



**Anthony v Communications Authority of Kenya & 3 others (Petition E161 of 2021) [2022] KEELRC 1117 (KLR) (25 January 2022) (Judgment)**

*Manyara Muchui Anthony v Communications Authority of Kenya & 3 others [2022] eKLR*

Neutral citation: [2022] KEELRC 1117 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E161 OF 2021  
M MBARŪ, J  
JANUARY 25, 2022**

**BETWEEN**

**MANYARA MUCHUI ANTHONY ..... PETITIONER**

**AND**

**COMMUNICATIONS AUTHORITY OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**STATE CORPORATIONS ADVISORY COMMITTEE ..... 2<sup>ND</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**Mandate of the Public Service Commission to regulate the Human Resources of State Corporations.**

*The court made a determination about the constitutionality of section 31 of the Public Service Commission Act. It stated that section 31 of the Public Service Commission Act allowed the PSC to delegate its functions in writing but it was in conflict with articles 232, 233, 234, 235 and 236 with regard to the public service and the Public Service Commission under the Constitution and the section should be declared null and void.*

Reported by John Ribia

**Constitution Law** – state corporations – State Corporations Advisory Committee (SCAC) – Public Service Commission (PSC) – mandate of SCAC vis-à-vis the mandate of PSC – whether positions held in state corporations were in the public service subject to regulation by the State Corporations Advisory Committee or by the Public Service Commission – who, between SCAC and the PSC, should regulate the human resource of state corporations? – Constitution of Kenya, 2010, articles 232, 233, 234, 235 and 236; Public Service Commission Act, Act No. 10 of 2017.

**Statutes** – constitutionality of statutory provisions – constitutionality of section 31 of the Public Service Commission (PSC) Act – whether section 31 of the PSC Act that provided that the PSC may delegate its duties was in conflict with articles 232, 233, 234, 235 and 236 (in respect of the public service and Public Service Commission) of the Constitution.



*Constitutional Law – public officers – categorization of employees of parastatals/state corporations – whether an employee of a parastatals/state corporation was a public officer – what did the courts consider in making a determination as to whether an individual was a public officer – Constitution of Kenya, 2010, article 260.*

### **Brief facts**

The Communications Authority of Kenya (CAK) (1<sup>st</sup> respondent) advertised for two vacant positions in the print media on October 1, 2021 with respect to director frequency spectrum management and director competition management and applicants were directed to submit applications by October 26, 2021. On September 28, 2021 the CAK issued an internal advertisement inviting applications for 43 vacant positions. Applicants were to submit applications by October 19, 2021. The advertisements were issued pursuant to the new human resource policies and guidelines prepared and prescribed by the CAK for the State Corporations Advisory Committee (SCAC) (2<sup>nd</sup> respondent). The human resource manual required that all serving and prospective employees of the CAK from the position of assistant manager and above must have a minimum academic qualification of a master's degree and that the persons must have undertaken supervisory or management courses lasting not less than 2 to 4 weeks respectively from a recognised institution. The CAK had scheduled trainings for the identified staff to undertake supervisory and senior management courses to be conducted at the Kenya School of Government during the year 2021/2022.

The petition was that the scheduled staff trainings were discriminatory and prejudicial to members of staff who would have undergone the training on supervisory and senior management courses before the close of the advertisements for vacant positions. The petitioner stated that the scheduled training gave an unfair advantage to the staff whose training had been timed to take place before the deadline for the submissions of the applications.

The petitioner also sought a declaration that section 31 of the Public Service Commission (PSC) Act (that provided that the PSC may delegate its duties) was in conflict with articles 232, 233, 234, 235 and 236 of the Constitution (in respect of the public service and Public Service Commission).

### **Issues**

- i. Whether positions held in state corporations were in the public service and were subject to regulation by the State Corporations Advisory Committee or by the Public Service Commission.
- ii. Whether section 31 of the Public Service Commission (PSC) Act (that provided that the PSC may delegate its duties) was in conflict with articles 232, 233, 234, 235 and 236 (in respect of the public service and Public Service Commission) of the Constitution.
- iii. Who should regulate the human resource of state corporations?
- iv. What did the courts consider in making a determination as to whether an individual was a public officer?
- v. Whether an employee of a parastatal/state corporation was a public officer within the meaning of article 260 of the Constitution.
- vi. Whether consent filed in a different suit could apply in perpetuity to regulate the employment of employees of a state corporation.

### **Relevant provisions of the Law**

#### **Public Service Commission Act, Act No. 10 of 2017**

#### **Section 31**

#### **31. Delegation of powers**

*(1) The Commission may, where appropriate and in writing, delegate any power or assign a duty conferred to it under the Constitution or this Act to its members, an officer, body or authority in the public service.*

*(2) A delegation or assignment under subsection (1) shall not prevent the Commission from exercising the power.*

*(3) A delegation under this section—*

*(a) shall be subject to any conditions that the Commission may impose;*



*(b) shall not divest the Commission of the responsibility concerning the exercise of the powers or the performance of the duty delegated, and*

*(c) may be withdrawn, and any decision made by the person to whom the delegation is made may be withdrawn or amended by the Commission.*

*(4) The Commission may, at any time, institute an audit, investigation, inquiry or visit to determine whether the delegated powers are properly exercised by the authorized officer.*

*(5) Where the audit, investigation, inquiry or visit establishes that an authorized officer has breached any condition or improperly exercised delegated powers, the Commission shall take corrective measures including revoking the delegation.*

### **Constitution of Kenya, 2010**

#### **Articles 233, 234, 235 and 236**

#### **233. The Public Service Commission**

*(1) There is established the Public Service Commission.*

*(2) The Public Service Commission consists of a chairperson, a vice chairperson and seven other members appointed by the President with the approval of the National Assembly.*

*(3) Subject to clause (4), a person is not eligible for appointment as a member of the Commission if the person—*

*(a) has, at any time within the preceding five years, held office, or stood for election as—*

*(i) a member of Parliament or of a county assembly; or*

*(ii) a member of the governing body of a political party; or*

*(b) holds any State office;*

*(c) is, or has at any time been, a candidate for election as a member of Parliament or of a county assembly; or*

*(d) is, or has at any time been, the holder of an office in any political organisation that sponsors or otherwise supports, or has at any time sponsored or otherwise supported, a candidate for election as a member of Parliament or of a county assembly.*

*(4) Clause (3)(c) and (d) cease to apply to a person after two general elections for Parliament have been held since the person ceased to be such a candidate or office holder.*

*(5) There shall be a secretary to the Commission.*

*(6) The secretary—*

*(a) is the chief executive of the Commission; and*

*(b) shall be appointed by the Commission for a term of five years, and is eligible for re-appointment once.*

#### **234. Functions and powers of the Public Service Commission**

*(1) The functions and powers of the Commission are as set out in this Article.*

*(2) The Commission shall—*

*(a) subject to this Constitution and legislation—*

*(i) establish and abolish offices in the public service; and*

*(ii) appoint persons to hold or act in those offices, and to confirm appointments;*

*(b) exercise disciplinary control over and remove persons holding or acting in those offices;*

*(c) promote the values and principles referred to in Articles 10 and 232 throughout the public service;*

*(d) investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;*

*(e) ensure that the public service is efficient and effective;*

*(f) develop human resources in the public service;*

*(g) review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;*



*(b) evaluate and report to the President and Parliament on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the public service;*

*(i) bear and determine appeals in respect of county governments' public service; and*

*(j) perform any other functions and exercise any other powers conferred by national legislation.*

*(3) Clauses (1) and (2) shall not apply to any of the following offices in the public service—*

*(a) State offices;*

*(b) an office of high commissioner, ambassador or other diplomatic or consular representative of the Republic;*

*(c) an office or position subject to—*

*(i) the Parliamentary Service Commission;*

*(ii) the Judicial Service Commission;*

*(iii) the Teachers Service Commission;*

*(iv) the National Police Service Commission; or*

*(d) an office in the service of a county government, except as contemplated in clause (2)(i).*

*(4) The Commission shall not appoint a person under clause (2) to hold or act in any office on the personal staff of the President or a retired President, except with the consent of the President or retired President.*

*(5) The Commission may delegate, in writing, with or without conditions, any of its functions and powers under this Article to any one or more of its members, or to any officer, body or authority in the public service.*

### **235. Staffing of county governments**

*(1) A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for—*

*(a) establishing and abolishing offices in its public service;*

*(b) appointing persons to hold or act in those offices, and confirming appointments; and*

*(c) exercising disciplinary control over and removing persons holding or acting in those offices.*

*(2) Clause (1) shall not apply to any office or position subject to the Teachers Service Commission.*

### **236. Protection of public officers**

*A public officer shall not be—*

*(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or*

*(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.*

### **Held**

1. Under Section 12(2) of the Employment and Labour Relations Court Act, 2011, the law provided for employment and labour relationships which the Employment and Labour Relations Court had jurisdiction to address. The court was given a constitutional mandate to hear and determine all employment and labour relations disputes.
2. The instant petition was anchored under the provisions of various articles including articles 22, 23, and 258 of the Constitution of Kenya, 2010 (Constitution). Under those provisions, a petitioner was allowed to file a petition to vindicate the rule of law and get the unlawful conduct stopped. In doing so, the strict rule of *locus standi* applicable to private litigation was relaxed and a broad rule was evolved which gave standing to any member of the public acting *bona fide* and having sufficient interest in instituting an action for redress of a public wrong or public injury. The public good was clear.
3. A determination on the constitutionality of section 31 of the Public Service Commission Act went to the mandate of the Communications Authority of Kenya (CAK) in managing its human resource vis-à-vis the mandate of the State Corporations Advisory Committee (SCAC) and Public Service



- Commission's (PSC). Those were matters which called on the court to address the constitutionality of various statutes looked at together with the Constitution and make a finding.
4. The Employment and Labour Relations Court Act stipulated the procedure for the enforcement of employment rights. The petitioner had filed the petition on his own behalf and on behalf of the Kenyan public as the issues addressed affected and were likely to affect the entire country. Such matters gave the petitioner proper standing before the court.
  5. The collectivity of public service and being a public officer were all interlinked into public service. The only exception was state officers performing a function within a State organ. All other persons serving the people of Kenya were in the public service. That was the constitutional definition under article 260 of the Constitution. Employees of state corporations were public officers within the meaning of article 260 of the Constitution.
  6. Under section 11 of the State Corporations Act, state corporations were required to prepare and submit to the line minister and the Treasury for approval, yearly estimates of their revenue and expenditure accompanied by proposals for funding of the projects they were to undertake, or implement during the financial year. State corporations and parastatals generated their own revenue for expenditure, and their funding was not necessarily wholly provided for by Parliament.
  7. Before determining whether an individual was a public officer and in line with the provisions of article 259 of the Constitution, the court considered the following questions;
    1. was the person concerned in an office in the national government, the county government or the public service?
    2. did that person receive remuneration or benefits payable from the consolidated fund or directly by moneys provided by Parliament?
    3. did that person perform a function within a State organ or a state corporation?
  8. Officers and persons serving/working in state corporations were public officers within the meaning of article 260 of the Constitution. A body corporate established under an Act of Parliament was a state corporation within the meaning of that Act, and therefore subject to the Constitution. All state corporations had national outreach by nature and design and fell squarely under the auspices of the National Government. The CAK was also a public service institution that was in existence under the former Constitution and its officials and employees would be considered public officers under it. The effect of the transitional clause in section 31 of the sixth schedule to the Constitution applied with regard to the CAK employees.
  9. The import of *Katiba Institute & another v Attorney General & Another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021] eKLR was not that officers of state corporations were not within the meaning of public officers and did not hold office in public service. The matter related to the appointment of board chairpersons and board members and not with regard to persons employed on contract to work and serve under the Board.
  10. An employee in a parastatal or a state corporation and a board member appointed under the State Corporations Act by the President held different positions in fact and in law. The two could not be equated and placed under the same legal regime. One was under an appointment by the President and subject to removal under the same mandate whereas an employee was recruited and appointed under the terms and conditions of service to perform a public service in the state corporation. State corporations were agencies of the government.
  11. The CAK had been in existence since the year 1999 regulating the communications/ICT sector in Kenya, a resource that belonged to the people of Kenya, the public, held in trust for them by the government. The employees of the CAK were paid from public funds, not private funds.
  12. All other public officers had to include all shades of public servants, including employees of the state corporations, which like the CAK were agents and instrumentalities of the government. The involvement of the Public Service Commission, PSC, with regard to all other public officers, was to



