



**Gicheha v Nairobi Water and Sewerage Co. Ltd (Petition
E083 of 2022) [2024] KEELRC 1984 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1984 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E083 OF 2022**

JK GAKERI, J

JULY 30, 2024

BETWEEN

KAGIRI MUKUNDI GICHEHA PETITIONER

AND

NAIROBI WATER AND SEWERAGE CO. LTD RESPONDENT

JUDGMENT

1. The Petitioner filed this Petition on 27th May, 2022 challenging his acting as Regional Manager Informal Settlement Region from 2018 to the present, the Internal advertisement and Re-advertisement dated 14th January, 2021 and 17th November, 2021 respectively and circular dated 13th May, 2021.
2. The gravamen of the Petitioner's case is that the Respondent advertised and shortlisted candidates for the position of Regional Manager Informal Settlement Region, a position he held in acting capacity since March 2018 and the Petitioner was not among those shortlisted for the position.
3. The Petitioner argues that having held the position since 2018, he ought to be the substantive holder by dint of the law and the Respondent's advertisement, shortlisting and appointment of another person would be a breach of his constitutional right to fair labour practice and fair administrative action.
4. In his Supporting Affidavit sworn on 27th May, 2022, the Petitioner deposes that he joined the Nairobi County Council in 1990 and was seconded to the Respondent when it was incorporated in 2005 as an Engineer and Technical Co-ordinator and in January 2012 was appointed the Acting Operations and Maintenance Manager and acted until December 2016 with no acting allowances nor confirmation. Allowances were paid in February 2022.
5. That in December 2016, the Petitioner was seconded to the Northern Collector Tunnel Project as the Respondent Engineer and in March 2018 as Regional Manager Informal Settlements to date.



6. The Petitioner avers that all Managers are at the same pay grade but he has been earning less by reason of being in an acting capacity.
7. It is the Petitioner's case that on 14th January, 2021, the Respondent placed an internal advertisement for the position of Regional Manager Informal Settlements Region and one of the requirements was a Master Degree which according to the Petitioner was intended to exclude him and was contrary to the Public Service Commission (herein after PSC) Guidelines and Legal Opinion of the Attorney General.
8. That he applied for the position but was not shortlisted and wrote to the Director Human Resource and Administration on 29th March, 2022 which was unresponded to and although the recruitment was halted, the position was re-advertised on 17th November, 2022 and once again the Petitioner wrote to the Managing Director who responded that the Masters Degree was provided for by the Respondent's Competency framework, the Attorney General's legal opinion applied to mainstream public service and acting can be for a maximum of 6 months or as determined by the appointing Authority.
9. The Petitioner deposes that by letter dated 10th February, 2022, he wrote to the Respondent's Managing Director requesting for clarification of the response dated 13th January, 2022 and a copy of the Respondent's Competency framework but the letter elicited no response.
10. According to the Petitioner, Respondent's Director and Managers have held office without a first degree and doubts the existence of a competency framework alleged by the Managing Director in his letter.
11. The shortlisted candidates were published in a circular dated 13th May, 2022.
12. The Petitioner alleges that he has been treated unfairly and discriminated by the insertion of a qualification not prescribed by the Respondent's job evaluation manual or the Government and failure to pay acting allowance on time and non-payment of the requisite remuneration of the position and was loosing a sum of Kshs.117,500/= per month.
13. The Petitioner alleges that the Respondent has violated the provisions of Section 3(1), 41 and 47 of the Constitution of Kenya, 2010. The relevant particulars are however not explained.
14. The Petitioner prays for;
 - i. A declaration that refusal by the Respondent to pay the Petitioner full remuneration for the position of Operations and Maintenance Manager (2016 – 2021) and Regional Manager Informal Settlement (2018 – present) is a violation of the Petitioner's right to equal remuneration for equal work or work of equal value, violation of his right to freedom from servitude and right to human dignity and self-worth.
 - ii. A declaration that causing the Petitioner to serve as acting Manager Operations and Maintenance (2012 – 2016) and Regional Manager Informal Settlement (2018 – present) beyond the lawful period amounted to constructive confirmation of the Petitioner as the substantive holder of the respective offices at the respective times.
 - iii. A declaration that the Respondent violated the Petitioner's right to legitimate expectation by not confirming or appointing him as its Regional Manager Informal Settlement.
 - iv. An Order for compensation of special damages at the rate of Kshs.117,500/= per month as at the date of filing of the Petition and applied as per the salary schedule since 2012 and which shall keep increasing until payment in full and more particularised under paragraph 17.



- v. An order for general damages for discrimination, violation of the Petitioner's right to human dignity and self-worth, fair labour practices, fair administrative action and freedom from servitude.
- vi. A permanent injunction restraining the Respondent from taking the Petitioner back to a position which is lower than his current position of Regional Manager Informal Settlements (JG 3) or victimizing or treating the Petitioner unfairly or account of this Petition.
- vii. An order of Judicial Review in the form of certiorari to bring into this court and quash the decision contained in the Respondent's internal Advertisement and Re-Advertisement dated 14th January, 2021 and 17th November, 2021 respectively, circular dated 13th May, 2022 to the extent that they deal with the position of Regional Manager Informal Settlement Region.
- viii. Costs of the Petition.
- ix. Interest at court rates on backdated underpayment from the date they fell due to the date of payment in full.
- x. Any other or further relief that this court may deem appropriate to meet the ends of justice.

