical manager on contractual terms, whose contract was renewed by the 2nd to 8th Respondent from time to time.

Upon the 1st Respondent's transition from the Coast Water Board to the Coast Water Works Development Agency, the 1st Interested Party was appointed deputy director of project development and management.

From 2021 to June 2025, the 1st Interested Party was holding the position of Acting CEO of the 1st Respondent. At the time of the revision of the 1st Interested Party's conditions of service and the conversion of the contract to

permanent and pensionable terms on 23rd November 2021, he had only 18 months remaining until the expiry of his contract. Notwithstanding that gratuity is payable at the end of the contract or at the end of service, on 22nd November 2021, the Respondents colluded with the 1st to 5th Interested Parties and paid gratuity to the 1st Interested Party instead of retiring him. They then appointed him as Acting CEO until June 2025. The gratuity payment was made a day before the conversion of his employment contract to permanent and pensionable terms.

From November 2021 to date, the 2nd Interested Party has served as Deputy Director of Human Resources and Administration within the 1st Respondent. He formerly started employment with the 1st Respondent in April 2016 as a human resources and administration manager on contractual terms, and that contract has been renewed by the 2nd to 8th Respondents.

The petition is that, notwithstanding that gratuity is payable at the end of service or retirement of the employee, on 22nd November 2021, the Respondents, in collusion with the 1st to 6th Interested Parties, paid gratuity to the 2nd Interested Party and, instead of retiring him, revised his terms and conditions of employment to permanent and pensionable terms on 23rd November 2021. He was placed in the position of deputy director, human resources and administration. The gratuity payment was made a day before the conversion of the term contract to permanent and pensionable employment.

Since 2021, the 3rd Interested Party has been working for the Corporation Secretary and Legal Services within the 1st Respondent. His contract has been renewed by the 2nd to 8th Respondents.

The petition is that, despite being paid a gratuity on 22nd November 2021, the 3rd Interested Party was not retired as required upon such payment. Instead, on 22nd November 2021, the employment was revised and converted to permanent and pensionable on 23rd November 2021, and the employee holds the position of deputy director, corporation secretary and legal services.

Since 2021, the 4th Interested Party has been working for the 1st Respondent as a deputy director of internal audit. He commenced employment in September 2020 on contractual terms. Despite being paid gratuity on 22nd November 2021, the Respondents colluded and revised his employment by converting it to permanent and pensionable terms.

The conversion of terms of employment for the 1st to 4th Interested Parties from contractual to permanent and pensionable terms was discussed and adopted at a full board meeting of the 1st Respondent held on 10th December 2021. The creation of vacancies within the 1st Respondent should have been brought to the public's attention, and the public should have been given the opportunity to apply for the positions of CEO and deputy director of human resources and administration. Deputy Director, corporation secretary and legal services, and

the deputy director, internal audit, within the 1st Respondent. The conversion of employment terms from contractual to permanent and pensionable terms was therefore unlawful and invalid.

The Respondents had a duty to place mechanisms to ensure public participation pursuant to the constitution to ensure the new recruitment or appointment of the acting CEO of the 1st Respondent, the deputy directors of human resources and administration, the deputy director, corporation secretary and legal services and the deputy director internal audit for the 1st Respondent was conducted within the law and the constitution. No advertisement or competitive process was undertaken that would enable public participation. There was no transparency or accountability, as required under the constitution, to lend legitimacy to the appointments in converting the contractual terms of the 1st to 4th Interested Parties into permanent and pensionable employment.

The revision of the conditions of service by conversion of terms of service from contractual to permanent and pensionable terms and placing the 1st to 4th P as CEO, deputy directors of human resource and administration, deputy director corporation secretary and legal services and the deputy director internal audit respectively, was pursuant to an approval of the 1st Respondent's instruments by the 9th Respondent.

The development, approval, and implementation of the human resource instruments, and the development and review of the organizational structure of

any public service entity, such as the 1st Respondent, must be approved by the 6th Interested Party, and not by the 9th Respondent, before implementation, by dint of section 58 of the Public Service Commission Act. The implementation of the HR instruments of the 1st Respondent without the 6th Interested Parties' approval is unconstitutional and contrary to article 234(2) (a) and (f) of the constitution and sections 26, 27, 55, and 58(1) of the Public Service Commission Act.

The principles of public finance are constitutionally established under article 201 which includes openness, accountability and equity. Section 3 of the Public Finance Management Act provides for reasonable and prudent use of public finances by both the national and county governments. The Respondents and the 1st to 5th Interested Parties have violated the prudent and responsible use of public resources under Article 201 of the Constitution and Sections 3 and 102 of the Public Finance Management Act.

The refusal and neglect by the 2nd to 8th Respondents and the 1st to 5th Interested Parties to ensure strict compliance with the applicable laws and regulations on public finances amounts to dereliction of their statutory duty. The Respondents have therefore violated the constitution pursuant to Articles 10, 21, 22, 23, 27, 48, 73, 156, 159, 232, and 259 which seek promotion of values and principles for good governance and accountability in the public service.