- be limited to advising the government and its agencies in the human resource policy, not defining and running the process.
13. The constitutional threshold for regulation of public service was a mandate of the PSC. Article 234(2) of the Constitution which directed in mandatory terms that the Commission was to establish and abolish offices in the public service and appoint persons to hold or act in those offices, and to confirm appointments. That was therefore the repository of all public service regulations in terms of terms and conditions of service in its collectivity. It was a constitutional mandate.
  14. The State Corporations Act in its preamble stated that the Act made provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes. The control and regulation of state corporations was therefore statutory. Pursuant to section 5(3) of the State Corporations Act, the Board of a state corporation was allowed to employ staff on terms and conditions of service as the Minister in consultation with the Committee may approve. That was in contradiction of article 234(2) read together with article 260 of the Constitution on regulation of public service and definition of who a person in the public service was.
  15. The entity given constitutional authority to employ, issue terms and conditions of service, review, audit and advice with regard to public service was the PSC. Employees in the service of the CAK were subject to the constitutional mandate of the PSC.
  16. The legal opinion issued by the Attorney General (AG) should translate into legislation giving effect/force to the provisions of article 234 of the Constitution. That was to ensure the intentions of the people of Kenya in stating that the Public Service Commission was in charge of the public service were not negated by other statutory provisions in force as at August, 2010.
  17. The AG had to address such matters with urgency and harmonise the legislation with the Constitution since without giving a proper framework, litigation such as the instant petition would continue to be filed out of great need to streamline public service applied by different agencies due to the nature of the statutory mandate specific to each authority, agencies, state corporations and parastatals. A common thread should flow from the PSC as mandated under the Constitution. Without it, authorities such as the CAK would continue to err for no fault of their own.
  18. State corporation staff were not officers in the public service and were outside the mandate of the Salaries and Remuneration Commission save the constitutional mandate of the Salaries and Remuneration Commission in addressing remuneration for public officers and giving advice to public service was fundamentally and foundationally different from that of the Public Service Commission who was given constitutional authority to;
    1. establish and abolish offices in the public service; and
    2. appoint persons to hold or act in those offices, and to confirm appointments.
  19. The AG was to take forward the opinion expressed above and give it the force of law. The diverse state corporations under the mandate of the SCAC particularly the CAK would benefit in terms of the law, policy and human resource instruments in force.
  20. The PSC was also given constitutional authority under article 234(2)(d) to investigate, monitor and evaluate the organisation, administration and personnel practices of the public service. Such mandate called for a proactive Commission. Standing aside to wait for state corporations to make requests for investigation, monitoring and evaluation was not sufficient. That could not happen considering the elaborate measures taken by the CAK to review its Human Resource instruments in consultation with the SCAC and the Minister had since approved the same for implementation. Such a situation demonstrated inaction on the part of the PSC and an abdication of its constitutional mandate.
  21. The PSC failed to investigate the practices of the CAK and SCAC as provided for under section 60 of the Public Service Commission Act. The withdrawal of the delegated authority issued to the CAK was not sufficient. It was imperative that pursuant to article 234(2) of the Constitution, for the PSC in conjunction with the the AG to ensure effective legislative changes in managing the public service.



- That would build harmony and cohesion under one constitutional commission, the PSC, by taking charge over public service. That was the essence of article 234(2)(g) and (h) of the Constitution that the PSC should review and make recommendations to the national Government on conditions of service, qualifications of officers and evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in articles 10 and 232 of the Constitution were complied with in the public service. Unless the PSC was able to draw from those provisions and address them on priority basis, petitions such as the instant one would continue to be filed.
22. The complaint received from the petitioner should have moved the PSC into action. They had opted to blame the CAK and SCAC. Such did not benefit the people of Kenya in any way. It only frustrated persons in the public service for lack of a proper legislative framework supported by policy and human resource instruments that were streamlined under the Public Service Commission.
  23. Pursuant to section 27 of the State Corporations Act, the CAK and SCAC were under the law allowed to review and investigate the affairs of the CAK and make recommendations and upon advice, review the establishment and re-organise its functions; and where necessary, advise on the appointment, removal or transfer of officers and staff. The 1<sup>st</sup> respondent in consultation with the SCAC and the Minister had reviewed its human resource and policy instruments and advertised for various positions internally and externally, which was the subject of the petition. That was done in recognition of the existing laws and in adherence to the provisions.
  24. Challenges would not have arisen had the PSC been proactive in undertaking its mandate. The CAK was bound to follow the law as it was. The advertisements posted were within law and the human resource instruments approved for use by the SCAC and the Minister pursuant to section 27 of the State Corporation Act. The relief sought to declare the powers of the SCAC in approving the human resource instruments for use by the CAK would not issue. The CAK and SCAC had adhered to the law as it was.
  25. Section 31 of the Public Service Commission Act allowed the PSC to delegate its functions in writing but it was in conflict with articles 232, 233, 234, 235 and 236 with regard to the public service and the Public Service Commission under the Constitution and the section should be declared null and void.
  26. The Public Service Commission as an independent constitutional commission was empowered under article 234(5) of the Constitution to delegate its functions and powers. Delegation of a function and power did not negate the power held by a principal. Responsibility lay with the principal. Delegation did not imply parting with powers by the person who delegated but conferred authority to do things which otherwise the person delegating would have to do himself. A power to delegate further could only arise where it was within the scope of the primary delegate's authority.
  27. It was constitutional and lawful for the PSC to delegate any of its functions to any of its members, officer, body or authority in the public service on condition that it was done in writing, with or without conditions. The PSC had issued such authority and delegated its powers to the CAK by a letter dated July 30, 2018 but it had since been recalled by letter dated September 30, 2019. Regulation of the human resource of state corporations was the mandate of the PSC.
  28. Various statutes, policies and practices in existence which gave SCAC various duties and responsibilities to regulate state corporations should be addressed by the PSC and the AG accordingly to avoid further petitions in that regard. Such matters could well be addressed by the Executive and Parliament with expert advice from the PSC in consultation with the AG to address and ensure adherence to article 234(2)(h) of the Constitution. There were far-reaching implications in the failure by the PSC to undertake an investigation and audit of all state corporations, including the CAK pursuant to article 234(2)(d) of the Constitution to ensure that the public service was efficient and effective towards the development of human resources in the public service. That could only be achieved through concerted efforts between all the respondents.



29. The CAK's Human Resources policies and guidelines prescribed and approved by the SCAC were to remain in operation and application until further action was undertaken on the same by the PSC and the AG. The PSC was to address and investigate and audit the CAK human resource instruments, policies and practices within 365 days from the date of the judgement and issue appropriate recommendations. The PSC was to report to the court on the measures undertaken to harmonise the law to meet the constitutional threshold pursuant to article 234 of the Constitution. The CAK had been granted operational autonomy by the SCAC. That was lawful and valid and would suffice pending action by the PSC and the AGs in the next 365 days. The orders were to run concurrently with the PSC undertaking an investigation of the organisation, administration and personnel practices of the CAKs and address.
30. The CAK was to proceed to use and apply and or implement the approved human resource policies and guidelines prescribed and approved by the SCAC for the next 365 days which was a reasonable time and space to engage and ensure a streamlined public service through the PSC.
31. The orders sought with regard to issuance of an injunction stopping the recruitment of director frequency spectrum management and director competition management of the CAK, which was done in the context of existing legislation out of no fault of the CAK and SCAC, would not issue. The recruitment of such officers was to proceed as advertised in application of approved human resource policies and guidelines applicable to the CAK.
32. To ensure completeness and taking into account the date the advertisements were closing the same was stopped by the court for good cause and to allow for the hearing of the petition, the CAK was to post and publicise a new date for receipt of all applications. That would give interested and eligible applicants a reasonable opportunity to put in their applications.
33. With regard to the internal advertisement for various vacant positions of the CAK, every employer had the prerogative to manage its internal affairs but that prerogative should not be used to deny any eligible employee a deserved promotion on the basis of fair competition and merit. Where the CAK had developed tools to ensure fairness and reward merit, with the advantage of expertise drawn from the SCAC, the internal advertisement for various positions was well addressed.
34. The core objective of article 232 of the Constitution was to ensure that all public/state institutions made all appointments and promotions on the basis of fair competition and merit and an advertisement was meant to promote fair competition among eligible candidates.
35. There existed no law which required an employer to confirm an officer in a vacant position on account of having acted in such position whatever the period of service. The parameters of article 232 of the Constitution applied. Every eligible candidate had to be given a reasonable opportunity to apply and fairly compete with others.
36. The petitioner had sought to be provided with certified copies of the delegation instrument and revocation/withdrawal of any delegated authority to the SCAC to carry out human resource powers and functions of the Public Service Commission. A letter of delegated authority was issued and dated July 30, 2018 but later recalled by letter dated September 30, 2019. That was not controverted in any manner. The facts as stated were part of the court record.
37. A consent filed in a different suit in the year 2015 could not apply in perpetuity to regulate the employment of all employees of the CAK particularly with regard to conversion of employment status from permanent and pensionable to contract terms even where the law permitted and the subject employee had given consent pursuant to section 13 of the Employment Act, 2007.
38. An employer had the prerogative to issue employment terms and conditions to each employee based on the business needs and operational requirements save where the employer sought to change such terms from one employment regime to the other, such matter had to be brought to the attention of the employee and who should give consent in writing. Conversion of employment terms and conditions was lawful and a legitimate practice at the shop floor subject to adherence to the applicable



- law, agreement or private treaty with the employee or the representative trade union or employers' organisation/association.
39. Section 10(5) of the Employment Act, 2007 required that any change to the employment contract be made in consultation with the subject and affected employee and upon the revision of the contract of service, it had to be done in writing and the subject employee(s) must signify his/her consent to the change/revision. In the instant case, where indeed the respondent had made changes, revised and or reviewed the terms and conditions of employment of any employee, there was need for interrogation as to whether written consent and approval was obtained and if so, whether the subject employee was aggrieved by any matter and if not, the matter must rest as the consent entered into in any other matter between another employee(s) and the CAK had to be looked at in its own merits. Employment was personal and specific and every employment contract had to be addressed on its terms and conditions.

