



Kosgei & 3 others v Geothermal Development Company; KCB Bank Kenya Limited (Interested Party) (Employment and Labour Relations Petition E077 of 2022) [2025] KEELRC 243 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 243 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E077 OF 2022**

JW KELL, J

JANUARY 31, 2025

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,41 (1) AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 11 OF THE SALARIES AND REMUNERATION 6 COMMISSION ACT,2011

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

**BATRICE KOSGEI 1ST PETITIONER
JOANNE WAMUYU 2ND PETITIONER
SIMON KIPLAGAT 3RD PETITIONER
ENG GEORGE KINYANJUI 4TH PETITIONER**

AND

GEOHERMAL DEVELOPMENT COMPANY RESPONDENT

AND

KCB BANK KENYA LIMITED INTERESTED PARTY

JUDGMENT

1. The petitioners, all former employees of the Respondent, aggrieved with the decision of the Respondent to vary applicable mortgage loan rates from 3% to market rates of 13% p.a upon separation



from employment, and for the failure to pay them gratuity as per their contracts, filed in court petition dated 18th May 2022 and received in court on the 18th May 2022 seeking the following reliefs:-

- a) A Declaration that the actions and decision of the Respondent of withdrawing support from the Petitioners' mortgage loans with the Interested Party under the Respondent's Staff House Mortgage Scheme and withholding the gratuity payable to the Petitioners violate the Petitioners' rights under Articles 27, 41 (1) and 47 of the Constitution of Kenya, 2010;
- b) A Declaration that the Respondent's action or decision that it will no longer support the Petitioners' mortgage loans with the Interested Party is unfair, unreasonable, unlawful therefore void;
- c) An order of certiorari quashing the Respondent's the decision of the Respondent that it will no longer support the Petitioners' mortgage loans under the Geothermal Development Company (GDC) Staff House Mortgage Scheme at an interest rate of 3% per annum;
- d) An order prohibiting and restraining the Respondent, its employees, agents or any person acting under its instructions, including the Interested Party from varying, adjusting, increasing or reviewing the interest rates on the Petitioners' mortgage loans under the Geothermal Development Company (GDC) Staff House Mortgage Scheme from 3%per annum for the life of the loans to 13% per annum or any other prevailing market or commercial rates;
- e) An order compelling the Respondent to pay gratuity to the Petitioners within 30 days of judgment in the following sums:
 - (i) Beatrice Kosgey KES 1,527,337.14
 - (ii) Joanne Wamuyu KES 1,527,337.14
 - (iii) Simon Kiplangat KES 1,527,337.14
 - (iv) Eng. George Kinyanjui KES 1,527,337.14
 - f) Interest on the amounts in (e) above;
 - g) Costs of the Petition be provided for; and
 - h) Any other relief this Honourable Court will deem fit and just to grant.

Background Of The Petition

2. The Petitioners were separately employed by the Respondent for four years in the different managerial positions effective 1st February 2017. The Petitioners served under the said contracts for their term.
3. Effective 1st February 2021, the Petitioners' contracts of service were renewed for a further term of one year for which the Petitioners served and separated from the Respondent on 31st January 2022 upon effluxion of time in their contracts of service.
4. The Petitioners aver that among the benefits accruing to them by their employment was the entitlement to Respondent's Staff Housing Mortgage Scheme as guided by its Human Resource Management Policies.



5. The Petitioners further aver that Section 5 of the Respondent's Human Resource Management Policies and Procedures Manual contains the car loan and mortgage policy. Clause 5.4 provides inter alia as follows:

“5. 4.1.2 The mortgage scheme will be administered by financial institution approved by the board from time to time in line with the prevailing Government circulars...

5. 4.2.2 The rate of interest applicable shall be three percent (3%) per annum on a reducing balance for the duration of the loan....

5. 4.5.3 Should an employee leave the service before repaying the amount in full, the terms of the mortgage shall remain in force and shall not change for the life of the mortgage unless in cases of default in which case the mortgage shall convert to commercial terms.

5. 4.6 The Mortgage Scheme will be implemented as outlined in the procedures.”

6. It was the Petitioners' case that the above policy was informed by the Salaries and Remuneration Commission circular number SRC/ADM/CIR/1/13 Vol. III (128) dated 17th December 2014 on Car Loan and Mortgage Schemes for State Officers and Other Public Officers of Government of Kenya providing as follows:

“6. Interest Rate Charge

The rate of interest applicable to both the Car Loan and Mortgage Scheme shall be three (3%) per annum on a reducing balance for the duration of the loan.

7. Duration And Termination Of The Scheme

The duration of the scheme shall be a maximum of twenty (20) years for mortgage schemes and five (5) years for Car Loan.

Where a State Officer or Public Officer leaves public service employment for whatever reason other than disciplinary grounds, the terms of the loan remains in force and does not change for the life of the loan unless in cases of default in which case it reverts to commercial terms.”

7. The Respondent gave effect to the benefit of staff Housing Mortgage for its employees by executing an Agreement with the Interested Party for the provision of loans to its employees under the Staff House Mortgage Scheme. The said Agreement envisages that the Respondent's Staff Mortgage Scheme is available to employees who permanently leave employment at the Respondent and shall only be inapplicable where such employees default in repayment of the loan for three months.

8. The Petitioners averred that the said Agreement incorporated the Salaries and Remuneration Commission Circular together with other documents and provided that where a borrower permanently leaves employment at the Respondent, the terms of the advanced loan shall remain but not where the borrower defaults in repayment of the loan for three months, in which case the terms shall revert to the prevailing commercial rates.

9. Further to this, the Respondent promulgated the Regulations & Guidelines for GDC Staff House Mortgage Scheme to guide the scheme. The said regulations similarly provide that where an employee leaves the service of the Respondent for whatever reason other than disciplinary grounds, the terms of the loan remain in force and does not change for the life of the loan unless in cases of default in which case it reverts to commercial rates as per the SRC Circular 7.



10. Relying on a communication from the Salaries and Remuneration Commission that persons employed on contractual terms, the Human Resource Management Policies and Procedures Manual, the Respondent's Regulations & Guidelines for Staff House Mortgage Scheme and the Petitioners' contracts of service; the Petitioners applied and were separately offered by the Interested Party, mortgage loan facilities under the Respondent's Staff Housing Mortgage Scheme on different dates in 2018 and 2019.
11. The Petitioners aver that upon acceptance of the terms thereof their loans were approved, disbursed and secured by charges over the properties they purchased under the scheme. The Petitioners have and continue to diligently service their loans with the Interested Party under the terms and rates contained despite leaving the employment of the Respondent.
12. The Petitioners contented that, despite their non-default, the Respondent had made a decision not to support the Petitioners' loans at the rate of 3% p.a. set under the scheme and has advised the Interested Party as much contrary to the Respondent's Human Resource Management Policies and Procedures, the Salaries and Remuneration Commission Circular and Regulations & Guidelines for GDC Staff House Mortgage. The Petitioners pleaded that the Interested Party had notified them that it shall convert their mortgage loans to market rates of 13%p.a. citing a written communication from the Respondent that it will no longer support their mortgage loans at an interest rate of 3 % p.a.
13. The Petitioners stated that the decision and actions of the Respondent were illegal and unreasonable and violated or threaten our rights to fair labour practices and fair administrative action under the Constitution of Kenya, 2010. The Respondent's actions are coated with malice and are a continuation of the oppression meted against the Petitioners since 2021 when the Respondent refused to renew their contracts as contemplated in the guiding policies.
14. Additionally, the Petitioners averred that as a term of their contracts of service, they were entitled to gratuity at the rate of 31% of the basic salary earned for the period served. But the Respondent has unjustifiably withheld the said gratuity despite the clearing with it. Gratuity payable to each of the Petitioners is as follows:
 - a) Beatrice Kosgey KES 1,527,337.14
 - b) Joanne Wamuyu KES 1,527,337.14
 - c) Simon Kiplangat KES 1,527,337.14
 - d) Eng. George Kinyanjui KES 1,527,337.14
15. The Respondent paid gratuity to one Dr. George Mwangela Muia whose contract of service ended at the same time as the Petitioners, effectively discriminating against them. This Petition also sought to compel the Respondent to pay the gratuity.