Respondent's case

- 15. By a Replying Affidavit sworn by Mr. Titus Tuitoek on 5th March, 2024, the affiant deposes that he is the Human Resource Manager of the Respondent Company.
- 16. The affiant admits that the Petitioner was appointed Acting Regional Manager Informal Settlement Region on 8th March, 2018 and took up the position.
- 17. The affiant deposes that acting allowance was paid to the Petitioner pursuant to the provisions of Clause 6.3 of the Respondent's Human Resource Policy and Procedures Manual (herein after Human Resource Manual or HR Manual).
- 18. That on 20th March, 2019, the Petitioner was transferred to the Environment & Compliance Department as Acting Manager and continued drawing acting allowance and was transferred back to Informal Settlement Region on 6th May, 2019 in accordance with the Respondent's Human Resource Manual.
- 19. That the appointment of the Petitioner to the position of Acting Manager-Informal Settlements Region was not competitive recruitment process and as such he cannot be confirmed as the substantive holder of the position according to the Human Resource Manual hence the advertisement dated 17th November, 2021.
- 20. The affiant states that the requirements were arrived at on the basis of the competency requirements for the position.
- 21. That the advertisement fell within the Respondent's Human Resource Manual which charged the Managing Director with the mandate of setting out the requirements of the recruitment process and the Petitioner's expectation that the requirements would be tailored to suit him are untenable as it would violate *the Constitution* and the HR Manual.
- 22. That the requirement of a Master Degree is not new and has been the part of the position as approved by the Director Human Resource and Administration Services in the job description document approved in November 2008.



23. That a Masters Degree was required for all Managers Grade 3.
24. That the Attorney General's opinion is not a judicial decision and is not binding on the Respondent.
25. The affiant deposes that the Petitioner is attempting to frustrate the Respondent's recruitment process after realising that he does not meet the requirements for the position and the court cannot be used to influence the recruitment process.
26. It is the Respondent's case that it has expended efforts to appoint a substantive holder of the position of Regional Manager Informal Settlement Region as per its HR Manual.
27. That the Petitioner has been adequately remunerated throughout his service and has been receiving an acting allowance of 25% and assertion of servitude is untrue and was paid acting allowance for the period 2012 – 2016 and is not holding the office substantively to claim the Kshs.117,500/= as lost income and there is no discrimination.
28. That for a legitimate expectation to arise, there must have been an express, clear and unambiguous promise and none was given in this case for an expectation to arise.
29. The affiant deposes that quashing the Respondent's advertisement and circular would be an interference with the Respondent's performance of internal human resource functions and no case for intervention had been made as neither the Constitution nor the HR Manual has been violated.

Petitioner's submissions

30. As regards the HR Manual, counsel cited the decisions in Susan Khakasa Oyatshi V Judicial Service Commission (2022) eKLR where the court held that the HR Manual binds both the employer and employee.
31. Reliance was also made on the decision in Edah Cherono Maiywa V University of Nairobi Enterprises & Services Ltd Cause No. 273 of 2019 on the binding nature of the HR Manual or Policy to urge that the Respondent's HR Manual is an internal guide with a statutory underpinning and the Respondent was bound by its terms.
32. Counsel further submits that contrary to the Respondent's Managing Director's view, the Respondent is a public entity subject to the public regulatory framework operative in the public service and was thus bound by the PSC Circular dated 11th March, 2020 on Review of Requirements for Promotion of Senior Officers in the Civil Service.
33. That the long acting period was an unfair labour practice as held in Kenya Shoe and Leather Workers Union V Slapper Shoe Industries (2015) eKLR and Silas Kaumbuthu Mbutura V Meru Central Dairy Co-operative Union Ltd (2015) eKLR.
34. In the latter case, the court awarded damages for breach of the right to fair labour practices.
35. Counsel urges that the Respondent has confirmed substantive positions to the Petitioner's colleagues of equal status who have acted for a lesser duration which amounts to direct discrimination under Article 27(1) of the Constitution and Section 5(5) of the Employment Act, 2007.
36. That the Respondent's refusal to avail a copy of the competency framework violated the Petitioner's right of access to information under the Constitution and the Access to Information Act, 2016.



Respondent's submissions

37. On violation of rights, counsel for the Respondent submits that the Respondent acted in consonance with its HR Manual which binds both parties and specifically on acting appointments under Clause 6.3 and the Respondent has discretionary authority to determine the period an employee can hold an office in acting capacity and in any case the Petitioner was acting on the basis that the position would be filled competitively as there is no automatic confirmation after the 6 months and was paid an acting allowance of 25% of his basic salary.
38. Counsel urges that breach of the right to fair labour practices and fair administrative action has not been pleaded with reasonable precision as held in *Anarita Karimi Njeru V Republic (No. 1) (1979)* eKLR, though violation of constitutional rights have been pleaded.
39. Counsel relies on the sentiments of the court in *Leonard Otieno V Airtel Kenya Ltd (2018)* eKLR to urge that the Petition is unsubstantiated and courts are not supposed to interfere with employer's right to perform internal human resource functions as held in *Kenya Plantation and Agricultural Workers Union V James Finlay (K) Ltd (2013)* eKLR and *Geoffrey Mworira V Water Resources Management Authority & 2 others (2015)* eKLR unless the employer is in contravention of the law or *the Constitution*.
40. Concerning legitimate expectation, counsel submits that an acting appointment cannot be the basis of a legitimate expectation as it is dependent on the HR Manual.
41. That the requirements of a legitimate expectation were articulated by the Supreme Court of Kenya in *Communication Commission of Kenya & 5 others V Royal Media Services & 5 others (2014)* eKLR namely;
 - i. Express, clear and unambiguous promise by the public authority.
 - ii. Expectation must be reasonable.
 - iii. Representation was lawful and made by the competent authority.
 - iv. There cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.
42. Counsel for the Respondent submits that the Petitioner's claim for legitimate expectation cannot arise.
43. Counsel urges that the terms of appointment were clear that the appointment was subject to the position being filled competitively substantively.
44. Reliance was also made on the sentiments of Rika J. in *Teresa Carlo Omondi V Transparency International Kenya (2017)* eKLR on legitimate expectation to urge that the burden lay on the Petitioner who has not demonstrated a rational and objection basis for the expectation.
45. As regards the reliefs sought, counsel urges that the claim for Kshs.117,500/= per month from 2012 has not been proved as held in *Wakim Soda Ltd V Sammy Anitos (2017)* eKLR, *Total Kenya Ltd V Janevams Ltd (2015)* eKLR, *Capital Fish Ltd V Kenya Power & Lighting Co. Ltd (2016)* eKLR and *Manyinsa V Lavington Security Ltd (2023)* eKLR on proof of actual loss.
46. That the acting allowance for 2012 – 2016 was paid and in any case the claim is statute barred by virtue of Section 90 of the *Employment Act, 2007*.
47. That the Petitioner waived his right by applying for the position and ought to have come to court before applying.



