



**Nandwa v National Communication Secretariat (Petition  
E085 of 2022) [2023] KEELRC 244 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 244 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E085 OF 2022  
JK GAKERI, J  
FEBRUARY 1, 2023**

**BETWEEN**

**NELLY AWINJA NANDWA ..... PETITIONER**

**AND**

**NATIONAL COMMUNICATION SECRETARIAT ..... RESPONDENT**

**RULING**

1. Before me for determination is a Petition and an Application both dated 9<sup>th</sup> February, 2022. The Applicant seeks ORDERS THAT:
  - a. Spent;
  - b. Pending inter-partes hearing of this application, this honourable court be pleased to issue conservatory orders restraining the respondent from unlawfully and unfairly terminating the applicants employment contract; from proceeding with the disciplinary action already commenced vide the show cause letter dated 8.5.2022, from compelling the applicant to obey illegal orders to make or authorise making of illegal payments and from threatening, harassing, mistreating or victimizing the applicant in any manner howsoever and from subjecting the applicant to hostile and unreasonable working conditions.
  - c. Upon hearing of this application, this honourable court be pleased to issue conservatory orders restraining the respondent from unlawfully and unfairly terminating the respondent the applicants employment contract; from proceeding with the disciplinary action already commenced vide the show cause letter dated 8.5.2022 from compelling the applicant to obey illegal orders to make or authorise making of illegal payments and from



threatening, harassing, mistreating or victimizing the applicant in any manner howsoever and from subjecting the applicant to hostile and unreasonable working conditions.

- d. Cost of the application be provided for
  - e. Any other or further order that the court may deem fit and appropriate to grant to meet the ends of justice.
2. The application is based on the grounds set out on the face of the Notice of Motion Application and the Supporting Affidavit of NELLY AWINJA NANDWA, the Petitioner sworn on the 30<sup>th</sup> May, 2022.
  3. In the petition the petitioner seeks the following prayers:
    - a. A DECLARATION that the Respondent has been violating the petitioners right to fair labour practices to equality before the law and freedom from discrimination, to fair administrative action, to fair remuneration and has been violating *the constitution*, in particular violating the values and principles of public finance, public service and national values and principles of governance.
    - b. An order for upgrading the petitioners job grade to NCS-3 or its equivalent under a minimum monthly salary of Kshs 231,280 together with all the attendant benefits.
    - c. An order for compensation of special damages of Kshs 8,781,986 as computed under paragraph 33 above since the petitioner has been performing work of equal value to the work performed by her colleagues serving at the same horizontal level as herself.
    - d. An order for general damages
    - e. A permanent injunction restraining the Respondent or its agents from unlawfully and unfairly terminating the claimant employment contract forcing the petitioner to make or authorise the making of irregular and unlawful payments or to commit any irregularity whatsoever harassing, mistreating, victimizing or subjecting the claimant to any kind of hostile and unreasonable working conditions.
    - f. Cost of the petition
    - g. Interest on special damages from the date they fell due till payment in full and on general damages and costs from the date of judgment till full in payment
    - h. Any other or further relief that the court may deem appropriate to meet the ends of justice.
  4. The grounds advanced on the face of the application and the supporting affidavit arise from the reliefs sought by the Petitioner in her petition dated 30<sup>th</sup> May, 2022.
  5. Upon effecting service of the pleadings, the Respondents filed a replying affidavit sworn by Ms JULIANA YIAPAN on the 16<sup>th</sup> June 2022 in response to the petition.



## **Petitioner's case**

6. The petitioner is acting in her own interest claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed.
7. The respondent is a public entity under the Ministry of Information and Communication Technology (ICT), Innovation and Youth Affairs and an employer to the petitioner.
8. The petitioner is a long serving employee of the Respondent who was employed in the year 2005 as a Clerical Officer then promoted severally to her current position as the Head of Department of Finance and Accounts.
9. The Petitioner avers that the respondent has been involved in acts of financial impropriety whereby unconstitutional and illegal expenditures have been incurred against the express advice of the petitioner.
10. The petitioner states that the Respondent's persistent violations of constitutional principles on public finance have been subject to investigations and reprimand by the Office of the Auditor General, Ethics and Anti-Corruption Commission (EACC) and the Commission on Administrative Justice (CAJ).
11. The petitioner avers that the Respondent has removed the petitioner as a signatory to the respondent's banks account so that cash can be transferred or withdrawn without the knowledge or opposition of the petitioner.
12. The petitioner avers that in February 2022 she proceeded for leave and on resuming in May 2022 she carried out reconciliations of the respondent's bank balances and found that there was massive irregular expenditure during the time she was away which condition is threatening to halt the operations of the respondent.
13. That despite the unhealthy financial condition the respondent continues to assert pressure on the petitioner to authorise payment of money to some members who are on a foreign trip and reported to be facing difficulties paying their hotel bills.
14. The petitioner avers that budgetary allocation for travel by staff has been depleted and there is no cash to finance such trips therefore making such approval unconstitutional, unlawful and irregular therefore the petitioner has refused to authorise such payments.
15. The petitioner avers that due to her strict adherence to the constitutional principles she has attracted all manner of unfair labour practices visited upon her.
16. The petitioner contends that though she is a Head of Department of Finance and Accounts, she earns much lower than her colleagues who are heads of department therefore violating the constitutional, legal and universal principle of equal remuneration for work of equal value.
17. The petitioner further contends that her colleagues who are heads of departments have a higher job grade NCS-3 while the petitioner is in a lower grade of NCS-4.
18. Further, she contends that the respondent failed to pay her salary for the month of April 2022 when she was on leave and due to the actions of the Respondent she has suffered and continues to suffer loss and injury as set out hereunder;
  - i. She has been earning a salary and allowance that is far lower than her colleagues heading the department of Human resource and administration and internal audit.



