



**Union of Kenya Civil Servants v Attorney General & 2 others;
Public Service Commission & 10 others (Interested Parties) (Petition
E026 of 2025) [2025] KEELRC 1618 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1618 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E026 OF 2025**

B ONGAYA, J

MAY 29, 2025

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 19, 20, 21, 22, 23, 24, 25, 27, 28, 35, 41, 47,
73(1) &(2), 159, 165(3) (B), 232, 258 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 3(1), 10(1), & (2), 20, 21,
22, 27, 35, 41, 47, 73(1), &(2), AND 232 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF CONTRAVENTION OF SECTIONS 4(1)(B)
AND 5(1) (A) (III) OF THE ACCESS TO INFORMATION ACT OF 2016**

**IN THE MATTER OF INFRINGEMENT OF RIGHTS AND
FUNDAMENTAL FREEDOMS OF 20 STATE COUNSELS**

**IN THE MATTER OF IRREGULAR, ILLEGAL & UNCONSTITUTIONAL PROMOTION
AND APPOINTMENT OF PRINCIPAL STATE COUNSEL IN THE OFFICE OF THE
ATTORNEY GENERAL & DEPARTMENT OF JUSTICE MADE ON 26TH NOVEMBER 2024**

**IN THE MATTER OF RULES B4, 10, 11, & 13 OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**IN THE MATTER OF ALLEGED BREACH OF THE PROVISIONS OF THE
OFFICE OF THE ATTORNEY GENERAL AMENDMENT ACT, CAP 6A**

**IN THE MATTER OF ALLEGED BREACH OF THE PROVISIONS
OF THE FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**IN THE MATTER OF ALLEGED BREACH OF THE PROVISIONS
OF THE LEADERSHIP AND INTEGRITY ACT, 2012**

BETWEEN

UNION OF KENYA CIVIL SERVANTS PETITIONER

AND



ATTORNEY GENERAL 1ST RESPONDENT
THE ADVISORY BOARD TO THE OFFICE OF THE ATTORNEY
GENERAL 2ND RESPONDENT
THE SOLICITOR GENERAL 3RD RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY
MUTEGI DENNIS NJIRU INTERESTED PARTY
NJAGI DENNIS NJIRU INTERESTED PARTY
KIRUGU PATRICIA KAWIRA INTERESTED PARTY
RUTO IMELDA CHEPKOSKEI INTERESTED PARTY
NJAGI BENSON KAMUNGE INTERESTED PARTY
OTIENDE IBRAHIM EMALI INTERESTED PARTY
MULAMA ANNE ALUCKY INTERESTED PARTY
LETTING CLEOPHAS KIPCHIRCIR INTERESTED PARTY
SEKO BRENDA NANCY INTERESTED PARTY
GODIA EZEKIEL MUDAVADI INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Thursday 29th May, 2025)

JUDGMENT

1. The petitioner is a duly registered trade union. I filed the petition dated 21.02.2025 through Roba & Associates Advocates. The petitioner prayed for the following reliefs:
 - a) A declaration that the Respondents action and /or omission in excluding the 20 State Senior Counsels from promotion to the position of Principal State Counsel (CSG7) violates Article 10,20,21,27,35,41,47,232, and 236 of the constitution of Kenya 2010 and are, therefore unconstitutional, null and void.
 - b) A declaration that the Respondents' action and /or omission in excluding the 20 State Counsels from the promotions process to Principal State Counsel (CS7) is discriminatory and violates the said 20 Senior State Counsels Constitutional rights as provided for under Article 20,21,27,25,41,47,232and 236.
 - c) A declaration that the 20 Senior State herein are entitled to promotions from the position of Senior State Counsel (CSG8) to the position of principal State counsel I(CSG7).
 - d) A declaration that the 20 Senior State Counsel are entitled to the salary and attendant privileges enjoyed or earned in position of principal state counsel (CSG7) from the date of promotion of the 2nd to the 11th interested Parties herein, together with the full benefits accrued during the period of nonpromotion.