Analysis and determination

48. It is common ground that the Petitioner was and still remains an employee of the Respondent.
49. It is equally not in contest that the Petitioner was appointed as acting Regional Manager Informal Settlements Region on 18th March, 2018 and the internal memo of appointment neither mentioned the duration of the appointment nor payment of acting allowance.
50. Notably, the Petitioner had previously acted as Operations and Maintenance Manager from January 2012 to December 2016 but was not paid acting allowance until February 2022 and after a written request.
51. Documents on record also reveal that the Petitioner was transferred from Informal Settlements Region to Environmental & Compliance Department on 20th March, 2019 as Acting Manager until 6th May, 2019 when he was transferred back to Informal Settlements Region.
52. It is equally not in contest that on 14th January, 2021, the Respondent published an internal advertisement for the position of Regional Manager Informal Settlement Region and applications were due by 28th January, 2021 and the Petitioner applied for the position but was not shortlisted or invited for an interview as his memo to the Director Human Resource and Administration dated 29th March, 2021 reveals.
53. The Petitioner was contesting the requirement of a “Masters Degree in related field” as part of the academic qualifications the applicants had to possess.
54. He also asserted that under the Job Evaluation and Competency Matrix 2005 approved by the Respondent’s Board of Directors, the education level of the Manager’s position was a first degree.
55. Relatedly, he contended that the Public Service Commission had fixed the requirement for Managers as first degree vide Circular Ref: PSC/ADM/13/(6) dated 11th March, 2020.
56. He also contested the long period he had acted and requested to be invited for the interview on the basis of having acted in the position since March 2018.
57. Puzzlingly, the Respondent’s Director of Human Resource and Administration did not respond to the Petitioner’s internal memo and the interviews did not take place.
58. However, on 17th November, 2021, the position was internally re-advertised under the same requirements and by an internal memo dated 30th November, 2021, the Petitioner sought clarification from the Respondent’s Managing Director on the Job Evaluation and Competency Matrix 2005, PSC’s Circular of 11th March, 2020, HR Manual on acting and payment of acting allowance for 2012 to 2016.
59. By a response dated 13th January, 2022, the Respondent’s Managing Director stated that the competency framework applied to all staff and required a Masters degree for the Manager’s position.
60. Strangely, no copy was availed to the Petitioner who had cited a particular competency framework.
61. As regards the PSC’s circular, the Managing Director cited the advisory of the Attorney General dated 21st August, 2014 so that the PSC covers the mainstream civil service and the PSC’s Circular as well.
62. On acting appointments, the Managing Director cited Clause 6.3 of the Respondent’s HR Manual which provides for a maximum period of 6 months or as determined by the appointing authority.



63. Intriguingly, and as adverted to elsewhere in this judgment, the appointing authority did not specify the duration.
64. Finally, the Managing Director promised feedback on acting allowance by 31st January, 2022.
65. Regrettably, the copy of the Managing Director’s Internal Memo dated 13th January, 2022 ends at note 4 and is thus incomplete and the Respondent did not avail a copy for records.
66. Relatedly, by a memo dated 10th February, 2022, the Petitioner expressed reservations as regards the Managing Director’s response on competency framework in use by staff referred to by the Managing Director and requested for the date it was amended and a copy. None was availed by the Respondent. He also contested the phrase mainstream civil service as according to him, the Respondent was public entity based on the advisory by the Attorney General dated 10th February, 2017 and 17th February, 2020 given at the instance of the Respondent.
67. The Petitioner was emphatic that in his view, the Respondent is a public entity and thus bound by *the Constitution* of Kenya, 2010 and all circulars issued by the government and had to implement all of them.
68. Finally, the Petitioner cites Clause 2.9.2 of the Human Resource Policies and Procedures Manual on promotion through acting but the same does not appear on the Respondent’s HR Manual on record.
69. The Petitioner appealed that the issue be addressed or he be accorded an opportunity to be interviewed for the position of Manager Informal Settlements Region.
70. There is no evidence on record that the Respondent’s Managing Director responded to the issues raised and the instant petition was filed 3 months later to inter alia restrain the Respondent from conducting interviews and/or filing the position of Regional Manager Informal Settlements Region, an order the court granted as the Petitioner was still serving in the position in an acting capacity.
71. After careful consideration of the Petition, Supporting Affidavit, Replying Affidavit and Submissions by counsel, the issues that commend themselves for determination are;
 - i. Whether the instant Petition meets the threshold in *Anarita Karimi Njeru V Republic (Supra)*.
 - ii. Whether the Respondent (Nairobi County Water & Sewerage Co. Ltd) is a public entity.
 - iii. Whether the Respondent’s undated Human Resources Policy and Procedures Manual Code NCWS/HRD/01 is regular.
 - iv. Whether the Petitioner’s Acting for over 4 years violated Article 41 of *the Constitution* of Kenya.
 - v. Whether the Petitioner was discriminated by the Respondent.
 - vi. Whether the Petitioner is entitled to the reliefs sought.
72. On the 1st issue, it is trite law that citing various Articles of *the Constitution* of Kenya, 2010 does not of itself render a suit a constitutional petition as envisaged in *Anarita Karimi Njeru V Republic (Supra)* and re-emphasized in countless decisions of the High Court, Court of Appeal and Supreme Court of Kenya including *Kiambu County Tenants Welfare Association V Attorney General & another (2017) eKLR* and *Mumo Matemu V Trusted Society of Human Rights Alliance (2014) eKLR* among others.