- ii. The Human Resource Administrator Officer earns a monthly salary of Kshs.231,280/= and an annual leave of Kshs.30,000/=.
- iii. The petitioner earns a monthly salary of Kshs.175,402/= and an annual leave of Kshs.25,000/=.
- iv. The monthly difference or underpayment in the petitioner's salary is Kshs.55,878/= and Kshs.5,000/= per year in annual leave.
- v. The total under payment in salary is Kshs.55,878 x 156 months Kshs.8,716,968/=.
- vi. The total underpayment in annual leave is Kshs.5,000 x 13 years = Kshs.65,000/=.

### **Respondents case**

- 19. In opposition of the Application and the petition the Respondents filed a Replying Affidavit sworn by JULIANA YIAPAN on dated 16<sup>th</sup> June 2022.
- 20. The affiant is the Secretary of Administration, State Department of Broadcasting and Telecommunication, Ministry of ICT, Innovation and Youth Affairs.
- 21. The affiant states that Section 84 of the Information and Communications Act Cap 411A, the Respondent is not a body corporate capable of suing and being sued in its own name instead it is a creature of statute under the Ministry of ICT, Innovation and Youth Affairs.
- 22. The affiant states pursuant to section 84 of the [Kenya Information and Communications Act](#), the Respondent is mandated to advise the government on the adoption of communication policy that promotes the benefits of technological development to all users of postal and telecommunication facilities.
- 23. The affiant states that the petitioner misapprehended and misunderstood her job contract and terms of service as she is not the Head of Finance and Accounts but an Accountant as per employment contract.
- 24. The affiant states that the petitioners job grade and salary were clearly spelt out in her appointment letter and renewal letters which she has dully accepted and signed.
- 25. The affiant states that the petitioner's job grade and salary in the employment contract is contingent or comparable to any other employee such as the Internal Auditor or the Human Resource Administrative Officer.
- 26. The affiant states that there is no legal or scientific basis for the assertion that the Human Resource and Administrative Officer and the applicant perform work of equal value.
- 27. The affiant further contends that it is illegal, unethical and unconscionable for the petitioner to abuse her position at the respondent and unlawfully access payslips of other staff namely the Internal Auditor and the Human Resource and Administrative Officer and proceed to divulge sensitive information without their consent.
- 28. The affiant further states that the petitioner has no responsibility to approve or authorise payments, halt reverse or otherwise frustrate expenditure where approval is dully issued by the Accounting Officer.



29. The affiant further states that about 4<sup>th</sup> April 2022 the ministry received invitation from the Universal Postal Union to attend its sessions of Council Administration and Postal Operations from 9<sup>th</sup> to 20<sup>th</sup> May 2022 in Bern, Switzerland and two officers namely Ms Juliana Yiaapan and Paul Gichuki Macharia attended.
30. The affiant states that the payment requests were for the two officers who were attending the sessions and they were neither unconstitutional, illegal nor unprocedural.
31. She states that the Ethics and Anti-Corruption Commission and the Commission on Administrative Justice conducted investigations and found no evidence of wrongdoing
32. The affiant further states that the petitioner was granted unpaid leave for 60 days from 7<sup>th</sup> February 2022 to 7<sup>th</sup> April 2022 where she travelled to Norway without proper clearance stipulated in the Directive for travel clearance Circular dated 18<sup>th</sup> March 2022.
33. The affiant states that the petitioner was issued with a show cause and warning letter for failure to obtain clearance prior to travelling to Norway contrary to the circular
34. The affiant further states that the petitioner was interdicted and requested the Ministry of ICT, Innovations and Youth Affairs Committee to conduct a professional investigation regarding the status of accounts and finances of the Respondent.
35. The affiant states that the petitioner will be given an opportunity to be heard during the Ministry of ICT, Innovations and Youth Affairs Committee and the team will provide the findings to the Respondent.