- e) An Order directing the Respondents to promote the 20 Senior State Counsels to the position of Principal State Counsel (CSG 7) with immediate effect.
 - f) An Order directing the Respondents herein provide the 20 Senior State Counsels with written reasons and/or justifications for the impugned exclusion from promotion to the position of Principal State Counsel (CSG 7).
 - g) A Conservatory Order be issued restraining the Respondents, whether by themselves, their agents, servants, or any other persons acting under their authority or supervision, from terminating, suspending, or otherwise altering the employment status of the Senior State Counsels, or in any manner taking adverse actions against the 20 Senior State Counsels herein on account of Petitioner on their behalf.
 - h) An award of damages for discrimination suffered by the 20 Senior State Counsels because of the exclusion from the promotion process by the Respondents herein and costs.
2. The petition is based upon the supporting affidavit of Tom Mboya Odede, Secretary General of the Union and the following facts:
- a. The 2nd to 11th interested parties and other 20 State Counsels listed in paragraph 9 of the petition were initially recruited and appointed as State Counsel II (CSG 9) by the appointment letters dated 05.06.2020. They were deployed to various duty stations on 25.08.2020. The 2nd to 11th interested parties and the other 20 members of the cohort are all represented by the petitioner trade union.
 - b. In September 2021 all the said members of the cohort were promoted to Senior State Counsel (CSG 8) in recognition of their performance and service. They have all served in that grade for about three years and six months.
 - c. On 17.10.2024 the 2nd Respondent, acting through the 1st Respondent, approved promotions for various cadres within the Office of the Attorney General, aiming to address stagnation among staff. The promotions were designed to boost morale, improve career progression, and strengthen leadership within the office. With respect to the cohort in issue, the 2nd to 11th interested party were promoted to the grade of Principal State Counsel (CSG 7) in the exclusion of the listed 20 members of the cohort who were not so promoted. The union wrote the letter dated 28.11.2024 seeking clarification and a review of the decision but the respondent have failed to respond. By letter dated 13.01.2025 the petitioner's advocates wrote to the respondents demanding cessation of the discrimination.
 - d. Clause B.27 of the Public Service Commission Human Resource Policies and Procedures Manual, 2016 states that promotions to posts within a common establishment should in principle cover the first two grades at the entry level, subject to satisfactory performance. Thus all members of the cohort including the 20 members not promoted ought to have been promoted alongside the 2nd to 11th interested parties. The exclusion of the 20 members contravened the human resource Manual and Article 27 of *the Constitution* of Kenya on equality and freedom from discrimination. All members of the cohort possessed same academic qualifications and professional training as well as experience or years of service. They have also undertaken in-service trainings and they all equally deserved to be promoted. There is no shown performance appraisal applied thus manifestation of possible favoritism, bias and discrimination.



