



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. E003 OF 2022

(BEFORE HON. JUSTICE DR. JACOB GAKERI)

**IN THE MATTER OF: AN APPLICATION UNDER ARTICLES 1, 2, 3, 10, 22, 23, 34, 35, 46,
75, 156, 165, 201, 232, 233, 234, 235, 236 AND 258 OF THE CONSTITUTION OF KENYA (2010)**

AND

IN THE MATTER OF: NATIONAL SOCIAL SECURITY FUND ACT

AND

IN THE MATTER OF: PUBLIC SERVICE COMMISSION ACT

AND

IN THE MATTER OF: EMPLOYMENT ACT, 2007

BETWEEN

CONSUMERS FEDERATION OF KENYA (COFEK) Suing Through Its Officials Namely

STEPHEN MUTORO, EPHRAIM KANAKE AND HENRY OCHIENG.....PETITIONER

VERSUS

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

CABINET SECRETARY,

MINISTRY OF LABOUR AND SOCIAL PROTECTION.....INTERESTED PARTY

JUDGMENT

1. Consumer Federation of Kenya (herein after the Petitioner) brought a petition dated 5th January 2022 against the National Board Security Fund (NSSF) Board of Trustees, the Attorney General and the Cabinet Secretary, Ministry of Labour and Social Protection as Interested Party.

2. The petition challenges the composition of the Board of the NSSF as well as the validity of its new human resource instruments and the advertisement by which NSSF invited eligible persons to apply for the position of General Manager established by the new human resource instruments.

3. The Petitioner seeks the following reliefs:

- a. Declaration that the Respondents have failed in their duty to uphold the rule of law, the Constitution and to protect public interest;
- b. Declaration that the petition a public litigation matter;
- c. Declaration that the 1st Respondent has no legal power or mandate whatsoever to prescribe or to approve Human Resource policies and guidelines for the 1st Respondent or for any other public body;
- d. Declaration that the 1st Respondent's Human Resource policies and guidelines prescribed and approved by the 1st Respondent null and void;
- e. Permanent injunction against the 1st Respondent from adopting, implementing or in any other way whatsoever dealing with the Human Resource policies and guidelines without approval of the Public Service Commission, public participation and views of its staff;
- f. Order compelling the 1st Respondent to ensure career progression and promotions of its diligent and honest long serving employees;
- g. Permanent injunction stopping the recruitment of General Managers of the 1st Respondent whereof invitations for applications closed on 15th January 2022 or any other date that the status quo be maintained until such a time a legitimate recruitment process will be conducted in accordance with the law;
- h. Respondents to pay costs of the Petition.

4. The petition is supported by a verifying affidavit deponed by Mr. Stephen Mutoro, the Secretary General of the Petitioner.

5. The Petitioner avers that the current Chairperson of the NSSF Board of Trustees is in office illegally because appointments vide Gazette Notices 10702 and 10703 were quashed in Petition No. 236 of 2018. That the Board of Trustees of the 1st Respondent was barred from conducting board meetings and operations.

6. Similarly, it is averred that advertisement for the positions of general managers dated 23rd December 2021 was issued pursuant to the new human resource instruments which were prepared without compliance with the Constitution, Public Service Act, NSSF Act and public participation and the 1st Respondent's actions were capricious, unreasonable, unfair, unjust, discrimination, illegal and an infringement of the Constitution.

7. It is also averred that adoption of the new human resource policies by the 1st Respondent was effected without public participation, presence of a representative of COTU, consent of the Public Service Commission and contravened the Constitution, Public Service Commission Act and Section 6(d)(ii) of the NSSF Act. That new employees could only be enlisted when the NSSF Board of Trustees and the human resources committee were properly constituted after gazettelement of the COTU representative who the Interested Party failed to gazette.

8. That the Respondent's human resource instruments were adopted without public and stakeholder participation, was characterised by non-disclosure and that NSSF employees' contributors and stakeholders were not aware.

9. It is the Petitioner's case that the new structure was not approved by Parliament and was not budgeted for and thus contravened Section 68(1)(a) and 2(j) of the Public Finance Management Act.

10. That Section 55 of the Public Service Commission Act (PSC Act) gave the commission the sole mandate to review and recommend to the Cabinet Secretary qualifications relating to public office as well as categories of public offices or public officers in public bodies.

11. It is contended that under Article 234 of the Constitution, only the Public Service Commission was mandated to prescribe human resource policies and guidelines unless the Commission delegated the mandate under Section 33 of the PSC Act.