### **Rejoinder**

36. In a rejoinder the Petitioner filed a supplementary affidavit sworn on 12<sup>th</sup> July 2022.
37. The petitioner states that contrary to the assertion of the respondent, it is her case that she is the Head of Finance and Accounts and performs the functions of the said office.
38. That employees holding different positions but are placed in the same job group are deemed to perform work of equal value.
39. The affiant states that she has been discharging the duties of a head of department for over 10 years through renewable contracts of three years therefore is entitled to the remuneration that is equal to the comparators.
40. The affiant contends that her refusal to process unconstitutional and unlawful payments is the reason the respondent has subjected her to the numerous acts that amount to violation of her right to fair labour practices.
41. The affiant further states that allegations that she travelled out of the country without clearance from the Communication Secretary was untrue since she had a long conversation with the Communication Secretary requesting for clearance to travel to Nigeria and Norway which was approved as the Communication Secretary directed the Head of Human Resource and Administration in writing to give her authorization on his behalf.



## Applicant's submissions

42. Counsel for the Petitioner identified four issues for determination;
  - a. Whether the Petitioner has been performing the roles of a person holding the position of Head Finance and Accounts for the last 10 years and has therefore all along been entitled to remuneration commensurate with the said position.
  - b. Whether the Respondent has been violating *the constitution*, the law and regulations in the manner it has been spending public funds.
  - c. Whether the disciplinary actions commenced against the petitioner by the Respondent are unlawful and
  - d. Whether the petitioner is entitled to the reliefs sought in the petition.
43. On the first issue, counsel submitted that for over 10 years the Petitioner had remained in job Group NCS-4 while being paid the salary of an Accountant but had been performing the functions of the Head of Finance and Accounts.
44. Counsel submitted that keeping the Petitioner at a lower grade and paying her lower remuneration than her counterparts for work of equal value was a violation of petitioner's right to freedom from discrimination contrary to Article 27 of *the Constitution* of Kenya, 2010.
45. Counsel relied on the holding in *Oyatsi v Judicial Service Commission (Petition E111 of 2021) [2022]* where the petitioner challenged the decision by her employer to retain her as acting Director of Finance without confirmation into the substantive office for over 6 years while paying her remuneration for the junior position of Assistant Director Finance all through. The Court agreed with the petitioner that although the Respondent refused to confirm her as Director Finance, the petitioner was nonetheless performing all the functions of the office of a substantive office holder and was therefore entitled to a backdated remuneration commensurate with the office of Director Finance in line with the principle of equal remuneration for work of equal value.
46. Similarly, in *Silas Kaumbuthu Mbutura vs Meru Central Dairy Co-Operative Union Limited[2015] eKLR*, the Claimant moved to court, aggrieved, that out of the 20 years he had worked for the Respondent, he had been on acting appointment for 18 years. He sought, among other reliefs, a declaration that the employer had violated his right to fair labour practice by keeping him in acting appointment for 18 years in the positions of dairy man, machine operator and finally, production supervisor without confirmation or appointment as a substantive holder of the said offices.
47. The petitioner submitted that the acting appointment was calculated to defeat his otherwise earned promotion and was denied the enjoyment of the prestige and payment attached to the substantive position of production supervisor.
48. On the 2<sup>nd</sup> issue, counsel submitted the Petitioner's refusal to cave in to the demands by the Communication Secretary requiring her to process illegal expenditure triggered the trumped-up charges and unfair labour practices against her such as keeping her at lower job grade and paying her lower salary and disciplinary actions taken against her.
49. Counsel further submitted that among the responsibilities of the head of finance and accounts was ensuring that expenditure did not exceed budget limits.



50. It was submitted that the petitioner prepared a report and advised the Communication Secretary that budget limit had been reached and that there was no room for further expenditure on external travel allowances but the report and recommendations were disregarded.
51. On the third issue, it was submitted that the disciplinary actions commenced by the Respondent against the petitioner including interdiction were procedurally and substantively unfair and unlawful.
52. Counsel submitted that the reasons given for interdiction of the petitioner was that she had filed a petition and unlawfully attached payslips of her comparators. It was further submitted that the petitioner had the right to file a petition and access information needed to enable her enforce her right or fundamental freedom protected by *the Constitution* of Kenya, 2010.
53. It was further submitted that the accusations that the petitioner travelled overseas without clearance was false.
54. Counsel urged the court to grant the reliefs sought in the petition.