- e. The 20 members of the cohort not promoted have suffered emotional distress and frustration. They feel undervalued and discriminated. They have been denied opportunities for career advancement and leadership roles attached to the promotions. Principles of meritocracy in the *Public Service (Values and Principles) Act*, 2015 on highest ethics and integrity for public officers have been breached.
 - f. In September
3. The 1st, 2nd, and 3rd respondents filed the replying affidavit of Gitari Silas Mugambi, Director of Human Resource in the Office of the Attorney General, sworn on 06.03.2025. it was filed through Chief Litigation Counsel Mr. Oscar Eredi for the Attorney General. It was urged as follows:
- a. The Office of the Attorney General was delinked from mainstream public service removing the officers serving in the Office from the purview of the Public Service Commission.
 - b. Section 21(1) of the Office of the Attorney General Act empowers the Attorney-General who may, in consultation with, and on the recommendation of the Advisory Board (established in section 20A of the Act) to appoint such number of State Counsel as may be necessary for the proper and efficient discharge of the functions of the Office.
 - c. After delinking the office of the Attorney General from the main stream public service, the Attorney General and the Advisory Board carried out a thorough review of the office and its practices including the human resource function and established that many of its officers had stagnated in certain job groups and others had been serving in acting capacity for very long periods of time.
 - d. The review of the establishment revealed that there were vacancies in the grades of the Senior Deputy Solicitor General as well as Deputy Solicitor General in comparison to the approved establishment. The review also revealed that several Heads of Department had been serving in acting capacities of more than the stipulated six (6) months and some had even served for up to seven (7) years while other senior officers who were eligible for this position had served in the same job group for more than 10 years a situation which was unwarranted.
 - e. The state of affairs was uncalled for, unnecessary, unfair and punitive to the concerned officers and was affecting their morale, reducing efficiency and effectiveness in delivery of the offices constitutional and statutory mandates and this needed to be remedied.
 - f. Guided by the staff establishment approved by the Public Service Commission vide a letter dated 31st August 2020, the Advisory Board held a meeting on 17th October 2024 where it was discussed and resolved that officer be promoted as communicated in the Internal Memo dated 26th November 2024.
 - g. While undertaking the said the promotions, the Attorney General and the Advisory Board used a well-considered criteria and was guided by the Human Resource Policies and Procedures Manual, May, 2016 and the Public Service Commission Regulations 2020. In addition, the office of the Attorney General and the Advisory Board adopted the following criteria: a. Existing Vacancies; b. Merit; c. Date and the nature of current appointment; d. Date of first appointment; e. Date of birth; f. Directives of the then Cabinet Secretary, Ministry of Public Service, Youth and Gender Affairs, vide Circular Ref No. MPSYG/DPSM/HRM/4/1/1 Vol. III dated 17th July 2017.
 - h. The decision of the Advisory Board has since been implemented and letters issued to the promoted officers who are discharging their functions. The interested parties were promoted



to the various cadres in recognition of their service and performance. These promotions marked an important milestone in their careers and indicated their potential for upward mobility within the Office of the Attorney General. They have demonstrated professionalism and commitment in fulfilling their duties.

- i. The 2nd Respondent, herein the Advisory Board Office of the Attorney-General approved promotions for various cadres within the Office of the Attorney General, aiming to address stagnation among staff. The promotions were designed to boost morale, improve career progression, and strengthen leadership within the office.
 - j. The Respondents submit that the decision not to promote the 20 Senior State Counsels to Principal State Counsel was not discriminatory. We submit that Promotions within the public service are governed by strict legal frameworks, particularly the Public Service Commission Human Resource Policies and Procedures Manual (2016), which outlines the criteria for promotions, including performance appraisals, professional competence, and departmental needs.
 - k. It is important to state that the promotions to the position of Principal State Counsel were in the first instance done taking into consideration the available vacancies as per the approved structure. The position of Principal State Counsel had an authorized establishment of 170 posts, while there were only 88 individuals in those roles, resulting in a discrepancy of 82 positions. Furthermore, an additional 63 vacancies emerged after the promotion of officers from the position of Principal State Counsel to that of Deputy Chief State Counsel. Following the promotions, the total number of vacancies reached 145. On the other hand there were 236 officers in the position of Senior State Counsel, grade CSG '8'/JG N. of these, 199 officers fulfilled the minimum qualifications, however there were only 145 vacancies available.
 - l. In order to effect the promotions to the positions available and having determined that the succession management principle would be used, in that there would be no interviews for the position due to the fact that the office was facing big shortage of staff as well as the fact that there was persistent stagnation, the office adopted an objective promotions criteria to be used since the number of qualified officers exceeded the available vacancies. The criteria used was merit-based, objective, fair, transparent, and verifiable, as a result, the following criteria was established.
 - m. The 20 members of the cohort not promoted lacked a legitimate expectation to be promoted because no legitimate expectation can exist against a provision of law, in the instant case, no promotions could be made beyond the number of vacancies in the higher grade. Under section B.29 the criteria use in promotions included availability of vacancies.
4. Mr Ogosso Advocate for the 1st interested party submitted that a similar position was taken as in the related case Dr.Magare Gikenyi B & 2 others –Versus- Attorney General & 4 others and Wachira Njeri Mwangi & 226 other interested parties ELRC Petition E202 OF 2024 at Nairobi, Thus no submissions were file for 1st interested party. The other interested parties did not enter appearance or participate in the proceedings.
 5. Final submissions were filed for the parties. The Court has considered the material on record and returns as follows.
 - a. The Court returns that the petitioners have established that indeed the right of equality before the law and freedom from discrimination per Article 27 of *the Constitution* was violated. The respondent has confirmed that the position of Principal State Counsel was competitive. Thus