12. That the 1st Respondent had developed illegal human resource instruments designed to lock out long serving, diligent, honest and deserving employees from promotion and locking out qualified members of the public from applying of vacant positions.

13. It is the Petitioner's case that the 1st Respondent established new positions of general managers in violation of Sections 25, 26 and 27 of the PSC Act and did not involve interested and affected persons such as professional bodies as provided by Section 55(3) of the PSC Act or consult the Kenya National Qualifications Authority (KNQA).

14. It is averred that Section 31 of the PSC Act gave the Commission power to delegate, in writing any powers conferred upon it by the Constitution or the Act. Reliance is made is on Articles 1, 2, 3, 4, 10(1), 22, 22, 23, 73, 232(1) and (2), 234(2) and 283(1) and (2) of the Constitution.

15. Finally on the issue of *locus standi* the Petitioner relies on Articles 3(1), 10, 22(2), 159, 160(1), 165 and 258 of the Constitution.

16. In its further affidavit dated 1st February 2022, the Petitioner depones that the impugned decision of the 1st Respondent was not approved or sanctioned by its Board of Trustees.

17. That if the petition is not heard and determined urgently, the Petitioner, public and employees of the 1st Respondent stand to suffer irreparable loss and damage.

1st Respondent's Case

18. In response, the 1st Respondent filed a replying affidavit of Anthony Opare Omerikwa, the Managing Trustee/CEO of NSSF dated 26th January 2022 who avers that the 1st Respondent is a creation of the NSSF Act, 2013 and the Board of Trustees is responsible for directing and managing the fund. That Section 10 of the Act sets out the powers and responsibilities of the NSSF

19. The deponent avers that contrary to the Petitioner's averments, the responsibility for the development of human resources in state corporations is statutorily vested in the State Corporations Advisory Committee (SCAC). Specifically, Section 5(3) and 27(c) of the State Corporations Act, that Boards of Directors develop the human resource instruments, submit the instruments to the relevant ministry for approval which forwards the instruments to SCAC for approval. That SCAC is empowered to review and investigate the affairs of state corporations and make recommendations to the President under Section 27 of the Act. It also advises the President on appointments, nomination and revocation of appointments of Board members including constitution of a new board.

20. It is further averred that Sections 5(3) and 27(c) of the State Corporations Act mandates SCAC to facilitate advisories to the cabinet secretaries on matters germane to human resource in state corporations.

21. It is averred that the 1st Respondent is neither constitutionally nor legally required to seek approval of the National Assembly in the discharge of its mandate.

22. The 1st Respondent avers that at its board meeting held on 17th August 2018, the board approved the terms of reference for the hiring of a consultant to carry out a job evaluation as budgeted for in the 2018/2019 financial year and the firm of KPMG was procured on 21st December 2018. It is further averred that phase 2 of the consultancy involved the organisational structure review and design and the board approved the final report on 29th May 2019. That the consultant worked with the job evaluation committee and the project management team through consultative meetings and members of staff were notified and involved in the job evaluation exercise and kept abreast on the approved organisational structure through circulars dated 29th December 2020 and 17th March 2021.

23. The deponent avers that the human resource instruments were forwarded to SCAC on 23rd June 2020 but returned via letter dated 12th November 2020 for rectification and approval by the Cabinet Secretary. That the instruments were approved by SCAC in May 2021. A copy of the approval letter was not attached.

24. That from 2018 to 2021 when the process commenced and concluded, the board was fully constituted and included a representative of COTU and the board relied on the approved structure to advertise for the positions of General Managers and invited all prospective applicants including those acting in the positions and the budget had been approved by the Board of Trustees as per letter dated 29th November 2021 on Revised Rationalised Budget.

25. The deponent avers that Section 11(2) of the NSSF Act provides for quorum for Board meetings which is two thirds () of whom one shall be a representative of employees and one a representative of the employers.

26. That the Board of Trustees has quorum even as it awaits the appointment of the 2nd representative of employees to the Board.

27. The deponent contends that by a circular no. OP/CAB9/1A dated 1st October 2019, the Head of Civil Service advised that the Public Service Commission had no role in the frame work of state corporations other than setting of values and standards and was not involved in the running of state corporations and had no role in human resource management in state corporations.

28. It is also averred that the powers and functions of the Public Service Commission under Article 234(2) of the Constitution are subject to the Constitution and legislation.

29. The decision in **Katiba Institute & another v Attorney General & another [2020] eKLR** is relied upon to urge that the Public Service Commission had no role in respect of state corporations.