The petition is that the payment of gratuity by a state corporation automatically terminates employment. Upon such payment of gratuity, any revision or conversion of employment terms should be through a competitive process with notice to the public. The Respondents have abdicated their duty in dealing with the 1st to 4th Interested Party's employment.

The Petitioner also filed his Supporting Affidavit to the petition.

In reply, Respondents filed the Replying Affidavit of Hamoud Mguza, the CEO of the 1st Respondent and avers that the allegations that the board facilitated and paid gratuity to the Interested Parties is without foundation. The decision to approve and make payment was taken by the former board whose term expired on 4th July 2025 and no longer serves the 1st Respondent.

Mgunza avers that the board members whose term came to an end are:

- a) Hafswa Abdalla Dele, appointed on 1 February 2023.
- b) Judith Wabosha Mwamburi, appointed 1 February 2023
- c) Mohamed Masoud Mwahima, appointed 1 February 2023.

The current members of the board who are improperly enjoined in this suit were not in office at the material time when the decision in question was made and therefore cannot lawfully be held personally liable for institutional decisions undertaken by their predecessors.

The 1st Respondent, as a statutory body, operates within its structures, the law, approved policies and budgetary approvals. All actions relating to payment of gratuity to any staff are undertaken within the law. There is a petition to demonstrate that the payment of gratuity was illegal or in contravention of any policy. The payment of gratuity in this case was in accordance with the contracts of service per the approved public service guidelines. The HR policy for the Public Service provides for gratuity payment upon the expiry of a fixed-term contract.

Following the gratuity payments, the Auditor General audited the 1st Respondent's accounts for the financial year 2021/2022. The said transactions were found to be regular and in compliance with applicable legal and policy frameworks.

The Petitioner cannot seek to penalize the 1st to 5th Interested Parties for entitlements that were lawfully and rightfully earned.

The provisions of section 27(1) of the State Corporations Act provide the duties of the State Corporation Advisory Committee. The six Interested Parties issued a circular Ref. No. OP/SCAC.17/34/6 dated 17th December 2015 on the delegation of PSC's functions to the State Corporations Advisory Committee (SCAC). The delegation instrument dated 9th December 2015 provides that, in reviewing and making recommendations regarding conditions of service, the 1st

Respondent was required to ensure the implementation of the SCAC approved policy.

Under section 68 of the Water Act, the 1st Respondent is allowed to make additional instruments on the human resources for its enhanced mandate. The 1st Respondent's HR policies were developed in consultation with experts from the Department of Public Service in January 2019 and 2020. The 1st Respondent therefore developed its policies to align with the career guidelines and a review of its instruments.

The 9th Respondent, through a letter dated 25 June 2020, approved the HR instruments and career guidelines issued by the Public Service Commission in May 2016. The 9th Respondent, through the line Ministry of Water, Sanitation and Irrigation, allowed the 1st Respondent to implement the organisational structure, staff establishment, career guidelines and HR instruments.

Mgunza avers that the 9th Respondent, through a letter dated 16th July 2020, advised the CEO to implement the HR instruments.

The transformation of staff terms from contract to permanent and pensionable terms was conducted in accordance with the provisions and laws in force at the time, per letter Ref. No. OP/SCAC.09/201/7 V1.1 (50) dated 22nd September 2021.

The conversion of staff terms was done for all the employees of the 1st Respondent. This was per the approved instruments, transitioning employees from their contracts to the revised terms. It is related to all the 182 employees of the 1st Respondent by virtue of the Gazette Notice No. 2717 dated 19th March 2021.

Mgunza avers that the transition of employees from the defunct Coast Water Service Board to the newly established Coast Water Works Development Agency was guided by the Gazette Notice and the letter dated 27 November 2020 from the SRC on the job evaluation grading results for the 1st Respondent.

There were no new positions beyond those approved in the transition documents. The 1st Respondent held discussions with the affected employees and obtained their consents before implementing the new HR instruments for the transition. The 9th Respondent approved the instruments under the delegated mandate from the 9th IP, the PSC.

Mgunza avers that the Petitioner and related parties have filed multiple suits before this court arising from the same or substantially similar facts, but with varying sets of Respondents in what appears to be a deliberate and vexatious litigation. In **ELRC Petition E018 of 2025 – Julius Ogogoh v Coast Water Works Development Agency & 3 others**, the Petitioner seeks similar orders directed to different members of the board. These Petitioners centre on the same

administrative issues as the 1st Respondent and have subjected the Respondents to undue prejudice. The petition should be dismissed with costs.