*Petition allowed.*

### **Orders**

- i. *Pursuant to article 234(2) of the Constitution the PSC was to review, audit and make recommendations with regard to the CAK human resource policies and practices of its officers/employees and report to the court within 365 days;*
- ii. *The PSC was to undertake an investigation of the organisation, administration and personnel practices of the CAK and report its recommendations within 365 days;*
- iii. *The PSC was directed to develop human resource policies and guidelines for the CAK in strict compliance with the Constitution and the law based on orders (i) and (ii) above;*
- iv. *The CAK were to re-issue the internal and other public advertisements for filling of vacant positions and allow receipt of applications within the next 14 days without placing to a disadvantage those who had already applied and those likely to apply in the extended period; the CAK was to apply existing approved tools until receipt of recommendations of the PSC in accordance with (i) and (ii) above; and*
- v. *Each was to shall bear its own costs.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Attorney General & 2 others v Independent Policing Oversight Authority & another* Civil Appeal 324 of 2014; [2015] eKLR - (Explained)
2. *Chemilil Sugar Company Limited & 2 others v Kenya Union of Sugar Plantation and Allied Workers & another* Cause 1882 of 2014; [2015] KEELRC 1493 (KLR) - (Explained)
3. *Hassan, Sumayya Athmani v Paul Masinde Simidi & another* Civil Appeal 195 of 2016; [2019] KECA 107 (KLR) - (Explained)
4. *Kandie, Juma Kiprono & 2 others v Communications Authority of Kenya* Cause 128 of 2015; [2015] KEELRC 64 (KLR) - (Explained)
5. *Katiba Institute & another v Attorney General & another* Constitutional Petition 331 of 2016; [2020] eKLR - (Explained)
6. *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties)* Petition 236 of 2018; [2021] KEHC 6781 (KLR) - (Explained)
7. *Kenya Union of Commercial, Food and Allied Workers v Salaries and Remuneration Commission & 2 others* Cause 30 of 2014; [2015] KEELRC 1628 (KLR) - (Explained)
8. *Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudbehia Workers) v Salaries and Renumeration Commission* Constitutional Application 294 of 2013; [2014] KEHC 8148 (KLR) - (Explained)
9. *Mogusu, Rogers Mogaka v George Onyango Oloo & 2 others* Petition 96 of 2014; [2015] KEHC 7639 (KLR) - (Explained)



10. *Mugendi, Daniel N v Kenyatta University & 3 others* Civil Appeal 6 of 2012; [2013] KECA 41 (KLR) - (Explained)
11. *National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 others; Attorney General & another (Interested Parties)* Cause 1664 of 2012; [2013] KEIC 4 (KLR) - (Explained)
12. *Njau, Alfred & 5 others v City Council of Nairobi* Civil Appeal 74 of 1982; [1983] KECA 56 (KLR) - (Explained)
13. *Okiya Omtatah Okoiti & another v Ann Waiguru, Cabinet Secretary, Devolution & 3 others* Petition 42 of 2014; [2014] KEELRC 231 (KLR) - (Followed)
14. *Oriaro, Geoffrey v Cabinet Secretary Ministry of Labour Social Security and Services & 4 others* Petition 24 of 2015; [2015] KEELRC 1076 (KLR) - (Explained)
15. *Outa, Frederick Otieno v Jared Odoyo Okello & 4 others* Petition 6 of 2014; [2014] eKLR - (Explained)
16. *Republic v Communications Authority of Kenya ex parte Information Communication Technology Association of Kenya (ICTAK)* Judicial Review Application 21 of 2020; [2021] KEELRC 7 (KLR) - (Explained)
17. *Republic v Karisa Chengo* Petition 5 of 2015; [2017] eKLR - (Explained)

## Statutes

### Kenya

1. Co-operative Society's Act (cap 490) In general - (Cited)
2. Constitution of Kenya articles 3, 22, 23, 34(5); 156; 159; 160; 232(g); 233; 234(2)(a)(i)(5); 235; 236; 258; 260(1)- (Interpreted)
3. Employment Act (cap 226) In general- (Cited)
4. Employment and Labour Relations Court Act (cap 8E) section 12(2)- (Interpreted)
5. Exchequer and Audit Act (cap 412) -In general (Cited)
6. Kenya Information and Communications Act (cap 411A) sections 3, 5A- (Interpreted)
7. Kenya National Qualifications Framework Act (cap 214) In general- (Cited)
8. Public Officer Ethics Act (cap 185B) section 2 - (Interpreted)
9. Public Service Commission Act (cap 185) sections 3, 25, 26, 27, 31, 33, 55(3)(5); 58(1); 60- (Interpreted)
10. State Corporations Act (cap 446) sections 4, 5(3); 18(3); 26; 27(c)- (Interpreted)

## Advocates

None mentioned

## JUDGMENT

1. The petitioner is seeking the following orders;
  1. A declaration that the 2<sup>nd</sup> respondent has no legal power or mandate whatsoever to prescribe or to approve Human Resource policies and guidelines for the 1<sup>st</sup> respondent or for any other public body;
  2. A declaration that section 31 of the Public Service Act is in conflict with articles 232, 233, 234, 235 and 236 (in respect of the Public Service and Public Service Commission) of the Constitution and the same is declared null and void;
  3. A declaration that the 1<sup>st</sup> respondent's Human Resources policies and guidelines prescribed and approved by the 2<sup>nd</sup> respondent are null and void;



4. A permanent injunction against the 1<sup>st</sup> respondent from adopting, implementing or in any other way whatsoever dealing with the Human Resource policies and guidelines prescribed and approved by the 2<sup>nd</sup> respondent;
5. A permanent injunction stopping the recruitment of Director Frequency Spectrum Management and director Competition Management of the 1<sup>st</sup> respondent whereof invitation for applications close on October 26, 2021 and that the status quo be and is hereby maintained until such a time a legitimate recruitment process will be conducted in accordance with the law;
6. A permanent injunction stopping the internal advertisement for various vacant positions of the 1<sup>st</sup> respondent whereof invitations for applications close on October 19, 2021;
7. A declaration that the Board of the 1<sup>st</sup> respondent misadvised itself by subjecting its decision to confirm members of staff who have been acting in various positions to the approval or concurrence by the 2<sup>nd</sup> respondent;
8. The court be pleased to quash and set aside the letter dated August 6, 2021 by the 2<sup>nd</sup> respondent requiring the 1<sup>st</sup> respondent to implement the impugned HR policies and guidelines and declining to concur with the decision of the 1<sup>st</sup> respondent's Board to confirm members of staff who have been acting in various positions;
9. The court to direct the 3<sup>rd</sup> respondent to develop Human Resource Policies and guidelines for the 1<sup>st</sup> respondent in strict compliance with the law;
10. The court to direct the 3<sup>rd</sup> respondent to investigate the organisation, administration and personnel practices of the 1<sup>st</sup> and 2<sup>nd</sup> respondents;
11. The court be pleased to issue an order compelling the 3<sup>rd</sup> respondent to provide certified copies of Delegated instrument and revocation/withdrawal thereof of any delegated authority to the 2<sup>nd</sup> respondent to carry out human resource powers and functions of the Public Service Commission;
12. The court be pleased to issue any other or further remedy deemed fit to grant;
13. An order directing the respondents to pay costs of this petition.

### **Petition**

2. The petitioner is a male adult. The 1<sup>st</sup> respondent is duly established under section 3 of the Kenya Information Communications Act and mandated to licence and regulate postal, information and communication services in line with article 34(5) of the *Constitution*. The 2<sup>nd</sup> respondent is established under the *State Corporations Act*. The 3<sup>rd</sup> respondent is established under article 234 of the *Constitution* and the 4<sup>th</sup> respondent is the Principal Legal Advisor to the government pursuant to article 156 of the *Constitution*.
3. The petition is that the 1<sup>st</sup> respondent advertised for two vacant positions in the print media on October 1, 2021 with respect to Director Frequency Spectrum Management and director competition management and applicants were directed to submit applications by October 26, 2021.
4. On September 28, 2021 the 1<sup>st</sup> respondent issued an internal advertisement inviting applications for 43 vacant positions. Applicants were to submit applications by October 19, 2021.



5. These advertisements were issued pursuant to the new Human Resource policies and guidelines prepared and prescribed by the 1<sup>st</sup> respondent for State Corporations Advisory Committee, the 2<sup>nd</sup> respondent.
6. The Human Resource manual requires that all serving and prospective employees of the 1<sup>st</sup> respondent from the position of Assistant Manager and above must have a minimum academic qualification of a Masters Degree and that the persons must have undertaken Supervisory or Management Courses lasting not less than 2 to 4 weeks respectively from a recognised institution. The 1<sup>st</sup> respondent has scheduled trainings for the identified staff to undertake supervisory and senior management courses to be conducted at the Kenya School of Government during the year 2021/2022.
7. The petition is that the scheduled staff trainings are discriminatory and prejudicial to members of staff who will have undergone the training on Supervisory and Senior Management Courses before the close of the advertisements for vacant positions. The scheduled training given unfair advantage to the staff whose trainings have been timed to take place before the deadline for the submissions of the applications.
8. The 1<sup>st</sup> respondent previously sought to fill the vacant position of Director General through an advertisement that contained the requirement that were not supported by the law. the matter was challenged in court but the 1<sup>st</sup> respondent still went ahead to advertise for the position in an irregular and incompetent manner despite findings in ELRC JR No 21 of 2020 – [Republic of Kenya v Communications Authority of Kenya, ex parte Information Communications Technology Association of Kenya\(ICTAK\)](#).
9. The office of the Director General of the 1<sup>st</sup> respondent is the highest ranking office in the Authority and is therefore not expected that junior officers in the advertised positions including Assistant Managers would be required to have much higher qualifications than the Director General. The 3<sup>rd</sup> respondent has the constitutional and statutory mandate to review the qualifications relating to public office in a public body.
10. The 3<sup>rd</sup> respondent issued a circular dated March 11, 2020 suspending the requirement of Strategic Leadership Development Programme and Masters Degree as parameters for promotion of public officers to senior positions and that promotion of public officers will be based on requisite experience and individual performance. Whereas such circular related to public officers it is not envisaged that members of the public and the serving employees of the 1<sup>st</sup> respondent would be required to have the same to qualify for the advertised positions.
11. Under section 55 of the [Public Service Commission Act](#) the 3<sup>rd</sup> respondent is mandated to review and make recommendations to the Cabinet Secretary on qualifications relating to a public office and the guiding principles for the review of qualifications are under section 55(5) of the Act. The 3<sup>rd</sup> respondent is also required to allow interested persons an opportunity to make representations before the review of qualifications.
12. The petitioner has an interest in the review and recommendations of the qualifications of the 1<sup>st</sup> respondent as a potential employee and has a duty to protect serving employees of the 1<sup>st</sup> respondent who are affected by the review of the qualifications. The 3<sup>rd</sup> respondent is expected to consult with the relevant professional bodies in reviewing the qualifications pursuant to section 55(3) of the [Public Service Commission Act](#) and are expected that they would seek the view of the Kenya National Qualifications Authority established under the [Kenya National Qualifications Framework Act](#).