73. In *Anarita Karimi Njeru V Republic (Supra)*, E. Trevelyn and A.R.W. Hancox JJ expressed themselves as follows;
- “ . . . 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 which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
74. (See also *Mumo V Republic & another (2004) 1 KLR 637*).
75. In the instant Petition, the Petitioner has not elaborately demonstrated the Constitutional foundation or anchorage of the Petition.
76. Apart from reproducing the provisions of Article 3(1), 41(1) and (2) and 47(1) and (2) of *the Constitution* of Kenya, 2010 under Part F of the Petition, the provisions are not referred to elsewhere in the body of the Petition nor the manner or extent to which they were allegedly violated or infringed by the Respondent.
77. In the absence of such particulars, the court is in agreement with the Respondent’s counsel’s submission that the argument that the Respondent infringed the Petitioner’s right to fair labour practice and fair administrative action is not pleaded with the degree of precision envisioned by *Anarita Karimi Njeru V Republic (Supra)*.
78. The absence of clear evidence and particulars of constitutional violations trivialises *the Constitution*.
79. In a nutshell, the Petitioner is challenging the long acting as Manager Informal Settlement Region from March 2018 to the present and the Respondent’s failure to confirm him in the position on account of experience and the Respondent cites its HR Manual on the requirement of competitiveness in hiring among other requirements.
80. These issues do not require a constitutional petition to canvass and determine.
81. An ordinary claim would have sufficed and would have accorded the Petitioner sufficient latitude to present oral evidence and cross-examine the Respondent’s witnesses.
82. In the upshot, it is the finding of the court that the instant Petition does not meet the threshold in *Annarita Karimi Njeru V Attorney General*.
83. As to whether the Respondent is a public entity, parties have adopted opposing positions with the Petitioner insisting that it is a public entity, analogous to any other and bound by *the constitution*, other applicable laws and government circulars. The Respondent appears to insist that it is a private company, though its counsel did not isolate it as a specific issue.
84. The court deems the issue central to the determination of the Petition as it is determinative on the applicable regulatory framework of the Respondent.
85. Fortunately, the issue was placed before the Office of the Attorney General by the Respondent and the Attorney General gave his considered opinion which the court is in agreement with as it is a clear articulation of the law as it is.
86. The Attorney General’s office relied on Article 260 of *the Constitution* of Kenya, 2010 and Section 3(1) of *Interpretation and General Provisions Act*, a decision of the Supreme Court of India and the sentiments of the court in *Maurice Omondi Odumbe V Kenya Cricket Association & 2 others Misc*.



App No. 1732 of 2004 and Githunguri Dairy Farmers Co-operative Society Ltd V Attorney General & 2 others (2016) eKLR to arrive at the conclusion that the Respondent is indeed a public entity.

87. In Githunguri Dairy Farmers Co-operative Society Ltd V Attorney General & 2 others (Supra), Onguto J. stated as follows;

“I come to the conclusion that phrase “public entity” in Article 227 of *the Constitution* should receive an extended meaning and not the restricted interpretation ascribed to ‘public office’ or public officer under Article 260 of *the Constitution*. The phrase public entity under Article 227 should include statutory bodies, parastatals, bodies established by statute but managed and maintained privately such as universities and professional bodies, all bodies financially supported by the state and operating in close co-operation with state authorities and also any private bodies fulfilling key functions under state supervision”.

88. The foregoing exposition by the learned judge encompasses the Respondent.

89. More significantly, however, it is common ground that the Respondent was incorporated under the *Companies Act* on the express authority under the *Water Act*, performs public functions, is wholly owned by the Nairobi City County, which is a County Government which is one of the levels of government under Article 1(4) of *the Constitution* of Kenya, 2010.

90. Chapter eleven of *the Constitution* of Kenya, 2010 deals with Devolved Government exclusively specifically, Part 2 addresses County Governments in terms of membership of County Assemblies, Speaker of County Assembly, County Executive Committees and election of Governor and Deputy Governor.

91. The Devolved Government mirrors the National Government at the County level and both constitute the Government. Both have law making powers by elected representatives.

92. In the upshot, having found that the Respondent is a creation of the Nairobi City County, a devolved unit of Government, it follows that since County Governments perform public functions as opposed to private and are creations of the people of Kenya, they have no capacity to incorporate a private entity to perform any of their functions.