they adopted a methodology of comprehensive review of the qualifications and suitability of the cohorts for promotion to Principal State Counsel. First no report of the alleged or purported comprehensive review of qualifications has been exhibited. Further, the criteria for promotions under the *Public Service Commission Act, 2017* applied to promotions and it is not shown to have been invoked. Thus the Court finds that the respondent adopted a strange promotional procedure which is also not demonstrated to have been undertaken because no scoring or assessment or review report was exhibited. As already found it disregarded the clear and applicable provisions of the *Public Service Commission Act, 2017* thus:

“ 36. Criteria for appointment and promotion

- (1) In selecting candidates for appointment or promotions, the Commission or other lawful appointing authority shall have regard to—
 - (a) merit, equity, aptitude and suitability;
 - (b) the prescribed qualifications for holding in the office;(c)the efficiency of the public service;
 - (d) the provable experience and demonstrable milestones attained by the candidate; and,
 - (e) the personal integrity of the candidate.
- (2) For the purposes of this section, "merit" in regard to a person means, the person—
 - (a) has the abilities, aptitude, skills, qualifications, knowledge, experience and personal qualities relevant to the carrying out of the duties in question;
 - (b) has potential for development; and(c)meets the criteria set out in subsection (1).
- (3) In making appointments or promotions, the Commission or authorized officer are bound by the constitutional principles which require that—
 - (a) no applicant or candidate is discriminated on any ground;
 - (b) no one gender constitutes more than two thirds of those appointed;
 - (c) at least five percent of the appointments constitute persons with disabilities;
 - (d) there is proportionate representation of all ethnic communities; and.
 - (e) the youth are appointed.



- (4) For purposes of ensuring representation of the diverse Kenyan Communities in the public service, the Commission or authorized officer shall, where necessary, adopt affirmative action measures in line with Articles 27(6) and 56(c) of *the Constitution*.
- (5) Where the Commission or other authorized officer prescribes a standard application form for submitting applications for employment, the Commission or other lawful appointing authority shall ensure that the form meets the requirements of this Act.
- (6) Where an expatriate is to be appointed to a position that falls within the Commission's jurisdiction, the Commission shall approve such an appointment.
- (7) The Commission shall approve the appointment of an expatriate only where the expertise sought is not locally available.

37. Advertisement of vacancies

- (1) Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite applications by advertising the vacancy in the Commission's website, at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.
- (2) The Commission or an authorised officer shall ensure that an invitation for application does not discriminate against any person.
- (3) The advertisements in subsection (1) shall be conducted in an efficient and effective manner so as to ensure that the applicants, including persons who for any reason have been or may be disadvantaged, have an equal opportunity to apply for the advertised positions.
- (4) An advertisement inviting applications to fill any vacancy in a public office shall provide for—
 - (a) the title and rank of the public office;(b)the public body in which the office is tenable;
 - (c) the background and context of the work, where necessary;
 - (d) the terms of employment;
 - (e) the applicable remuneration including salary, allowances and other benefits;



- (f) the prescribed qualifications applicable, including any desired previous achievements;(g)the core duties of the office;
- (h) the expected deliverables of the office;
- (i) the supervision, accountability and reporting arrangements;
- (j) any added advantage applicable;
- (k) the mode and deadline of transmitting the application;
- (l) any consideration that may occasion disqualification; and,
- (m) any consideration of equity or affirmative action.”