13. The 2<sup>nd</sup> respondent does not have the legal mandate to prescribe human resource policies and guidelines as such is the mandate of the 3<sup>rd</sup> respondent pursuant to article 234 of the Constitution. Even where such mandate is delegated under section 33 of the Public Service Commission Act, the body exercising such delegated power must comply with the requirements of the Constitution and the Public Service Commission Act particularly section 55 of the Act.
14. The 3<sup>rd</sup> respondent in a letter dated July 30, 2018 delegated some human resource functions to the authorised officers seeking information on various matters, save the 2<sup>nd</sup> respondent is not one such body. The 2<sup>nd</sup> respondent has no legal mandate to manage the human resource of the 1<sup>st</sup> respondent in law or in fact.
15. Section 31 of the Public Service Commission Act allow the 3<sup>rd</sup> respondent to delegate its functions in writing but such section is in conflict with articles 232, 233, 234, 235 and 236 with regard to the public service and the Public Service Commission under the Constitution and such Section should be declared null and void.
16. The purported approval given to the 1<sup>st</sup> respondent through letter dated May 17, 2021 by the Ministry of ICT, Innovation and Youth Affairs and the subsequent Human Resources policies and guidelines developed and prescribed for the 1<sup>st</sup> respondent are therefore null and void and not capable of being implemented. These policies have been developed in violation of the Constitution. All positions subject of the internal advertisement are held by members of staff of the 1<sup>st</sup> respondent in acting positions some for over 5 years.
17. The petition is also that the 1<sup>st</sup> respondent Board of Directors made a decision to confirm 59 members of staff to the substantive positions where they have been acting but made the confirmation subject to the concurrence of the 2<sup>nd</sup> respondent.
18. In a letter dated August 6, 2021 the 2<sup>nd</sup> respondent declined to approve the decision of the 1<sup>st</sup> respondent board to promote employees to the positions they were acting in and instead advised them to advertise in line with the new policies and guidelines.
19. The 1<sup>st</sup> respondent board misadvised itself by subjecting its decisions to the approval of the 2<sup>nd</sup> respondent whereas under article 34(5) of the Constitution and section 5A of the Kenya Information and Communications Act it ought to be independent. The 1<sup>st</sup> respondent also failed to appreciate that promotion of its employees should be in compliance with promotion guidelines as prescribed by the 3<sup>rd</sup> respondent and not by internal advertisement.
20. The advertised position of Director, Frequency Spectrum Management is held by an officer, who is due to retire in March, 2022. The position of Director Competition Management has officially been created by transferring certain directors to other Directorates and thereby making it look like a vacancy when indeed there has been a substantive holder of Director Competition, Tariffs and markets Analysis now remained Competition Management in the new organisational structure.
21. The new human resource policies purport to convert the employment of all serving Directors from permanent and pensionable terms to employment on contracts. The conversion is detrimental to the directors and is in contempt of the Consent Orders that the 1<sup>st</sup> respondent recorded in court in ELRC Cause No 128 of 2015 Jumna Kiprono Kandie & 2 others v Communications Authority of Kenya. The 1<sup>st</sup> respondent agreed that before making any changes to its internal or organisational structure it would comply with the law, regulations and policies that would not adversely affect the terms of employment for employees. For such contempt the 1<sup>st</sup> respondent ought to be punished.



22. The petition is that there is a deliberate conspiracy between the 1<sup>st</sup> and 2<sup>nd</sup> respondents to undermine the Constitution to frustrate members of staff of the 1<sup>st</sup> respondent and lock out qualified members of the public from joining the employment of the Authority. The respondents have devised human resource tools that are meant to lock out deserving members of staff from being promoted and further locking out qualified members of the public from applying for position that fall vacant within the Authority. They have created new senior positions of Directors just below the statutory position of Director General in express disregard to section 25, 26 and 27 of the Public Service Commission Act on establishment of public offices in the public service.
23. The petition is that the 3<sup>rd</sup> respondent has failed to investigate the illegal practices of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as provided for under section 60 of the Public Service Commission Act despite these violations being brought to their attention.
24. The petition is that the petitioner has filed the petition in the public interests and under the provisions of articles 3, 22, 258, 23 and 159 read together with 160 and 165 of the Constitution and that unless the orders sought in the petition are granted there shall be grave public interest injury suffered that will irreparable and the respondents have no risk to be suffered.
25. The petition is supported by the affidavit of the petitioner.

### **1st Respondent**

26. The 1<sup>st</sup> respondent in response filed the replying affidavit of Ezra Chiloba the Director General (DG) and avers that the petitioner is a stranger and lacks *locus standi* to file and prosecute this application and petition against the 1st respondent and has no sufficient interest in law to commence these proceedings since section 12(2) of the Employment and Labour Relations Relation Court Act, the petitioner is neither an employee of the 1<sup>st</sup> respondent nor an employer, a trade union or parties defined under the law to file a petition before this court.
27. The petitioner's supporting affidavit contains contradictions, fabrications and material non-disclosure calculated to mislead the court. The 1<sup>st</sup> respondent is the regulatory authority for the communication sector in Kenya and has been regulating the ICT industry in Kenya since 1999 when it was established under the Kenya Information and Communications Act (KICA) and has facilitated growth in the ICT sector since.
28. Mr Chiloba also avers that the 1<sup>st</sup> respondent has been implementing 5-year strategic plan cycles which provide the roadmap for its operations and resource allocation geared towards facilitation of growth in the ICT sector and in order to respond to the changing needs, has regularly reviewed its talent management strategy, skills requirements and utilisation of the existing human resource policies. Under the 2018/2023 strategic plan the 1<sup>st</sup> respondent committed to strengthen its institutional capacity and stimulate a high performing culture so as to deliver its mandate.
29. On May 15, 2017 the State Corporations Advisory Committee issued a circular requiring all state corporations to submit their human resource instruments for their approval and the 1<sup>st</sup> respondent reviewed its HR instruments including the Human Resource Policy and Procedures Manual, Career Guidelines, Job Grading, Organisational Structure and Staff Establishment. The process adopted on the review as indicated that;
  - i. In December, 2020 the 1<sup>st</sup> respondent requested its employees to submit proposals and inputs to the HR instruments;



- ii. Between 11<sup>th</sup> and January 22, 2021 a taskforce comprising member of the 1<sup>st</sup> and 2<sup>nd</sup> respondent carried out a review of the said HR instruments;
  - iii. On February 16, 2021 the management of the 1<sup>st</sup> respondent went on a retreat to discuss the proposals;
  - iv. The HR instruments were presented to the management committee on February 18, 2021;
  - v. On February 20, 2021 the Board of the 1<sup>st</sup> respondent went on a retreat to discuss the HR instruments and the 2<sup>nd</sup> respondent was invited to provide technical advice;
  - vi. The 1<sup>st</sup> respondent board approved the HR instruments on February 22, 2021;
  - vii. On March 7, 2021 the members of staff of the 1<sup>st</sup> respondent were invited to a meeting where the HR instruments were shared and were invited to make comments; and
  - viii. On March 1, 2021 the approved HR instruments were forwarded to the Ministry of ICT, Innovation & Youth Affairs for onward transmission to the 2<sup>nd</sup> respondent.
30. Mr Chiloba also avers that the staff of the 1<sup>st</sup> respondent were involved in the review of the HR instruments and the petitioner cannot purport that they were not afforded an opportunity to make representations. On March 11, 2020 the Head of Public Service issued a circular directing Boards of Directors to ensure that they were implanting SCAC approved Human Resource policy instruments in line with the circular. On May 17, 2021 the Principal Secretary, Ministry of Information Communication Technology and Youth Affairs informed the 1<sup>st</sup> respondent that the 2<sup>nd</sup> respondent had approved the authority's HR Instruments. The 1<sup>st</sup> respondent is now in the process of implementing the new instruments as part of the transition, the Board at its 97<sup>th</sup> meeting held on September 14, 2021 decided that vacant positions in various departments be filled through internal competition and in line with the new HR framework.
31. The 1<sup>st</sup> respondent on September 28, 2021 issued an internal advertisement inviting applications in respect of 43 vacant positions to be filled through internal competition. In addition to this, placed advertisements for two vacant positions that were posted on print media on October 1, 2021 for the position of Director Frequency Spectrum Management and the Director Competition Management. This was done in compliance with the HR instruments and article 232(g) of the *Constitution*, which mandates public institutions to make all appointments and promotions on the basis of fair competition and merit and the advertisement, is meant to promote fair competition among eligible candidates.
32. Mr Chiloba also avers that the requirement for a masters degree is not a new requirement in the new HR instruments as the 2007 Scheme of Service did not have a requirement of a post graduate degree from the Job Scale F/Assistant Managers across all departments. The 1<sup>st</sup> respondent has been sponsoring its employees for masters/post graduate degree programmes based on individual employees initiative and the requirement for masters degree for officers in the capacity of assistant managers and above is within the 1<sup>st</sup> respondent mandate as such officers need to be subject matter experts in their respective fields to be competent in their respective roles.
33. By a circular dated March 11, 2020 which suspended the requirement of Strategic Leadership Development Programme and Masters degree as parameters for promotion of public officers to senior position was a purpose specific policy meant to accommodate a specific niche of public officers who at the time did not possess the requisite qualifications but needed to fill in vacant positions caused by retiring of old public officers. Such suspension was not meant to run indefinitely. The 2<sup>nd</sup> respondent



has legal mandate to prescribe HR policies and guidelines for the 1<sup>st</sup> respondent the power to, where necessary, advice on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment removal, transfer or secondment

34. The 3<sup>rd</sup> respondent is required to delegate to the oversight agency responsible for state corporations/agencies its functions in relation to development and implementation of guidelines by state corporations/agencies and be responsible for;
  - i. Customisation and issuance of guidelines for state corporations. Agencies in line with the guidelines on design of organisational structures;
  - ii. Approval of the organisational structures for state corporations/agencies;
  - iii. Provision of advice on the process of designing organisational structures for state corporations/agencies;
  - iv. Monitor the implementation of the approved structures; and
  - v. Ensure compliance with the provisions of these guidelines and provide annual reports.
35. The HR instruments developed by the 1<sup>st</sup> respondent are legal, valid and binding.
36. There is no law which give an obligation on the 1<sup>st</sup> respondent to confirm an officer in a vacant position on account of having acted in such a position.
37. The petitioner has no arguable case with a likelihood of success and should be dismissed with costs.

## **2nd Respondent**

38. The 2<sup>nd</sup> respondent in response to the petition filed the replying affidavit of Wanjiku Wakogi the secretary and who avers that the 2<sup>nd</sup> responded is incorporated under the positions of section 26 of the [State Corporations Act](#) to review and investigate affairs of state corporation and make recommendations to the President as necessary and has other functions which includes to advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment. The 2<sup>nd</sup> respondent also has the role to advice the President on the removal of Board members and revocation of appointments.
39. Under the State Corporations (Performance Contracting) Regulations, 2004 the Minister for Treasury in consultation with the 2<sup>nd</sup> respondent is mandated to approve incentives for Board members and employees of the state corporations and under the Code of Governance for State Corporations (Mwongozo) the 2<sup>nd</sup> respondent is required to initiate development of guidelines on board induction, terms and conditions of service
40. The 2<sup>nd</sup> respondent undertakes its mandate directly and through the inspectorates of State Corporations in line with section 18(3) of the [State Corporations Act](#).
41. Ms Wakogi also avers in reply that the residual framework governing the management of state corporations is the [State Corporations Act](#) and section 5(3) and 27(c) the 2<sup>nd</sup> respondent is mandated to facilitate advisories to Cabinet Secretaries relating to human resource in state corporations. Under section 15, the Board is required to offer oversight on operations and performances of state corporations. The development of human resources for state corporations vests in the Board of Directors as provided for by the law.