30. Similarly, the decisions in **Chemilil Sugar Company Limited & 2 others v Kenya Union of Sugar Plantation and Allied Workers [2014] eKLR** as well as **Kenya Union of Commercial, Food and Allied Workers v Salaries and Remuneration Commission & 2 others [2015] eKLR** are relied upon to urge that employees of state corporations are not officers in the public service and are invariably outside the purview of the Public Service Commission.

31. That the Petitioner has not demonstrated violation of constitutional rights by the Respondent or isolated any constitutional issue with precision as enunciated in **Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154** and the orders sought should not be granted.

32. The Respondents and the Interested Party filed grounds of opposition stating that the application had not met the threshold for grant of interlocutory injunction and stay established by **Giella v Cassman Brown [1973] E.A 358**.

33. That the Petitioner stands to suffer no irreparable injury or prejudice if the orders are not granted and being public interest, the orders sought be declined as set out in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR**.

34. That the process conducted by the 1st Respondent is consistent with the constitutional principles of openness competitiveness, inclusiveness, democracy and fairness.

35. That the Petitioner has no interest or stake on the matter and has not shown how its interests are affected by the promotion of constitutional principles.

Petitioner's Submissions

36. The Petitioner submits that the 1st Respondent prepared and adopted the human resource instruments without stakeholder and public participation and without approval of the Public Service Commission which is statutorily and constitutionally mandated to review qualifications relating to a public office category of public officers or all public officers in a public body as per Section 55 of the PSC Act.

37. The Petitioner identifies five issues for determination whether:

i. The Petitioner has *locus standi*;

ii. The 1st Respondent has failed in its duty to uphold the rule of law and protect the constitution;

iii. The 1st Respondent has legal power or mandate to prescribe human resource policies and guidelines;

iv. The human resource policies and guidelines prescribed by the 1st Respondent should be declared null and void and implementation stopped.

v. Section 31 of the PSC Act should be declared unconstitutional.

38. On the first issue, it is submitted that the Petitioner has the requisite standing by virtue of Article 258 of the Constitution since the Constitution has been contravened and the petition has been brought to ensure observance of the rule of law. The decision in **Daniel N. Mugendi v Kenyatta University & others [2013] eKLR** is relied upon as are Articles 3(1) and 22 of the Constitution of Kenya.

39. As regards the second issue, it is submitted that 1st Respondent has failed in its obligation to uphold the rule of law and protect the Constitution because the human resource instruments it prescribed have hindered the career progression of employees.

40. It is the Petitioner's submission that the 1st Respondent had not taken its staff for training in supervisory and senior management courses but made the same mandatory.

41. It is submitted that some members of staff were trained in supervisory and management courses prior to closure of the internal advertisement. That the 1st and 2nd Respondents have failed to uphold the rule of law and the constitution, specifically Articles 1, 232(1) and (2), 21 and 73 of the Constitution.

42. As to whether the 1st Respondent has power to prescribe or approve human resource instruments, it is submitted that this is the most substantive issue for determination in this petition.

43. The rest of the submission on this issue mistakenly assumes that the Public Service Commission is the 3rd Respondent which is not the case and reliance is made on Articles 234 and 260 of the Constitution of Kenya as well as Section 27 of the State Corporations Act as well as the Mwongozo Code of Governance for state corporations. It is submitted that employees of state corporations are public officers. The decision in **National Union of Water & Sewerage Employees v Mathira Water and Sanitation Company Limited & 2 Others [2013] eKLR** is relied upon to buttress the submission.

44. Relatedly, the decisions in **Fredrick Otieno Outa v Jared Odoyo Okello & 4 others [2014] eKLR** as well as **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudheih Workers) v Salaries and Remuneration Commission [2014] eKLR** are relied upon to demonstrate that employees of state corporations are public offices and the 1st Respondent is a public service institution.

46. It is further submitted that the Public Service Commission has the overall mandate to regulate the public service as mandated by the Constitution of Kenya.

46. The Petitioner appeared to have abandoned the other two issues listed above.

Respondent's Submissions

47. The Respondent identifies seven issues for determination, namely whether:

i. Petitioner has *locus standi*;

ii. The matter is public interest;

iii. The Petitioner has met the threshold for interlocutory injunction;

iv. The 1st Respondent has legal mandate to prescribe human resource policies and guidelines and role of Public Service Commission;

v. The 1st Respondent complied with the applicable laws, regulations and human resource policy;

vi. The Petitioner has demonstrated with precision how its rights and fundamental freedoms have been violated or threatened;

vii. The NSSF Chairperson is legally in office.