Legal Foundation Of The Petition And Contravention Of The Provisions Of Law And Internal Policies

16. The Petition was founded on Section 2 of the Fair Administrative Action Act, 2015 defines an administrative action to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Section 3 of the Fair Administrative Action Act, 2015 provides that the Act shall apply to all state and non-state agencies, including any person whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.



17. The Petition was also anchored on Section 4 of the *Fair Administrative Action Act*, 2015 provides that every person is entitled to an administrative action that is among other things lawful and reasonable. It also provides for the steps expected of an administrator where a decision is likely to adversely affect the rights or fundamental freedoms of any person. The Petitioners averred that the Respondent had failed to observe the provisions of the above legislation by failing to give the Petitioners prior and adequate notice of the nature and reasons for its decision and an opportunity to be heard and to make representations in that regard as the Respondent made the decision and wrote to the Interested Party without informing the Petitioners.
18. The Petition was also anchored on section 7 of the *Fair Administrative Action Act*, 2017 which stipulates that a person may apply to the Court to review a decision. The Court is empowered to review the decision if the action or decision was materially influenced by an error of law; the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant. The petitioners contended that a decision may be reviewed under section 7 if the administrative action or decision was made in bad faith; the administrative action or decision is unreasonable; the administrative action or decision violates the legitimate expectations of the person to whom it relates, or the administrative action or decision is unfair.
19. The Petitioners averred that the Respondent's decision was unlawful as it contravened the provisions of the Human Resource Management Policies and Procedures Manual, the Regulations & Guidelines for the Respondent's Staff House Mortgage Scheme and the Salaries and Remuneration Commission Circular number SRC/ADM/CIR/1/13 Vol. III (128). Since the Petitioners applied for mortgage loans based on the above-mentioned documents, and their old contracts of service, they legitimately expected that the mortgage loans would be serviced at the rate of 3% for the life of the loans and not the commercial rates. Thus the Respondent's actions or decision violated this legitimate expectation.
20. The Petitioners averred that they filed the Petition on the strength of sections 9 and 11 of the *Fair Administrative Action Act*, 2015 which provides for the procedure of review and the orders that may be made including declaring the rights of the parties in respect of any matter to which the administrative action relates and prohibiting the administrator from acting in a particular manner.
21. The Petitioners relied on Respondent's Human Resource Management Policies and Procedures Manual which provides among other things that,
 - “5. 4.1.2 The mortgage scheme will be administered by financial institution approved by the board from time to time in line with the prevailing Government circulars...
 5. 4.2.2 The rate of interest applicable shall be three percent (3%) per annum on a reducing balance for the duration of the loan....
 5. 4.5.3 Should an employee leave the service before repaying the amount in full, the terms of the mortgage shall remain in force and shall not change for the life of the mortgage unless in cases of default in which case the mortgage shall convert to commercial terms.
 5. 4.6 The Mortgage Scheme will be implemented as outlined in the procedures.”
22. The Petition was also anchored on the Salaries and Remuneration Commission circular number SRC/ADM/CIR/1/13 Vol. III (128) dated 17th December 2014 on Car Loan and Mortgage Schemes for



State Officers and Other Public Officers of Government of Kenya which provide among other things that:-

“

“ 6. Interest Rate Charge

The rate of interest applicable to both the Car Loan and Mortgage Scheme shall be three (3%) per annum on a reducing balance for the duration of the loan.

7. Duration And Termination Of The Scheme

The duration of the scheme shall be a maximum of twenty (20) years for mortgage schemes and five (5) years for Car Loan.

Where a State Officer or Public Officer leaves public service employment for whatever reason other than disciplinary grounds, the terms of the loan remains in force and does not change for the life of the loan unless in cases of default in which case it reverts to commercial terms.”

23. The petitioners further stated that the Petition was founded on the Regulations & Guidelines for GDC Staff House Mortgage Scheme which provide in Regulation 21.0(iii) that where an employee leaves the service of the Respondent for whatever reason other than disciplinary grounds, the terms of the loan remains in force and does not change for the life of the loan unless in cases of default in which case it reverts to commercial rates. The Petitioners averred that the Respondent's decision violated the provisions of its internal policies and guidelines.

Constitutional Provisions Violated Or Threatened To Be Violated

24. The petitioners set out the constitutional provisions which they averred were violated or threatened to be violated as follows: -
25. Article 19 (2) of *the Constitution* spells out the purpose of recognizing and protecting rights and fundamental freedoms as being to preserve the dignity of individuals and promote social justice and that the rights are subject only to the limitations contemplated in *the Constitution*.
26. Article 21 of *the Constitution* makes provision for the application of the Bill of Rights while Articles 22 and 23 provide for the enforcement of the Bill of Rights and the authority of Courts to uphold and enforce the Bill of Rights, respectively. Effectively under Article 23 (3) a Court may issue a Declaration of rights, an injunction, an order for compensation and order of judicial review.
27. Article 24 of *the Constitution* enshrines provisions on the limitation of rights.
28. The Petition is grounded on Article 27 of *the Constitution* which prohibits discrimination on grounds including the listed ones. The Petitioners aver that they have been discriminated against by the Respondent failing to pay them the gratuity while an employee whose contract terminated under similar circumstances was paid.
29. Article 41 (1) of *the Constitution* grants the Petitioners the right to fair labour practices which has been violated by the Respondent's decision which does not conform with the policies guiding the staff house mortgage entitling the Petitioners to the interest of 3% for the life of the loans. This right has further been violated by the Respondent's action of withholding the Petitioners' gratuity despite the contracts of service providing that the Petitioners are entitled to gratuity at the Rate of 31% of the basic salary paid in the period served.



30. Article 47 of *the Constitution* provides that every person has the right to fair administrative action which the Respondent has violated by failing to notify the Petitioners of its decision regarding the mortgages despite the knowledge that it will affect the Petitioners' interests; taking a decision that is unlawful in light with the applicable policies; acting on the motivation of malice; violating the Petitioners' legitimate expectation.