42. The procedure for development of the relevant Human Resource Instruments pursuant to section 5(3) and 27(c) of the [State Corporations Act](#) is that the Board of Directors develop the instruments and submit to the responsible Minister for approval and upon receipt the Minister must consult with the 2<sup>nd</sup> respondent and upon a review advise the Minister on the same for approval and back to the organisation for implementation.
43. The objections of the Human Resource Policy instruments are to entrench good practices in management of employee and ensuring alignment with the [Constitution](#) and all other relevant legislation is to institutionalise decision making on employee matters; create a transparent remuneration mechanism; create paths for growth and standards of behaviour and overall costs for the state corporation.
44. On March 19, 2021 the Ministry of ICT, Innovation and Youth requested the 1<sup>st</sup> respondent committee to consider the Human Resource Instruments pursuant to section 5(3) and 27(c) of the [State Corporations Act](#) and the 2<sup>nd</sup> respondent did so and at its 16<sup>th</sup> meeting held on April 14, 2021 issued its advice. The Human Resources Policy Instrument were transmitted to the Minister and part of considerations were the necessary qualifications that fit the purpose, mandate and performance of the state corporation, assure equity and equality of treatment across cadres and alignment to professional specific requirements. The career guidelines in particular insulate officers from newly introduced requirements for positions they substantively hold irrespective of minimum qualifications and experience for the higher grade.
45. The Committee in its considerations of the 1<sup>st</sup> respondent's Human Resources Policy instruments was in concurrence with the Board of Directors and the Minister of the need for a Masters degree qualifications for the advertised positions as they are not only technical positions requiring a higher level of competence but the staff appointed thereof would form the pool for which succession to the Director General position would be sourced.
46. The questions of a Masters degree requirement for officers below the Director General position as alleged by the petitioner to be a requirement was never determined by the court or settled by Consent. The 2<sup>nd</sup> respondent agreed with the 1<sup>st</sup> respondent's Board and the Minister for a Masters degree requirement for the position of Director General. Various court judgements have affirmed the place of Mwongozo Code of Governance for State Corporations within the legal framework and its applicability in the governance of state corporations.
47. Any recruitment including the filling of any vacant positions held in an acting capacity ought to be undertaken as per the approved Human Resource Policy instruments. The framework used in the review and approval is not unique to the 1<sup>st</sup> respondent and all other state corporations comply with its requirements in line with the prevailing law, policy and guidelines.
48. The alleged conversion of employment terms from permanent and pensionable to contract is aligned to the policy adopted by the government and guided by the Human Resource Instrument applicable to top level management and is intended to assure and incentivise performance based on the set targets.
49. The entire human resource management in state corporations falls outside the purview of the Public Service Commission (the Commission) in term of the 4<sup>th</sup> respondent Legal Opinion dated December 17, 2012 and Legal opinion on Salaries and Remuneration Commission mandate over State Corporations dated August 21, 2014.



50. The powers of the 3<sup>rd</sup> respondent under article 234(2) of the Constitution are subject to the constitution and the law. The State Corporations Act being lex specialis legislation grants mandate and function to various institutions and governance structures including the Office of the President.

### 3rd Respondent

51. In reply to the Petition, the 3<sup>rd</sup> respondent filed the replying affidavit of Simon K Rotich the Secretary and Chief Executive officer and who avers that the 3<sup>rd</sup> respondent has a constitutional mandated pursuant to article 234 of the Constitution and exercisable over all public offices including state corporations including the 1<sup>st</sup> respondent save for bodies outlined under article 234(3) of the Constitution.
52. Mr Rotich also avers that the question whether state corporations are part of the public service and whether its employees are public officers as defined in article 260 of the Constitution was addressed in High Court Petition No 294 of 2013 *KUDHEIHA v SRC* and the court held such employees are part of the public service and hence public officers. This remains the position. under article 234 of the Constitution, the effect of the enactment of Public Service Commission Act is that it is an Act for the provision of the functions, powers and the administration of the Public Service Commission and to give effect to article 234 of the Constitution.
53. Section 3 of the Public Service Commission Act states that the Act applies to all public bodies and persons holding office in the public service. Public body is then defined to include a corporations, council board, body or committee relating to any law which exercise its functions in the public service. In this regard, the Public Service Commission Act provisions apply to the 1st respondent which is a state corporation and public body. Section 55 of the Public Service Commission Act gives power to the 3<sup>rd</sup> respondent to review and make recommendations to the Minister responsible for the Public Service on qualifications relating to a public officer, category of public officer or all public officers in a public body.
54. On March 11, 2020 the 3<sup>rd</sup> respondent issued a circular suspending the requirement of Strategic Leadership Development Programme and Masters degree as parameters for promotion of public officers to senior positions and it was categorical that the requirement would still be a requirement for promotion to Director
55. Position or all positions graded at CSG 5 and above. It was noted that some of the requirements for promotion may not be facilitating acquisition of the envisaged skills, competencies and other attributes and the decision to suspend the said requirements was a temporary measure to enable for the evaluation and relevance and suitability of existing promotion courses in equipping public servants with the necessary skills, competencies and attributes.
56. Under article 234(2)(a)(i) of the Constitution, the 3<sup>rd</sup> respondent is given power to establish offices in the public service. Section 26 and 27 of the Public Service Commission Act was enacted to give effect to these constitutional provisions particularly the determination and creation of the number and kinds of offices in the public service and the law goes further to set the requirements the 3<sup>rd</sup> respondent should consider while undertaking such mandate.
57. Mr Rotich also avers that undersection 26 and 27 of the Public Service Commission Act, any office in the public service falling within its mandate to establish cannot be so established by any party or body without its approval. The development or review of the organisational structure of a public service entity such as the 1<sup>st</sup> respondent must be approved by the 3<sup>rd</sup> respondent before implementation pursuant to section 58 of the Public Service Commission Act and any change or implementation without



- approval is unconstitutional and express violation of article 234(2)(a) (i) of the Constitution and section 26, 27 and 58(1) of the Public Service Commission Act.
58. The 3<sup>rd</sup> respondent has not received any request from the 1<sup>st</sup> respondent to review or establish any position qualifications relating to public officers or offices and was not aware of any review until letter by the petitioner dated October 8, 2021 inquiring about the matter.
59. The petition that section 31 of the Public Service Commission Act is unconstitutional is not correct since article 234(5) of the Constitution gives the 3<sup>rd</sup> respondent power to delegate in writing with or without conditions any of its functions and powers under the Constitution to any person in the public service. Under this mandate the 3<sup>rd</sup> respondent delegated to the 2<sup>nd</sup> respondent powers pursuant to letter dated December 14, 2015 but the powers delegated did not relate to the provisions of article 234(2) of Constitution to establish and abolish offices in the public service which is a fundamental function of Public Service Commission and cannot be delegate to a third party as such would be prone to abuse to the detriment of the people of Kenya.
60. On September 30, 2019 the 3<sup>rd</sup> respondent recalled and withdrew the delegation of its functions to the 3<sup>rd</sup> respondent. Such has not been reinstated and the 2<sup>nd</sup> respondent has no power to establish, abolish or determine the organisational structure of the 1<sup>st</sup> respondent.
61. The State Corporations Act on the powers and functions of the 2<sup>nd</sup> respondent does not include that of establishment or abolition of offices or review of organisational structures of state corporations. The 3<sup>rd</sup> respondent has not been requested to either establish or review the organisational structure of the 1<sup>st</sup> respondent nor has it approved human resource policies and guidelines. There is no request to investigate the personnel practices of the 1<sup>st</sup> respondent and prayers (a), (i) and (m) of the petition are premature. Prayers (d) of the petition cannot issue since section 31 of the Public Service Commission Act is in line with article 234(5) of the Constitution and the petition should be dismissed with costs to the 3<sup>rd</sup> respondent.
62. In the written submissions, the 1<sup>st</sup> respondent submitted that the petitioner is a stranger and lacks the requisite *locus standi* to file and prosecute the petition against the respondents and has no sufficient interest in law to commence these proceedings before this court. That he is not an employee of the 1<sup>st</sup> respondent and is certainly not in any way aggrieved or affected by the internal advertisements inviting applications in respect of the forty-three (43) vacant positions in the 1<sup>st</sup> respondent meant to be filled through internal competition. The petitioner also has no interest in the external advertisements for the positions of Director Frequency Spectrum Management and the Director Competition Management as he has not annexed a copy of his application for any of those 2 positions. As such, counsel urges this court to dismiss the instant petition for lack of *locus standi*.
63. The 2<sup>nd</sup> respondent is an unincorporated entity established under section 26 of the State Corporations Act and under section 27 of the State Corporations Act mandates it to review and investigate the affairs of State Corporations and make such recommendations to the President as it may deem necessary; in consultation with the 4<sup>th</sup> respondent and the Treasury to advise the President on the establishment, reorganization or dissolution of state corporations; where necessary to advise on the appointment, removal or transfer of officers and state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment. The 2<sup>nd</sup> respondent is also required to *inter alia* advise the President on removal of a Board or any member of a Board of a State Corporation; including the revocation of appointments, nomination of new members of the Board, or Constitution of a new board under section 7(3).



64. The functions and powers of the 3<sup>rd</sup> respondent articulated in article 234(2) are subject to the Constitution and Legislation. The State Corporations Act being a *lex specialis* legislation grants mandate and function to various institutions and governance structures including the Office of the President, the 2<sup>nd</sup> respondent, the Inspector General Corporations, the National Treasury, Cabinet Secretaries of respective line ministries, the Boards of Directors and Chief Executive Officers of the entities themselves and not the 3<sup>rd</sup> respondent. State Corporations are established as special purpose vehicles to serve a specific strategic public purpose, governed by principles of corporate governance and espousing common characteristics as are applicable to private sector entities.
65. The 3<sup>rd</sup> respondent has mandate over state corporations and is a matter *sub judice* as the same is now the subject of an appeal in Civil Appeal No E096 of 2021. Therefore state corporations and parastatals are not offices in the national or county governments or public service. That article 234(2) (f) of the Constitution and section 55 of the Public Service Commission (PSC) Act which mandates the 3<sup>rd</sup> respondent to develop human resources policies in the public service do not extend and/or apply to the 1<sup>st</sup> respondent which is a state corporation. The only entity known in law with the mandate to approve HR policies and guidelines for state corporations like the 1<sup>st</sup> respondent is the 2<sup>nd</sup> respondent.
66. The 1<sup>st</sup> respondent also submitted that due process was followed in the development, approval and implementation of the HR instruments for the 1<sup>st</sup> respondent. The framework used in the review and approval of Human Resource Policy Instruments is not in any way unique to the 1<sup>st</sup> respondent and all other State Corporations comply with this requirement in line with prevailing law, policy and issued guidelines. Further, due process was followed in the development, approval and implementation of the HR Instruments by the 1<sup>st</sup> respondent.
67. The alleged conversion of employment terms from permanent and pensionable to contract, with respect to the advertised directorship positions is aligned to a policy position adopted by the Government, guided by the Human Resource Instruments applicable to the top level management and is intended to assure and incentivize performance based on the set targets.
68. The 2<sup>nd</sup> and 4<sup>th</sup> respondents submitted that the court lacks jurisdiction on two grounds. First the petitioner lacks *locus standi* to file and prosecute this petition against the respondents as he has no sufficient interest in law to commence these proceedings. Secondly, the petition does not disclose a cause of action or dispute within the meaning of section 12(1) of the Employment and Labour Relations Court Act. He relies on the case of Geoffrey Oriaro v Cabinet Secretary Ministry of Labour Social Security & Services & Others [2015] eKLR where the court held that for there to be an employer-employee relationship, a person must be having an oral or written contract of service and must be receiving a wage or salary for services rendered. There must be a contract of service.
69. The ELRC does not have jurisdiction to declare the provisions of an Act of Parliament unconstitutional as this is the preserve of the High Court. He relies on the case Republic v Karisa Chengo & 2 others [2017] eKLR where the Supreme Court held that;
- The three are different and autonomous Courts and exercise different and distinct jurisdictions. As article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.
70. The human resource policies and guidelines issued by the 2<sup>nd</sup> respondent are lawful and the impugned Human Resource policies and guidelines issued by the 2<sup>nd</sup> respondent are lawful as the same are formulated pursuant to the provisions of section 27 of the State Corporations Act and The Code of



Governance for State Corporations (*Mwongozo*). Section 4 and 5(3) of the [State Corporations Act](#) as well as provisions of Mwongozo authorize the Cabinet Secretary and the 2<sup>nd</sup> respondent to exercise oversight authority over state corporations falling within their docket.

71. Courts have issued several Judgements to the effect that State Corporations are not offices within the public service and as such the Public Service Commission has no role in the management and operations of State Corporations. He relies on the case of [Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others \(Interested Parties\)](#) [2021] eKLR where the court stated as follows;

We therefore find and hold that positions in Parastatals and State Corporations are not positions in the public service.