The Petitioner challenges the payment of gratuity to the 1st to 4th Interested Parties on 22nd November 2021, and the subsequent conversion of their terms of service from contractual to permanent and pensionable on 23rd November 2021. He argues that once gratuity was paid, their contracts were automatically or constructively terminated, and the Respondents therefore acted unlawfully by retaining or appointing them to office rather than treating the positions as vacant and subjecting them to a new, competitive process. The Petitioner seeks declarations that the gratuity payments, the conversion of terms, and the ongoing payment of salaries, allowances, and benefits were unconstitutional, unlawful, and contrary to Article 201 of the Constitution and the Public Finance Management Act, together with orders for refund, recovery, and surcharge.

On locus standi, the Petitioner submits that he has standing under Articles 22 and 258 of the Constitution because the Constitution has greatly broadened access to the courts in matters involving constitutional violations and public interest litigation.

In *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR (Court of Appeal), *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] KECA 231 (KLR), and *John Wekesa*

Khaoya v Attorney General, Petition No 60 of 2012 [2013] eKLR the courts have held that under Articles 22 and 258 of the Constitution, locus standi has been expanded to allow any person, including those acting in the public interest, to institute proceedings, provided such action is brought bona fide and is not an abuse of the court process.

Under article 3(1) of the Constitution, every person has a duty to respect, uphold,

and defend the Constitution, and the present petition is one way of discharging that duty. In **Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR**, the Court held that locus standi is distinct from the merits of a case, emphasising that whether a petition is merited is a separate question from whether the Petitioner has standing.

In the public interest, the Petitioner argues that the petition is not motivated by private gain but aims to uphold the public interest in the lawful and prudent management of a public body and public funds. In **Brian Asin & 2 others v Wafula Chebukati & 9 others [2017] eKLR**, the Court held that public interest litigation is a legal action brought to enforce a public or general interest affecting the rights or liabilities of a class of the community.

In **Kenya Anti-Corruption Commission v Deepak Chamanlal Kamani & 4 others [2014] eKLR**, the Court held that a matter of public interest is one in which the whole society has a stake and which affects the legal rights or

liabilities of the public at large. In **Republic v County Government of Mombasa Ex parte Outdoor Advertising Association of Kenya [2014] eKLR**, the Court adopted the principle in **R v Greater London Council ex parte Blackburn [1976] 3 All ER 184** that where a public authority is acting unlawfully, any person affected may approach the court to seek enforcement of the law.

Regarding the competence of the petition, the Petitioner contends that it satisfies the threshold set out in **Anarita Karimi Njeru v Republic (No 1) [1979] KLR 154**, in that it sets out, with reasonable precision, the constitutional provisions allegedly violated, the manner of their violation, and the reliefs sought. The strict application of the **Anarita principle** has been qualified by subsequent jurisprudence and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules), which emphasise substantive justice. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, **Trusted Society of Human Rights Alliance v Attorney General & 2 others [2012] eKLR**, and **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR**, the courts held that while constitutional petitions must be pleaded with reasonable precision, the court should not adopt undue formalism, and the applicable test is whether the petition gives proper notice to the Respondent of the nature of the claim so as to

enable an adequate response and facilitate determination of the alleged constitutional violation.

The Petitioner denies the allegation that the current petition is simply one in a series of repetitive or proxy suits filed through the same advocates. He contends that he has the right to choose his legal representation and that there has been no demonstrated prejudice due to the involvement of the same advocates in other matters. In **Luka v Narok Bursaries Management Board & 6 others [2024] KEHC 2523 (KLR)**, the Court held that withdrawal of a constitutional petition is not automatic but subject to leave of the Court under Rule 27 of the Mutunga Rules. The Court further emphasized that constitutional petitions involve public interest and are not purely private disputes, and that where a petition is withdrawn without a determination on the merits, such withdrawal does not bar subsequent proceedings on the same issues. In this petition, the grievance concerns specifically the payment of gratuity and the subsequent alteration of his terms of service.

On the merits, the Petitioner's main argument is that the payment of gratuity to the 1st to 4th Interested Parties around 22nd November 2021 ended their contractual relationships with the 1st Respondent, making their offices vacant. He asserts that the Respondents then had a constitutional duty, particularly under articles 10 and 232, to fill those positions through a transparent, competitive, and inclusive process that adhered to standards of public

participation, merit, accountability, and equality. Instead, he contends, the Respondents unlawfully changed the Interested Parties' terms of service from contractual to permanent and pensionable without advertisement, interviews, or any open competition. In his view, this process lacked transparency, accountability, fairness, and compliance with diversity requirements, and thus did not meet constitutional standards.

In **Katiba Institute & another v Attorney General & another [2017] eKLR**, the Court held that all public actions, including appointments and administrative decisions, must comply with the Constitution, particularly Article 10 on national values and principles of governance, and that any action undertaken in violation of constitutional requirements is invalid. The Court emphasised the principles of transparency, accountability, and adherence to the rule of law in public decision-making.