Response

31. The respondent filed a replying affidavit sworn by Irene Onyambu on the 14th March 2024 and annexed documents in support. Irene stated that she was General Manager Human Resources and Administration of the respondent. She averred that the mortgage scheme was for attraction and retention of talent and skills and enable employees access loans to purchase ready houses including off plan or for construction. That the SRC vide circular dated 17th December 2014 advised on the mortgage benefits to public officers and state officers and mandated state corporations like the respondent to administer and manage the mortgage scheme. (pages 70-73 of respondent bundle was the SRC circular).
32. The Respondent stated that on the 12th May 2017 the Board of Directors approved the GDC staff mortgage scheme and KCB as the administrator. It also approved a budgetary approval of Kshs. 300 million with monthly allocation of Kshs. 50 million each month. That on the 16th April 2019 the Board approved the GDC Staff mortgage scheme with effect from 16th April 2019 (pages 74-75 of the Response were the minutes). To operationalise the scheme the Board approved the respondent's mortgage regulations and guidelines (Page 76-101 of the response).
33. The respondent contended that due to financial constraints and the lack of funding of the scheme by the exchequer, the Board reviewed the mortgage guidelines in April 2019 in a meeting where 2 of the petitioners were present. The review gave discretion to the Board to determine how to deal with outstanding mortgage facilities issued to staff who subsequently left service of the respondent. That the petitioners were in the staff mortgage advisory committee and selfishly allocated themselves a large allocation of mortgage to the detriment of other employees. That they ceased being employees on 31st January 2022.
34. The Respondent to justify its action, relied on regulation 20.2(a) of the respondent's mortgage regulations and guidelines which provides:- "in the event of a borrower ceasing to be an employee of GDC, GDC shall inform the financial institution on whether it wishes to continue supporting the exstaff borrower under the terms of the scheme." Under guideline 20.2(c) the respondent's Board is required to make the decision on whether to continue supporting the borrower who exits service. Irene averred that the Board exercised the decision against the support hence the communication to the Interested Party. She stated the decision was in good faith. That 2 of the petitioners had since settled the mortgagee hence had no claims.
35. On the claim for unpaid gratuity Irene stated it had since been paid and attributed the delay to requirements of public finance management.

Reply to response

36. The petitioner filed a supplementary affidavit of Beatrice Kosgey in reply stating that the Respondent must comply with the SRC circular and the guidelines on the mortgage scheme and the decision to the contrary was unlawful. That the Petitioner had not defaulted in the repayment of the mortgages for the interest rates to change, and that the mortgage issued to them was as per approved grades contrary



to the respondent's assertion that they awarded themselves large amounts to the detriment of other employees. That they had since been paid gratuity and that was no longer a relief before the court.

Determination

Issues for determination

37. The petitioners in written submissions identified the following issues for determination: -
- a) Is the Salaries and Remuneration Commission's advice binding on the respondent;
 - b) Is the respondent's decision not to support the petitioners' mortgage loans at the rate of 3% lawful;
 - c) Without prejudice, is the respondent's decision not to support the petitioners' mortgage loans at the rate of 3% reasonable;
 - d) Does the respondent's decision not to support the petitioners' mortgage loans at the rate of 3% violate their right to fair administrative action; and
 - e) What orders should this Honourable Court grant?
38. The respondent identified the following issues for determination:-
- a. Did the Respondent offend any law by terminating the Petitioners' participation in its staff car loans and mortgage scheme?
 - b. Has the Petition met the threshold of a constitutional challenge worthy of review by the court?
 - c. What remedies are applicable?

Decision

39. The court identified the issue to be whether the decision of the respondent to vary interest rates on loans taken by the petitioners under the staff mortgage scheme was unconstitutional and unlawful.

Petitioners' submissions

40. Is the Salaries and Remuneration Commission's advice binding on the respondent? The petitioners urged that they were employed as public officers and relied on the case of Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others (Civil Appeal 156 of 2016) [2024] KECA 419 (KLR) (26 April 2024) (Judgment) where the Court of Appeal analyzed at length how employees of State Parastatals qualify as public officers. It held that "officers and persons serving/working in state corporations are public officers within the meaning of Article 260 of *the constitution*" (see: paragraphs 38 to 40 of the authority). The respondent is established under the *Energy Act* as one of the energy sector entities solidifying its status as a State Corporation which they said was acknowledged in paragraph 4 of the respondent's Replying Affidavit of Irine. As the petitioners were employed by the respondent, whose budget is provided for by parliament, they served as Public Officers. The petitioners contended that as public officers, the regulation of their salaries and benefits fell within the mandate of the SRC under Article 230 (4) of *the Constitution* which provides as follows: "(4) The powers and functions of the Salaries and Remuneration Commission shall be to-(b) advise the national and county governments on the remuneration and benefits of all other public officers." In interpreting this provision, the Court of Appeal in the Salaries and Remuneration Commission case (supra) held that the advice given by SRC is binding when it returned that no valid salary or benefit of a state or public officer can ensue from a process that ignores the roles of SRC.



The Court faulted the trial Judge for finding that SRC has a non-binding role in determining the remuneration and benefits of public officers.

41. The Petitioners contended that the respondent's Staff House Mortgage Scheme was regarded as a benefit and its legality was derived from the Circular prescribing how the benefits of Car Loan and Mortgage Schemes for state and public officers are to be administered (pages 84 to 87 of the Petitioners' Annexures). The respondent's Managing Director/CEO recognized the role of SRC and wrote to it to seek guidance on this benefit. Through the letter dated 7th December 2018, SRC instructed the Managing Director to apply the circular in developing the respondent's specific regulations (page 155 of the Petitioners' Annexures. In light of these arguments, the petitioners urged the Court to recognize SRC's advice through the letter dated 7th December 2018 and the Circular issued in the discharge of its constitutional mandate as binding on the respondent. The petitioner submitted that all actions of State Corporations such as the respondent in so far as they relate to car loan and mortgage schemes must comply with the circular dated 17th December 2018.
42. Is the respondent's decision not to support the petitioners' mortgage loans at the rate of 3% lawful? The Petitioners submitted that the lawfulness or otherwise of the respondent's decision must be tested against the role of SRC in setting benefits for public officers. The respondent stated that its Board of Directors decided not to support the interest rate of 3% based on Regulation 20.2 (a) and (c) of the 2019 Regulations & Guidelines. These provisions related to the action to be taken by the Board of Directors when a borrower ceases to be an employee of the respondent as is the case with the petitioners. However the petitioners argued that these provisions must be read in line with paragraphs 6 and 7 of the circular which provides:- "6. Interest Rate Charge The rate of interest applicable to both the Car Loan and Mortgage Scheme shall be three (3%) per annum on a reducing balance for the duration of the loan. 7. Duration And Termination Of The Scheme The duration of the scheme shall be a maximum of twenty (20) years for mortgage schemes and five (5) years for Car Loan. Where a State Officer or Public Officer leaves public service employment for whatever reason other than disciplinary grounds, the terms of the loan remains in force and does not change for the life of the loan unless in cases of default in which case it reverts to commercial terms."
43. The Petitioners submitted that these mandatory and binding provisions in the Circular cannot stressed any further as they succinctly stipulate the interest rate of loans to be 3% for the duration of the loan. They also provide for what happens when a public officer leaves employment and circumstances when the loan reverts to commercial terms. The binding nature of the Circular was that mortgage scheme regulations and guidelines developed by any State Corporation must align with the SRC's Circular. Anything short of that is considered unlawful. While it was true that the respondent revised the 2017 Regulations & Guidelines to come up with the 2019 Regulations & Guidelines which fundamentally offended the spirit and letter of the Circular; such revision was only possible with the advice of SRC. The petitioners invited the Court to the Court of Appeal's finding in the Salaries and Remuneration Commission Case (supra) that, "The giving of advice on remuneration was one of the reasons the SRC was created by *the Constitution*, 2010. The role of SRC is not cosmetic; it is mandatory. It is not only mandatory, it is to be sought and obtained prior to taking any action that requires that advice. And that advice is binding as per the requirements of article 259(11)..."
44. The Petitioners contended that the respondent had not demonstrated that it sought SRC's advice before approving the 2019 Regulations & Guidelines whose Regulations 20.2 (a) and (c) derogate from the Circular. For these reasons, Regulations 20.2 (a) and (c) of the respondent's 2019 Regulations & Guidelines for GDC Staff House Mortgage Scheme were unlawful in so far as purport to donate to the Board of Directors the discretion to choose whether or not to support the interest rates set by SRC. Besides, the lawfulness of the decision of the respondent's Board of Directors is defeated by the fact that