72. Consequently, the court should not interfere with the 2<sup>nd</sup> respondent's mandate to prescribe Human Resource policies and guidelines for the 1<sup>st</sup> Respondent or any other state corporation as this is the statutory mandate of the 2<sup>nd</sup> respondent and the law ousts the jurisdiction of the 3<sup>rd</sup> respondent in the management of state corporations.

73. The Attorney General for the 3<sup>rd</sup> and 4th respondents submitted that there are only four sectors in our country upon which all organisations, institutions, enterprises and businesses may fall. These are the private sector, the public sector which includes Ministries, State owned corporations, enterprises, businesses, industries, organisations, Non-Governmental Organisations (NGOs) and Community Based Organisations (CBOs). State Corporations, including the 1<sup>st</sup> respondent, collectively fall within the government of the Republic of Kenya. the definition of "public service" under article 260 of [the Constitution](#) which defines the Public Service as the collectivity of all individuals, other than state officers, performing a function within a state organ/ which is clear that State corporations are State owned and which, as per the definition of a State, comprise the government of the Republic under [the Constitution](#) are part of the public service.

74. Further, the remuneration of officers in State Corporations is payable either from money provided by Parliament through the national annual budget or funds retained by the State Corporation pursuant to the provisions of article 206(1)(b) which empowers State organs to retain money that they receive for purposes of defraying expenses as empowered by an Act of Parliament. Counsel relies on the case of [KUDHEHLA v SRC](#) where the court held that;

...any other finding would be absurd, illogical and impractical given the design and structure of our Constitution.

75. Article 233 of the [Constitution](#) establishes the 3<sup>rd</sup> respondent with functions and powers provided for in article 234. The article gives the 3<sup>rd</sup> respondent the constitutional mandate to manage human resource in the entire public service save for the excluded public offices and public officers stated in article 234(3) of the [Constitution](#). Whereas the various legislations establishing State Corporations give power to Boards of the said State Corporations to appoint persons, no legislation gives the Board of any State Corporation power to establish offices in the State Corporation. As such, the only entity that is constitutionally and legislatively mandated to establish offices in State Corporations and specifically offices in the 1<sup>st</sup> respondent is the Public Service Commission. Consequently, the 3<sup>rd</sup> respondent has authority over State Corporations, including the 1<sup>st</sup> respondent, in as far as management of human resources is concerned including the establishments of offices and appointment of persons to hold those offices to the extent that is not otherwise provided by the [Constitution](#) and legislation.



76. Section 27 of the [PSC Act](#) reiterates the Constitutional function and power of the 3<sup>rd</sup> respondent to establish offices in the public service and sets the requirements precedent to the 3<sup>rd</sup> respondent establishing offices in the public services.
77. From the provisions of sections 26 and 27 of the [PSC Act](#) it is clear that an office in the public service falling within the mandate of the 3<sup>rd</sup> respondent cannot be established without the approval of the 3<sup>rd</sup> respondent. In light of the provisions of section 26 of the [PSC Act](#), as read together with section 58(1) the development or review of the organization structure of a public service entity such as the 1<sup>st</sup> respondent should be approved by the 3<sup>rd</sup> respondent before implementation. The implementation of any establishment, organisation structure or qualifications without the approval of the 3<sup>rd</sup> respondent is unconstitutional and unlawful for violating the express provisions of article 234(2)(a)(i) of the [Constitution](#) and sections 26, 27 and 58(1) and 55 of the [PSC Act](#) and we urge the court to allow the petition to this extent.

### Determination

78. The following issues are outlined for determination;
- a. Whether positions held in state corporations are in the public service subject to regulation by the 2<sup>nd</sup> or 3<sup>rd</sup> respondent;
  - b. Whether section 31 of the Public Service Act is in conflict with articles 232, 233, 234, 235 and 236 (in respect of the Public Service and Public Service Commission) of the [Constitution](#) and the same is declared null and void;
  - c. Who should regulate the human resource of state corporations?
  - d. The reliefs to grant.
79. Before delving into the issues above, the 1<sup>st</sup> respondent challenged the standing of the petitioner to file this petition or seek the reliefs outlined. That the petitioner lacks sufficient interest in law to urge this petition and the Court of Appeal in the case of [Alfred Njau & 5 others v City Council of Nairobi](#) [1983] eKLR that;
- The term *locus standi* means a right to appear in Court, and consequently, as is stated in *Jowitt's Dictionary Law*, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.
80. Indeed under section 12(2) of the [Employment and Labour Relations Court Act, 2011](#) the law provides for employment and labour relationships which give court jurisdiction to address save in the preamble to the Act, the provisions extend to for connected purposes.
81. The court is given a constitutional mandate to hear and determine all employment and labour relations disputes. This mandate is defined in various cases before this court and the Court of Appeal in the case of [Daniel N Mugendi v Kenyatta University & 3 others](#) [2013] eKLR;
- ... [the Employment and Labour Relations Court has] jurisdiction to enforce labour rights in article 41 and the jurisdiction to interpret the [Constitution](#) and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of [section 12 of the Industrial Court Act](#), then the Industrial Court has jurisdiction to enforce, not only [article 41](#) rights but



also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.

82. In this regard, the petition herein is anchored under the provisions of various articles of the Constitution particularly article 22, 23, and 258 of the Constitution, 2010. Under these provisions, a petitioner is allowed to file a petition to vindicate the rule of law and get the unlawful conduct stopped. In doing so, The strict rule of *locus standi* applicable to private litigation is relaxed and a broad rule is evolved which gives standing to any member of public acting *bona fide* and having sufficient interest in instituting an action for redress of public wrong or public injury. The public good is clear.

Article 258 of the Constitution provides as follows:

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
  - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
    - (a) A person acting on behalf of another person who cannot act in their own name;
    - (b) A person acting as a member of, or in the interest of, a group or class of persons;
    - (c) A person acting in the public interest; or
    - (d) An association acting in the interest of one or more of its members.
83. At the core of this petition, the petitioner is seeking various declarations, reliefs and particularly that section 31 of the Public Service Act is in conflict with articles 232, 233, 234, 235 and 236 of the Constitution in respect of the public service and Public Service Commission and the same is declared null and void. Such a determination will therefore go to the mandate of the 1<sup>st</sup> respondent in managing its human resource *visa-a-vis* the mandate of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. These are matters which call on the court to address the constitutionality of various statutes looked at together with the Constitution and make a finding.
84. The Court of Appeal in the case of Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR that;

By article 22(1) as read with article 22(3) and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 - Legal Notice No 117 of 2013, the Bill of Rights is enforced by filing a petition in the High Court and by article 23(3), the court may grant appropriate relief including a declaration of invalidity of any law that violates the Bill of Rights. The Employment Act, 2007 as revised in 2012 – after the coming into operation of the current Constitution, indicates in the preamble that one of its objects is to declare and define the fundamental rights of employees. Section 3 thereof provides that the Act applies to all employees employed by an employer under a contract of service except the classes of employees specified therein.

The employment and Labour Relations Court Act stipulates the procedure for the enforcement of employment rights.

85. The petitioner has defined himself as a citizen of Kenya and has filed the petition herein on his own behalf and on behalf of the entire Kenyan public as the issues addressed affect and are likely to affect and entire country. Such matters addressed in the petition give the petitioner proper standing before



this court. See *Okiya Omtatah Okoiti & another v Anne Waiguru, Cabinet Secretary, Devolution and Planning & others* Petition No 42 of 2014.

86. On whether positions held in state corporations such as the 1<sup>st</sup> respondent are in the public service subject to regulation by the 2<sup>nd</sup> and or the 3<sup>rd</sup> respondent, such matter has been the subject of litigation and fundamentally the constitutional threshold is article 260 of the Constitution defines “public officer” as follows:

Public officer means –

- (a) any State officer; or
- (b) any person, other than a state officer, who holds a public office.

87. It defines „public office as follows:

“Public office means an office in the national government, a county government or the 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”

88. On the other hand „public service is defined as follows;

“public service means the collectivity of all individuals, other than State officers, performing a function within a State organ”

89. The „collectivity of public service and being a public officer are all interlinked into public service. the only exception is state officers performing a function within a state organ. All other persons serving the People of Kenya are in the public service. This is the constitutional definition.

90. This collectivity in public service is further given meaning pursuant to section 2 of the Public Officer Ethics Act that defines a public officer as follows;

Public officer means any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the following-

- a) the Government or any department, service or undertaking of the Government;
- b) the National Assembly or the Parliamentary Service;
- c) a local authority;
- d) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;
- e) a co-operative society established under the Co-operative Societies Act;

91. The courts in addressing the issue of whether employees of state corporations are public officers within the meaning of article 260 of the Constitution have affirmed the same and given emphasis to the fact of service to the Kenyan public as a collective.



92. In *National Union of Water & Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 others* [2013] eKLR the court held that;

“The employees of Mathira Water and Sanitation Company may therefore be viewed as public servants, as they are working for an agent and instrumentality of a Public Authority. They are public servants, though not in the traditional public service, controlled directly by Government Ministries. Their employer is a private company, rendering public service. The Water Bill proposes that the water agents may conduct their functions through a public-private partnership. Persons drawn in as partners of the water agents will themselves be new forms of employers, and their employees would not easily fit in the public servant-private employee dichotomy. In the view of the court, employees of the water companies are vaguely public servants, going by the definition given by Oxford Dictionary at paragraph 25 above. The characterization is a matter of qualitative judgment, rather than quantitative measurement.”

93. In *Rogers Mogaka Mogusu v George Onyango Oloo & 2 others* [2015] the court held that;

“If LBDA receives funds from the Parliament of Kenya and its Chairman gets paid from such funds, can it properly be said that he is not a public officer? I think not and the law as expressed above bears me out.

It also follows that the circular dated July 4, 2013 by the Registrar of Political Parties has captured the law well and ought to be implemented otherwise perceived partisan, non-impartial officials of political parties will also play important roles in public entities, a situation that cannot be proper in our new and settling constitutional dispensation.

It is my finding therefore that as Chairman of LBDA, the 1<sup>st</sup> respondent is a public officer and it is untenable that he should continue holding the position of Secretary-General of TNA

94. In *Katiba Institute & another v Attorney General & another* [2020] eKLR, a bench comprising of three Judges held that;

“As we have already stated, public service is the collectivity of all individuals, other than state officers, performing a function within a State organ; while State organ is either, a commission, office, agency or other body established under *the Constitution*. That means, the collectivity of the individuals must be performing a function within a state organ established under *the Constitution*. It is clear to us that offices in state corporations and parastatals are not commissions, offices, agencies or other bodies established under *the Constitution*. They are, therefore, not state organs within the meaning of *the Constitution*.

67. Regarding remuneration and benefits, our reading of the law is that this is not directly drawn from the Consolidated Fund or directly provided by Parliament. Under section 11 of the *State Corporations Act*, state corporations are required to prepare and submit to the line minister and the Treasury for approval, yearly estimates of their revenue and expenditure accompanied by proposals for funding of the projects they are to undertake, or implement during the financial year. This is testimony to the fact that state corporations and parastatals generate their own revenue for expenditure, and their funding is not necessarily wholly provided for by Parliament.