The Petitioner also asserts that the impugned conduct violated Article 201 of the Constitution and sections 3 and 102 of the Public Finance Management Act because public funds were used in a way that was neither prudent nor accountable. He contends that the payment of gratuity, immediately followed by its conversion to permanent and pensionable terms and the continued payment of salaries and benefits, constituted misuse of public resources, financial impropriety, and dereliction of duty by the Respondents and Interested Parties. He further states that even if an audit later deems the payments lawful, an

unconstitutional act remains void ab initio and cannot be validated retrospectively.

The legality of the job grading and the role of the State Corporations Advisory Committee, the Petitioner argues, do not affect the regulation of the public service, which remains the exclusive constitutional mandate of the Public Service Commission (PSC) under article 234(2) of the Constitution. In **Manyara Muthui Anthony v Communications Authority of Kenya & 3 others [2022] eKLR**, the Court held that the PSC has the exclusive constitutional mandate under Article 234 to regulate human resource matters in the public service, including state corporations, whose employees are public officers. The Court further held that the State Corporations Advisory Committee cannot usurp this mandate, and that any statutory provisions purporting to reassign or limit the PSC's constitutional functions are inconsistent with the Constitution and therefore void. He therefore contends that the alleged delegation instrument dated 9 December 2015 could not lawfully transfer powers under article 234(2)(a) and (f), and that any SCAC approval of human resource instruments was unconstitutional, null and void.

The Petitioner submitted that the 1st Respondent implemented human resource instruments and transitions without the PSC's approval, contrary to article 234 and sections 26, 27, 55, and 58(1) of the PSC. He concludes that the payment of gratuity and the subsequent automatic conversion of the 1st to 4th Interested

Parties' terms of service, without first retiring them and conducting a fresh competitive recruitment process, was unlawful, unconstitutional, and ought to be nullified, and he urges the Court to grant the petition with costs.

In response, the Respondent submitted that the petition is based on a mistaken understanding of the legal effect of gratuity, the transition of Coast Water Services Board into Coast Water Works Development Agency, and the approval of the 1st Respondent's human resource instruments.

The petition challenges the payment of gratuity to the 1st to 4th Interested Parties, the subsequent change of their terms from contractual to permanent and pensionable, and the approval and implementation of the relevant human resource instruments.

According to the Respondents, the Petitioner's case is that gratuity should only be payable upon termination or retirement, that employees on contract with the predecessor entity were not entitled to gratuity at the time of conversion to permanent and pensionable status, and that any organisational structure or human resource instruments of a public body, such as the 1st Respondent, require approval from the PSC.

The Respondents submitted that the Petitioner alleges abdication and neglect of statutory duties by the 1st to 8th Respondents and the 1st to 6th Interested Parties, and seeks declarations that the payment of gratuity automatically terminated the

contracts of the 1st to 4th Interested Parties, that the revision of their conditions of service was unlawful, that the continued payment of salaries and allowances was unconstitutional and contrary to the Public Finance Management Act, and that monies paid should be refunded or recovered through surcharge.

The Respondents submitted that the 1st Respondent was established under the Water Act as the successor to the Water Services Board, with transitional arrangements outlined in section 152 of that Act, whereby staff from the predecessor organisation transferred to the new entity on modified terms. They also complain that the petition appears to be part of what they describe as a concerted effort through multiple suits filed by the same law firm, including the **ELRC Petition No. E009 of 2025, John Oucho Abura v Coast Water Works Development Agency & 11 Others**, and **ELRC Petition No. E018 of 2025, Julius Odogoh v Coast Water Works Development Agency & 3 Others**, aimed at disrupting the proper functioning of the 1st Respondent.

On the burden of proof, the Respondents' main argument is that the Petitioner was obligated to prove the factual basis of the petition and failed to do so. They explicitly cite sections 107, 108, and 109 of the Evidence Act and contend that constitutional petitions are subject to the same evidential burden as other cases. In support, they refer to **Ochieng v Njoroge & 2 others (Petition E170 of 2025) [2025] KEELRC 3660 (KLR)**, where the Court, relying on **Ben Chikamai & another v Peter Maciithi Muigai & 2 others [2020] KECA 625**

(KLR), affirmed that the burden of proof lies on the party alleging and held that it would be out of step with the law to shift the burden of proof to the Respondents in respect of unproven allegations.

Based on that, the Respondents argue that the Petitioner failed to submit supportive documentary evidence or sworn testimony showing that the human resource instruments were not lawfully approved, and that relying solely on assertions by the 6th Interested Party was insufficient, especially without proof that approval had been denied, not sought, or that there was no delegated authority allowing SCAC to approve the instruments.

Regarding whether the PSC delegated its role to the State Corporations Advisory Committee, the Respondents argue that there was a valid written delegation under Article 234(5) of the Constitution. The timeline presented in the affidavits of Hamoud Mguza and Martin Tsuma demonstrates that the PSC delegated responsibilities to SCAC via a delegation instrument dated December 2015, and that paragraph 6 of that instrument gave SCAC functions including tailoring the framework for terms and conditions of service, coordinating the development and review of career progression guidelines, and submitting recommendations and annual reports to the PSC.