- b. The Court finds that the petitioner was misconceived in urging that the promotion to Principal State Counsel was with respect to a common cadre position not requiring advertisement. Indeed in common cadre establishment, one or more sequential grades may be established as one meaning that an employee in such establishment is promotable to higher grade without need of a vacancy. However, the claimant urged that it was the first two entry positions that could be so established. The evidence was that the cohort members had joined at initial grade and then promoted, all of them to a second grade – in the Court’s findings, thereby exhausting the two grades in the common establishment. It is that, as already found, the position ought to have been advertised as prescribed in the earlier quoted provisions of the *Public Service Commission Act, 2017*. The Court returns that while serving officers indeed have a legitimate expectation to be promoted according to the prevailing public service human resource career guidelines or schemes of service and the applicable constitutional and statutory safeguards, *the Constitution* and the *Public Service Commission Act, 2017* impose the criteria for appointment and promotion entailing open competition. It is that the serving officers will obtain priority in the sense that in promotional vacancies, they would readily possess the required or prescribed qualifications. The *Public Service Commission Act, 2017* and the Constitutional prescription do not appear to provide for appointments or promotions other than by open competitive recruitment or selection. That is the essence of particularly, section 36(3) & (4) of the Act as reproduced earlier in this judgment.
- c. For avoidance of doubt, in a judgment also being delivered today in *Dr. Magare Gikenyi B & 2 others –Versus- Attorney General & 4 others and Wachira Njeri Mwangi & 226 other interested parties ELRC Petition E202 OF 2024* at Nairobi, the Court found and ordered inter alia “14) The declaration be and is hereby issued that the amendment of the Office of Attorney General Act vide Statute Law (Miscellaneous Amendments) Act 2024 *Act No. 3 of 2024* which transferred some powers of the 3rd respondent (PSC) to the Office of Attorney General is unconstitutional, null and void.” The Court finds that the declaration together with other findings and orders therein would hold and apply to the instant case accordingly.
- d. The parties are in a recognition and collective agreement and each will bear own costs of the petition.



- e. While discrimination and other cited violations of the Bill of Rights has been established for the petitioner, parties are continuing in the employment relationship and it is, in the findings of the Court, sufficient that parties' rights and obligations are declared as meeting full ends of justice. In that consideration award of compensation for the violation of rights is declined in the interests of proportionality in the outcome of the instant judgment in the immediate and long run.

In conclusion and in view of the findings in this judgment, the petition is hereby determined with orders as follows:

1. The declaration that the Respondents' action and omission in excluding the 20 Senior State Counsel from promotion to the position of Principal State Counsel (CSG7) violates Article 10,20,21,27,35,41,47,232, and 236 of *the Constitution* of Kenya 2010 and are, therefore unconstitutional, null and void.
2. The declaration that the Respondents' action and omission in excluding the 20 State Counsel from the promotions process to Principal State Counsel (CS7) is discriminatory and violates the said 20 Senior State Counsel constitutional rights as provided for under Article 20,21,27,25,41,47,232and 236.
3. The declaration that the 20 Senior State Counsel herein are entitled to promotions from the position of Senior State Counsel (CSG8) to the position of Principal State counsel l(CSG7) in an open competitive process in accordance with relevant provisions of *the Constitution*, *Public Service Commission Act* and the regulations and Commission's policies and procedures thereunder.
4. The order hereby issued restraining the Respondents, whether by themselves, their agents, servants, or any other persons acting under their authority or supervision, from terminating, suspending, or otherwise altering the employment status of the Senior State Counsels, or in any manner taking adverse actions against the 20 Senior State Counsels herein on account of the instant Petition instituted on their behalf.
5. For the full appreciation and impact on circumstances of the affected officers and parties subject of this petition, this judgment be read together with the judgment also delivered today in Dr.Magare Gikenyi B & 2 others –Versus- Attorney General & 4 others and Wachira Njeri Mwangi & 226 other interested parties ELRC Petition E202 OF 2024 at Nairobi, where the Court found and ordered inter alia "14) The declaration be and is hereby issued that the amendment of the Office of Attorney General Act vide Statute Law (Miscellaneous Amendments) Act 2024 *Act No. 3 of 2024* which transferred some powers of the 3rd respondent (PSC) to the Office of Attorney General is unconstitutional, null and void."

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 29TH MAY, 2025

BYRAM ONGAYA

PRINCIPAL JUDGE