68. To answer the first issue in this petition, we find and hold that positions of chairpersons and members of boards of state corporations and parastatals are not offices in the public service."
95. And the Supreme Court of Kenya in *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR held that;
- "It is my understanding, therefore, that the definition of public officer<sup>4</sup> cannot be strictly confined to the singular definition clause in article 260; there are other constitutional stipulations, and statutory and common law provisions that speak to the definitions, values, principles, and the institutional framework of public service that must apply. This therefore calls for the Constitution to be read in a holistic manner when it comes to the interpretation of any one clause."
96. The Court further stated that before determining whether an individual is a public officer and in line with the provisions of article 259, the court must consider the following questions;
- Is the person concerned in an office in the national government, the county government or the public service?
  - Does that person receive remuneration or benefits payable by the consolidated fund or directly by moneys provided by Parliament?
  - Does that person perform a function within a state organ or a state corporation?
97. In *Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhebia Workers) v Salaries and Remuneration Commission* [2014] eKLR the court held that;
- "What I gather from the above definition is that the criteria for determining whether one is a public officer is quite clear and requires no more than a literal interpretation. First, the person must hold an office either in the national government, county government or public service; secondly, the remuneration and benefits of that officer must be payable directly from the Consolidated Fund or directly out of money provided by Parliament."
98. The convergence is that officers and persons serving/working in state corporations are public officers within the meaning of article 260 of the Constitution.
99. Therefore, article 260 of the Constitution gives an explicit definition of public service, as;\* the collectivity of all individuals, other than State officers, performing a function within a state organ.
100. A body corporate established under an Act of Parliament is a State corporation within the meaning of that Act, and therefore subject to the Constitution. All State Corporations have national outreach by nature and design, fall squarely under the auspices of the National Government. This also means that the 1<sup>st</sup> respondent is also a public service institution that was in existence under the former constitution and its officials and employees would be considered public officers under it. The effect of the transitional clause in section 31 of schedule 6 of the current Constitution applies with regard to the 1<sup>st</sup> respondent employees.
101. In the written submissions, the 1<sup>st</sup> respondent has heavily relied on the three-Judge Bench in the case of *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021] eKLR with the view that state corporations are not regulated and its officers are not within the meaning of public officers and do not hold office in public service. however, such



matter, in my appreciation of the facts related to the appointment of Board Chairpersons and Board Members thereof and not with regard to persons employed on contract to work and serve under the Board. An employee in a parastatal or a state corporation and a board member appointed under the State Corporations Act by the President hold different positions in fact and in law. the two cannot be equated and placed under the same legal regime. One is under an appointment by the President and subject to removal under the same mandate whereas an employee is recruited and appointed under terms and conditions of service to perform a public service in the state corporation.

102. State corporations are agencies of the Government.
103. As stated by Mr Chiloba in his replying affidavit, the 1st respondent has been in existence since the year 1999 regulating the communications/ICT sector in Kenya, a resource that belongs to the people of Kenya, the public, held in trust for them by the Government. The employees of the 1<sup>st</sup> respondent are paid from public funds, not private funds.
104. All other Public Officers‘ must include all shades of public servants, including employees of the State Corporations, which like the 1<sup>st</sup> respondent are agents and instrumentalities of the Government. The involvement of the Public Service Commission, 3<sup>rd</sup> respondent with regard to all other Public Officers,‘ must however, be limited to advising the Government and its Agencies in the human resource policy, not defining and running the process.
105. In Rogers Mogaka Mogusu v George Onyango Oloo & 2 others [2015] eKLR the court referenced the case of KUDHEIHA, cited above and the findings that;

“It cannot be denied therefore that in the above context, Moi Teaching and Referral Hospital as well as Kenyatta National Hospital are State Corporation established under section 3 of the State Corporations Act. Public Universities such as Moi University, University of Nairobi, and Egerton University etc are established by Acts of Parliament as public universities. Although these institutions do not receive monies from the consolidated fund, they are empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations receive funds from Parliament through their respective Ministries and fit the description in article 260 regarding funds from Parliament.

Further Public fund‘ has the meaning assigned to it by the Exchequer and Audit Act (cap 412 Laws of Kenya). Public money is said therefore to include; revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not. Given that definition of public funds and given that the Petitioner’s members work for institutions, parastatals or corporations that provide a public function, then to my mind they are properly within the public service category and therefore state corporations and their employees fall within the meaning of public office and public officers, and I so find.”

106. In the case National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 others [2013] eKLR, cited above, the court held that;

“The employees of Mathira Water and Sanitation Company may therefore be viewed as public servants, as they are working for an agent and instrumentality of a Public Authority. They are public servants, though not in the traditional public service, controlled directly by Government Ministries. Their employer is a private company, rendering public service. ...”



107. The constitutional threshold for regulation of public service is a mandate of the 3<sup>rd</sup> respondent. Under article 234(2) directs in mandatory terms that;
- (2) The Commission shall—
- (A) subject to this Constitution and legislation--
- (i) Establish and abolish offices in the public service; and
- (ii) Appoint persons to hold or act in those offices, and to confirm appointments;
108. Pursuant to article 234(d) to (h) of the *Constitution*, the 3<sup>rd</sup> respondent is directed to evaluate all organisation in the public service; ensure efficiency; develop human resources; review and make recommendations to the national government in respect of conditions of service; and evaluate and report to the President and Parliament on the extent to which the principles and values of article 10 and 232 are complied with in the public service;
- (d) Investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
- (e) Ensure that the public service is efficient and effective;
- (f) Develop human resources in the public service;
- (g) Review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
- (h) Evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in articles 10 and 232 are complied with in the public service;
109. This is therefore the repository of all public service regulation in terms of terms and conditions of service in its collectivity. It is a constitutional mandate.
110. In this regard, there exists the *State Corporations Act* and in its preamble provides that;
- “An Act of Parliament to make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes.”
111. The control and regulation of state corporations is therefore statutory.
112. Pursuant to section 5(3) of the *State Corporations Act*, the Board of a state corporation is allowed to employ staff on terms and conditions of service as the Minister in consultation with the Committee may approve.
- (3) A state corporation may engage and employ such number of staff, including the chief executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve.
113. This is in contradiction of article 234(2) read together with article 260 of the *Constitution* on regulation of public service and definition of who a person in the public service is.
114. The entity given constitutional authority to employ, issue terms and conditions of service, review, audit and advice with regard to public service is the 3<sup>rd</sup> respondent. Employees in the service of the 1<sup>st</sup> respondent Authority are subject to the constitutional mandate of the 3<sup>rd</sup> respondent.



115. I take cognisance of the Legal Opinion issued by the 4<sup>th</sup> respondent dated December 17, 2012. With respect, the advisory/Legal Opinion should translate into legislation giving effect/force to the provisions of article 234 of the Constitution. That is to ensure the intentions of the People of Kenya in stating that the Public Service Commission is in charge of the public Service is not negated by other statutory provisions in force as at August, 2010.
116. The 4<sup>th</sup> respondent must address such matter with urgency and harmonise the legislation with the Constitution as without giving a proper framework, litigations such as the instant petition shall continue to be filed out of great need to streamline public service applied by different agencies due to the nature of the statutory mandate specific to each authority, agencies, state corporations and parastatals.
117. A common thread should flow from the 3<sup>rd</sup> respondent as currently mandated under the Constitution. Without it, authorities such as the 1<sup>st</sup> respondent will continue to err for no fault of their own.
118. In the replying affidavit of Ms Wakogi she avers that the court in the cases of Chemilil Sugar Company Limited, Muhoroni Sugar Company Limited and South Nyanza Sugar Company Limited v Kenya Union of Sugar Plantations and Allied Workers Cause No 1882 of 2014 and in the case of Kenya Union of Commercial, Food and Allied Workers v Salaries and Remuneration Commission & 2 others [2015] eKLR the court held that state corporation staff are not officers in the public service and are outside the mandate of the Salaries and Remuneration Commission save the constitutional mandate of the Salaries and Remuneration Commission in addressing remuneration for public officers and giving advisory to public service is fundamentally and foundationally different from that of the 3<sup>rd</sup> respondent who is given constitutional authority to;
- (i) Establish and abolish offices in the public service; and
  - (ii) Appoint persons to hold or act in those offices, and to confirm appointments;
119. The 4<sup>th</sup> respondent shall take forward the Legal Opinion addressed above and give it the force of law. The diverse state corporations under the mandate of the 2<sup>nd</sup> respondent particularly the 1<sup>st</sup> respondent will benefit in terms of the law, policy and human resource instruments now in force.
120. The 3<sup>rd</sup> respondent is also given constitutional authority under article 234(2)(d) to;
- (d) Investigate, monitor and evaluate the organisation, administration and personnel practices of the public service;
121. Such call for a proactive Commission. By standing aside to wait for state corporations to make requests for investigation, monitor and evaluation is not sufficient. It may never happen taking note of the elaborate measures taken by the 1<sup>st</sup> respondent to review its HR instruments in consultation with the 2<sup>nd</sup> respondent and the Minister has since approved the same for implementation. Such demonstrates inaction on the part of the 3<sup>rd</sup> respondent and an abdication of its constitutional mandate.
122. The petitioner is therefore correct in his assertion that the 3<sup>rd</sup> respondent has failed to investigate the practices of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as provided for under section 60 of the Public Service Commission Act. The withdrawal of the delegated authority issued to the 1<sup>st</sup> respondent is not sufficient. It is imperative that pursuant to article 234(2) of the Constitution, the 3<sup>rd</sup> respondent in conjunction with the 4<sup>th</sup> respondent should ensure legislative changes in managing public service. This will build harmony and cohesion under one constitutional commission, the 3<sup>rd</sup> respondent by taking charge over public service.



123. This is the essence of article 234(2)(g) and (h) of the *Constitution* that the 3<sup>rd</sup> respondent should review and make recommendations to the national government on conditions of service, qualifications of officers and evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in article 10 and 232 are complied with in the public service. Unless the 3<sup>rd</sup> respondent is able to draw from these provisions and address on priority basis, petitions such as the instant one will continue to be filed.
- (g) Review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service;
  - (h) Evaluate and report to the President and Parliament on the extent to which the values and principles mentioned in articles 10 and 232 are complied with in the public service;
124. The complaint received from the petitioner should have moved the 3<sup>rd</sup> respondent into action. They have opted to blame the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Such does not benefit the People of Kenya in any way. It only frustrates persons in the public service for lack of a proper legislative framework supported by policy and HR instruments that are streamlined under the Public Service Commission, the 3<sup>rd</sup> respondent.
125. Pursuant to section 27 of the *State Corporations Act*, the 1<sup>st</sup> and 2<sup>nd</sup> respondent are under the law allowed to review and investigate the affairs of the Authority and make recommendations and upon advice review the establishment and reorganise its functions; and where necessary, advise on the appointment, removal or transfer of officers and staff in the following terms;
27. Functions of the Committee
- (1) The Committee shall advise on the matters and perform any functions it is required by this Act to perform and in addition shall—
    - (a) With the assistance of experts where necessary, review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary;
    - (b) In consultation with the Attorney-General and the Treasury, advise the President on the establishment, reorganization or dissolution of state corporations;
    - (c) where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment;
    - (d) Examine any management or consultancy agreement made or proposed to be made by a state corporation with any other party or person and advise thereon;
    - (e) Examine proposals by state corporations to acquire interests in any business or to enter into joint ventures with other bodies or persons or to undertake new business or otherwise expand the scope of the activities and advise thereon.
126. Under this legal framework and as outlined by the Director General in the replying affidavit of Mr Chiloba, the 1<sup>st</sup> respondent in consultation with the 2<sup>nd</sup> respondent and the Minister have reviewed its human resource and policy instruments and advertised for various positions internally and externally,



now the subject of this petition. Such is done in recognition of the existing laws and in adherence to the provisions therefrom.