### **Respondent's submissions**

55. Counsel for the Respondent identified four issues for determination, namely;
  - i. Whether the Respondent is an entity that can be sued?
  - ii. What is the Petitioner's job title?
  - iii. Whether the disciplinary measures taken by the Respondent against the Petitioner for her actions and/or inactions are lawful, fair and procedural?
  - iv. Whether the petitioner is entitled to the reliefs sought in her Petition?
56. On the first issue the respondent's counsel submitted that the respondent was akin to a department in an organization and legal action cannot be initiated by or against a department and the respondent was not a body corporate capable of being sued in its name.
57. Reliance was made on the holding by Bosire J. (as he then was) in *Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank* in (HCC No. 5116 of 1992) where the learned judge held that;

“In the instant matter the suit was instituted in the name of a religious organization. It is not a body corporate which would then mean it would sue as a legal personality. That being so it lacked capacity to institute proceedings in its own name.”
58. On the 2<sup>nd</sup> issue, counsel submitted that the petitioner was an Accountant and her employment including her job grade and salary were spelt out in the letter by the Acting Communication Secretary dated 25<sup>th</sup> May 2009.
59. Counsel further submitted that the claim that her job grade should be higher than what it was was an afterthought following the commencement of the disciplinary proceedings against her.
60. The decisions in *Fredrick Ouma vs Spectre International Limited* (2013) eKLR and No. 437 of 2011, *Miguna Miguna vs Attorney General* were relied upon to buttress the submission. In the latter, Wasilwa J. explained that even salaries of officers serving the same capacity need not necessary be the same due to seniority in rank or due to individual experience. The court explained that even Judges of the High court did not earn the same salaries as they have different days of appointment and therefore levels of experience.



61. Counsel for the Respondent submitted that the concept of equal pay for equal work was misplaced in the instant case as the petitioner was comparing herself with other departments which was stretching the concept too wide.
62. Counsel submitted that an employer-employee relationship was contractual as expressed in a duly executed employment contract. That the petitioner failed to produce her employment contract but instead engaged in a fishing expedition in the supplementary affidavit in an endeavour to prove her role and title.
63. Reliance was made on the sentiments of the court in *Carolyn L. Musonye v Panari Hotel Ltd (2017) eKLR* where it expressed itself as follows;

“The requirement that an employer should give an employee a clear job description is not the duty of an employee. Section 10(2)(c) of the *Employment Act* require an employer while giving an employment contract and giving the details of such employment or particulars thereof to also set out the job description. Where such job description is not defined in the contract of service, the employer must state where the employee is to access such document whether in the work policy, manual or any other work related rules and regulations . . .”
64. On the 3<sup>rd</sup> issue counsel submitted that there was an executive directive and practice that all government employees require clearance to travel out of the county.
65. The respondent submitted that the petitioner requested and take partly unpaid leave to travel out of the country and a letter was issued to assist her secure visas but did not explicitly request and obtain clearance for foreign travel from the Respondent’s Communication Secretary and was in breach of the circular on foreign travel.
66. On the forth issue, counsel submitted that Section 84 of the Information and Communications Act empowered the Communication Secretary to be the head of the Respondent and also the Accounting Officer therefore is authorised to make lawful payments.
67. It was submitted that the petitioner had no responsibility or mandate to authorise payment nor to veto, halt, reverse or otherwise frustrate expenditure where approvals are duly issued by the Communication Secretary.
68. Counsel submitted that the petitioner has behaved unprofessionally and displayed insubordination as particularised in the notice to show cause.
69. The respondent further submitted that the petitioner in her attempt to justify that she was the Head of Finance and Accounts used the payslips of her colleagues which was unlawful and unethical and in contravention of the *Data Protection Act, 2019*.
70. Reliance was made on the holding in *Joseph D Baras vs United EA Warehouse Limited (2014) eKLR* where the court held that an oral hearing was not mandatory and the process contemplated by section 41 of the *Employment Act* could be conducted through correspondence.
71. It was submitted that the petitioner had been interdicted to allow the parent ministry carry our investigations and was on half salary with full house allowance and medical insurance in line with the provisions of the *Public Service Commission Act*.
72. The respondent’s counsel urged that a valid procedure had been followed and the petitioner would have an opportunity to respond to the allegations against her.



73. Reliance was made on the decision in *Joseph Makau Munyao & 4 others V Kenya Airports Authority & another* (2016) eKLR.
74. On the last issue, counsel submitted that the petitioner was not the Head of Finance and Accounts as alleged and that she did not obtain travel clearance as required and was guilty of insubordination which amounted to gross misconduct justifying disciplinary action against her.
75. The court was urged to dismiss the application and the petition with costs to the respondent.