Further, the PSC cannot be considered bypassed, given that its chairperson signed the instrument and SCAC operated under it. They emphasise that the

Board of the 1st Respondent acted on directives from the Head of Public Service, under the understanding that SCAC had full authority under the delegated mandate to approve human resource instruments. They criticise the PSC's affidavit for denying any delegation, while, in their opinion, failing to explain how the written delegation instrument was created or whether it was claimed to be a forgery. They also argue there was no evidence that the instrument had ever been revoked, invalidated, or that CWWDA had been notified of any change in the relationship between PSC and SCAC before the suit was filed.

In *Githongo & another v State Corporations Advisory Committee & another; Public Service Commission & 2 others (Interested Parties) (Petition E303 & E026 of 2023 (Consolidated))* the Court held that any interpretation suggesting that PSC's constitutional functions can be reassigned by legislation is incorrect, and that such functions may only be delegated in writing under Article 234(5) of the Constitution. The delegation in question was indeed in writing.

In *Republic v Kenya Ports Authority Board of Directors & 2 others; Public Service Commission (Interested Party); Commission for Human Rights Justice (Ex parte Applicant) (Judicial Review Application E001 of 2022) [2023] KEELRC 1943 (KLR)* the court held that the PSC is the constitutionally mandated body under Article 234 to approve human resource

instruments in the public service, and that any such instruments implemented without its approval are ultra vires and unlawful. The organisational restructuring and change of terms occurred in December 2021 under a 2015 instrument, while the later cases did not directly address that instrument.

In *Torutt v Coast Water Works Development Agency & another; Commission for Human Rights and Justice (Interested Party) (Civil Appeal E059 of 2021)*, the Court held that legitimate expectation is grounded in fairness and arises only where the representation is made by a person with actual or ostensible authority. In the absence of such authority, any expectation, though subjectively held, is not legally enforceable.

The Respondents argue that the 1st Respondent and its board were entitled to expect clear, effective, and authoritative communication from public bodies if the delegated mandate had changed, and that, in the absence of proof of withdrawal or invalidation, it would be unfair to penalise civil servants for a policy dispute at higher government levels over which they had no control or influence. Their broad submission is that the Petitioner is attempting to impose hardship on office holders due to inter-institutional confusion between the PSC and the SCAC, rather than because of any misconduct by those officers.

In this case, the effect of gratuity does not terminate employment. In ***Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR***, the Court of Appeal

held that where a contract provides for gratuity, an employee is entitled to proportionate gratuity for the period served, and such entitlement is not defeated by premature termination where the dismissal is found to be unjustified, unless the contract lawfully excludes gratuity on account of proven misconduct.

The Respondents argue that the prerequisites for gratuity are the existence of a contract of service that is coming to an end, provision for gratuity in the contract in place of a pension scheme, and service rendered. They also rely on the CWWDA Human Resource Policies and Procedures Manual, which they say provides that an employee serving on contract is eligible for service gratuity at the rate of 31% of basic salary, and that, where the employee has not completed the contract term, gratuity is payable on a pro rata basis.

The 1st to 4th Interested Parties were clearly employees under contracts that provided for gratuity, their contracts concluded as part of the transition from contractual to permanent and pensionable terms, and there was neither termination for misconduct nor any allegation that they were overpaid. They emphasise that the Petitioner did not even argue that the gratuity exceeded the contractual entitlement; rather, his entire case was that conversion to permanent and pensionable terms somehow invalidated gratuity, which the Respondents assert is unsupported by law. They therefore maintain that paying gratuity did not terminate the employment relationship, prevent renewal or re-engagement, or itself create vacancies.

The Respondents further argue that the shift from contract to permanent and pensionable status was part of a wider restructuring under the Ministry of Water, in accordance with section 68 of the Water Act. This was intended to enhance service delivery through the agencies established under the relevant statute. Due to the statutory change, CWWDA was required to develop a new Human Resource Policy, organisational chart, salary structure, and career progression guidelines, all of which were approved by SCAC in a letter dated 25th June 2020. They argue that, after securing SCAC's approval, the Board was responsible for creating staff establishment instruments, career guidelines, and a human resource policy and procedure manual, all in accordance with PSC guidelines. The transition was carried out in accordance with SCAC guidance and did not require re-advertising positions within the same job group family. They highlight that all four Interested Parties were on renewable contracts and that the Petitioner failed to demonstrate that the contracts were non-renewable or that gratuity payments rendered them expired vacancies. Their contention is that the contractual obligations involved both the employer and the employees and could not be deemed extinguished solely because the employees were moved to better terms of service.