127. As outlined above, such challenge would not have arisen had the 3<sup>rd</sup> respondent been proactive in undertaking its mandate. The 1<sup>st</sup> respondent is bound to follow the law as it is. The advertisements posted are within law and the HR Instruments approved for use by the 2<sup>nd</sup> respondent and the Minister pursuant to section 27 of the [State Corporation Act](#).
128. The relief sought to declare the powers of the 2<sup>nd</sup> respondent in approving the HR instruments for use by the 1<sup>st</sup> respondent shall not issue. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have adhered to the law as it is.
129. On whether section 31 of the [Public Service Act](#) is in conflict with articles 232, 233, 234, 235 and 236 of the [Constitution](#) in respect of the Public Service and Public Service Commission, the petition is that the 3<sup>rd</sup> respondent in a letter dated 30<sup>th</sup> July, 2018 delegated some human resource functions to the authorised officers seeking information on various matters. Section 31 of the [Public Service Commission Act](#) allows the 3<sup>rd</sup> respondent to delegate its functions in writing but such Section is in conflict with articles 232, 233, 234, 235 and 236 with regard to the public service and the Public Service Commission under the [Constitution](#) and such section should be declared null and void.
130. The court reading of section 31 of the Public Service Act would be incomplete if not read together with article 234(5) of the [Constitution](#) which provides that;
  - (5) The Commission may delegate, in writing, with or without conditions, any of its functions and powers under this article to any one or more of its members, or to any officer, body or authority in the public service.
131. Section 31 of the Public Service Act on the other hand provides that;
  31. (1) The Commission may, where appropriate and in writing, delegate any power or assign a duty conferred to it under the [Constitution](#) or this Act to its members, an officer, body or authority in the public service.
132. The Public Service Commission as an independent constitutional Commission is empowered under article 234(5) of the [Constitution](#) to delegate its functions and powers.
133. Delegation of function and power does not negate the power held by a principal. Responsibility lies with the principal. Delegation does not imply parting with powers by the person who delegates but confers authority to do things which otherwise the person delegating would have to do himself.
134. A power to delegate further can only arise where it is within the scope of the primary delegate's authority. See [Okiya Omtatah Okiiti & another v Anne Waiguru, Cabinet Secretary, Devolution and Planning & others](#) Petition No 42 of 2014, cited above.
135. The Court of Appeal in addressing the question what is delegation in the case of [Attorney General & 2 others v Independent Policing Oversight Authority & another](#) [2015] eKLR held that;

“What then amounts to delegation?

Delegation is the assignment of responsibility or authority to another person usually one's subordinate, or another officer of a lower rank. It is instructive however that the person delegating must remain fully accountable for the outcome of the delegated work. One can delegate authority but not responsibility. If a person delegates both authority and responsibility, then this becomes abdication of duty or denudation of authority and it is not acceptable.



Where delegation is underpinned in statute, and there is a requirement that the delegation be in writing, then such delegation must be in writing. There must be an instrument clearly defining the extent of the delegated authority and the duties involved. In such a case, if the person delegating power does so verbally contrary to the statute allowing him to delegate, then such delegation becomes null and void for all intents and purposes."

136. It is constitutional and lawful for the 3<sup>rd</sup> respondent to delegate any of its functions to any of its members, officer, body or authority in the public service on condition that this is done in writing, with or without conditions. The 3<sup>rd</sup> respondent had issued such authority and delegated its powers to the 1<sup>st</sup> respondent by letter dated July 30, 2018 save such matter has since been recalled by letter dated September 30, 2019.
137. On the issue as to who should regulate the human resource of state corporations, the issue addressed above, and the constitutional mandate is vested in the 3<sup>rd</sup> respondent.
138. Various statutes, policies and practices still exist to date which gives the 2<sup>nd</sup> respondents various duties and responsibilities to regulate state corporations which should be addressed by the 3<sup>rd</sup> and 4<sup>th</sup> respondents accordingly to avoid further petitions in this regard.
139. In the 3<sup>rd</sup> respondents review and report to the President and Parliament, such matters can well be addressed for the Executive and Parliament with expert advice from the 3<sup>rd</sup> respondent responsible for public service in consultation with the Government Principal Legal Advisor, the 4<sup>th</sup> respondent to address and ensure adherence to article 234(2)(h) of the Constitution. There are far-reaching implications in the failure by the 3<sup>rd</sup> respondent inaction that should carry an investigation and audit of all state corporations, including the 1<sup>st</sup> respondent pursuant to article 234(2)(d) of the Constitution to ensure that the public service is efficient and effective towards the development of human resources in the public service.
140. This can only be achieved through concerted efforts between all the listed respondents.
141. The 1<sup>st</sup> respondent's Human Resources policies and guidelines prescribed and approved by the 2<sup>nd</sup> respondent shall remain in operation and application until the 3<sup>rd</sup> and 4<sup>th</sup> respondents address as above directed.
142. On the orders sought by the petitioner, the 3<sup>rd</sup> respondent shall address and investigate and audit the 1<sup>st</sup> respondent HR instruments, policies and practices within 365 days from the date of this judgement and issue appropriate recommendations. The 3<sup>rd</sup> respondent shall report to this court on the measures undertaken to harmonise the law to meet the constitutional threshold pursuant to article 234 of the Constitution as directed.
143. The 1<sup>st</sup> respondent has been granted operational autonomy by the 2<sup>nd</sup> respondent. This is lawful and valid and as directed above such shall suffice pending action by the 3<sup>rd</sup> and 4<sup>th</sup> respondents in the next 365 days.
144. Orders above shall run concurrently with the 3<sup>rd</sup> respondent undertaking an investigation of the organisation, administration and personnel practices of the 1<sup>st</sup> respondents and address accordingly.
145. The 1<sup>st</sup> respondent shall proceed to use and apply and or implement the approved Human Resource policies and guidelines prescribed and approved by the 2<sup>nd</sup> respondent for the next 365 days which is a reasonable time and space to engage and ensure a streamlined public service through the 3<sup>rd</sup> respondent.



146. In this regard, the orders sought with regard to issuance of an injunction stopping the recruitment of Director Frequency Spectrum Management and director Competition Management of the 1<sup>st</sup> respondent is done in the context of existing legislation out of no fault of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The recruitment of such officers shall proceed as advertised in application of approved HR policies and guidelines applicable to the 1<sup>st</sup> respondent.
147. To ensure completeness and taking into account the date the advertisements were closing the same was stopped by the court for good cause and to allow for the hearing of the petition, the 1<sup>st</sup> respondent shall post and publicise a new date for receipt of all applications. This will give interested and eligible applicants a reasonable opportunity to put in their applications.
148. With regard to the internal advertisement for various vacant positions of the 1<sup>st</sup> respondent, every employer has the prerogative to manage its internal affairs save such should not be used to deny any eligible employee a deserved promotion on the basis of fair competition and merit. Where the 1<sup>st</sup> respondent has developed tools to ensure fairness and reward merit, with advantage of expertise drawn from the 2<sup>nd</sup> respondent, the internal advertisement for various positions is well addressed. Mr Chiloba in his replying affidavit has well addressed the rationale and parameters for such a decision to recruit internally for various positions and interested employees ought to indicate interest and motivations in the individual applications.
149. The core objective of article 232 of the *Constitution* is to ensure that all public/state institutions make all appointments and promotions on the basis of fair competition and merit and an advertisement is meant to promote fair competition among eligible candidates.
150. Article 232 of the *Constitution* requires that;
- (1)
    - (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
    - (h) representation of Kenya's diverse communities; and
    - (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of--
      - (i) men and women;
      - (ii) the members of all ethnic groups; and
      - (iii) persons with disabilities.
  - (2) The values and principles of public service apply to public service in—
    - (a) all State organs in both levels of government; and
    - (b) all State corporations.
  - (3) Parliament shall enact legislation to give full effect to this Article. to ensure completeness, the 1<sup>st</sup> respondent shall re-issue the internal invitation for applications for vacant positions closing on October 19, 2021 within a reasonable time from the date of this judgement.
151. Inherently, there exists no law which requires an employer to confirm an officer in a vacant position on account of having acted in such position whatever the period of service. the parameters of article



232 of the Constitution apply. every eligible candidate must be given a reasonable opportunity to apply and fairly compete with others.

152. On the other reliefs sought in the petition, the petitioner is seeking to have and be provided with certified copies of Delegated instrument and revocation/withdrawal thereof of any delegated authority to the 2<sup>nd</sup> respondent to carry out human resource powers and functions of the Public Service Commission. Mr Rotich in his Replying Affidavit to the petition has confirmed under oath that a letter of delegated authority was issued and dated July 30, 2018 and which was recalled by letter dated September 30, 2019. Such matter is not controverted in any manner. The facts as stated are now part of the court record.
153. Before conclusion, the petitioner has challenged the practice of the 1<sup>st</sup> respondent in conversion of employment terms and conditions from permanent and pensionable to contract terms. He relied on a consent filed under ELRC Cause No 128 of 2015 – Juma Kiprono Kandie & 2 others v Communications Authority of Kenya said to be related to the facts therein. A consent filed in a different suit in the year 2015 cannot apply in perpetuity to regulate the employment of all employees of the 1<sup>st</sup> respondent particularly with regard to conversion of employment status from permanent and pensionable to contract terms even where the law permit and the subject employee has given consent pursuant to section 13 of the Employment Act, 2007.
154. An employer has the prerogative to issue employment terms and conditions to each employee based on the business need and operational requirements save where the employer seeks to change such terms from one employment regime to the other, such matter must be brought to the attention of the employee and who should give consent in writing. Conversation of employment terms and conditions is lawful and a legitimate practice at the shop floor sachet to adherence to the subject law, agreement or private treaty with the employee or the representative trade union or employers organisation/ association.
155. Section 13 (1) of the Employment Act, 2007 directs that;
- (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change. ...
  - (2) ...
156. In this regard section 10(5) of the Employment Act, 2007 requires that any change to the employment contract be made in consultation with the subject and affected employee and upon the revision of the contract of service, this must be done in writing and the subject employee(s) must signify his/her consent to the change/revision;
- (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
157. In this case, where indeed the respondent has made changes, revised and or reviewed the terms and conditions of employment of any employee, there is need for interrogation as to whether written consent and approval was obtained and if so, whether the subject employee is aggrieved by any matter and if not, the matter must rest as the consent entered into in any other matter between another employee(s) and the 1<sup>st</sup> respondent must be looked at in its own merits. At the end of the day, employment is personal and specific and every employment contract must be addressed on its terms and conditions.



158. On costs, the court finds the petition herein is filed in with good foundation and responsible and the petitioner has brought to the fore constitutional and legal matters which require the 3<sup>rd</sup> and 4<sup>th</sup> respondent to address as directed above. With good foundation, each party should bear own costs.

159. Accordingly, judgement is hereby entered and the following orders issued;

- a) Pursuant to article 234(2) of the Constitution the 3<sup>rd</sup> respondent shall review, audit and make recommendations with regard to the 1<sup>st</sup> respondent human resource policies and practices of its officers/employees and report to the court within 365 days;
- b) The 3<sup>rd</sup> respondent shall undertake an investigation of the organisation, administration and personnel practices of the 1<sup>st</sup> respondents and report its recommendations within 365 days;
- c) The 3<sup>rd</sup> respondent is hereby directed to develop Human Resource Policies and guidelines for the 1<sup>st</sup> respondent in strict compliance with the Constitution and the law based on orders (a) and (b) above;
- d) The 1<sup>st</sup> respondent shall re-issue the internal and other public advertisements for filling of vacant positions and allow receipt of applications within the next 14 days without placing to a disadvantage those who had already applied and those likely to apply in the extended period; the 1<sup>st</sup> respondent shall apply existing approved tools until receipt of recommendations of the 3<sup>rd</sup> respondent in accordance with (a) and (b) above; and
- e) As the petition is made on good foundation, each party shall bear own costs.

**DELIVERED IN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY, 2022.**

**M. MBARU**

**JUDGE**

**IN THE PRESENCE OF:**

**COURT ASSISTANT: OKODOI**

..... **AND** .....