### **Analysis and determination**

76. After careful consideration of the pleadings, evidence on record and rival submissions, the issues for determination are;
  - i. Whether the petitioner was the Head of Finance and Accounts or discharging the functions of that position.
  - ii. Whether the notice to show cause issued by the Respondent was justified and procedural.
  - iii. Whether the petitioner is entitled to the reliefs sought.
77. As to the petitioner's job title or job description or duties, parties have adopted contrasting positions. While the Petitioner's counsel urges that the petitioner was an Accountant performing the responsibilities of the Head of Finance and Accounts, the respondent maintained that the Petitioner was an Accountant employed under a 3 year contracts renewed since 2005 when she was employed as a Clerical Officer.
78. It is not in dispute that the Respondent's Finance Policy and Procedures Manual, 2021 recognizes the position of Head of Finance and Accounts with specific responsibilities.
79. Puzzlingly, the petitioner did not attach a copy of her appointment letter but provided a copy of the letter dated 25<sup>th</sup> May, 2009 which described her as Clerical Officer and promoted her to the position of Accountant effective 1<sup>st</sup> May, 2012. The letter also makes reference to another letter dated 21<sup>st</sup> May, 2012. Although the Supporting Affidavit sworn by the petitioner mentions the letter as document I, it makes no reference to the confusing dates. The date of promotion to Accountant is unclear to the court as the evidence relied upon is unclear.
80. The Claimant provided a copy of the latest renewal of contract dated 19<sup>th</sup> November, 2020. The letter details the duties and responsibilities of the petitioner including establishing, maintaining and coordinating implementation of accounting and accounting control procedures, representing the Secretariat in various finance fora managing the financial database, preparation of review of budgets, reconciling bank statements, verifying vouchers and committal documents, supervising the capturing of data, maintenance of primary records such as cash books, ledgers, note books registers and preparation of management reports e.g imprest, expenditure returns, cashiering duties, financial reporting, co-ordinating of annual external audit and any other duties that may be assigned from time to time.
81. Equally, although counsel relied on the Report on Organizational Structure and Staffing levels for National Communication Secretariat prepared by a Joint Taskforce in 2021 to urge that the Finance and Accounts Department was headed by a Deputy Director NCS3, the document lacks authentication and resembles a draft copy or work-in progress pending approval and operationalization by the Respondent.



82. Reproduction of the foregoing duties was necessitated by the need to exemplify the nature and spectrum of duties the Petitioner was obligated to discharge. Evidently, the foregoing duties leave no doubt the petitioner had an extensive menu.
83. Similarly, the respondent's Finance Policy & Procedures Manual, March 2021 has clearly defined roles of the Head of Finance and Accounts in relation to planning and budgeting revenue and other matters. Specifically, chapter 5 on Expenditure identifies five (5) matters the Head of Finance & Accounting is required to ensure including that "expenditure incurred is within the approved budget."
84. Relatedly, in the Respondent's Annual Report and Financial Statements for the Financial Year ended June 30<sup>th</sup> 2021, authenticated by the Acting Communications Secretary, Eng. Vincent Adul HSC, the petitioner is identified as Head of Finance and Accounts.
85. In addition, by Circular No. OP/CAB.39/A dated 4<sup>th</sup> June, 2018, the Head of the Public Service communicated to all Government Ministries Departments Agencies that Heads of Accounting Units and Procurement Units would be vetted a fresh and were directed to proceed on a 30 working days compulsory leave from 6<sup>th</sup> June, 2018. The Circular required Accounting Officers to notify the affected officers.
86. In this case, the Petitioner and one Mr. David K. Ngugi, Head of Procurement were the affected officers and proceeded on leave as directed.
87. By a further Circular Ref. OP/CAB.39/1A, the Head of the Public Service demanded detailed written confirmation from Accounting Officers that the earlier circular had been complied.
88. Finally, by an internal memo dated 29<sup>th</sup> October, 2018, the Respondent's Accounting Officer notified the Petitioner and one David K. Ngugi that they had been successfully vetted and cleared and could resume duty.
89. From the documentary evidence on record in the form of payment vouchers, all payments must pass through the Accountant to certify that the organization had adequate funds for the item or service to be paid for.
90. Similarly, the Terms and Conditions of Service for the staff of the National Communications Secretariat dated February 2002 defined professionals to mean "employees on Grades NCS 1 – NCS 3. The others were categorised as support staff. These terms could not have envisioned the Petitioner as support staff.
91. Although the Respondent's counsel maintained that the Petitioner's job title was that of Accountant and her job grade was NCS-4, as spelt out in her appointment letter and renewals, her day to day responsibilities and the job description in the last renewal letter are unambiguous that the department of Finance and Accounts was under her superintendence.
92. Contrary to the Respondent counsel's submission that the Head of Finance or Accountant or whoever superintends cannot veto payments, the holder of this office plays a critical role in the financial management of any organization. He or she is an indispensable cog in the well-being of an organization and typically is or ought to be the Accounting Officer's right hand person. This is the person who ensures compliance with all constitutional and statutory provisions relating to financial matters, circulars and directives issued by the National Treasury from time to time. His or her role is further amplified when it comes to responding to the management letter and addressing queries raised by the Auditor General.