the petitioners left employment due to lapse of the term of their contracts and not through disciplinary action. Further, the respondent and the Interested Party had not demonstrated that there had been a default in servicing the mortgage loans to justify the crystallization of the application of commercial rates. Thus, the decision is unlawful for flaunting the provisions of the Circular on which the scheme is anchored. Additionally, the decision of the respondent's Board of Directors remains unlawful even when evaluated against the 2019 Regulations & Guidelines.

45. The Petitioners urged the Court to note that Regulation 20 (b) of the 2019 Regulations & Guidelines which was not given any regard in reaching the decision provides: "Where a borrower ceases to be an employee of GDC for whatever reason other than disciplinary grounds, the terms of the loan with negotiated interest rate remain in force and do not change for the life of the loan unless in cases of default." From the foregoing, the petitioners urged this Court to find that they had sufficiently demonstrated that the decision reached by the Respondent's Board of Directors was not lawful.
46. The Petitioner in further submissions stated that Regulation 20.2 (b) of the 2019 Regulations & Guidelines (above), Clause 5.4.5.3 of the HR Policy and Manual of the Respondent prescribes that, "Should an employee leave the service before repaying the amount in full, the terms of the mortgage shall remain in force and shall not change for the life of the mortgage unless in cases of default in which case the mortgage amount shall convert to commercial terms." The respondent had acknowledged the place of the HR Policy and Manual in its Human Resource processes. Paragraph 7 of the respondent's Replying Affidavit deposed that the respondent's Human Resource portfolio on terms of service including the Staff Mortgage Scheme is governed by the HR Policy and Manual. This, therefore, means that the Staff House Mortgage Scheme has various rules that may be applied by calling in the favourability principle. That faced with the conflict between Regulation 20.2 (a) and (c) of the 2019 Regulations & Guidelines on one hand and Regulation 20.2 (b) of the 2019 Regulations & Guidelines for GDC Staff House Mortgage Scheme and Clause 5.4.5.3 of the HR Policy and Manual on the other hand; the respondent's Board of Directors was under the obligation to apply that which is most favourable to the petitioners. It was evident that Regulation 20.2 (b) of the 2019 Regulations & Guidelines and Clause 5.4.5.3 of the HR Policy and Manual were more favourable in this case as they provide for maintaining the terms of the mortgage loan for the life of the loan unless there was termination on disciplinary grounds or default. The petitioners urged the Court to be persuaded to protect the petitioners by applying the provisions that are most favourable.
47. The Petitioners further submitted that the right to fair administrative action is enshrined in Article 47 of *the Constitution*. It provides that every person has the right to administrative action that is inter alia lawful, reasonable and procedurally fair. In effecting this Article, parliament enacted the *Fair Administrative Action Act*, which defines an administrative action to include any act or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Thus, the decision of the respondent's Board of Directors amounted to administrative action as it affected the legal rights and interests of the petitioners. Section 4 (1) of the Act restates that administrative action must be lawful. The Black's Law Dictionary defines lawful as: "Legal; warranted or authorized by the law; having the qualifications prescribed by law; not contrary to nor forbidden by the law." 28. The regulations relied upon by and thus the decision of the respondent's Board of Directors are not legal or authorized by law on various fronts. First, they do not align with the Circular by SRC, which derives a clear mandate from Article 230 of *the Constitution* to advise the national government on the remuneration and benefits of all other public officers. Second, they do not comply with the SRC Circular on the Car Loan and Mortgage Scheme for Public Officers. Third, the decision also offends Clause 5.4.5.3 of the respondent's Human Resource Policy and Procedures Manual and Regulation 20.2 (b) of the 2019 Regulations & Guidelines.



48. The petitioners invited the court to peruse the decision of Hon. Lady Justice Maureen Onyango in the case of *Jackson Ngovi, Francis Mutuku, Bernard Musau, Bensley Mathuku, Timothy Maneno, Sharack Mwau & Gideon Mwangi v County Assembly of Makueni (Petition 1 of 2021)* [2021] KEELRC 940 (KLR) (Employment and Labour) (24 September 2021) (Judgment) where she upheld the interest rate of 3% as provided in the Circular upon finding that there was no basis for varying the same. That the decision of the Respondent not to support the petitioners' mortgage loans at the rate of 3% per annum violates the petitioners' right to fair administrative action to the extent that it is unlawful and unreasonable.
49. The Petitioners urged the Court to decline the respondent's invitation to uphold such an unlawful decision and instead find that the right was indeed violated.
50. On the orders sought, the petitioners submitted that they demonstrated that the respondent violated their right to fair administrative action by reaching and effecting an unlawful decision not to support the subsisting interest rate of 3% per annum as set by SRC. As a result, Honourable Court was invited to exercise its jurisdiction under Article 23 (3) of *the Constitution* and make a Declaration that the petitioners' right to fair administrative action has been violated by the unlawful decision which is null and void. 33. Additionally, as the respondent's decision is unlawful and offending the role of the SRC, the same should be reversed through judicial review orders under the auspices of Article 23 (3) (e) of *the Constitution* by grant an order of certiorari and prohibition in the terms contained in prayers (c) and (d) of the Petition As the respondent's unlawful actions caused the petitioners to institute these proceedings, the Honourable Court is invited to award the costs of the Petition to the petitioners.

Respondent's submissions

51. Did the Respondent offend any law by terminating the Petitioners' participation in its staff car loans and mortgage scheme? The Respondent wholly opposed the Petition and the prayers sought and filed the affidavit of Irene Onyambu, its Human Resource General Manager, sworn on the 14th day of March 2024. In summary, the Petitioners were all employees of the Respondent at the positions of General Managers of respective Directorates. The positions were held on fixed term contracts, renewable upon successful performance and on other terms as spelt out under the contracts. Upon their contracts coming to an end, the Petitioners were unable to secure renewal and were therefore terminated. They subsequently filed a suit at the Employment and Labour Relations Court at Nairobi case number E038 of 2021, primarily challenging the termination of their out of over 900 staff allocated themselves (by virtue of their position as scheme administrators) over 50% of the resources. At paragraph 37, it would have been unfair for the Respondent to continue supporting 4 ex-staff to continue enjoying the bulk of the mortgage resources while excluding the core staff who are responsible for day-to-day realization of the Respondent's business goals At paragraph 43, in addition to the Respondent basing its decision not to support the Petitioners' mortgage loans at the rate of 3% p.a. set under the scheme on grounds of budgetary constraint, it also had to ensure that other staff benefited from the scheme, especially the low-cadre staff who were imagined as the primary beneficiaries under the scheme. At paragraph 51, had the Respondent chosen to support the 4 Petitioners throughout the life of their mortgages, the scheme would have instantly died and not achieved its objectives, and there was imminent unrest by the Respondent's majority staff who were disgruntled by inability to access the mortgages while a few senior staff (the four Petitioners) had received lion's share of the scheme.
52. The Respondents submitted that all the Petitioners acquired the subject loans after the operationalization of the scheme in April 2019. The 2017 scheme rules were amended in April 2019 before the scheme was operationalized. No further amendments to the scheme rules had been undertaken since then. At the time the Petitioners took loans under the scheme, the applicable rules