93. Section 2 of the *Public Service Commission Act* defines a body such as the Respondent as a public body.

94. Being fully owned by the Nairobi City County, the Respondent is a public entity. It is a State Corporation as defined by Section 2(b)(v) of the *State Corporations Act*.

95. As concluded by the Attorney General, the Respondent is subject to the operative public regulatory framework under *the Constitution* of Kenya and all relevant laws and national government circulars.

96. The laws include the;

Public Procurement and Asset Disposal Act

State Corporations Act

Public Officer Ethics Act

Integrity Act

Public Finance Management Act



97. Significantly, under Article 260 of *the Constitution* of Kenya, public service means;
- “The collectivity of all individuals, other than state officer performing a function within a state organ and state means the collectivity of offices and other entities comprising the Government of the Republic of Kenya under this Constitution”.
98. See *Manyara Muchui Anthony V Commission Authority of Kenya & 3 others* (2022) eKLR.
99. Similarly, public officer means;
- An office in the national county government or public service, if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by Parliament.
100. These definitions leave no doubt that employees of the Respondent serve in the public service and are public officers in law.
101. See the sentiments of the Supreme Court of Kenya in *Fredrick Otieno Outa V Jared Odoyo Okello & 4 others* (2014) eKLR.
102. See also the sentiments of Lenaola J. (as he then was) in *Kenya Union of Domestic, Hotels, Education and Allied Workers (KUDHEIHA) V Salaries and Remuneration Commission* (2014) eKLR.
103. Notably, the Respondent did not avail a copy of the PSC Circular it alleged advised that the PSC applies to “mainstream civil service”, or avails its title, date or reference for scrutiny by the court.
104. Contrary to the retort by the Respondent’s Managing Director that the Attorney General’s advisory to the Respondent is just an opinion and not binding, it is a considered advisory and binds the Respondent unless challenged in court and declared null and void or ineffectual.
105. The reason for the foregoing is simple.
106. Under Article 156(4)(a) of *the Constitution* of Kenya, 2010, “The Attorney General is the principal legal adviser to the Government” .
107. Equally, under Section 5(1) of the Office of Attorney General Act, 2012, the Attorney General is responsible for;
- a. Advising Government, Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters.
108. It is noteworthy that the Respondent sought and received advisories of the Attorney General, not once but twice.
109. It is disingenuous for the Respondent to contend that the advisory it received from the Attorney General was not binding.
110. Having not challenged it in a court of law, the Respondent cannot be heard to say that it is not bound by it and ought to have acted and acting accordingly. Acting otherwise signifies impunity.
111. A cursory reading of Article 234 of *the Constitution* reveals that the framers of *the constitution* contemplated a more extensive role of the PSC than the so called “civil service” a phrase not used by the Article which uses the phrase “public service” defined elsewhere in this judgment.



112. This expansive role is decipherable from the provisions on establishment and abolishing of offices in the public service, promotion of values and principles in Article 10 and 234 throughout in the public service develop human resources review and makes recommendations to the national government on conditions of service, Code of Conduct and qualifications, hear appeals in respect of County Government public service and most critically
- “perform any other functions and exercise any other powers conferred by national legislation”.
113. Finally, Section 3 of the [Public Service Commission Act](#), provides that subject to Articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 252(1) of [the Constitution](#) and Section 28 of the [Kenya Defence Forces Act](#), this Act shall apply for all public bodies and persons holding office in the public service.
114. It requires no belabouring that employees of the Respondent are employees in the public service.
115. Concerning the regularity of the Respondent’s HR Manual, none of the parties raised the issue as it directly flows from the legal status of the Respondent in the public private sector dichotomy.
116. More specific however, the copy of the Respondent’s Human Resource Policy and Procedures Manual Code NCWS/HR/01 lacks an effective date on the cover page or any other page and lacks any indication of approval by the Respondent’s Board of Directors or the State Corporations Advisory Committee (SCAC) or the Public Service Commission (PSC).
117. Page 2 of the document states that document was reviewed and approved by the Respondent’s Board of Management on 18th December, 2012.
118. The Respondent availed no resolution of the Respondent’s Board of Directors or any other body approving the HR Manual. The document was signed by the Respondent’s Director, Human Resource and Administration Services on 14th March, 2013 (indicated as 1/3/013).
119. It cannot be gainsaid that all human resource instruments of state corporations including the organizational structures, career guidelines and human resource policy and procedures manual among others are board documents and are ineffectual unless approved by the Board of Directors which is the policy and decision making body of a corporation. Approval by the board of management under the Managing Director is ineffectual as it is only the initial level of approval.
120. In this case, the Respondent’s HR Manual relied upon by the parties is irregular and requires approval by the Board of Directors, if it has not and the Public Service Commission before implementation.
121. The Respondent availed no scintilla of evidence to show that its board of directors approved the document or any other government agency or body had done so. A resolution of the board of directors would have been sufficient and approval by a government body is always in writing.
122. However, actions or decisions taken on the basis of the HR Manual will be deemed valid as they were made in good faith and in the firm belief that the Respondent was unregulated by the legal regime that regulates state corporations.
123. However, the foregoing should not be construed to mean that the decisions are beyond scrutiny by the court. They are and will be scrutinized later in this judgment specifically in relation to the Petitioner’s acting appointment in March 2018 which he is contesting.
124. As regards the Petitioner’s inordinate acting period, while the Respondent argues that the appointing authority had discretion to determine the duration of the acting appointment, the Petitioner’s case is