93. In sum, the person superintending the Finance and Accounting dockets may veto a proposed expenditure if in his or her professional opinion it was not budgeted for, was not in the procurement plan for the year in question or was contrary to a circular or directive of the National Treasury or other reason. Holders of this Office must be professionals qualified in Accounting, Finance or other related field.
94. As correctly submitted by the Respondent's counsel, the decision in Susan Khakasa Oyatsi V Judicial Service Commission (2022) eKLR is not applicable to the instant case as the material facts are patently distinguishable. In that case, the petitioner was challenging the fact that she had been serving in an acting capacity from 2015 to 2021 yet the Human Resource Policies and Procedure Manual of the Respondent provided for confirmation of the Petitioner to the position of Director Finance. Relatedly, attempts to fill the position competitively had fallen through in 2015 and 2019.
95. In the instant suit, the petitioner had not been acting in any position.
96. In sum, it is the finding of the court that the petitioner has on a balance of probabilities demonstrated that she was indeed discharging the functions of the Office of Head of Finance and Accounts at the Respondents, her designation of Accountant notwithstanding and the Respondent recognized her as such.
97. As regards the notice to show cause, it is not in dispute that the Petitioner by letter dated 1<sup>st</sup> February, 2022 to the Communications Secretary applied for unpaid leave to travel to Nigeria to condole a family she related to closely. The leave was for a duration of 3 months from 7<sup>th</sup> February to 6<sup>th</sup> May 2022 and the application was approved with modification that since the Public Service Commission Human Resource Manual, 2016 allowed a maximum of 60 days of unpaid leave, annual leave was to cover the rest of the days as evidenced by the Leave Application Forms on record.
98. The Petitioner avered that she talked to the Commission Secretary on phone who had no objection and directed her to request the Human Resource to prepare a letter for purposes of securing of visas and Human Resource obliged.
99. From the email communication between the Petitioner and one Tabitha Mwangi, it would appear as if the Petitioner was not on the payroll for April 2022 and the Petitioner received no salary for the month and complained about it in a language described as disrespectful and unprofessional. From the email communication, the Petitioner was far from civil.
100. The Respondent served a show cause letter upon the Petitioner dated 8<sup>th</sup> May, 2022 after her return.
101. The letter accused the Petitioner for having travelled out of the country without clearance from the Communications Secretary and demanded a response within 7 days.
102. The Petitioner responded by a letter dated 12<sup>th</sup> May, 2022 detailing that she had called the Communications Secretary in early February 2022 about the intended travel to Nigeria and Norway and had sought verbal clearance which the Communications Secretary gave and subsequently Human Resource advised her of the approval and completion of leave application form.
103. The Petitioner explained that she had another telephone conversation about the information required by the Nigerian High Commission and Embassy of Norway and the Communications Secretary gave directions on the email to the Human Resource Administrative Officer who did and signed the letter dated 7<sup>th</sup> February, 2022 to the Nigerian High Commission.
104. Contrary to the Respondent Counsel's submissions which sets out 3 reasons why disciplinary measures should be taken against the Petitioner, the notice to show cause on record has a single accusation vide



- travelling out of the country without clearance contrary to Circular Ref No. OP/CAB.8/19A dated 18<sup>th</sup> March, 2022.
105. It was urged that although the Communications Secretary was aware of the Petitioner's travelling and directed Human Resource to facilitate the same, that was not clearance to travel out of the country.
  106. The Respondent counsel's submission may be faulted in various ways, first, the Respondent's Communications Secretary did not deny having given verbal authority for the Petitioner to travel as contained in the Petitioner's letter dated 12<sup>th</sup> May, 2022 and email communication between Human Resource and the Petitioner. Second, the Respondent has not demonstrated that the circular in question indicated that clearance had to be applied for and granted in a written form and was required at the Airport as was the case in the late 1990s and early 2000. Third, the Communication Secretary did not direct the Petitioner to apply for clearance in writing or was required to. Finally, the Respondent did not furnish a copy of the circular to authenticate the allegation.
  107. From the evidence on record, the court is satisfied that the petitioner applied for unpaid leave for 3 months which was approved and informed the Communications Secretary the purpose for which leave was taken, who had no objection and facilitated the procurement of visas.
  108. It is disingenuous for the Communication Secretary to subsequently allege that the Petitioner travelled out of the country without clearance. The Communications Secretary was by his conduct estopped from making the accusation having approved the travelling and facilitated the same in February 2022.
  109. It is the finding of the court that the Notice to Show Cause dated 8<sup>th</sup> May, 2022 lacks validity and any other action resulting there from is invalid.
  110. The Respondent's Replying Affidavit makes reference to an interdiction letter dated 3<sup>rd</sup> June, 2022 and a warning letter dated 31<sup>st</sup> May, 2022 which were served after the petition herein was filed on 31<sup>st</sup> May, 2022.
  111. The letter accuses the petitioner of various transgressions including mishandling of official information by giving details to persons outside the Respondent and the courts, failure to obey instructions of the supervisor, reinstating an officer's salary while facing disciplinary action, rudeness and insubordination. The letter accorded the Petitioner 21 days to respond and interdicted the Petitioner pending investigation on the alleged misconduct and was to report on duty once a week.
  112. In her response, the Petitioner relied on the International Code of Ethics for Professional Accounts as the justification of disclosure of information to the court.
  113. The Petitioner stated that the Communications Secretary pressured her to do things in contravention of *the Constitution* of Kenya and the *Public Finance Management Act* and attendant regulations and paragraphs 270.2 and 270.3 of the International Code for Professional Accountants.
  114. On reinstatement of salary, the Petitioner posited that the accusation was false and attached copies of emails and documents submitted for the processing of salaries and the alleged staff was not on the payroll and the email was copied to the Communication Secretary and Internal Auditor.
  115. The Petitioner maintained that she only declined to process irregular payments and the alleged inactivity at the Respondent was due to over expenditure which she raised and was being punished.
  116. One of the accusations against the Petitioner is rudeness. Regrettably, she did not address this issue. Evidence on record, in the form of email communication between the Petitioner and Human Resource reveals the use of intemperate language by the Petitioner and having agreed to work together