48. On standing, it is submitted that the Petitioner has no standing to commence proceedings under Articles 22 and 258 of the Constitution of Kenya 2010. The decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** is relied upon for the proposition that “*the standard guide for locus standi must remain the command in Article 258 of the Constitution*”.

49. Articles 23 and 258 of the Constitution are also cited to urge that the Petitioner ought to demonstrate an interest and that the parties affected by the decision cannot act by themselves and the Petitioner had not shown any interest. That the issue is a private matter been an employer and employees.

50. The decision in **Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others [2018] eKLR** is cited for the proposition that a person who wishes to enforce the Constitution must fit into one of the categories set out in the two Articles and state the capacity in which they have come to Court under either of the two Articles.

51. Section 12 of the Employment and Labour Relations Court Act is also relied upon to contextualize the jurisdiction of this Court. It is submitted that the Court has no jurisdiction in this case.

52. As regards public interest litigation, it is contended that the Petitioner is a consumer rights lobby group pursuing public interest yet the issue before the Court was in the private law arena. That the public stands to suffer no prejudice since the advertisement was open to every Kenyan including NSSF employees and the same promoted the attendant constitutional principle of openness, competitiveness and fairness. That the Petitioner stands to suffer no disadvantage. The decision in **Communication Workers Union & another v Communication Authority of Kenya [2015] eKLR** issued to urge that employment is a matter of private law.

53. As regards the threshold for grant of interlocutory injunction, it is urged that the Petitioner has not demonstrated a *prima facie* case with a probability of success or that it will suffer irreparable injury which cannot be compensated by way of damages.

54. The decisions in **Stek Cosmetics Limited v Family Bank Limited & another [2020] eKLR**, **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**, **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** and **Nken v Holder 556 U.S. 418 [2009]** are relied upon to espouse the principles applicable in the grant of interlocutory injunction.

55. It is submitted that the balance of convenience is not in favour of maintaining the status quo to avoid unnecessary expenditure of public funds.

56. As regards the 1st Respondent's mandate to prescribe human resource policies and guidelines and the role of the Public Service Commission, reliance is made on the NSSF Act on the establishment and mandate of the 1st Respondent as well as Section 10 of the Act on powers of the Board on the basis of which the 1st Respondent had advertised positions under its new human resource instruments prepared in accordance with the Constitution.

57. Section 5(3) and 27(c) of the State Corporations Act are cited to urge that the board of each state corporation is mandated to develop the human resources of the particular corporation and the impugned human resource instruments and guidelines were issued by the 1st Respondent in accordance with Section 27 of the State Corporations Act.

58. That the Act and provisions of Mwongozo empower the Cabinet Secretary and the SCAC to exercise oversight authority over state corporations within their docket and offer policy direction. Section 5(3) of the Act is cited on the power of state corporations to hire staff.

59. The procedure on preparation and approval of human resource instruments under Section 5(3) and 27(c) of the State Corporations Act is reproduced for emphasis and to urge that the impugned human resource instruments are lawful.

60. That the assertion that the Public Service Commission is the only body mandated to review and make recommendations to the Cabinet Secretary on qualifications to a public office category of public officer in a public body such as the 1st Respondent is erroneous and the functions and powers of the Public Service Commission under Article 234(2) of the constitution are subject to the Constitution and legislation and the State Corporations Act is the *lex specialis* legislation. That state corporations are “*special purpose vehicles to serve specific strategic public purpose governed by principles of corporate governance and espousing common features as are applicable to private sector entities.*”

61. It is submitted that the provisions of the State Corporations Act oust the mandate of the Public Service Commission over the affairs of

state corporations. The advisory of the Attorney General dated 12th August 2014 is also relied upon as is the Head of Public Service circular Ref. No. OP/CAB.9/A dated 1st October 2019. The decision in **Katiba Institute & another v Attorney General & another [2020] eKLR** and others are relied upon to urge that offices in state corporations are not offices in the public service.

62. That not all offices in the public service fall under the purview of the Public Service Commission. That the Court should therefore not interfere with the mandate of the 1st Respondent to prescribe human resource policies and guidelines with approval of SCAC.

63. It is further submitted that an injunction would curtail the statutory duty and function of the 1st Respondent. The decision in **Republic v Commissioner of Customs Services Ex-Parte Africa K-Link International Limited [2012] eKLR** is relied upon as is the decision in **Manyara Muchui Anthony v Communications Authority of Kenya & 3 others [2022] eKLR** to urge that the 1st Respondent had indeed complied with the law as it was.