- that it exceeded the prescribed duration and as such he was automatically confirmed to the position and ought to have received the salary attendant to the position of Regional Manager Informal Settlements Region after 6 months.
125. Both parties premise the arguments on Clause 6.3 of the Respondent's HR Manual on record.
 126. As adverted to elsewhere in this judgement, the Petitioner was appointed as the Acting Regional Manager-Informal Settlements Region by the Managing Director's Internal Memo dated 8th March, 2018 and remains in the same position to date and the Respondent has not demonstrated that his execution of duty has been wanting at any time since appointment, more than 3 years ago.
 127. As adverted to elsewhere, the Petitioner was appointed as Acting Regional Manager-Informal Settlement Region effective 8th March, 2018 for undefined duration and terms and no renewal was filed by the Respondent or the Petitioner which would suggest that no renewal took place.
 128. Is the prolonged acting appointment of the Petitioner irregular and/or a violation of fair labour practices?
 129. Clause 6.3 of the Respondent's Human Resource Policy and Procedures Manual provides for payment of an acting allowance of 25% of the employee's basic salary or acting allowance equivalent to the difference between the employee's salary and the minimum salary of the post the employee is acting whichever is higher for the duration the acting takes place appointed to act in an office higher than his/her substantive office provides that the appointment is of at least thirty (30) consecutive days and a "maximum of 6 months or as determined by the appointing authority".
 130. Clause 6.3 of the HR Manual is categorical that in appointing an employee to act in a vacant position, "the appointing authority shall put into consideration the relevant personal qualifications, competence and seniority".
 131. The clause additionally provides that a Special Duty Allowance is payable when an employee who is not qualified to be appointed to act on a higher post but is nevertheless called upon to perform the duties of the higher post.
 132. This clause would appear to suggest that acting allowance was payable to employees called upon to act in higher position for which the employee has the minimum qualifications to hold and by parity of reasoning, that the petitioner met the minimum qualifications for the position he was appointed to act.
 133. Needless to gainsay, the clause obligates the appointing authority to consider the employee's personal qualifications, competence and seniority.
 134. Although Clause 6 of the Respondent's HR Manual provided for an acting appointment "for maximum of 6 months or as determined by appointing authority", and the Respondent's Internal Memo dated 8th March, 2018 had no fixed duration or a duration capable of being ascertained. The Respondent's retort that phrase "or as determined by appointing authority" in Clause 6.3 of the HR Manual cannot avail the Respondent as it made no determination as required by Clause 6.3 of the HR Manual which has led to the Petitioner acting as Regional Manager-Informal Settlement Region for an indefinite period which is a violation of the Petitioner's right to fair labour practices.
 135. The foregoing finding is exacerbated by the fact that the Petitioner had previously acted as Manager Operations and Maintenance (2012 – 2016), which is not an issue before this court as he was paid and accepted payment in 2022 more than 3 years after the cause of action had accrued.



136. The court is in agreement with the sentiments of Byram Ongaya J. in *Silas Kaumbuthu Mbutura V Meru Central Dairy Co-operative Union Ltd (Supra)* as follows;

“The court finds that the Claimant was subjected to unfair labour practice by constantly being held on acting capacity in the post of Production Supervisor. The Claimant’s claim to substantive appointment is valid and for the unfair labour practice in contravention of Article 41 of *the Constitution*, the court finds that compensation of Kshs.300,000.00 under Article 21(3)(e) of *the Constitution* will meet the ends of justice. While making that finding, the court finds that for over 18 years of service, the Claimant was required by the Respondent to serve in an acting capacity for unexplained reasons of failure to be appointed substantively as a Production supervisor or any other suitable position in the Respondent’s establishment. Such conduct on the part of the Respondent in the opinion of the court was a gross violation of the Claimant’s entitlement to fair labour practices as provided for in Article 41 of *the Constitution*”.

137. In the court’s view, retaining an employee in an acting position for an undefined period without any demonstrable attempt to fill the position substantively after the 6 months prescribed by law and the Respondent’s HR Manual, cannot pass as a fair labour practice.

138. Finally on the HR Manual and other policy documents such as Career Guidelines and organizational structure, the Respondent has no alternative but to ensure that it is compliant in every respect.

139. The HR Manual on record is not supported by evidence of approval by anyone save for the Director, Human Resource & Administration Services as the Head of the Board of Management is the Managing Director.

140. Should the Petitioner be confirmed to the position of Regional Manager Informal Settlements Region?

141. The court is not persuaded that that is an appropriate relief in the circumstances of this case for the following reasons;

142. First, Article 232(1)(g) of *the Constitution* of Kenya, 2010 lays it bare that;

The values and principles of public service include –

“subject to paragraphs (h) and (i) fair competition and merit as the basis of appointment and promotion” in the public service.

143. The values and principles enumerated under Article 232 (i) of *the Constitution* of Kenya apply to all state organs in both levels of government and state corporations, such as the Respondent.

144. Second in law, an acting appointment is neither a promotion nor a promise/representation by the employer that the appointee will get the position. It is just that, acting and that is one of the reason why the law and practice limits the duration unless extended with justification.

145. The foregoing is consistent with the provisions of Section 2(1) of the Public Service Act which is categorical that “acting appointment means temporary conferment upon a public officer, by the commission or the relevant appointing authority, the power to perform duties of a public officer other than the office the officer is substantially appointed to hold, while the public officer continues to hold the substantive appointment”.

146. Needless to belabour, an officer appointed in an acting capacity is entitled to an acting allowance as long as the acting is for a period of at least 30 days.