previously, the language did not augur well with the maintenance of harmony and conducive working environment.

117. The Petitioner stated that she was hounded out of office, denied access to the office through confiscation of keys and laptop and email communication which amounted to a violation of her rights.
118. Finally, the Petitioner maintained that she acted and continued to act in accordance with *the Constitution* of Kenya, Public Management Finance Act and the International Code of Ethics.
119. The Respondent's notice to show cause/interdiction letter dated 3<sup>rd</sup> June, 2022 lapsed on 24<sup>th</sup> June, 2022 and the interdiction was supposed to facilitate investigations.
120. It is unclear whether the investigation was conducted and what has transpired since then.
121. The Respondent made specific allegations, the Petitioner responded and the Respondent is yet to respond to the responses or file an investigation report.
122. It is elemental to mention that from the evidence on record, it is unambiguous that the Petitioner and the Respondent's Communication Secretary have had not a very cordial relationship for some time which perhaps could explain exclusion of the Petitioner as a signatory to the Respondent's bank accounts. A few illustrations would appear to reinforce this position.
123. First, by an internal memo dated 4<sup>th</sup> March, 2019, the Petitioner informed the Communications Secretary about undocumented transfers/payments on the Respondent's Current Account on 25<sup>th</sup> February, 2019 and 1<sup>st</sup> March, 2019 of Kshs.65,000/= and Kshs.96,000,000/= respectively. While the latter was not irregular, the former was and the Communications Secretary was surcharged by the Ethics and Anti-Corruption Commissions vide letter dated 10<sup>th</sup> November, 2020.
124. Second, by an internal memo dated 7<sup>th</sup> March, 2019, the Petitioner notified the Communications Secretary that the Respondent's Account had insufficient balances owing to undocumented transfers/payments made on the account.
125. Third, by letter dated 9<sup>th</sup> October, 2019, the Petitioner made a written complaint to the Commission on Administrative Justice (CAJ) on unfair treatment regarding late submission of Accounts and Budget yet she was on compulsory leave following a Presidential Directive of June 2018, threatening her with disciplinary action and unilateral approval of training plan to the exclusion of management. The parties agreed to have the matter resolved by the CAJ through mediation and the agreement was signed on 19<sup>th</sup> January, 2021.
126. By letter dated 19<sup>th</sup> January, 2021, the mediation agreement was forwarded to the parties. The parties agreed on the establishment of Standard Operating Procedures on inter alia capacity development, appraisals, contract renewals, communication and communication channels, reporting channels and reports, team building and grievance resolution. The parties committed to work together.
127. Finally, in its Draft Management Letter for the year ended 30<sup>th</sup> June, 2021, the Office of Auditor General raised innumerable audit queries which the Respondent responded to. It is unclear how many of them were eventually dropped from the list. The Respondent tendered no evidence on this issue. The queries related to inter alia failure to account for monies (Kshs.4,350,000/=), payments made in contravention of Treasury and Salaries and Remuneration Commission circulars, payments made to a Taskforce whose task remained outstanding long after the deadline, Asset Management, contracting employees on permanent and pensionable terms. Cash management, irregular procurement of goods and services, categorization of Head of Finance and Accounts as NCS 4 while other heads of Department were in NCS 3, lack of career progression and an unproven staff establishment.