Regarding public participation and competitive recruitment, the Respondents state that the Petitioner repeatedly confused the two concepts. Not every administrative action requires public participation, and if public input were

needed for every human resource decision, institutions would struggle to function, since recruitment, deployment, and promotion are standard HR functions. Recruitment is a human resources activity conducted by the Board in accordance with the law and does not inherently require public participation. They also state that the Petitioner did not allege that the initial appointments of the 1st to 4th Interested Parties were not conducted through competitive recruitment. Instead, his argument was limited to the claim that the later change in terms required fresh recruitment, which the Respondents deny. They assert that the 1st to 4th Interested Parties were initially recruited through a competitive process from among Kenyans, met the criteria for public service employment, including diversity requirements, and that any claim of discrimination is completely unsubstantiated.

The Respondents also deny that the change in terms amounted to the creation of new offices or promotions that required competitive recruitment. They state that the transition from the previous Coast Water Services Board structure to the Coast Water Works Development Agency was guided by the Salaries and Remuneration Commission letter dated 27th November 2020 and the SCAC letter dated 22nd September 2021, following the approval of the human resource policy manual. These directions mandated staff to be transitioned into the revised organisational structure and given an opportunity to negotiate new terms when moving into permanent and pensionable positions. They portray this as a

safeguard of the Interested Parties' rights, consistent with Article 47 of the Constitution, because employees who had accepted earlier contracts could not be fairly compelled into new contracts without negotiation. They further argue that the negotiations included an option to either convert the gratuity entitlement into a pension scheme or receive it on a pro rata basis.

The Respondents maintain that all actions taken by the 1st Respondent and its Board were directly authorised by the Ministry of Water, the Head of Public Service, and SCAC, acting under what they claim was delegated authority. Consequently, they call for dismissal of the petition or, at the very least, argue that, if additional PSC approval were necessary, any remedy should be directed to the Commission rather than imposed on the officers involved in the transition.

The 1st to 5th Interested Parties submitted that the petition is factually misleading, legally unsustainable, and procedurally flawed. They demonstrated that they were lawfully employed by the 1st Respondent over time, initially on contractual terms with clear gratuity provisions, and in some cases on permanent and pensionable terms. They clarify that gratuity was not irregular but arose from explicit contractual provisions entitling employees to payment upon completion of the contract term, including on a pro rata basis where applicable. The subsequent shift from contractual to permanent and pensionable terms was not an isolated or targeted action but rather part of a broader

institutional restructuring affecting all employees following the transition from the Coast Water Services Board to the Coast Water Works Development Agency under the Water Act, 2016.

They further contend that the restructuring, including the development and implementation of Human Resource instruments such as the organisational structure and career progression guidelines, was carried out in compliance with the law and applicable government frameworks. In particular, they argue that at the relevant time, the PSC had delegated its mandate to the State Corporations Advisory Committee pursuant to Article 234(5) of the Constitution, and therefore the approval of the Human Resource instruments by the said body was lawful.

Following the issuance of the Guidelines on the Design of Organisational Structure in the Public Service and the completion of delegation instruments to the 9th Respondent, disputes arose between the PSC and the SCAC over which body had the authority to approve human resource tools in state corporations. This disagreement led to a series of lawsuits between the two institutions, as well as high-level engagements involving the National Treasury, PSC, SCAC, and the Attorney General, resulting in significant uncertainty within the sector. Some of the lawsuits filed included the following:

In **Manyara Muchui Anthony v Communications Authority of Kenya & 3 others [2022] eKLR**, the Court held that the PSC retains the constitutional mandate over the public service under Article 234. The coexistence of constitutional and statutory mandates across different institutions governing state corporations had created a fragmented and unharmonised framework, necessitating legislative and institutional alignment to avoid continued disputes.

In **Consumer Federation of Kenya (COFEK) v National Social Security Fund Board of Trustees & 2 others [2022] eKLR**, the Court held that human resource functions in state corporations are constitutionally vested in the PSC, and that Article 234 prevails over the State Corporations Act, which must be aligned to the Constitution. In **Republic v Kenya Ports Authority Board of Directors & 3 others Ex Parte Commission for Human Rights and Justice (Mombasa ELRC JR No. E001 of 2022)**, the Court held that human resource decisions in state corporations, particularly establishment of offices, appointments, and HR instruments, fall within the constitutional mandate of the PSC, and that any implementation without PSC approval is unconstitutional and ultra vires.

In **Enos Namasaka & 9 others v Medical Supplies Authority & others (Nairobi ELRC Petition No. E149 of 2023)** the Court held that establishment and abolition of offices in public bodies is a constitutional function of the PSC,

and where a state corporation undertakes such functions without PSC involvement or delegation, the action is unconstitutional, null and void.

Regarding gratuity, the Interested Parties submitted that payment did not indicate the end of employment but simply marked the completion of contractual phases before transitioning to new terms under the reorganised structure. The Petitioner's argument that gratuity causes vacancies is legally ungrounded, and that changes to employment terms did not require new recruitment or competitive interviews, especially when employees remained within the same job group as permitted under relevant Human Resources policies. The process was approved by the Board and later audited, with the Auditor-General finding no adverse issues, thus confirming its validity and legality.