147. Clearly, the officer appointed to act has a substantive appointment in the organization and as soon as the officer resumes duty or is appointed, the officer acting continues serving in the substantive position but without the acting allowance.
148. Acting appointments ensures that there is no discontinuity in the delivery of services to the public in the event of an unforeseen absence of an officer. It also enables officers familiarise themselves with the roles and responsibilities of the higher office for purposes of future planning and the officer earns an acting allowance which is an important incentive.
149. Third, contrary to the Petitioner’s counsel’s submission that long period the Petitioner has acted qualifies him for constructive confirmation to the position or be entitled to the remuneration attached to the position or office, the law does not recognize appointment or promotion by constructive confirmation in the post *Constitution of Kenya, 2010* era which promotes the principle of fair competition in the public service.
150. The provisions of the Public Service Act embody similar principles under Section 34 and 36 of the Act.
151. Finally, and as discernible from the foregoing and as contended by the Respondent’s counsel, the Petitioner’s Counsel’s argument that the Petitioner had a legitimate expectation that he would be confirmed is difficult to sustain for the simple reason that the Petitioner has not provided any evidence or a promise or representation by the Respondent to suggest that he would be confirmed after the acting period was over or any other time.
152. As correctly submitted by the Respondent’s counsel, the principal or concept of legitimate expectation was discussed in details by the Supreme Court of Kenya in *Communication Commission of Kenya & 5 others V Royal Media Services & 5 others* (Supra) (pages 286 – 291) where the court placed heavy reliance on the decision of the South African Court in *South African Veterinary Council V Szymanski* (2003) (4) (S.A) 42 (SCA);
153. The Supreme Court at paragraph 269 expressed itself as follows;
- “The emerging principles may be succinctly set out as follows;
- a. There must be an express, clear and unambiguous promise given by a public authority;
 - b. The expectation must be reasonable;
 - c. The representation must be one which it was competent and lawful for the decision maker to make; and
 - d. There cannot be a legitimate expectation against clear provisions of the law or *the constitution*”.
154. In the instant case and as observed elsewhere, the internal memo dated 8th March, 2018 makes no reference to what would happen after the acting and in the court’s view does not amount to a promise or clear and unambiguous representation.
155. More significantly, even if there was an expectation, it would not have qualified as legitimate as both *the Constitution* and the Public Service Act are explicit on requirements of fair compensation in appointment and promotion in the public service.
156. In sum, it is the finding of the court that Petitioner has not proved that he had a legitimate expectation of ascending to the position of Regional Manager Informal Settlement Region by confirmation.



157. However, having found that the inordinate acting period amounted to an unfair labour practice and guided by the decision in *Silas Kaumbuthu Mbutura V Meru Central Dairy Co-operative Union Ltd* (Supra), the Petitioner is entitled to compensation by virtue of Article 23(3)(e) of *the Constitution* of Kenya, 2010.
158. Bearing in mind that in that case the employee had acted for 18 years and taking into account the fact that the decision was made almost 10 years ago, the sum of Kshs.500,000/= would be sufficient and fair compensation in the instant case.
159. As regards discrimination, the Petitioner pleaded that he was discriminated in that the Respondent's advertisement demanded for qualifications not set out in the Respondent's job evaluation manual or the government in an endeavour to dislodge him from the position he had been acting.
160. According to the Respondent, the Petitioner was not discriminated or treated differently as he was unsuccessful after a competitive, fair and transparent exercise.
161. In *Peter K. Waweru V Republic* (2006) KLR, the court expressed itself as follows;
- “ . . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subjected to . . . restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description . . . ”
162. See also *Nyarangi & others V Attorney General* (2008) KLR 688.
163. The court is guided accordingly.
164. Strangely, the Respondent avers that the minimum educational qualifications were approved by the Director-Human Resource and Administration Services.
165. In support of its case, the Respondent availed a copy of document entitled “JOB DESCRIPTIONS”. The document is not under the Respondent's letterhead and the only writing on the page states as follows;
- “For the purpose of Nairobi City Water and Sewerage Company Ltd Quality Management System and in pursuit of ISO 9001:2000, the Director Human Resources and Administration Services has approved the attached Job description document (November 2008).
- Designation: Director – HR&SA Signed
- Date 24/11/2008”
166. Evidently, the document was prepared and signed for purposes of the application for ISO 9001:2000 certification.
167. There is no indication that the purported job descriptions which are typically embodied in the Career Guidelines were approved by the Respondent's board of directors of anyone else.
168. Significantly, the Petitioner requested for a copy of the Job Evaluation Competency framework on which the minimum qualifications for the position he was acting was grounded but none was provided without any explanation.