64. As regards compliance with applicable laws regulations and human resource policy, it is submitted that the 1st Respondent is not legally required to seek approval from the National Assembly in the discharge of its mandate germane to human resource. That this allegation has not been substantiated. That the Board of Trustees meeting on 17th Augusts 2018 was quorate and COTU had a representative.

65. That the management team held meetings with the consultant and input from stakeholders and employees of NSSF was discussed and incorporated. In addition, the members of the Evaluation Committee were drawn from management, staff union and other staff.

66. That employees as stakeholders, were involved in the job evaluation and notified of the new human resource instruments.

67. Further, the Respondents submit that the allegation that the new structure had not been budgeted for is unfounded since the budget had been approved by the Board of Trustees.

68. The decision in **Okiya Omtatah Okoiti v Head of Public Service & 5 others [2018] eKLR** is relied upon to urge that the government as an employer should be subject to the Constitution and statute retain discretion in the management and control of its human resource function.

69. As regards violation of fundamental rights under the bill of rights, it is submitted that although the Petitioner quotes an array of Articles of the Constitution, it has not demonstrated with precision how any or all of them have been violated. No evidence has been adduced in support.

70. It is submitted that the Petitioner has not established any violation of the Constitution as required by Article 22. It is further submitted that constitutional rights are specific and the Petitioner is obligated to set out some level of particularity of the right(s) allegedly breached as enunciated in **Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154** and echoed in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra)**.

71. The sentiments of the Court in **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR** are also relied upon to buttress the submission that the party suing must state the provisions allegedly infringed, in relation to them, manner of infringement as well as the nature and extent of the infringement and the nature and extent of the injury suffered.

72. It is also submitted that the petition does not meet the threshold of a constitutional petition.

73. Finally, as to whether the Chairperson of the NSSF Board of Trustees is illegally in office as alleged by the Petitioner, courtesy of the decision **Katiba Institute & another v Attorney General & another (supra)**, it is submitted that the decision was in fact stayed by the Court of Appeal in **Nairobi Civil Application E184 of 2021 - Attorney General v Katiba Institute & 2 others** in a ruling delivered on 23rd September 2021.

74. The Respondents pray for dismissal of the petition with costs.

Determination

75. After careful consideration of petition, replying affidavit and grounds of opposition, further affidavit, submissions by Counsel and the law, the issues for determination are whether: -

- i. The Petitioner has standing to commence these proceedings;
- ii. The 1st Respondent had the mandate to prescribe its human resource instruments;
- iii. The 1st Respondent acted in accordance with the applicable and relevant law
- iv. The Petitioner is entitled to the reliefs sought.

76. Before delving into the issues listed herein above, the Petitioner alleged that the Chairperson of the 1st Respondent was in office illegally by virtue of the decision in **Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties) [2021] eKLR** by which a three Judge bench of the High Court quashed Kenya Gazette Notice numbers 5569 to 5620 of 5th June 2018 and numbers 5622 to 5623 of 7th June 2018 on appointments of Chairperson and board members of several state corporations

including the 1st Respondent's Chairperson.

77. The position is however different. After the judgment was delivered on 27th May 2021, the Attorney General filed a notice of appeal and subsequently a notice of motion seeking stay of execution of judgment and decree pending the hearing and determination of the intended appeal. The Court of Appeal granted a stay by its ruling delivered on 23rd September 2021.

78. The Court is in agreement with the submission of the 1st Respondent on this issue. The Petitioner's allegation falls by the wayside.

79. As to whether the Petitioner has standing to commence these proceedings, the Court proceeds as follows:

80. According to **Black's Law Dictionary 10th Edition 2014**, standing means –

“A party's right to make alleged claim or seek judicial enforcement of duty or right.”

81. The 1st Respondent contends that the Petitioner has not demonstrated that it has sufficient interest in law to urge the petition. Needles to emphasise, the Employment and Labour Relations Court derive its jurisdiction from Article 162(2)(a) of the Constitution of Kenya, 2010 and the provisions of Section 12 of the Employment and Labour Relations Court Act, 2011. Section 12(2) of the Act provides *inter alia* that:

The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

82. It is instructive to note that this provision is not exhaustive. Moreover, the preambular provision of the Employment and Labour Relations Court Act states that it is:

An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.

83. In **Daniel N Mugendi v Kenyatta University & 3 others (supra)** the Court of Appeal stated that:

“... 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.”