The Interested Parties also challenge the competence of the petition, arguing that it fails to meet the constitutional threshold established in **Anarita Kariuki Njeru v Republic [1979] eKLR**, as it does not plead with precision the specific constitutional provisions violated or the manner in which such violations occurred. In **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] KECA 304 (KLR)**, the Court of Appeal emphasised that where a dispute resolution mechanism exists, it must be exhausted before resorting to the courts, which should be a forum of last resort. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR**, the Court held

that public interest litigation must be brought in good faith and should not be aimed at

giving any personal gain to the applicant.

They further argue that the petition is improper and fatally defective following the court's earlier ruling expunging the Petitioner's supporting documents, leaving the claims unsubstantiated contrary to sections 107 and 109 of the Evidence Act and Rule 11 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. They also accuse the Petitioner of filing repetitive and similar suits through proxies, pointing to prior proceedings such as *John Abura Oucho t/a Jabo Agencies v Coast Water Works Development Agency & others* (ELRC Petition No. E009 of 2025), which was struck out. The Interested Parties rely on **Communication Commission of Kenya & others v Royal Media Services Limited & 5 others [2014] eKLR**, where the Supreme Court affirmed the doctrine of constitutional avoidance, holding that where adequate statutory or alternative remedies exist, a party should not invoke the Constitution as a substitute for ordinary legal procedures. The impugned actions were statutory, and policy instruments applied. They argue that the petition is speculative, lacks supporting evidence, and constitutes an abuse of court process, therefore urging the Court to dismiss it with costs.

The 6th Interested Party maintains that its constitutional mandate under Articles 232 and 234 of the Constitution, as interpreted in light of the PSC Act and Regulations, positions it as the central authority for regulating human resource management throughout the public service, including state corporations. It states that it is the only body authorised to approve human resource management instruments, including organisational structures, staff establishments, career progression guidelines, and human resource manuals.

The 6th Interested Party further relies on **Anthony v Communications Authority of Kenya & 3 others [2022] KEELRC 1117 (KLR)**, where the Court held that the PSC has the constitutional mandate over human resource management in the public service, including state corporations, but recognised that existing statutory frameworks permitted state corporations to exercise certain HR functions pending harmonisation. It further held that PSC may delegate its powers in writing under Article 234(5), and directed a structured review and alignment of HR frameworks with the Constitution. In **Consumers Federation of Kenya (COFEK) suing through its officials namely Stephen Mutoro, Ephraim Kanake and Henry Ochieng v National Social Security Fund Board of Trustees & another; Cabinet Secretary, Ministry of Labour and Social Protection (Interested Party) [2022] KEELRC 248 (KLR)**, he Court held that the PSC has the constitutional authority over human resource regulation in the public service, including state corporations; that state

corporations may originate but cannot approve HR instruments; and that any instruments implemented without PSC approval are null, void, and inoperable.

In Republic v Kenya Ports Authority Board of Directors & 3 others Ex Parte Commission for Human Rights and Justice (Mombasa ELRC Judicial Review Application No. E001 of 2022), the Court held that the PSC has exclusive constitutional authority over human resource management in the public service, including state corporations, and that any human resource instruments developed or implemented without its approval are unlawful and ultra vires

Flowing from the foregoing authorities, the 6th Interested Party asserts that it has never delegated its constitutional mandate to SCAC, and that SCAC has no legal authority to establish or approve human resource instruments in state corporations. Consequently, any such instruments implemented without the Commission's approval are unlawful, null and void, and cannot confer legal validity. The Commission therefore urges the Court to uphold its constitutional role as the sole authority in regulating and approving human resource management within the public service.

Determination

The issues which emerge for determination in this petition can be summarised as follows:

- (i) Whether the payment of gratuity to the 1st to 4th Interested Parties on 22nd November 2021 constructively terminated their employments with the 1st Respondent and whether such payment is in breach of Article 201 of the Constitution, Section 3 of the Public Finance Management Act.
- (ii) Whether the paid gratuity should be refunded.
- (iii) Whether the revision of the conditions and terms of service for the 1st to 4th Interested Parties from contractual to permanent and pensionable terms, instead of retirement upon payment of gratuity, is in breach of the fiduciary duty bestowed upon the 5th and 5th Respondents.

The 1st Respondent is a state corporation. It is regulated under the Water Act and the constitutional provisions regulating public servants.

The transition of employees from the defunct Coast Water Service Board to the newly established Coast Water Works Development Agency was guided by the Gazette Notice 2717 dated 19th March 2021.

Under the Employment Act (the Act), the employer may reorganize its operations, including its employees. Where the business requires the employees to be under fixed-term contracts, this is permissible under section 10(3) of the Act. The parties to the employment relationship are at liberty to agree on the terms and conditions regulating the relationship, as held in **Postal Corporation**

of Kenya v Tanui [2019] KECA 489 (KLR) and **Karanja v Taphe Guest House [2026] KECA 372 (KLR)**.