169. The Managing Director's retort in his internal memo to the Petitioner dated 13th January, 2022 that the "competency framework in use applied to all staff and the position of Regional Manager required a Masters Degree cannot camouflage the reality that there was no such requirement in the competency framework.
170. The Managing Director made no reference to any document known to the staff of the Respondent or direct the Claimant to it or advert to when it was approved.
171. Notably, the Petitioner had in his internal memo dated 30th November, 2021 cited the job evaluation and competency matrix adopted by the Respondent's Board of directors in 2005.
172. Having requested for the information formally as by law required, the refusal by the Respondent to avail the same or provide a justification for the refusal was a violation of the Petitioner's right of access to information guaranteed by Article 35(1) of *the Constitution* of Kenya, 2010.
173. This was information the Respondent ought to have availed to all its staff for information and refusal to furnish the same after a request by a member of staffs reveals how disdainfully the Respondent treated its staff.
174. Be that as it may, having found that the Respondent is a State Corporation, was the Masters degree a requirement for the Manager's level, in light of the PSC's Circular Ref: PSC/ADM/13(6) dated 11th March, 2020 which suspended its requirement for purposes of promotion to senior positions other than those of Directors?
175. The court is not persuaded that it was.
176. It is unclear why the Respondent made the Master degree a requirement for the position yet it had paid the Petitioner acting allowance for having acted in the position, and confirmed that he met its requirements as by law required.
177. The appointment was made by no other than the Acting Managing Director, Engineer Nahashon Muguna who must have been aware of the prerequisites for acting in a position in 2008.
178. It is common ground that Article 27(4) of *the Constitution* of Kenya, 2010 and Section 5(3) of the *Employment Act*, 2007 outlaw direct and indirect discrimination against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
179. Under the Respondent's HR Manual, an officer who did not have the qualifications of a higher office but was called upon to perform the duties on the higher post was entitled to Special Duty Allowance as is the case with the Public Service Commission Policies and Procedures Manual, 2016. Those qualified for the higher position act and qualify for Acting Allowance.
180. The *Public Service Commission Act*, Cap 185 provides for acting appointments.
181. Section 34 of the Act provides:-
1.
 2. A person shall not be appointed to hold a public office in acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.
182. Clearly, since the Respondent appointed the Petitioner to act in the position of Regional Manager Informal Settlement Region and has not alleged that it made a mistake or that the appointment was subject to any condition, and having affirmed that the appointment was made in consonance with the



HR Manual, it is discernible that the Respondent was aware that the Petitioner was qualified to hold the position and that's why it paid him an acting as opposed to special duty allowance and is not re-claiming it from him.

183. The foregoing justified the Petitioner's application for the position and ought not be used against him though he ought to have raised the issue prior to lodging the application.
184. Having submitted his application while aware that he had no Masters Degree in a relevant field, the Petitioner cannot be heard to say that he meet the advertised requirements for the position.
185. However, having found that the Masters Degree was not a requirement at the time and the position is yet to be filled on account of the temporary Order granted by the Court vide its ruling on 14th March, 2023, it is the finding of the court that the Petitioner was not discriminated by the Respondent.

Appropriate Reliefs

Declaration on length of acting

186. Having found that keeping the Petitioner in an acting capacity for an undefined duration and inordinately long was unlawful and violated the Petitioner's right to fair labour practice, a declaration to that effect is merited.

Declaration on full remuneration for the acting appointments 2012 – 2016 and 2018 – present

187. Having found that the Petitioner failed to prove entitlement to full pay when he was serving in an acting capacity, the declaration that his rights were violated is unmerited as acting appointments are lawful.

Declaration on constructive confirmation

188. Having found that neither *the Constitution* of Kenya, 2010 nor the Public Service Act recognizes constructive confirmation, and both insist on fair competition based on merit, qualification and other defined parameters, the order to declare the Petitioner the substantive holder of the office of Regional Manager- Informal Settlement Region is unsustainable and is declined.

Declaration on legitimate expectation

189. Having found that the Petitioner failed to prove on a balance of probabilities that he had a legitimate expectation of being confirmed as the substantive holder of the office he was acting, the declaration is unmerited and is declined.

Compensation of special damages at Kshs.117,500/= per month as at the date of filing and applied since 2012

190. Having found that the Petitioner was paid for the duration 2012 – 2016 and did not contest the amount paid in 2022, the same is of no moment in this case by virtue of limitation of actions.
191. As regards the duration 8th March, 2018 to the present, having found that the Petitioner is not entitled to constructive confirmation after the 6 months period prescribed by the HR Manual and Section 34(3) of the *Public Service Commission Act* and *the Constitution* of Kenya, 2010, the claim for the sum of Kshs.117,500/= as loss of income is unproven and is declined.



General damages

192. Having found that the undefined and inordinate acting by the Petitioner amounted to unfair labour practice and thus a violation of Article 41 of *the Constitution* of Kenya, 2010, the Petitioner is awarded the sum of Kshs.500,000/= as compensation.

Permanent Injunction to restrain the Respondent from taking the Petitioner back to a lower position

193. Having found that acting appointments are based on a substantive appointment and the acting appointment does not extinguish the substantive appointment as provided by Section 2 of the *Public Service Commission Act*, the order sought is unmerited as it would amount to a court sanctioned promotion or constructive confirmation rejected earlier.

The prayer is declined.

An order of Judicial Review in the form of certiorari

194. Having found that the Respondent has failed to prove the basis on which prescribed the minimum qualifications for the position of Regional Manager Informal Settlement Region or any other, has no career guidelines and is a state corporation bound by the Public Service Commission circulars on human resource matters as ordained by Article 232 of *the Constitution* of Kenya, 2010, an order of certiorari is hereby issued to bring into this court for purposes of quashing the Respondent's Advertisement and Re-advertisement dated 14th January, 2021 and 17th November, 2021 respectively, to the extent they relate to the position of Regional Manager Informal Settlement Region.

195. The upshot of the foregoing in that judgment is entered for the Petitioner against the Respondent as follows;

- a. Declaration that the Respondent violated the Petitioner's right to fair labour practices.
- b. Compensation in the sum of Kshs.500,000/=.
- c. Respondent's advertisement and re-advertisements for the position of Regional Manager-Informal Settlement Region, dated 14th January, 2021 and 17th November, 2021 respectively are hereby quashed.
- d. Costs of the Petition.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