were the 2019 scheme rules which remained applicable at the time they left employment. They are now challenging these 2019 scheme rules, when they actually benefitted under them. Considering that the same 2019 scheme rules under which the Petitioners' loans were disbursed are the same rules under which their entitlement to the scheme was terminated, the Petitioners cannot argue that the amendments in 2019 were malicious and targeted at them when the same were done before any staff member benefitted from the scheme.

53. The Respondent submitted that the 1st and 3rd Petitioners had already settled their mortgage accounts and had no outstanding balances. It was doubtful that they had any competent claim before the court, having settled their mortgage under the 3% interest rate and having not paid the commercial rates they allege are unfair. The claims by the 1st and 3rd Petitioners should be dismissed outrightly with costs, for vexing the court. The 1st Petitioner was the secretary to the Respondent's Board of Directors at the time of the development of the 2019 scheme rules. She was also the head of legal responsible for advising the Respondent for compliance with the law. While she now alleged that the 2019 scheme rules did not comply with the relevance SRC circular, she had not adduced any evidence showing that there was any Declaration of non-conformity by SRC or that she took steps to cure the irregularity. In any case, she already benefitted under the alleged irregularity and cannot seek to approbate and reprobate.
54. The Respondent submitted that the Petition was not merited because: i. The Petition was a mere displeasure with an administration action contained in the 2019 scheme rules, but raised no merited violation of *the Constitution*. ii. At all material times, the Petitioners were well aware and even involved in the making, implementation and operationalisation of the 2019 scheme rules and guidelines and procedures upon which the Respondent acted in 2022. The Petitioners were direct beneficiaries under the said 2019 scheme rules, and were estopped from raising questions of irregularities or illegality around it which questions they had the opportunity to raise in 2019 when they were accepting benefits under the scheme rules. iii. There had been no finding by the SRC that the 2019 scheme rules are inconsistent with its guidelines, and a mere allegation by the Petitioners should not suffice. iv. Despite the Respondent having more than 900 employees who were entitled to Car Loans and Mortgage benefits, the Petitioners (also the scheme's administrators at the time they conferred benefit upon themselves) unfairly received more than half of the said mortgage at a total of Kshs. 69,500,000/- out of the Kshs. 125,000,000/-. They essentially retired holding half of the benefits that ought to have accrued to over 900 other staff. That was untenable and would have just collapsed the scheme. That it was not tenable that half of the schemes fund would be held by retired or former employees, leaving the existing staff with peanuts. The purpose of the scheme, as set out in the SRC circular (70) was to motivate, attract and retain talents among public institutions in line with Article 230(5) of *the Constitution*. It would not be possible for the Respondent to meet the purposes of the scheme when half of the scheme is held by only four people, already ex-employees, and a majority are unable to access it. v. The Respondent was empowered. Under clause 3 of the SRC circular, to develop rules for and ministering the scheme. There was no requirement that such rules be approved by SRC. The Respondent was only required to act in a manner that ensures the scheme meets its objectives. vi. In any case, it seemed that the Petitioners did not qualify to have benefits under the scheme right at inception. Clause 1 of the SRC circular stated that, in the case of public officers, the scheme should benefit only those employees on permanent and pensionable terms. The Petitioners were on fixed-term contracts, and it is questionable how they ended up drawing benefits under a scheme that was clearly not designed for them. Could it be because they were the scheme administrators and could influence decisions in their favour?
55. The Respondent further submitted that the Petitioners were estopped by the doctrine of promissory estoppel from challenging the very 2019 scheme rules under which they derived the benefits. Promissory estoppel is defined by Black's Law Dictionary Ninth Edition as: "The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor



should have reasonably expected the promise to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.” In *Benjamin Airo Shiraku v. Fauzia Mohamed HCCC 272 of 2011 Justice Havelock* citing Lord Denning in *Combe v. Combe [1951] 2 KB 215* held that: “Where one party by his words or conduct made to the other a promise or an assurance which was intended to affect their legal relations and to be acted on accordingly then once the other party has taken him at his word and acted on it the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him. But he must accept the legal relation subject to the qualification which he himself has so introduced even though it is not supported in point of law by consideration but only his word.”

56. The Respondent submitted that the Petitioners made representations, in 2019 while seeking the loans, that they agreed to be bound by the 2019 scheme rules. Had they stated their reservations at that time, the Respondent would not have approved their applications for the facility. Having unconditionally represented to the Respondent that they would be bound by the 2019 scheme rules, they are now estopped from purporting to introduce reservations about some provisions of the 2019 scheme rules. The Respondent had already relied on those representations to its detriment and had already disbursed the loans.
57. On the specific allegations of violations of constitutional rights the Respondent submitted as follows:-
- a. The Right to Equality - Article 27 of *the Constitution* of Kenya, 2010 15. The Petitioners averred that they have been discriminated against by the Respondent for failing to pay them the gratuity contrary to the treatment accorded to other exiting employees. That this was not true. The Petitioners, in their supplementary affidavit, had abandoned this allegation and have conceded that they received their gratuity. No violation of *the Constitution* has been established.
 - b. The Right to fair labour practices - Article 41 of *the Constitution* of Kenya. The Petitioners alleged that the decision to terminate their participation in the mortgage scheme constituted unfair labour practice. The basis for this allegation was not established both in the Petition and in the supporting affidavit. They had not proved the alleged malice against them and had not shown that any of the Respondent’s actions were actuated by malice. What had been established was that prior to the Respondent taking a decision to terminate the Petitioners’ participation in the mortgage scheme, the following steps had occurred:-
 - a. The Petitioners had ceased employment with the Respondent.
 - b. A comprehensive study of the efficacy of the mortgage scheme had been done and it was established that the scheme would collapse because 4 out of 900 employees, and who had already left the organization, were holding 50% of the disbursed benefits thus leaving the bulk of the employees with nothing.
 - c. The Treasury had not funded the scheme to enable the Respondent to cater for existing staff, and the only way to ensure equity and fairness was to free up resources from former staff members who were no longer serving the interest of the organization, of the public service and of the spirit of the SRC circular setting up the scheme.
 - d. A meeting was held by the Respondent’s directors, and after comprehensive deliberations, a decision was made and communicated to the Petitioners.
 - e. The decision was made in line with the letter and the spirit of the scheme rules, and no rule was violated.
 - f. The Respondent verified that the Petitioners were aware of the provisions of the scheme rules at the time they sought their loans in 2019 and understood that the Respondent’s board retained the discretion to recall all loan facilities in the event that an employee left employment of the organization.
58. The Respondent conceded that Clause 20.2 (a) of the scheme rules (See Page 94 of the Replying Affidavit) provides that: “..In the event of a borrower ceasing to be an employee of GDC, GDC shall within fourteen (14) inform the financial institution in writing, whether it wishes to continue supporting the (ex-staff) borrower under the terms of the scheme.” Clause 20.2(c) of the Guidelines aforementioned, provides that; “The GDC Board of Directors will make the decision and give direction on GDC’s ability to support the borrower. If in any case, GDC expresses its inability to