With regard to payment of gratuity, in **Bamburi Cement Ltd v. William Kilonzi [2016] eKLR**, the court held that, as suggested by the name, gratuity is a gratuitous payment by an employer for services rendered, which is made at the discretion of the employer but will be enforced if and when provided for in the contract of employment. In the case of **Maina v Family Bank Limited [2025] KECA 2043 (KLR)**, the court reiterated that gratuity is only payable upon the agreed terms in the written contract.

In this case, the 1st Respondent enjoyed a written contract with the 1st to 4th Interested Parties. The contract came to an end, and under its terms and conditions, gratuity was payable.

In this case, the terms of the contract and the payment of gratuity at the end were lawful and contractual. The petition that such payments should be refunded and the 5th and 6th Respondents be surcharged has no legal basis.

The Auditor General has since undertaken audits of the 1st Respondent and found no irregularity. The payment of gratuity was contractual and valid.

On the question of converting the employment of the 1st to 4th Interested Parties to permanent and pensionable terms, the 1st Respondent indeed states that a

state corporation is bound under the constitution and the law. Any new employment within its ranks should be advertised and members of the public invited to attend under a competitive process.

In **Institution of Engineering Technology of Kenya v Kenya National Highways Authority & another; Engineers Board of Kenya (Interested Party) [2026] KEELRC 872 (KLR)** the court held that Article 232(1)(g) of **the Constitution** requires fair competition and merit as the basis of appointments and promotions in public service; and Article 232(1)(i) which mandates the provision of adequate and equal opportunities for appointment, training, and advancement at all levels of public service. This position is reiterated in **Kioko & another v Machakos County Assembly Services Board & 2 others [2026] KEELRC 729 (KLR)** and **Njeri v New Kenya Co-operative Cremaries Limited [2026] KEELRC 680 (KLR)**

In this case, the 1st Respondent employees transitioned from the defunct Coast Water Service Board to the newly established Coast Water Works Development Agency. A public notice through Gazette Notice No. 2717 dated 19 March 2021 to this effect.

Before the conversion of employment, the 1st Respondent obtained the necessary approvals. Through the letter Ref. No. OP/SCAC.09/201/7 V1.1 (50)

dated 22nd September 2021; the conversion of employee terms of service was granted.

Indeed, the conversion of staff terms was carried out for all employees of the 1st Respondent. This was per the approved instruments, transitioning employees from their contracts to the revised terms. It is related to all the 182 employees of the 1st Respondent by virtue of the Gazette Notice 2717 dated 19th March 2021.

Under part D of Gazette Notice No. 2717, there is a list of 183 employees of the 1st Respondent whose employment was converted to permanent and pensionable terms. The public was notified that:

d) THAT the persons specified in Part D of the Schedule hereto, who were employees of Coast Water Services Board on 3rd May, 2019 shall, with effect from the same date be deemed to have become employees of Coast Water Works Development Agency on the same terms and conditions of service.

This notice thus insulated the Respondents.

Conversion of the employment terms from contractual to permanent and pensionable was accepted by the affected employees. This is a mandatory requirement under section 10(5) of the Act, as held in **Margaret Wanja Muthui v Ministry of Transport, Infrastructure, Housing and Urban Development & 2 others [2019] KEELRC 2161 (KLR).**

Fundamentally, the 9th Respondent approved the instruments that led to the conversion of employment, in conjunction with the 9th Interested Party, the PSC. The 9th Interested Party is the independent and constitutional body mandated to regulate public employment.

The court finds no illegality or maladministration on the part of the 1st Respondent in converting the employment of the 183 employees, including the 1st to 4th IP.

On the petition, the court finds no merit.

On the question of costs, indeed, the 1st Respondent has provided a chronology and a litany of cases filed by the Petitioner, together with others. I have traced several before the ELRC, including **Ogogoh v Coast Water Works Development Agency & 8 others; Tsuma & 5 others (Interested Parties) [2025] KEELRC 2957 (KLR), Ogogoh v Water Services Regulatory Board and Coast Water Works Development Agency & 6 others [2026] KEELRC 646 (KLR)** and In ELRC Petition No. E009 of 2025 – **John Oucho Abura v Coast Water Works Development Agency & 11 others**, the Petitioner raises issues relating to the tenure of service of the employees.

The petition was found to be without merit. Although the Petitioner describes himself as a free-spirited person seeking to ensure the democratisation of public agencies, he shall meet the costs due to the 1st Respondent.

Accordingly, the petition is without merit and is hereby dismissed. Costs to the 1st Respondents. All other parties to bear its costs.

Delivered in open court at Nairobi, this 23rd day of April 2026

**M. MBARŮ
JUDGE**

In the presence of:

Court Assistant: Catherine and Omar

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