84. In **Public Service Commission & 4 others v Cheruiyot & 32 others (Civil Appeal 119 & 139 of 2017 (Consolidated) [2022] KECA 15 (KLR) (8 February 2022) (Judgment)** the Court of Appeal stated as follows –

“This is therefore to mean that the jurisdiction of the Employment and Labour Relations Court is not limited to the determination of disputes arising out of a contract of employment between an employee and an employer, the Court can also determine any constitutional violations of the rights of any party arising from an employee-employer relationship. However, for the court to entertain a petition premised on the breach of a party's fundamental rights under the Constitution, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under section 12 of the Act. Our view is fortified by the preamble to the Employment and Labour Relations Court Act, 2011”

85. The petition before the Court is hinged on an array of Articles of the Constitution of Kenya, including 10, 22, 23, 73, 232, 234 and 258.

86. Article 258 of the Constitution of Kenya, 2010 provides that:

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.

87. Under clause (1) above every person has locus standi to file a claim on alleged or threatened contraventions of the Constitution. Relatedly, Article 260 of the Constitution states that **“person” includes a company, association or other body of persons whether**

incorporated or unincorporated.

88. It is not in dispute that the Petitioner is a registered society and is thus a person within the meaning of Article 260 of the Constitution of Kenya, 2010.

89. Finally, the sentiments of the Court of Appeal in **Sumayya Athmani Hassan v Paul Masinde Simidi & another [2019] eKLR** as instructive:

“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.”

90. The Petitioner states that it is a duly registered society and a consumer rights lobby group in Kenya and operates as a non-political, non-profit and nondenominational and urges the Court to consider the sensitivities, consumers and public interest raised by the Petitioner.

91. Among the reliefs sought are declarations that the 1st Respondent did not observe the rule of law or the Constitution or public interest in the process leading to the advertisement for positions of General Managers. Others touch on the mandate of the Public Service Commission and State Corporations Advisory Committee and their determination impact on the mandate of the State Corporations Advisory Committee and are invariably issues of public interest.

92. For the above reasons, it is the finding of the Court that the Petitioner has standing to file and prosecute the petition.

93. As to whether the 1st Respondent had the legal mandate to prescribe human resource instruments and guidelines, while the Petitioner urges that it had no mandate to do so by virtue of Article 234 of the Constitution of Kenya, 2010, the Respondents contend that it acted in accordance with the applicable law and practice at the time.

94. Article 234 of the Constitution provides as follows:

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;

h. 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. hear 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.

95. There are sufficient constitutional, statutory provisions and judicial articulations to the effect that employees of state corporations are public officers in the public service. Article 260 of the Constitution of Kenya, 2010 states that “*public officer*” means –

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

96. “*Public office*” on the other hand is defined as –

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;

97. “*Public service*” is defined as –

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

98. The Court is in agreement with the sentiments of Mbaru J. in **Manyara Muchui Anthony v Communications Authority of Kenya & 3 others (supra)** as follows –

“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.”

99. In **Fredrick Otieno Outa v Jared Odoyo Okello & 4 others [2014] eKLR** the Supreme Court expressed itself as follows:

“And thus, the proper meaning of “public officer” currently is:

- i. the person concerned is a State officer; or
- ii. any other person who holds “public office” – an office within the national government, county government, or public service;
- iii. a person holding such an office, being sustained in terms of remuneration and benefits from the public exchequer.”

100. Similarly, in the words of Lenaola J. (as he then was) in **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) v Salaries and Remuneration Commission [2014] eKLR**

“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.”

101. The foregoing demonstrates beyond peradventure that employees of state corporations are public officers, perform public service, are remunerated by monies provided by Parliament and belong to the Government.

102. While the Petitioner contends that the Public Service Commission “*is the repository of all public service regulation in terms of conditions of service*”, the 1st Respondent relies on the provisions of the State Corporations Act, Cap 446 and the Code of Governance for State Corporations (Mwongozo) exclusively to urge that powers conferred by Sections the 1st Respondent exercised the 5(3) and 27(1) of the States Corporations Act.

103. Further reliance is made on several decisions such as **Katiba Institute & another v Attorney General & another (supra)** which was premised on board positions not employees. Others include **Kenya Union of Commercial, Food and Allied Workers v Salaries and Remuneration Commission & 2 others (supra)**.

104. Significantly, the functions and powers of the Public Service Commission under Articles 234(1) and (2) do not apply to the offices identified in Article 234(3). The list of exemptions does not include officers in the state corporations, a fact the framers of the Constitution of Kenya, 2010 must have been aware of.