support the borrower who leaves its employment, the borrower shall within fourteen days (14) days request the financial institution through a written proposal for the loan to continue being serviced under the financial institution market interest rate terms for mortgages.” The Respondent with respect to these impugned clauses submitted that the provisions are clear on the discretion of the Respondent’s board when dealing with a former employee under the scheme rules. Contrary to the Petitioners’ allegations, the Respondent did not have to limit termination of a former staff’s participation under the scheme to those who left on disciplinary grounds alone. As long as the Respondent determined that a particular action was desirable to ensure sustainability and relevance of the scheme, it could take appropriate action. In this case, the Respondent determined that the scheme would collapse and would not serve its purpose if the 4 Respondents continued holding large cash reserves while the bulk of employees, on low cadres, did not get the benefits under scheme. There would be industrial disharmony within the organization. The Respondent was required to uphold the requirements of Article 232 of *the Constitution* of Kenya as regards the principles of public service. These include efficient, effective and economic use of resources; and responsive, prompt, effective, impartial and equitable provision of services. The Respondent had to weigh the risks associated with not catering for the bulk of 900 existing employees versus the benefit of only catering for 4 former employees holding half of the available resources under the scheme. The decision was made that ensured fair distribution to make available resources to the bulk of the 900 employees as opposed to serving interesting of only 4 former employees.

59. On the right to Fair Administrative Action - Article 47 of *the Constitution* of Kenya, the Respondent submitted that at all material times, the Respondent had in place a clear and structured policy framework known as the Geothermal Development Company Limited Human Resource Policy and Procedures Manual (HRPP) June 2018 (HRPP) that governs all aspects of employment, including the Staff Mortgage Scheme. Specifically, Section 5.4 (See page 68 of the Replying Affidavit) of the HRPP establishes the Mortgage Scheme Policy, and Section 5.4.6 stipulates that the Mortgage Scheme will be implemented as outlined in the procedures. The HRPP in conjunction with the SRC circular, formed the legal and procedural foundation under which the Geothermal Development Staff Mortgage Scheme was implemented and operationalized; and the Mortgage Regulations and Guidelines Revision 1, with key amendments, were approved. It was crucial to note that the SRC circular SRC/ADM/CIR/1/13 Vol. III (128) (See page 71 of the Replying Affidavit) clarifies that the administration of the Car Loan and Mortgage Scheme was subject to management efficiency and should be handled independently by each government institution. Implementation and administration of the benefits due to management efficiency, the Car Loan and Mortgages Scheme benefits for other public officers shall be administered and managed by individual Government Institutions such as commissions, Independent Offices, State Corporations, County Governments, Statutory Bodies and Ministries independently for their employees. The independent government agencies should, therefore, prepare appropriate Regulations to guide the implementation of the benefits for their employees. The Respondent’s decision to withdraw mortgage support was made in strict accordance with the established scheme guidelines, particularly Clause 20.2 (a) and (c), which grants the Respondent’s Board the discretion to determine whether to continue supporting employees after their exit from the company and the decision was transparently communicated vide a letter dated 21st April 2022 Letter from Geothermal Development Company to KCB Bank Kenya Limited dated 21st April 2022 (see pages 108 - 109 of the Replying Affidavit) and the subsequent response from KCB Bank Kenya Limited to Geothermal Development Company dated 9th May 2022 (see page 110 of the Replying Affidavit). There was no legitimate expectation created when the Petitioners took loans under the scheme that under all circumstances they would enjoy the benefits after cessation of employment with the Respondent. To the contrary, the Petitioners acknowledged that they understood the provisions of the scheme rules part of which provided that upon cessation of employment, the Respondent had the



discretion to terminate one's participation in the scheme. There was no evidence or basis to conclude that the making of the 2019 scheme rules did not accord with fair administrative action, or that the enforcement of those rules in respect of the Petitioners was done in a manner that violated the scheme rules or the law. The Petitioners' allegation regarding fair administrative action remains unproven and unmerited.

60. On whether the Petition met the threshold of a constitutional challenge worth review by the court, the Respondent contended that the Petition, while described as an action for redress of constitutional violations, was essentially premised on contract. All that the Petitioners were alleging was that they entered into employment contracts with the Respondent, and received benefits in form of car loans and mortgage scheme loans under the said employment contract, and expected that upon termination of their employments they will continue to derive those benefits. That the Respondent had now terminated those benefits, and that is a breach of the contract. This was a claim in contract, and not a constitutional violation claim. The Respondent submitted that there was nothing in the so-called constitutional petition that raises a violation of *the Constitution*. Every allegation in the Petition was about an alleged breach of contract by the Respondent. The Petitioners' remedies, if any, lie in an action for enforcement of contract. The threshold for a constitutional suit was defined in *Anarita Karimi Njeru v Republic* [1979] KLR 154 as: "We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed." In *Japheth Ododa Origa v Vice Chancellor University of Nairobi & 2 Others* [2018] eKLR the court held that, as regards claims of constitutional violations: "...there must be a real infringement, denial of rights or threat to violation that calls for interpretation of *the constitution* vis a vis the rights infringed or threatened. It is not every disagreement that must find its way to the constitutional court." The Respondent contended that the Petitioners had other remedies and the court must apply the doctrine of constitutional avoidance to direct the Petitioners to pursue their grievance in a claim in contract.
61. The Respondent urged the court to consider the doctrine of constitutional avoidance already laid out in a myriad of judicial precedents, to find that the Petition herein is superfluous and should have been determined as a contractual dispute under the *Employment Act* or under the general claims under contract. In *KKB v SCM & 5 others* [2022] KEHC 289 (KLR), it was held, as regards the doctrine of constitutional avoidance, that: "The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. ... The doctrine of ripeness and constitutional avoidance gives credence to the concept that *the Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to *the Constitution*. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realisation that all legislative or common-law remedies are part of the legal system."



62. On the remedies the respondent submitted on Prayers (a), (b), (c) and (d). The Respondent submitted that the remedies sought for gratuity payment was overtaken by events. The Petitioners acknowledged that they have already received the payment. As regards the other prayers premised on the alleged violation of the scheme rules or of the SRC circular, they must fail. The Petitioners had not proved any violation and entitlement to remedies. The Respondent was entitled to cost, having been made to expend public resources to defend an otherwise spurious case.
63. In a nutshell the respondent submitted:- a. The Petitioners were on fixed-term contracts as of 2019 when the car loan and mortgage scheme was operationalized by the Respondent. According to the underlying SRC circular, only those public officers on permanent and pensionable contracts ought to have benefitted. The Petitioners' participation in the scheme was, therefore, an illegality which ought to have been cured immediately it was noticed. They cannot seek to continue benefitting under a void arrangement which is inconsistent with the express provision of the SRC circular they seek to benefit from. b. The Respondent reserved for itself the discretion to decide whether to terminate or sustain the participation of a former employee from the scheme. c. In this case, the Respondent applied its mind to clause 20 of the scheme rules and determined that it was necessary and reasonable to limit access of the Petitioners, being former employees, to the scheme to ensure it was sustainable for its larger workforce of over 900 personnel. d. The very scheme rules that the Petitioners are questioning now are the same ones under which they derived benefit. They are estopped from approbating and reprobating. e. In addition, the Petitioners are stopped by the doctrine of promissory estoppel from running away from their undertaking in 2019 when taking the loans under the scheme that they understood that the loans would be governed by the scheme rules, which included the provisions regarding what would happen one left the employment of the Respondent.

Decision

64. The court having analysed the positions and evidence of the parties found that Section 5 of the Respondent's Human Resource Management Policies and Procedures Manual contains the car loan and mortgage policy. Clause 5.4 provides inter alia as follows:
- “...board from time to time in line with the prevailing Government circulars...
- 5.4.2.2 The rate of interest applicable shall be three percent (3%) per annum on a reducing balance for the duration of the loan....
- 5.4.5.3 Should an employee leave the service before repaying the amount in full, the terms of the mortgage shall remain in force and shall not change for the life of the mortgage unless in cases of default in which case the mortgage shall convert to commercial terms.(emphasis supplied)
- 5.4.6 The Mortgage Scheme will be implemented as outlined in the procedures.”
65. Under the manual clause 5.4.1.3 (supra) the mortgage facility of the respondent applied to employees on permanent and pensionable as well those on contract terms of service. The petitioners were under on contract terms of service hence eligible to benefit from the respondent's mortgage scheme.
66. It was the Petitioners' case that the above policy was informed by the Salaries and Remuneration Commission circular number SRC/ADM/CIR/1/13 Vol. III (128) dated 17th December 2014 on Car Loan and Mortgage Schemes for State Officers and Other Public Officers of Government of Kenya providing as follows:-

“...interest Rate Charge



The rate of interest applicable to both the Car Loan and Mortgage Scheme shall be three (3%) per annum on a reducing balance for the duration of the loan.

7. Duration And Termination Of The Scheme

The duration of the scheme shall be a maximum of twenty (20) years for mortgage schemes and five (5) years for Car Loan.

Where a State Officer or Public Officer leaves public service employment for whatever reason other than disciplinary grounds, the terms of the loan remains in force and does not change for the life of the loan unless in cases of default in which case it reverts to commercial terms."

67. It was undisputed that the respondent's mortgage scheme was authorised under the said Circular. Under circular the scope of the mortgage scheme was for permanent and pensionable public officer and state officers either on full time or part-time basis. The court noted the submissions by the respondent but that was water under the bridge as its own human manual clause 5.4.1.3 the mortgage facility, applied to employees on permanent and pensionable terms as well as contract terms of service. The petitioners were under contract terms of service hence eligible to benefit from the respondent's scheme. The court held that the issue of eligibility was not before the court as the loans had already been disbursed.
68. The Respondent gave effect to the benefit of staff Housing Mortgage for its employees by executing an Agreement with the Interested Party for the provision of loans to its employees under the Staff House Mortgage Scheme. The said Agreement envisaged that the Respondent's Staff Mortgage Scheme was available to employees who permanently leave the employment of the Respondent and shall only be inapplicable where such employees default in repayment of the loan for three months.
69. It was averred by the Petitioners and undisputed that the said Agreement incorporated the Salaries and Remuneration Commission Circular together with other documents and provided that where a borrower permanently leaves employment at the Respondent, the terms of the advanced loan shall remain unless the borrower defaults in repayment of the loan for three months, in which case the terms shall revert to the prevailing commercial rates.
70. Further to this, the Respondent promulgated the Regulations & Guidelines for GDC Staff House Mortgage Scheme to guide the scheme. The said regulations similarly provide that where an employee leaves the service of the Respondent for whatever reason other than disciplinary grounds, the terms of the loan remain in force and does not change for the life of the loan unless in cases of default in which case it reverts to commercial rates as per the SRC Circular 7.
71. Relying on a communication from the Salaries and Remuneration Commission, the Human Resource Management Policies and Procedures Manual, the Respondent's Regulations & Guidelines for Staff House Mortgage Scheme and the Petitioners' contracts of service; the court found that the Petitioners applied and were separately offered by the Interested Party, mortgage loan facilities under the Respondent's Staff Housing Mortgage Scheme on different dates in 2018 and 2019.
72. The Petitioners averred that upon acceptance of the terms thereof their loans were approved, disbursed and secured by charges over the properties they purchased under the scheme. The Petitioners continued to diligently service their loans with the Interested Party under the terms and rates contained despite leaving the employment of the Respondent.15. But the Respondent has made a decision not to support the Petitioners' loans at the rate of 3% p.a. set under the scheme and advised the Interested Party as much contrary to the Respondent's Human Resource Management Policies and Procedures,



the Salaries and Remuneration Commission Circular and Regulations & Guidelines for GDC Staff House Mortgage. Vide letter dated 9th May 2022 authored by Eugenio Waweru, branch manager of the interested party's Flamingo Branch Nakuru, wrote to the petitioners' individually reading in part: "withdraw of mortgage support by GDC. Reference is made to the above subject in relation to your mortgage loan under GDC mortgage scheme. Geothermal Development Company has written to us that they will no longer support your mortgage loan at an interest rate of 3%. Kindly give us a proposal of how you will service the balance of your loan at market interest rate within 14 days of this letter," (page 222-224 of the petitioners' bundle was the letter dated 9th May 2022).

73. The Respondent contended that its decision to withdraw mortgage support was made in strict accordance with the established scheme guidelines, particularly Clause 20.2 (a) and (c), which grants the Respondent's Board the discretion to determine whether to continue supporting employees after their exit from the company and the decision was transparently communicated vide a letter dated 21st April 2022 Letter from Geothermal Development Company to KCB Bank Kenya Limited dated 21st April 2022 (see pages 108 - 109 of the Replying Affidavit) and the subsequent response from KCB Bank Kenya Limited to Geothermal Development Company dated 9th May 2022 (see page 110 of the Replying Affidavit). There was no legitimate expectation created when the Petitioners took loans under the scheme that under all circumstances they would enjoy the benefits after cessation of employment with the Respondent. To the contrary, the Petitioners acknowledged that they understood the provisions of the scheme rules part of which provided that upon cessation of employment, the Respondent had the discretion to terminate one's participation in the scheme. There was no evidence or basis to conclude that the making of the 2019 scheme rules did not accord with fair administrative action, or that the enforcement of those rules in respect of the Petitioners was done in a manner that violated the scheme rules or the law. The Petitioners' allegation regarding fair administrative action remains unproven and unmerited.
74. The mortgage facility contract clause 5.1 stated the loan interest was 3% per annum provided; "upon notice from GDC(Respondent) that the borrower could no longer benefit from the scheme the interest rate applicable shall be the commercial rate chargeable by the bank from time to time which will be subject to the prevailing central bank rate..."
75. The respondent relied on the mortgage scheme regulations of 2019 to change the terms of the interest rate of the petitioners. Clause 20.2 (a) of the scheme rules (See Page 94 of the Replying Affidavit) provides that: "...In the event of a borrower ceasing to be an employee of GDC, GDC shall within fourteen (14) inform the financial institution in writing, whether it wishes to continue supporting the (ex-staff) borrower under the terms of the scheme." Clause 20.2(c) of the Guidelines aforementioned, provides that; "The GDC Board of Directors will make the decision and give direction on GDC's ability to support the borrower. If in any case, GDC expresses its inability to support the borrower who leaves its employment, the borrower shall within fourteen days (14) days request the financial institution through a written proposal for the loan to continue being serviced under the financial institution market interest rate terms for mortgages."
76. The court doubted whether those guidelines by the Respondent as outlined above could override the enabling legal framework for the staff mortgage, being the Salaries and Remuneration Commission circular number SRC/ADM/CIR/1/13 Vol. III (128) dated 17th December 2014 on Car Loan and Mortgage Schemes for State Officers and Other Public Officers of Government of Kenya providing as follows:-

" 6. Interest Rate Charge



The rate of interest applicable to both the Car Loan and Mortgage Scheme shall be three (3%) per annum on a reducing balance for the duration of the loan.

7. Duration And Termination Of The Scheme

The duration of the scheme shall be a maximum of twenty (20) years for mortgage schemes and five (5) years for Car Loan.

Where a State Officer or Public Officer leaves public service employment for whatever reason other than disciplinary grounds, the terms of the loan remains in force and does not change for the life of the loan unless in cases of default in which case it reverts to commercial terms."

77. It was undisputed that the petitioners had not defaulted in repayment of the loans. There was no dispute that the petitioners were ex public officers. The court upheld the decision of the Court of Appeal in Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others (Civil Appeal 156 of 2016) [2024] KECA 419 (KLR) (26 April 2024) (Judgment) where the Court of Appeal analyzed at length how employees of State Parastatals qualify as public officers. It held that "officers and persons serving/working in state corporations are public officers within the meaning of Article 260 of *the constitution*"
78. The mandate of SRC is according to Article 230 (4) which provides as follows: "(4) The powers and functions of the Salaries and Remuneration Commission shall be to-(b) advise the national and county governments on the remuneration and benefits of all other public office"
79. In answer to the doubt of the court whether the regulations could overrule the SRC Circular on ex-public officers' mortgage terms by the respondent taking away the right of the said ex- officers to enjoy mortgage at same rate of 3% , the court was guided by the decision of the Court of appeal in Salaries and Remuneration Commission v National Hospital Insurance Fund, Management Board & 2 others [2024] KECA 419 (KLR) Where the court held:-

"Article 230 (1) of *the Constitution* established the SRC whose functions regarding public officers were set out under article 230 (4). The functions of the SRC are further expounded in section 11 of the SRC Act. *The Constitution* obligated the SRC to take into account principles set out under article 230 (5) when exercising its mandate and functions. No valid salary or benefit of a state or public officer, as appropriate, would ensue from a process that ignored the roles of SRC as provided by *the Constitution* and enabling statute, the SRC Act.

The giving of advice on remuneration was one of the reasons the SRC was created by *the Constitution*, 2010. The role of SRC was not cosmetic; it was mandatory. It was not only mandatory; it was to be sought and obtained before taking any action that required that advice. That advice was binding as per the requirements of article 259(11) of *the Constitution*. The trial court found that SRC's advice did not bind the 1st respondent in matters of salary and CBA. With that finding the trial court cast out SRC's constitutional duty to manage the Country's compensation bill to keep it fiscally sustainable, a constitutional prerequisite of article 230(5)."

80. It follows that the Salaries and Remuneration Commission circular number SRC/ADM/CIR/1/13 Vol. III (128) dated 17th December 2014 on Car Loan and Mortgage Schemes for State Officers and Other Public Officers of Government of Kenya providing as follows:

"6. Interest Rate Charge



The rate of interest applicable to both the Car Loan and Mortgage Scheme shall be three (3%) per annum on a reducing balance for the duration of the loan.

7. Duration And Termination Of The Scheme

The duration of the scheme shall be a maximum of twenty (20) years for mortgage schemes and five (5) years for Car Loan.

Where a State Officer or Public Officer leaves public service employment for whatever reason other than disciplinary grounds, the terms of the loan remains in force and does not change for the life of the loan unless in cases of default in which case it reverts to commercial terms." Was superior to the guidelines relied on by the respondent to change the terms of the loan interest applicable to the petitioners. The circular was binding on the respondent. There was no evidence that the SRC approved the changes to the detriment of the petitioners. The court held that Clause 20.2 (a) and(c) of the scheme rules were unlawful for being contrary to the enabling Salaries and Remuneration Commission circular number SRC/ADM/CIR/1/13 Vol. III (128) dated 17th December 2014 on Car Loan and Mortgage Schemes for State Officers and Other Public Officers of Government of Kenya . The court further held that the decision of Respondent action to implement the regulations to an adverse effect on the petitioners was unfair administrative action contrary to the provisions of Article 47 (1)of *the Constitution* to wit "(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

81. Having found violation of article 47 I find the petitioners met the threshold in Anarita Karimi case and further the petition was not a case of constitutional avoidance.

Conclusion

82. The court held that the petition was merited. The decision of the Respondent to vary the interest applicable to loans taken by the petitioners is held as unlawful and unconstitutional. Clause 20.2 (a) of the scheme rules which provides that: "...In the event of a borrower ceasing to be an employee of GDC, GDC shall within fourteen (14) inform the financial institution in writing, whether it wishes to continue supporting the (ex-staff) borrower under the terms of the scheme." And Clause 20.2(c) which , provides that; "The GDC Board of Directors will make the decision and give direction on GDC's ability to support the borrower. If in any case, GDC expresses its inability to support the borrower who leaves its employment, the borrower shall within fourteen days (14) days request the financial institution through a written proposal for the loan to continue being serviced under the financial institution market interest rate terms for mortgages." Are held as unlawful for being contrary to the provisions of the Salaries and Remuneration Commission circular number SRC/ADM/CIR/1/13 Vol. III (128) dated 17th December 2014 on Car Loan and Mortgage Schemes for State Officers and Other Public Officers of Government of Kenya.
83. The prayer for gratuity was withdrawn the monies having been settled.
84. The court enters judgment for the petitioners against the respondent as follows:-
- a) A Declaration is issued that the actions and decision of the Respondent of withdrawing support from the Petitioners' mortgage loans with the Interested Party under the Respondent's Staff House Mortgage Scheme violated the Petitioners' rights under 47 of *the Constitution* of Kenya, 2010;



- b) A Declaration that the Respondent's action or decision that it will no longer support the Petitioners' mortgage loans with the Interested Party is unfair, unreasonable, unlawful therefore void;
- c) An order of certiorari is issued quashing the Respondent's the decision of the Respondent that it will no longer support the Petitioners' mortgage loans under the Geothermal Development Company (GDC) Staff House Mortgage Scheme at an interest rate of 3% per annum;
- d) An order prohibiting and restraining the Respondent, its employees, agents or any person acting under its instructions, including the Interested Party from varying, adjusting, increasing or reviewing the interest rates on the Petitioners' mortgage loans under the Geothermal Development Company (GDC) Staff House Mortgage Scheme from 3%per annum for the life of the loans to 13% per annum or any other prevailing market or commercial rates as long the petitioners do not default in their loans is issued ;
- e) cost of the petition

85. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF JANUARY , 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Petitioners :- Pamba

Respondent: Okalo h/b Amol

Interested party- no appearance