128. The Respondent's response to the management letter dated 31<sup>st</sup> January, 2022 was a general treatise of how things would be done in future without explaining the past.
129. Notably, the number of audit queries signifies a dysfunctional organization where tax payers money was being paid out without regard to the law, procedures and government circulars.
130. Coincidentally, the Auditor General raised a query on spending without budget, one of the accusations made against the Petitioner as failure to obey instructions of her superior in the next financial year having been raised the previous year.
131. In the face of such impunity, it would be injudicious not to sympathise with the petitioner's case that she is being punished and harassed because of being honest and forthright in undertaking her professional duties as an Accountant and upholding the ethical principles of the profession.
132. Similarly, the petitioner has by documentary evidence demonstrated consistent course of conduct in her endeavour to ensure observance of the law and principles of finance and accounting and was vindicated by the Auditor General earlier in the year through audit queries. Evidence the Respondent has barely controverted.
133. Before concluding this issue, it is worth noting that the notice to show cause/interdiction letter dated 3<sup>rd</sup> June, 2022 made no reference to the duration of the interdiction which cannot escape the court's scrutiny. Typically, interdictions are often resorted to for purposes of investigations which must be conducted expeditiously.
134. It is trite that interdiction must be for a prescribed duration. It must have a beginning and an end. It is an unfair labour practice to put an employee on tenterhooks for an undefined duration.
135. The interdiction in the instant case cannot stand, if it has not been lifted since June 2022.
136. Before delving into the issue of reliefs, it is essential to dispose of the issue of whether the respondent was an entity that can be sued.
137. The Respondent urged that it lacked legal capacity and could not be sued.
138. Section 84 of the [\*Kenya Information and Communications Act\*](#) provides;
1. There is established a Secretariat to be known as the National Communication Secretariat headed by a Communications Secretary and comprising such other officials as may be determined from time to time.
  2. The function of the Secretariat shall be to advise the Government on the adoption of a communication policy . . .
139. Significantly, the National Communication Secretariat (NCS) was established long before the Communications Authority of Kenya in 2013.
140. Section 84 of the Act does not expressly confer upon the NCS legal status.
141. The terms and conditions of service for the National Communication Secretariat staff were developed by the Directorate of Personnel Management, Office of the President in 2002 and the salaries proposed by the task force required approval by the Head of Public Service.
142. The terms and conditions of service provided for a Board of Directors comprising a Chairman, Communications Secretary, Permanent Secretary for Communications or his representative, Permanent Secretary for Information and Broadcasting or his representative, Permanent Secretary



- for Finance or his representative, Attorney General or his representative and at least 4 other persons appointed by the Minister by virtue of their knowledge in matters relating to Postal Services Broadcasting, telecommunications, radio communication, commerce or related consumer interests.
143. The terms of service were explicit that all employees of the Secretariat were to be appointed on a three year contract renewable subject to satisfactory performance and on satisfactory completion of each contract term, an employee was eligible for gratuity at 31% of the basic salary.
144. From the evidence on record, it is evident that the Respondent has a distinct budget separate from that of the Parent Ministry and has an Accounting Officer who authorizes expenditure and who is answerable to the board. Equally, its financial statements are audited by the Auditor General.
145. From the forgoing, it is the court's view that the NCS was conceived as a distinct government entity which ought not be viewed as unincorporated analogous to a religious organization which are private institutions as was the case in HCCC No. 5116 of 1992, Free Pentecostal Fellowship in Kenya V Kenya Commercial Bank. Moreover, it was not established as an office.
146. Holding otherwise would have serious implications, including exposing public officers to personal liability for decisions made in an official capacity.
147. As regards the reliefs sought, the court proceeds as follows;
148. Having found that the Petitioner has been serving the Respondent as the Accountant but discharging the duties and responsibilities of the Head of Finance and Accounts, a fact the Respondent admits in its documents and was raised by the Auditor General as an audit query, the court is satisfied that the Petitioner ought to have been designated as a Head of Finance and Accounts and remunerated accordingly. Regrettably, since the petitioner did not raise the issue at any point with the employer and executed different contracts overtime and the Human Resource Instruments relied upon had not been approved, as a basis, the amount of Kshs.8,781,968.00 claimed is in the court's view unmerited in this instance.
149. In addition, the position of Accountant was not part of the original positions established by the terms and conditions for staff of the NCS, 2002. It is unclear how it was categorized in 2009 when the Petitioner was promoted.
150. Similarly, the petitioner has not demonstrated entitlement to general damages or permanent injunction.
151. In the end, judgement is entered for the Petitioner as against the Respondent in the following terms:
- a. A declaration that the Respondent violated the Petitioner's rights under Article 41 of *the Constitution* of Kenya, 2010.
  - b. A declaration that the Petitioner's job grade should be consistent with her role, qualifications and experience comparable to her professional peers.
  - c. An order in the form of *certiorari* is issued to bring into this court and quash the notice to show cause dated 8<sup>th</sup> May, 2022 and any action taken in furtherance thereof.
  - d. The Respondent is directed to pay the petitioner total underpayment from the date the last contract was executed to date.
  - e. Interest at court rates on (d) from date of judgement till payment in full.
  - f. Costs of this suit.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF  
FEBRUARY 2023**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**DR. JACOB GAKERI**

**JUDGE**