105. For the foregoing reasons, it is the finding of the Court that the Public Service Commission has the constitutional mandate to exercise the powers and functions under Article 234 of the Constitution over the public service, the Attorney General’s legal opinion No. AG/CONF/4/127 Vol. II of 21st August 2014 notwithstanding.

106. On the other hand, the preamble to the State Corporations Act states that it is –

An Act of Parliament to make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes.

107. On the power to hire, Section 5(3) of the Act provides that:

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.

108. Finally, the State Corporations Act establishes a committee, the State Corporations Advisory Committee whose functions are set out in Section 27(1) of the Act. Section 27(1) of the Act provides as follows:

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.

109. As the name of the Committee suggests, it is primarily an advisory committee.

110. While Section 5(3) of the State Corporations Act requires the Minister to consult the SCAC in the process of approval of terms and constitution of service of employees of state corporations, Section 27(2) of the Act accords the committee advisory and other specific powers which do not include approval of human resource instruments of state corporations.

111. The committee appear to have been exercising powers it did not have *ab initio*.

112. More importantly, the Court is also guided by Section 7 of the 6th Schedule of the Constitution of Kenya, 2010 which provides guidance on how a statute such as the State Corporations Act should be construed. The Section provides as follows:

1. All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

2. If, with respect to any particular matter—

a. a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

b. a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

113. What the Court gathers from these provisions is that because the responsibility of issues of human resource in state corporations is now specifically vested in the Public Service Commission as a constitutional imperative, the provisions of Article 234 of the Constitution prevail over Sections 5(3), 27 or any other provisions of the State Corporations Act. Finally, a cursory glance of the Act reveals that it is yet to be aligned to the provisions of the Constitution of Kenya, 2010.

114. To push the matter further, the provisions of the Public Service Commission, Act, No. 10 of 2017 are also explicit on the mandate of the Public Service Commission.

115. The preambular provision of the Act states that it is an Act of Parliament to make further provisions as to the functions, powers and administration of the Public Service Commission established under Article 233 of the Constitution, **to give effect to Article 234 of the Constitution** and for connected purposes.

116. Secondly, Section 3 of the Public Commission Act, provides that –

Subject to Articles 155(3)(a), 158(3), 234(2)(a), 234(3) and 252(1) of the Constitution and section 28 of the Kenya Defence Forces Act, this Act shall apply to all public bodies and persons holding office in the public service.

117. Section 2 of the Public Service Commission Act provides that “a public body” includes:

a. any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a 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;

b. a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition;

c. statutory public bodies; or

d. any public body brought under the jurisdiction of the Commission by an Act of Parliament for a specified function to the extent of that function;

118. Finally, Article 234(2)(c) of the constitution provides that:

The Commission shall perform any other functions and exercise any other powers conferred by national legislation.

119. Bearing in mind that the Public Service Commission Act was enacted in 2017 and came into operation on 20th April 2017, it is the Court’s view that its provisions were intended to reinforce the provisions of Article 234 of the Constitution of Kenya, 2010 and underscore its preeminent character.

120. In nutshell, these constitutional and statutory provision demonstrate that the Public Service Commission is the only body with constitutional authority to approve human resource instruments of state corporations and other state bodies.

121. In simple parlance, the Board of Directors of a state corporation is the policy making body of the corporation and provides the strategic direction. It is the decision maker on all matters of policy.

122. Section 5(1) of the NSSF Act 2013 provides that

There is established a body to be known as the National Social Security Fund Board of Trustees which shall, inter alia, be vested with the responsibility of directing and managing the Fund.

123. Section 5(2) of the NSSF Act itemises the powers of the Board of Trustees. It is a body corporate with perpetual succession and a common seal, and can sue or be sued in its name.

124. Under Section 6, the Board of Trustees consists of eleven (11) members including the Managing Trustees who is an *ex officio* member.

125. Section 10 of the Act sets out the powers and responsibilities of the Board of Trustees.

126. Section 10(1) provides that the Board shall exercise all the powers necessary for the proper performance of its responsibilities under this

Act.

127. Section 10(2) provides that without prejudice to the generality of subsection (1), the Board may –

a. ...;

b. ...;

c. lay down such policies and guidelines as may be necessary for the proper operations and management of all the contributions and funds collected by the Fund and for any other matter concerning the Fund;

d. ...;

e. approve contracts, undertakings, hiring of senior staff and other activities entered into by the Management or otherwise undertaken in the name of the Fund whose value requires Board approval;

f. ...;

g. ...;

h. ...;

i. ...;

j. exercise such other powers as may be conferred upon the Board by this Act or any other written law.

