



Republic v Inspector – General of State Corporations & 2 others (Judicial Review Application E072 of 2024) [2025] KEELRC 826 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 826 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION E072 OF 2024**

**B ONGAYA, J
MARCH 14, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

INSPECTOR – GENERAL OF STATE CORPORATIONS 1ST RESPONDENT

PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The judicial review proceedings were filed herein for the applicant by the notice of motion dated 20.12.2024 and through Miller & Company Advocates. The applicant purports to pray for certiorari to remove and quash the 1st respondent’s decision conveyed in the letter dated 08.10.2024 being a surcharge certificate of Kshs.2,761.236.00 and further, an order of prohibition to prohibit the 1st respondent from issuing any other or further decision in respect of the surcharge.
2. Learned Principal Litigation Counsel Mr.Ernest Kioko filed a notice of preliminary objection dated 21.01.2025 for the 1st and 3rd respondents. It was urged that the suit is incompetent and be struck out upon the following grounds:
 - a. That the application dated 20.12.2024 is an abuse of court process and incompetent because it raises issues that have already been dispensed with by the State Corporations Appeals Tribunal and is res judicata.
 - b. The order of prohibition cannot issue whereas it seeks to stop that which was already done as the surcharge was confirmed on 08.11.2022 per section 21(2) of the [State Corporations Act](#), Cap 446 hence the order cannot issue.



3. The 2nd respondent filed grounds of opposition dated 20.01.2025 and urged preliminary points as follows:
 - a. The ex-parte applicant should have first lodged an appeal to the State Corporations Appeals Tribunal against the decision of the 1st respondent by dint of section 21 of the [State Corporations Act](#) and, before moving the Court. Further by reason of section 23 of the Act, the Court may only entertain an appeal against the decision of the tribunal. The application should fail for want of exhaustion of statutory procedure and the application offends section 9(2) of the [Fair Administrative Action Act](#) and attendant rules.
4. The applicant and the 1st and 3rd respondents filed submissions on the points of the preliminary objection. The Court returns as follows.
5. First, section 21 of the [State Corporations Act](#) provides as follows:
 - (1) Any person who is aggrieved by a disallowance or surcharge may, within thirty days of the date of the certificate of surcharge, appeal by written memorandum to the Tribunal.
 - (2) The Tribunal shall, on appeal, have power to confirm, vary or quash the decision of the Inspector-General (Corporations), and to remit the case to the Inspector-General (Corporations) with such directions as the Tribunal thinks fit for giving effect to the decision on appeal.
6. It is urged for the applicant that the State Corporations Tribunal is not vested with the power to determine whether the Acting Inspector General has acted within or outside jurisdiction. It was submitted that by issuing a certificate of surcharge after the expiry of the six-month statutory period the 1st respondent acted unlawfully. Thus, the statutory appeals procedure does not operate to impair the Court's jurisdiction.
7. For respondents it was submitted that the 1st respondent has power to surcharge per section 19 of the Act and the applicant can appeal per statutory provisions.
8. The applicant has stated in paragraph 22 that she received the surcharge certificate dated 08.10.2024 and she now wishes to appeal the decision of the 1st respondent to the State Corporations Appeals Tribunal but the Inspector General of State Corporations has been acting for more than six months contrary to provisions of [Public Service Commission Act](#). It is urged that in the circumstances, the Inspector General of State Corporations cannot undertake the surcharge function as is illegally in office and letter of certificate of surcharge dated 08.10.2024 is illegal.
9. The Court has considered the parties' respective cases. By the applicant's own position as cited above, the applicant knows that the statutory appeal procedure is the proper manner to attack the surcharge decision. She then introduces an extraneous issue about illegality of tenure of the Acting Inspector General but which appears not to relate to her opportunity to invoke the statutory appeal procedure. The Court considers that the relationship between the legality of the tenure of the Acting Inspector General and the applicant's discretion to invoke the statutory appeal procedure amounts to a zero correlation.
10. It is therefore the Court's finding that the statutory procedure applies and the only issue in dispute is the applicant's challenge to the surcharge decision. The Court finds that the availability of the statutory appeals procedure, in absence of any other material, operates as an absolute bar to the instant judicial review proceedings. The same is found to pass the test for a proper preliminary objection – one based



on undisputed pleaded facts and raising a pure point of law. The preliminary objection will be upheld upon that ground.

11. Second, the Court finds that whether the State Corporations Appeals Tribunal has ever determined the appeal by the applicant against the impugned surcharge decision is disputed by the applicant. The preliminary objection based upon that ground will collapse as not passing the test for a proper preliminary objection. The submission for the applicant in that respect is upheld. Res judicata has not been established at all.
12. Third, the issue whether a prohibitory order can issue may only be determined after the full hearing of the application and evaluating all matters of fact and evidence. Whether there is anything left of the impugned surcharge decision that can be arrested by an order of prohibition is to be determined by weighing evidence and circumstances of the case and which are not said to be not in dispute. Accordingly, that ground in the notice of preliminary objection will collapse as not passing the test of a pure point of law based on undisputed pleaded facts.
13. The Court has considered the margins of success and the history of the case and each party to bear own costs of the application.

In conclusion the preliminary objection is upheld upon the ground of want of invoking the prescribed statutory appeal procedure and with orders:

- a. The judicial review proceedings herein are struck out.
- b. Each party to bear own costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 14TH MARCH, 2025**

BYRAM ONGAYA

PRINCIPAL JUDGE

Page 2 of 2