128. Section 10(3)(b) of the Act states that the Board shall be responsible for enforcement of good corporate governance practices within the Board and senior management;

129. These provisions clearly demonstrate that the 1st Respondent had the mandate and justification to originate its human resource instruments subject to compliance with the Constitution and the NSSF Act. However, it did not comply with the provisions of the Constitution. The instruments were not submitted to the Public Service Commission for consideration and approval and are therefore inoperable.

130. On public and stakeholder participation in the preparation of the human resource instruments, the Petitioner did not lead evidence on who was not involved or did not participate in the process and cited no law that required public participation in the preparation of the initial instruments other than employees who are the intended stakeholders.

131. On quorum of the 1st Respondent when it made the decision in question, the Petitioner led no evidence of which of the meeting(s) had no quorum. The Respondent submitted that at all material times the 1st Respondent was quorate as provided by Section 11(2) of the NSSF Act which provides that:

The quorum for the conduct of the meetings of the Board shall be two thirds of the Trustees of whom one shall be a representative of employees and one a representative of employers.

132. As regards budgetary provision for the positions advertised by the 1st Respondent, the Petitioner adduced no evidence to demonstrate that the requisite budgetary allocation had not been made while on the other hand the 1st Respondent led evidence showing that the 1st Respondent engaged the National Treasury in the process leading to the rationalised budget 2018/2019 as well as evidence of the 2021/2022 Revised Rationalised Budget of Kshs.14,402,750,000/-.

133. It is the finding of the Court that the 1st Respondent had the requisite budgetary allocation for the positions it had advertised.

134. The foregoing analysis disposes of issues nos (ii) and (iii).

Reliefs

a. A declaration that the Respondent have failed in their duty to uphold the rule of law, the Constitution and public interest

135. Having found that the 1st Respondent did not comply with the provisions of the Constitution in the preparation and approval of human resource instruments, a declaration is hereby issued that the 1st Respondent did not uphold the rule of law and the Constitution.

b. A declaration that the petition is a public interest litigation

136. Granted that the purpose of the petition is to secure observance and compliance with the rule of law and the Constitution of Kenya, 2010, a declaration that the petition is public interest litigation is hereby issued.

c. A declaration that the 1st Respondent had no legal power or mandate whatsoever to prescribe or to approve human resource policies and guidelines for the 1st Respondent or any other public body

137. Although the 1st Respondent has the mandate to originate the human resource instruments, it has not power to approve the same for implementation.

d. A declaration that the 1st Respondent's human resource policies and guidelines prescribed and approved the 1st Respondent are null and void

138. Having found that the 1st Respondent had legal mandate to originate the human resource instruments but were not approved by the Public Service Commission, the instruments are ineffectual until approved by the Commission.

e. Permanent injunction against the 1st Respondent from adopting, implementing or in any other way whatsoever, dealing with the human resource policies and guidelines without approval of the Public Service Commission, public participation and views of its staff

139. The Petitioner led no evidence that it will suffer any irreparable injury or loss not compensable by damages if the injunction is not granted. In the absence of the specific loss or injury to be suffered, the declaration is **declined**.

f. An order compelling the 1st Respondent to ensure career progressions and promotions of its diligent, honest and long serving employees

140. The Petitioner laid no foundation for such an order. No evidence was led to show or demonstrate that honest, diligent and long serving employees of the 1st Respondent ought to be catered for or had been discriminated and how.

141. Career progression and promotions should be equitable and all-inclusive subject to the fulfilment of the prescribed criteria. Long service, dedication and honesty are but some of the parameters considered. The level of education, relevant training since employment, initiative and demands for the higher office are relevant considerations too. The entire milieu is taken into consideration.

142. Having observed that the prayer lacks the necessary factual background and foundation, it is **declined**.

g. A permanent injunction stopping the recruitment of general managers of the 1st Respondent whereof invitation for applications close on 15th January 2022 or any other date and that the status quo be and is hereby maintained until such time a legitimate recruitment process will be conducted in accordance with the law

143. Having found that the 1st Respondent's human resource instruments are ineffectual until approved by the Public Service Commission with or without modification for implementation, **recruitment of general managers advertised on 23rd December 2021 shall remain in abeyance until the instruments are approved by the Public Service Commission.**

144. Finally, the 1st Respondent shall within 21 days present draft human resource instruments to the Public Service Commission for review, for the Commission to satisfy itself that the instruments were prepared in conformity with the Commission's policies and guidelines for purposes of approval with or without any modifications.

145. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF APRIL, 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE