



**Kamau v Kenya Accreditation Service (Petition E053 of 2021)  
[2021] KEELRC 8 (KLR) (30 July 2021) (Judgment)**

*John Mburu Kamau v Kenya Accreditation Service [2021] eKLR*

Neutral citation: [2021] KEELRC 8 (KLR)

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

**PETITION E053 OF 2021**

**ON MAKAU, J**

**JULY 30, 2021**

**IN THE MATTER OF ARTICLES 7, 10, 27, 28, 32, 33, 35, 41, 47,  
48, 50, 232 AND 236 OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE CONSTITUTION OF KENYA; 2010;**

**AND**

**IN THE MATTER OF SECTIONS 5, 6, 7, 8, 9 AND 10 OF THE PUBLIC  
SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015;**

**AND**

**IN THE MATTER OF SECTIONS 9, 10, 11 AND 12 OF THE  
PUBLIC OFFICER ETHICS ACT, CHAPTER 183 OF 2003;**

**AND**

**IN THE MATTER OF SECTIONS 8, 9, 10, 11 AND 15 OF THE  
LEADERSHIP AND INTEGRITY ACT, CHAPTER 182 OF 2012**

**AND**

**IN THE MATTER OF SECTIONS 4, 6, 7, 8, 9 AND 11 OF  
THE FAIR ADMINISTRATIVE ACTION ACT, NO.4 OF 2015;**

**AND**

**IN THE MATTER OF RULES 4, 10, 11, 22, 23 AND 24 OF THE  
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**JOHN MBURU KAMAU ..... PETITIONER**



AND

KENYA ACCREDITATION SERVICE ..... RESPONDENT

**The Public Service Commission was not a sufficient and adequate forum to resolve disputes involving the interpretation of the Constitution.**

*The petitioner's duties were changed by the Chief Executive Officer (CEO) of his employer, as part of the CEO's attempt at restructuring the organization without approval from the organization's board or the State Corporations Advisory Committee (SCAC). The petitioner alleged that the unilateral change of his contract of service was a violation of his fundamental rights and freedoms. A question arose as to whether the proper forum for the resolution of the dispute was the Public Service Commission (PSC). On questions about the doctrine of exhaustion of administrative remedies, the court held that the PSC was not a sufficient and adequate forum for the resolution of the dispute because the dispute involved the interpretation of the Constitution.*

Reported by Kakai Toili

**Jurisdiction** – jurisdiction of the Employment and Labour Court – doctrine of exhaustion of remedies – jurisdiction to review the legality and constitutionality of disciplinary committees – what was the scope and applicability of the doctrine of exhaustion of administrative remedies – whether the Public Service Commission had the jurisdiction to determine applications challenging the legality and constitutionality of administrative procedures/decisions made by boards of institutions in the public service – whether the Employment and Labour Court had the jurisdiction to forego the doctrine of exhaustion of remedies and to determine the legality and constitutionality of disciplinary proceedings of a public institution that were appealable to the Public Service Commission – Constitution of Kenya, 2010 articles 23(1), 159(2) and 165(5); Public Service Commission Act (Act No. 10 of 2017) section 3(c) and 74.

**Labour Law** – public service – power to revise the organizational structure and staff establishment of a parastatal – where a CEO to a parastatal revised the organizational structure and staff establishment of a parastatal – whether the Chief Executive Officer of a parastatal had the powers to revise the organizational structure and staff establishment without the approval of the board and without approval by the State Corporations Advisory Committee – Guidelines on Design of Organization Structures in the Public Service of (2015) guideline 2.2, steps 5 and 6.

**Constitutional Law** – fundamental rights and freedoms – right to fair labour practices – where a CEO to a parastatal had altered the terms of employment of an employee from permanent and pensionable to a 4-year contract – where a CEO to a parastatal revised the organizational structure and staff establishment of a parastatal by re-assigning the duties of an employee to another docket – whether such decisions violated an employee's right to fair labour practices – Constitution of Kenya, 2010 article 41

**Constitutional Law** – fundamental rights and freedoms – right to fair administrative action – right to a fair hearing – where a CEO to a parastatal had subjected an employee to disciplinary proceedings in which the CEO was the complainant, prosecutor, and judge – whether subjecting an employee to disciplinary proceedings in which the complainant also served as the prosecutor and judge was a breach the employee's rights to fair administrative action and to a fair hearing – Constitution of Kenya, 2010 articles 47 and 50(1)

**Labour Law** – legitimate expectation – where an employee in a parastatal was accused of improper performance – where such allegations were settled before the Human Resource Committee of the parastatal's board – where the CEO of the parastatal re-instated the settled allegations and required the employee to answer to them again before a disciplinary committee – whether an employee had a legitimate expectation not to answer to allegations that had already been settled in subsequent disciplinary committee hearings

**Brief facts**

The petitioner filed the instant suit contending that the respondent had subjected him to harassment, threats, intimidation, verbal abuse and psychological torture and had failed to accord him a fair hearing before



taking any adverse action against him. The petitioner sought orders that a declaration be issued stating that the initiation of the disciplinary action and removal of the department of finance and accounts from the petitioner's directorate was unlawful; that the department of finance and accounts be reinstated to the directorate under the petitioner and the respondent be restrained from interfering with the applicant's contract of employment; and compensation and payment of general damages for violation of the petitioner's constitutional rights.

The petitioner claimed that his terms of service were changed from permanent and pensionable to a 4-year contract as chief manager of corporate services. Further, he received a memo on the organizational changes that the finance and accounts department had been moved to the executive directorate and the manager of finance and accounts would report to the Chief Executive Officer (CEO). The petitioner was also issued with a show-cause letter on why he should not be surcharged on penalties and interests accruing from non-remittance of statutory deductions. The petitioner was later on invited to appear before the Human Resource Committee for a disciplinary hearing. According to the petitioner, the CEO was the judge, prosecutor and complainant.

The respondent raised a preliminary objection on the ground that the court lacked the jurisdiction to determine the instant petition as the jurisdiction of the court had been prematurely invoked as the petitioner had failed to invoke alternative dispute resolution mechanisms prescribed under the Public Service Commission Act (PSC Act) before approaching the court.

### **Issues**

- i. What was the scope and applicability of the doctrine of exhaustion of resources?
- ii. Whether the Public Service Commission had the jurisdiction to determine applications challenging the legality and constitutionality of administrative procedures/decisions made by boards of institutions in the public service.
- iii. Whether the Employment and Labour Court had the jurisdiction to forego the doctrine of exhaustion of remedies and to determine the legality and constitutionality of disciplinary proceedings of a public institution that were appealable to the Public Service Commission.
- iv. Whether the Chief Executive Officer of a parastatal had the powers to revise the organizational structure and staff establishment without the approval of the board and without approval by the State Corporations Advisory Committee.
- v. Whether the decision by the CEO of a parastatal to alter the contract of service of an employee from permanent and pensionable to a 4-year contract violated the employee's rights to fair labour practices.
- vi. Whether subjecting an employee to disciplinary proceedings in which the complainant also serves as the prosecutor and judge was a breach the employee's rights to fair administrative action and to a fair hearing.

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

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

##### **Section 74 - Appeals**

1. *Any person who is dissatisfied or affected by a decision made by an authorized officer or other authority in exercise or purported exercise of disciplinary control against any public officer under this Act may appeal to the Commission.*

#### **Employment Act, 2007**

##### **Section 10 - Employment particulars**

*(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.*

### **Held**

1. Subject to the doctrine of exhaustion of administrative remedies, a person challenging an agency decision had to first pursue the agency's available remedies before seeking judicial review. The doctrine



- promoted an efficient justice system, an autonomous administrative state, and was in line with article 159(2)(c) of the Constitution of Kenya, 2010 (Constitution).
2. The Kenya Accreditation Service (respondent) was a statutory body established under section 3 of the Kenya Accreditation Service Act. The respondent fell within section 3(c) of the Public Service Commission Act (PSC Act) and therefore its employees, including the petitioner, were bound by the general provisions of the PSC Act in so far as there were no specific provisions in the respondent's human resource policy (HR Policy) and Procedures Manual. Section 74(1) of the PSC Act was a general provision and it did not supersede specific HR Policy and Procedures Manual made by a specific state corporation. Coincidentally, the respondent's HR Manual like section 74 provided that a decision by the respondent's board was appealable to the PSC.
  3. The Public Service Commission (PSC) was not a sufficient and adequate forum to resolve the instant dispute because it involved an interpretation of the Constitution. Under article 23(1) and 165(5) of the Constitution, the court and not the PSC had the jurisdiction to interpret the Constitution in respect of matters related to employment and labour relations in Kenya. There were exceptions to the doctrine of exhaustion.
  4. There was no decision by the Human Resource Committee Board (Board) which was capable of being appealed to the PSC. The petitioner was basically challenging disciplinary proceedings and unilateral change of his contract of service by the respondent's CEO in violation of his rights and fundamental freedoms as enshrined under the Constitution and Employment Act. He had set out the provisions of the Constitution and the Employment Act that had been breached and how violations had been done. Consequently, the petition met the competency threshold for a constitutional pleading and the court had jurisdiction to entertain the same, notwithstanding the existence of the internal appeal mechanism.
  5. The court could intervene in the internal disciplinary process for a good cause being demonstrated by the employee. The intervention was not necessarily meant to stop the process altogether but to put things right so as to avoid a violation of the employee's rights and fundamental freedoms, and also to ensure procedural fairness to the employee.
  6. There was a marked distinction between the instant case and the *Mutanga Tea and Coffee Company Limited v Shikara Limited & another* [2015] eKLR in that the statute in that case provided for an appeal to the High Court after the internal mechanism unlike in the instant case where, there was no provision for appeal to the court. In the instant case, the PSC Act and the respondent's HR Manual had denied the petitioner the constitutional right of access to court. In the instant case, even if the claim was not founded on the Constitution, the same would see the light of the day.
  7. The court could intervene in the internal disciplinary proceedings for a good cause being shown by the employee. The court's intervention to interdict disciplinary action before its concluded should be exercised in exceptional circumstances. The grounds upon which the court would intervene in an employer's disciplinary process included;
    - a. where an employee established that the employer was proceeding in a manner that contravened the provisions of the Constitution or legislation, or
    - b. in breach of agreed terms of contract or employer's policy, or
    - c. if the process was manifestly unfair and offended the rules of natural justice.
  8. There was no internal appeal mechanism available for the petitioner to question the constitutionality of his disciplinary proceedings before a decision by the board, or to agitate for his right to legitimate expectations under the Constitution. Further, until a final decision was made by the Board, the petitioner had no right of appeal under the respondent's HR Manual. The jurisdiction of the court had been properly invoked.
  9. The petitioner being job grade KENAS 2, only the board of directors could discipline him and not the CEO. The CEO persisted in serving the claimant with the show-cause letters and memos and after response, he just stated that the same had been amicably resolved. Further, the CEO on two



- occasions, transferred key roles from the petitioner's docket to his deputy without approval from the board citing the reason as improper performance by the petitioner. That showed that the CEO was the one exercising disciplinary powers over the petitioner and not the board of directors.
10. The respondent's internal proceedings commenced by the letter dated February 25, 2021, were unfair and likely to prejudice the petitioner if they were allowed to continue blindly. The proceedings had been commenced by the CEO without any evidence that the respondent's board passed a resolution to commence the same. There was no evidence that any investigations were done by the board or at all before commencing the proceedings as required by the HR Policy Manual. Some of the matters involved, including the intended surcharge, were earlier on settled amicably according to the letter by the CEO dated December 8, 2020.
  11. Some of the issues settled *vide* the letter dated December 8, 2020 was a surcharge for alleged losses caused to the respondent by the petitioner's alleged improper performance. According to the letter, that matter was settled after the petitioner made representations to the Human Resource Committee of the Board. Consequently, the court had to intervene in the proceedings by barring the respondent from revisiting the performance and surcharge issues which were settled as per the letter. Allowing the respondent to go against its own word would be violating the petitioner's right to a legitimate expectation that the settled matters would not be revisited. Consequently, the respondent could only charge the petitioner for improper performance after December 8, 2020 and surcharge for losses incurred after that date, if any.
  12. There was no evidence that the petitioner was consulted prior to the review of his functions. The review of his duties and contract of employment was done unilaterally in disregard of section 10 (5) of the Employment Act. The CEO did not secure approval from the respondent's board and the State Corporations Advisory Committee (SCAC) before altering the duties of the petitioner. That was because the alteration of the duties resulted to a change in the organizational structure and the functions of the chief manager, corporate services as set out under clause 2.10.1 of the Career Progression Guidelines.
  13. The alteration of the petitioner's function and the placement of some functions under the CEO meant the respondent had revised the organizational structure and staff establishment which had been approved by SCAC for implementation. Steps 5 and 6 of guideline 2.2 of the Guidelines on Design of Organization Structures in the Public Service of May 2015 stated that the organizational design was to be subjected to stakeholders for input and approval for implementation had to be sought from SCAC. The impugned unilateral redesigning of the organizational structure by the CEO required approval from the respondent's board and the SCAC.
  14. The failure to seek approval, prior to altering the petitioner's functions, rendered the new organizational changes irregular, illegal, null and void. The action also violated the petitioner's right to fair labour practices, right to fair administrative action, right to fair hearing and right to legitimate expectation because he was denied the right of being consulted before the transfer of key roles from his docket. The decisions made unilaterally by the CEO against the petitioner were enormous and amounted to condemning the petitioner unheard contrary to rules of natural justice that were recognized under article 47 of the Constitution. The decision also had the effect of re-writing the petitioner's contract of service contrary to his legitimate expectation that Finance and Accounts were to remain in his docket.

*Petition partly allowed; preliminary objection dismissed; petitioner awarded costs of the suit.*

#### **Orders**

- i. *Declaration issued that the respondent's actions violated the petitioner's rights under article 41, 47 and 50(1) of the Constitution.*
- ii. *The respondent was permanently restrained from revisiting the settled issues in the impugned disciplinary proceedings.*



- iii. *The finance and accounts function was reinstated to the petitioner's docket.*
- iv. *Any other relief sought and which was not expressly granted was dismissed.*

## Citations

### Cases

#### *Kenya*

1. *Achieng, Janet & another v University of Nairobi* Cause 2144 of 2012; [2015] KEELRC 1251 (KLR) - (Explained)
2. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1979] eKLR; (1976 -1980) KLR 1283 - (Applied)
3. *Chana, Savraj Singh v Diamond Trust Bank (Kenya) Limited & another* Constitutional Petition 201 of 2019; [2020] KEHC 5432 (KLR) - (Explained)
4. *Gumba, Abraham v Kenya Medical Supplies Authority* Cause 1073 of 2012; [2014] KEELRC 463 (KLR) - (Explained)
5. *Kebongo v Barclays Bank of Kenya presently known as Absa Bank Kenya PLC* Cause 1340 of 2018; [2024] KEELRC 110 (KLR) - (Explained)
6. *Keige, Esther W & another v Kenya Forest Service & another* Petition 23 of 2018; [2018] KEELRC 1719 (KLR)
7. *Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudhebia Workers) v Salaries and Remuneration Commission* Constitutional Application 294 of 2013; [2014] KEHC 8148 (KLR) - (Explained)
8. *Kombo, Mulwa Msanifu v Kenya Airways* Cause 1012 of 2013; [2013] KEELRC 747 (KLR) - (Explained)
9. *Maina, Rebecca Ann & 2 others v Jomo Kenyatta University of Agriculture and Technology* Cause 1789 of 2013; [2014] KEELRC 793 (KLR) - (Explained)
10. *Mutanga Tea & Coffee Company Ltd v Shikara Limited & Municipal Council of Mombasa* Civil Appeal 54 of 2014; [2015] KECA 469 (KLR) - (Explained)
11. *Nambiro, Josephine Washifutswa v Energy and Petroleum Regulatory Authority* Petition 135 of 2019; [2020] KEELRC 672 (KLR) - (Applied)
12. *Njeru, Eustace Muriithi v Energy and Petroleum Regulatory Authority* Petition 136 of 2019; [2020] KEELRC 655 (KLR) - (Applied)
13. *Okeyo, James Ang'awa v Kenya Plant Health Inspectorate Services* Petition 42 of 2020; [2020] KEELRC 888 (KLR) - (Explained)
14. *Ongadi, Agnes v Kenya Electricity Transmission Company Limited* Cause 1406 of 2016; [2016] KEELRC 14 (KLR) - (Explained)
15. *Ramogi, William Odhiambo & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018; [2020] KEHC 10266 (KLR) - (Followed)
16. *Secretary, County Public Service Board & another v Hulubhai Gedi Abdille* Civil Appeal 202 of 2015; [2017] KECA 643 (KLR) - (Explained)
17. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR); [1992] KLR 22; (2008) 1 KLR (EP) 425 - (Explained)

#### *South Africa*

*Booyesen v Minister of Safety and Security and OR* [2010] ZALAC 21; [2011] 1 BLLR 83 (LAC); (2011) 32 ILJ 112 (LAC) - (Explained)

### Statutes

#### *Kenya*



1. Constitution of Kenya articles 10, 23(1); 27; 28; 41; 47;50 (1); 73; 155(3)(a); 158(3); 159(2)(c); 216(2) (c); 165(5); 232(2)(a); 236; 252(1); 260 - (Interpreted)
2. County Governments Act (cap 265) section 77 - (Interpreted)
3. Employment Act (cap 226) sections 4,10(5)- (Interpreted)
4. Employment and Labour Relations Court (Procedure) Rules, 2016 (cap 8E Sub Leg) rule 28(3) - (Interpreted)
5. Fair Administrative Actions Act (cap 7L) In general - (Cited)
6. Kenya Accreditation Service Act (cap 469A) section 3- (Interpreted)
7. Kenya Defence Forces Act (cap 199) section 28- (Interpreted)
8. Public Service Commission Act (cap 185) sections 2, 3, 74- (Interpreted)
9. Public Service Commission Regulations, 2005 (Revoked) (cap 185 Sub Leg) paragraph 31- (Interpreted)
10. Public Service Commission Regulations, 2020 (cap 185 Sub Leg) paragraphs 31, 68- (Interpreted)
11. State Corporations Act (cap 446) section 27(1)- (Interpreted)

#### **Advocates**

*Mr Achiando* for the petitioner

*Mr Mwangi* for the respondent

### **JUDGMENT**

1. The petitioner filed this suit on April 15, 2021 contending that the respondent had subjected him to harassment, threats, intimidation, verbal abuse and psychological torture and had failed to accord him a fair hearing before taking any adverse action against him. Therefore, he prayed for the following orders:
  - a. A declaration that the action of the respondent is opaque, egregious, clandestine, capricious whimsical and contrary to articles 10, 27, 28, 41 , 47, 50, 73 & 236 of the [Constitution of Kenya 2010](#) hence unconstitutional and consequently null and void.
  - b. A declaration that the respondent's action and conduct amount to denial, violation and/or infringement of the petitioner's fundamental rights and freedoms under articles 27, 28, 41 and 50 (1) of the [Constitution](#).
  - c. A declaration that the initiation of the disciplinary action and removal of the department of finance and accounts from the petitioner's directorate was unlawful, unprocedural and unfair.
  - d. A declaration that the initiation of the disciplinary action and removal of the department of finance and accounts from the petitioner's directorate, harassment , intimidation , threatening and bullying of the petitioner by the respondent was in gross violation of section 4 of the [Employment Act, 2007](#) article 41, 47, 50 (1) and 216 of the [Constitution](#).
  - e. A declaration that the actions and conduct of the respondent are in breach of the [Fair Administrative Action Act](#), its own Terms and Conditions of Service Manual, Rules of Natural Justice and also violates the petitioner's legitimate expectation.
  - f. A permanent order of injunction staying the implementation of the show cause letter dated 12.4.2021 and any disciplinary hearing against the petitioner.
  - g. A permanent order of injunction restraining the respondent, its servants, officials, representatives and/or agents from conducting or taking any steps to conduct disciplinary



proceedings against the petitioner and taking any steps to dismiss or terminate the employment of the petitioner.

- h. A permanent order of injunction restraining the respondent, its servants, officials, representatives, and/or agents from intimidating, harassing, threatening and bullying the petitioner.
  - i. An order reinstating the department of Finance and Accounts to the directorate under the petitioner and the respondent restrained from interfering with the applicant's contract of employment.
  - j. Compensation and payment of general damages for violation of the petitioner's constitutional rights.
  - k. Exemplary and punitive damages.
  - l. Damages for unlawful and illegal intimidation, harassment, threat and bullying of the Petitioner.
  - m. Costs of this petition and interest at court rate.
  - n. Any other relief and or further relief that this honourable court deem fit and just to grant in the circumstances.
2. The petition is supported by the affidavit of the petitioner sworn on even date, in which he basically reiterated the averments in the petition.
  3. The respondent opposed the petition vide a notice of preliminary objection (PO) filed on 20.4.2.2021 and a replying affidavit sworn by the respondent's Chief Executive Officer, Martin Chesire, on 23.4.2021.
  4. The petition and the notice of preliminary objection were heard simultaneously by oral submissions.

#### **Petitioner's Case**

5. The summary of the petitioner's case is that he was employed by the 2<sup>nd</sup> respondent as Deputy Director and Administration, Grade KAS 10 vide a letter dated August 1, 2011; that later on the respondent appointed Martin Chesire as the Chief Executive Officer (CEO) who frustrated him in various ways including issuing him with show cause letters and using unethical language like, "You are a fool John"; that vide an internal Memo dated December 17, 2018, the CEO required him to show cause why he continued to sign and dispatch letters without his knowledge and delegated authority; that on July 1, 2019 the CEO relieved him of his responsibility over the functions of Finance, ICT and Communications and Public Relations and put them to report to him (the CEO) directly.
6. He further averred that *vide* a letter dated August 3, 2020 his terms of service were changed from permanent and pensionable to a 4 year contract as Chief Manager Corporate Services and the Manager Finance and Accounts, Manager Human Resource and Administration and Information Technology Officer were to report to him.
7. Again on February 25, 2021 he received a Memo on the organizational changes that the Finance and Accounts Department had been moved to the Executive Directorate and the Manager Finance and Accounts would report to the CEO. On the same day, February 25, 2021, he was issued with a show cause letter on why he should not be surcharged on penalties and interests accruing from non-remittance of statutory deductions. He responded to the show cause letter vide a letter dated 26.2.2021.



8. By a letter dated April 12, 2021 he was invited to appear before the Human Resource Committee on April 21, 2021 but in his view the heading of this letter was ill-intended because it indicated that the hearing was to be conducted on April 13, 2021 yet he received the letter on even date. He averred that the respondent invited him to the disciplinary hearing whereas it knew that he had begun his leave on March 23, 2021 to April 21, 2021.
9. According to the petitioner the CEO was the Judge, prosecutor and complainant; and that under section 12 of the Human Resource Practitioner's Act 2012 the CEO had no power to issue the show cause letter to him. He further contended that section 11.9.1 of the respondent's Human Resource Policy and Procedures Manual ( the HR Manual) 2019 provides that disciplinary cases shall be processed through the HR Committee of the Boards and as such the CEO does not have jurisdiction to discipline the petitioner. He averred that the investigations leading to the issuance of the show cause letter had not been issued to him contrary to section 11.9 of the respondent's Procedure Manual.
10. He further averred that he had legitimate expectation that the respondent had made a commitment to him that he would discharge his duties under the terms of the initial employment contract as the Head of Corporate Affairs Directorate, without any harassment, intimidation, threats and bullying; and that any disciplinary action against him would be in compliance with the Human Resource Manual, [Employment Act](#) and the [Constitution](#).

### **Respondent's Case**

11. The respondent has raised a notice of preliminary on ground that the honourable court lacks the jurisdiction to determine the present Petition as the jurisdiction of this honourable court has been prematurely invoked on account of article 159(2)(c) of the [Constitution of Kenya, 2010](#) section 74 of the [Public Service Commission Act](#), No 10 of 2017 and Paragraph 31 of the [Public Service Commission Regulations, 2005](#) (Legal Notice No 28 of 2005 as amended by Legal Notice No 49 of 2004) where the petitioner has failed to invoke alternative dispute resolution mechanisms prescribed under the [Public Service Commission Act](#), No 10 of 2017 before approaching the court.
12. Martin Cheshire (CEO) in his replying affidavit confirmed that the petitioner was engaged in 2011 in the position of Deputy Director, Finance and Administration and was to report to the CEO. He deposed that the petitioner was sanctioned on 12.10.2017 when he purportedly usurped the roles of the CEO and the Board.
13. He contended that his Memodated December 17, 2018 was not a notice to show cause but a request to the petitioner to afford an explanation why his conduct was contrary to the protocol established by the respondent yet he (CEO) was in office. He contended that the petitioner provided a response in his letter dated December 18, 2018 and in a meeting held on 9.1.2019 the matter was informally settled without taking any further action.
14. He averred that on May 20, 2019, he issued the petitioner with a notice to show cause for making payments of the respondent's funds when approval had not been sought and amendments to the payees had not been approved. According to him, the petitioner's response dated May 27, 2019 did not address the question but the matter was amicably settled.
15. He confirmed that he made administrative changes on July 1, 2019 which were to align functions in a manner that was more effective and result oriented. He averred that the finance role was removed from the petitioner's function to afford him sufficient time to conclude on asset valuation which was critical for an impending audit. Therefore, the roles were handed over to the petitioner's deputy who was to be supervised by the CEO.



16. He averred that after successful implementation of human resource instruments approved by the State Corporations Advisory Committee (SCAC) all employees were required to execute fresh contracts of service; that the petitioner executed a contract of service on August 3, 2020 which effectively reflected the changes to the terms of employment; and that the petitioner was engaged as Chief Manager, under KENAS Grade 2 with additional benefits that he has continued to enjoy.
17. He averred that the audited reports from the Office of the Auditor General for the years 2016, 2017 and 2018 during which the petitioner was the Head of the Finance function established that the respondent continued to incur penalties on late payments or non-remittance of statutory remittances. That on December 16, 2019, the Board also took note that the respondent was repeatedly incurring penalties and interest from the frequent non-compliance with statutory remittance and it resolved to surcharge any employee that was responsible for financial loss arising from non-compliance with statutory timelines.
18. He contended that the petitioner on January 28, 2020 confirmed to the Board that he was aware of the statutory deadlines for filing returns and making payments of the statutory deductions; that on February 27, 2020 the petitioner was given an opportunity to restore full compliance with the statutory timelines, failure to which a surcharge would be imposed on any penalties and interests levied against the respondent; that due to repeated non-compliance with statutory timelines the respondent was issued with the Notice to Show Cause letter dated February 25, 2021 which he responded to.
19. He contended that the petitioner's response was unsatisfactory thus he was invited to a hearing before the Human Resource Committee of the Board of Directors on April 21, 2021. In his view the respondent has observed the provisions of the Human Resource Policy, 2019 in instituting the present disciplinary processes against petitioner and that the petitioner will not suffer any prejudice by participating in the hearing.
20. He averred that the petitioner has failed to demonstrate the prejudice he will suffer upon attending the disciplinary hearing. Further, should he be aggrieved by the current disciplinary proceedings or ultimate decision of HRAC, he has the right and opportunity to appeal to the Public Service Commission (PSC) as per the respondent's HR Policy 2019 and section 74 of the Public Service Commission Act (PSC Act).

## Rejoinder

21. In reply, the petitioner filed a further affidavit sworn on April 30, 2021. He averred that his reinstatement was confirmation that he was not only qualified to hold the position of Deputy Director Finance and Administration but also he had integrity and professional background.
22. He contended that despite the provisions of the Human Resource Manual, the respondent was not justified in subjecting him to numerous show cause letters on flimsy reasons without justification whatsoever whose disciplinary hearing have never been held or conducted. He contended that in the 10 years of working, he has exercised due care in his roles and observed the guiding rules and regulations and any issues he had with the Board were well supported and clarified.
23. He averred that the issue of signing letters on behalf of other officers has never been brought to his attention and the letter dated December 17, 2018 was a show cause letter because he was expected to give reasons as to why he signed the letters while the CEO was away on official assignments.
24. He contended that he was to be issued with a warning letter under section 22.6.3 of the HR Manual but none was issued instead the respondent issued him with show cause letters.



25. He denied that the respondent amicably settled his matters. He contended that the establishment, deployment and placement under the organizational structure was never ratified by the board and as such the CEO used his discretionary role in bad faith and in violation of the [Employment Act](#).
26. He contended that the respondent failed to settle the statutory deductions for the years 2016, 2017 and 2018 due to budgetary constraints coupled with less funding from National Treasury. He further contended that the CEO is in charge of approving all payments and it is his discretion to authorize what to pay at any given time.

### **Petitioner's Submissions**

27. Mr Achiando, learned counsel for the petitioner submitted that a surcharge is defined under Clause 11.20 of the HR Manual and it cannot be the basis of the letter dated 5.2.2021 which is under review. He further argued that the letter and the surcharge deal with two different matters.
28. He further submitted that no investigations were conducted against the petitioner under clause 11.19 of the HR Manual yet it is a mandatory requirement. He submitted that even if the investigations were done, the petitioner was never accorded a fair hearing before punishment. According to the counsel the 9 show cause letters were done without substantive fairness and the employer was abusing power by issuing many show cause letters and conveniently picking on one to surcharge.
29. He argued that by re-organizing the respondent, the CEO removed the finance and accounting roles from the petitioner and assigned him other functions in which he lacked the necessary competencies. He relied on the case of [Josephine Washifutswa Nambiro v Energy and Petroleum Regulatory Authority](#) [2020] eKLR where the court held that a HR Manual must comply with article 47 and 236 of the Constitution.
30. He also relied on [Eustace Muriithi Njeru v Energy and Petroleum Regulatory Authority](#) [2020] eKLR where the court held that for it to intervene in the disciplinary proceedings, an employee must show that the employer is proceeding in an unfair manner. The counsel submitted that the petitioner will suffer injustice and the court is required to intervene if there is likelihood of injustice to the employee.
31. He argued that the respondent is violating the HR Manual by surcharging the employee and cherry-picking show cause letters among the 9 which have never been dealt with. In support of this he relied on [Stella Nkatha Kebongo v Barclays Bank Limited](#) [2016] eKLR and [Agnes Ongadi v Kenya Electricity Transmission Company Limited](#) [2016] eKLR.
32. He also relied on [Jane Achieng & another v University of Nairobi](#) [2015] eKLR and [Esther W Kiege & another v Kenya Forest Service & another](#) [2018] eKLR and urged the court not to depart from these decisions. He urged the court to grant the remedies similar to those in the above cited cases.

### **Respondent's case**

33. Mr Mwangi, learned counsel for the respondent argued that the preliminary objection challenges the jurisdiction of the court because the petitioner did not exhaust provisions in the [PSC Act](#). He argued that the [PSC Regulations 2005](#) have been revoked by the [PSC Regulations, 2020](#) but paragraph 31 of the [2005 Regulations](#) is similar to paragraph 68 of the [2020 Regulations](#). He stated that the said Regulations provide for a process which the petitioner has ignored.
34. He argued that the exhaustion doctrine upholds the principle that where there is a mechanism or resolving a dispute outside the court, the mechanism must be exhausted before involving the



- jurisdiction of the court. He further argued that article 159(2)(c) of the Constitution encourages alternative dispute resolution and that is in tune with section 74 of the *PSC Act*.
35. He submitted that there is neither a decision nor an appeal to the PSC. He submitted that the court in *Mutanga Tea and Coffee Company Limited v Shikara Limited & another* [2015] eKLR laid down 3 clear principles first, parties are to strictly follow procedure under statute, second, the procedure of exhaustion is not in contravention with articles 162(2)(c) and 165 (5) of the Constitution and third, alternative dispute mechanism is vital and beneficial in dispute resolution.
  36. He relied on the Court of Appeal decision in *Secretary, County Public Service Board v Hulbai Gedi Abdille* [2017] eKLR that the Petitioner was to submit to the PSC as provided under section 77 of the *County Governments Act*. He further relied on *Savraj Singh Chania v Diamond Trust Bank (Kenya) Limited & another* [2020] eKLR where the court held that jurisdiction cannot be exercised in a vacuum but in accordance with laid down principles of law which include the doctrine of exhaustion. He argued that the court further held that a party that avoids the provided mechanism must demonstrate the reason the petitioner has not done so.
  37. He argued that while the petitioner submitted that he is not an employee of PSC, and in *Kenya Union of Domestic, Hotels, Education And Allied Workers (Kudhebia Workers) v Salaries and Remuneration Commission* [2014] eKLR Lenaola J (as he then was) held that employees of state corporations are public officers as defined under articles 232 and 260 of the *Constitution*.
  38. The counsel denied that 9 show cause letters were issued to the petitioner and contended that he was issued with 7 show cause letters and was given an opportunity to appear before the Board where most of the issues were settled. He urged the court to look at the various show cause letters and find that he was afforded a hearing.
  39. Counsel submitted that in accordance with the petitioner's contracts of employment, his terms of service kept on changing including the HR instruments. He relied on *Abraham Gumba v Kenya Medical Supplies Authority* [2017] eKLR where the court held that HR policies and procedures become part of an employee's contract
  40. He argued that the contract of August 2020 was entered into pursuant to the guidelines from the SCAC and that the changes had begun in 2017 and ended in 2020. He argued that the petitioner being Deputy Director cannot allege that he was unaware of the changes yet he participated in the process.
  41. He argued that the transfer of the petitioner's responsibilities was done in order to enable him finalize an assignment given by the CEO which was the assets valuation that was critical to the audit. He submitted that the roles were thereafter reverted to the petitioner.
  42. Counsel reiterated that the surcharges resulted from penalties levied on late remittances and that the notices to show cause were justified because they were issued procedurally under the HR Manual. He contended that the notices were issued to explain certain conduct and they were not always issued for disciplinary action.
  43. Counsel finally argued that the petitioner in paragraph 23 of the Further Affidavit made an admission hence there was a justification for the notice to show cause.

### **Petitioner's Rejoinder**

44. In his rejoinder, Mr Ochiando argued that article 159 of the *Constitution* deals with judicial authority and not disciplinary matters. He submitted that the legal notice referred to in the PO has been revoked thus the PO must fail.



45. He argued that articles 10, 27, 28, 41, 47, 50 (1) and 236 of the Constitution cannot be litigated before the PSC because it has no jurisdiction to interpret the Constitution.
46. He argued that the Constitution does not provide that violations of article 27 of the Constitution must just be dealt with by another forum before coming to court. He submitted that the definition of public officer notwithstanding, the PSC Act does not apply to state corporation officers.
47. To buttress this position, he relied on James Angawa Okeyo v Kenya Plant Health Inspectorate Services [2020] eKLR where the court held that the claimant was not an employee of the PSC and as such he was only bound by employer's HR Manual and not the PSC Regulations. He argued that the Public Service is a general Act and it does not take precedence of special provisions of HR Manual.
48. The counsel submitted that the Mutanga Tea case [*supra*] relied upon by the respondent does not apply to this case because there was no specific procedure sanctioned by parliament that was ignored.
49. He submitted that this court has original and exclusive jurisdiction in all employment matters and that this being a constitutional petition the PSC does not have jurisdiction. He submitted that the Court of Appeal in the Hulbbhai Gedi case [*supra*] held that Odunga J had treated a judicial review matter as a constitutional petition. He further submitted that the Savraj Singh case [*supra*] is inapplicable to the current matter because it is a constitutional petition. He further argued that the Court of Appeal overturned the decision in the Abraham Gumba case [*supra*].
50. The counsel denied that the allegations in the show cause letters were informally settled and argued that the show cause letters continue to be in force so long as they are not revoked. Finally, he submitted that the surcharge was done unlawfully and that the failure to remit the statutory deductions was not due to the petitioner negligence.

### Issues for Determination and Analysis

51. There is no dispute that the petitioner is currently serving the respondent as the Chief Manager, Corporate Services Grade KENAS 2. There is also no dispute that the petitioner has been served with several show cause letters and Memos some of which have been resolved informally but there is one in respect of which he has been summoned for disciplinary hearing before the HRA committee of the respondent's Board. Finally, there is no dispute that the respondent's CEO has transferred three key roles from the petitioner to his docket.
52. The issues in contest revolve around the intended disciplinary proceedings against the petitioner, the alteration of his contract of employment, and the exhaustion doctrine. The issues are:
  - a. Whether this court has jurisdiction to determine the Petition before exhaustion of internal dispute resolution mechanism.
  - b. Whether the court should intervene in the respondent's disciplinary process against the petitioner.
  - c. Whether the transfer of finance and accounts function from the petitioner's docket was a violation of his right to legitimate expectation, fair labour practices and fair administrative action.
  - d. Whether the petitioner is entitled to the remedies sought.



### **Whether this Court has jurisdiction to determine the Petition.**

53. The respondent in its PO contended that this court has no jurisdiction to determine the matter pursuant to section 74 of the PSC Act and paragraph 31 of the Public Service Regulations 2005 as amended by legal Notice No 49 of 2014. In its view, the petitioner being an employee of a state corporation, is a public officer and had to exhaust the mechanisms set out by the PSC Act.

54. Mr. Achiando opposed this argument by stating that the definition of public officer does not mean that the PSC Act applies to state corporations' employees, and that this being a constitutional matter, the PSC has no mandate to decide it under article 27 of the Constitution.

55. The doctrine of exhaustion of administrative remedies states that a person challenging an agency decision must first pursue the agency's available remedies before seeking judicial review. It was created by courts in order to promote an efficient justice system and an autonomous administrative state. The doctrine was articulated by the Court of Appeal in Speaker of the National Assembly v Njenga Karume [1992] KLR 21 thus:

“Where there is a clear procedure for redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

56. The doctrine is in line with article 159(2)(c) of the Constitution and has been upheld by the local courts in various persuasive and binding precedents. The Court of Appeal in Mutanga Coffee Company Limited v Shikara Limited & another [2015] eKLR reaffirmed the exhaustion doctrine when it expressed itself as follows:

“However, we entertain no doubt in our minds that the reasoning of the court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or Statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.”

57. The question that arises is whether there is a specific dispute resolution mechanism in respect of the dispute provided under the PSC Act, which should take precedence before invoking the jurisdiction of this court as alleged by the respondent. Section 2 of the Act defines a public body as:

- (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;” [Emphasis Added]

58. Section 3 of the PSC Act provides:

“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 (No. 25 of 2012), this Act shall apply to all public bodies and persons holding office in the public service.” [Emphasis Added]



59. The respondent is a statutory body established under section 3 of the [Kenya Accreditation Service Act](#). Consequently, the respondents falls within section 3(c) of the [PSC Act](#) and therefore its employees, including the petitioner, are bound by the general provisions of the [PSC Act](#) in so far as there is no specific provisions in the respondent's HR Policy and Procedures Manual. As regards the exhaustion doctrine section 74(1) of the [PSC Act](#) provides:

“Any person who is dissatisfied or affected by a decision made by an authorized officer or other authority in exercise or purported exercise of disciplinary control against any public officer under this Act may appeal to the Commission.”

60. The foregoing is a general provision and it does not supersede specific HR Policy and procedures Manual made by specific State Corporation. Coincidentally, the respondent's HR manual like section 74 of the [PSC Act](#) provides that a decision by the respondent's Board is appealable to the PSC. The question that arises is whether the said administrative dispute resolution mechanism provided under the respondent's HR Manual, and which forms part of the petitioner's contract of service is sufficient and adequate forum for resolving the dispute between the parties herein.

61. In the view of this court, the PSC is not sufficient and adequate forum to resolve the instant dispute because it involves interpretation of the [Constitution](#). Under article 23(1) and 165(5) of the [Constitution](#), this court and not the PSC has the jurisdiction to interpret the Constitution in respect of matters related to employment and labour relations in Kenya. I gather support from the case of [William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others \(Interested Parties\)](#) [2020] eKLR where recently, the court held that there are exceptions to the doctrine of exhaustion and held:

“However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R v Independent Electoral and Boundaries Commission (IEBC) & others Ex Parte The National Super Alliance Kenya (NASA)* (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited* case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. (See also *Moffat Kamau and 9 others v Aelous (K) Ltd and 9 others.*)”

62. In the instant case, there is no decision by Board which is capable of being appealed to the PSC. The petitioner is basically challenging disciplinary proceedings and unilateral change of his contract of service by the respondent's CEO in violation of his rights and fundamental freedoms as enshrined under the Constitution and Employment Act. He has set out the provisions of the Constitution and the [Employment Act](#) that have been breached and how violations have been done. Consequently, the



petition meets the competency threshold for a constitutional pleading as set out by the case of *Anarita Karimi Njeru v Republic* and the court has jurisdiction to entertain the same, notwithstanding the existence of the said internal appeal mechanism.

63. In addition, and as will show below, the emerging jurisprudence from this court supports the view that the court can intervene in the internal disciplinary process for a good cause being demonstrated by the employee. The said intervention is not necessarily meant stop the process altogether but to put things right so as to avoid violation of the employee's rights and fundamental freedoms, and also to ensure procedural fairness to the employee. Consequently, I find and hold that the Preliminary Objection by the respondent has no merits and it dismissed.
64. As I conclude this part, I must observe that there is a marked distinction between this case and the *Mutanga Coffee* case in that the statute in that case provided for an appeal to the High Court after the internal mechanism unlike in the instant case where, there is no provision for appeal to the court. In the instant case it would appear that the *PSC Act* and the respondent's HR Manual has denied the petitioner the constitutional right of access to court. Consequently, I hold the view that in the instant case, even if the claim was not founded on the Constitution, the same would still see the light of the day.

#### **Whether the court should interfere with the respondent disciplinary process against the petitioner.**

65. The petitioner averred that he was issued with 9 show cause letters for which he was not subjected to proper disciplinary process including investigations and hearings. On the other hand, the CEO disputed that the alleged 9 show cause letters and contended that some were Internal Memo requiring the petitioner to respond to the issues which ranged from improper performance of work, illegal payment of service funds and surcharge for delayed remittance of staff deductions and payment of rent. According to the evidence on record, all the issues raised by the show cause letters and Memos, served on the petitioner as at 8.12.2020, were resolved amicably.
66. On February 25, 2021 the respondent's CEO served the petitioner with a show cause letter dated even date and its subject was surcharge on penalties and interest accruing from non-remittance of statutory deductions. The petitioner responded to the show cause letter vide his letter dated February 26, 2021. His response elicited the respondent's reply dated March 12, 2021 which further required him to explain why his response was copied to an external party. The petitioner further responded vide the letter dated March 22, 2021 and subsequently, through a letter dated April 12, 2021, he was invited to appear before the Human Resource Committee (HRC) of the Board for hearing. However, the letter was contradictory because the subject of the letter stated that the hearing was to happen on April 13, 2021 while the body of the letter stated April 21, 2021.
67. The petitioner urged this court to intervene in the disciplinary process because the CEO had violated the HR Manual as he had no mandate to discipline him and was a judge in his own cause. As stated earlier, it is now well settled that this court can intervene in the internal disciplinary proceedings for a good cause being shown by the employee. In *Booyesen v The Minister of Safety and Security and OR* [2011] 1 BLLR 83 (LAC), it was held that the court's intervention to interdict disciplinary action before it is concluded should be exercised in exceptional circumstances. This is mirrored in the approach of the Kenyan courts.



68. In the case of *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR, where Ndolo J held that:-
- “However in the a case where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or stage managed towards their dismissal, the court will intervene, not to stop the process altogether but to put things right.”
69. Again in *Mulwa Msanifu Kombo v Kenya Airways*[2013] eKLR Mbaru J held that:
- “The court will intervene in administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness, or due process by not upholding the rules of natural justice, or if the procedure is in breach of the agreed or legislated or employer’s prescribed applicable policy, or standards, or if the disciplinary procedure were to continue, it would result into manifest injustice in view of the circumstances of the case. The court will normally not intervene if it is established that there exists mechanisms between employer and employee such as appeal or revision or review that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the court’s intervention and, the employee has not exhausted such internal mechanisms.”
70. Flowing from the foregoing persuasive decisions, the grounds upon which the court would intervene in an employer’s disciplinary process include:
- (a) where an employee establishes that the employer is proceeding in a manner that contravenes the provisions of the Constitution or legislation, or
  - (b) in breach of agreed term of contract or employer’s policy, or
  - (c) If the process is manifestly unfair and offends the rule of natural justice.
71. In this case there is no internal appeal mechanism available for the petitioner to question the constitutionality of his disciplinary proceedings before a decision by the Board, or to agitate for his right to legitimate expectation under the Constitution. Further, until a final decision is made by the Board, the petitioner has no right of appeal under the respondent’s HR Manual. Consequently, the jurisdiction of this court has been properly invoked.
72. The question that arises is whether the petitioner has demonstrated any sufficient reason for the court to intervene in the intended disciplinary hearing. There is no dispute that the petitioner being Job Grade KENAS 2, only the Board of Directors could discipline him and not the CEO. In this case, the CEO persisted in serving the claimant with the said show letters and Memos and after response, he just stated that the same had been amicably resolved. Further, the CEO on two occasions, transferred key roles from the petitioner’s docket to his deputy without approval from the Board citing the reason as improper performance by the petitioner. That clearly shows that the CEO was the one exercising disciplinary powers over the petitioner and not the Board of Directors.
73. Having carefully considered the evidence before the court and the circumstances of the case, I find that the respondent’s internal proceedings commenced by the letter dated February 25, 2021, are unfair and likely to prejudice the petitioner if they are allowed to continue blindly. First, the proceedings have been commenced by the CEO without any evidence that the respondent’s Board passed a resolution to commence the same. Secondly, there is no evidence that any investigations were done by the Board or at all before commencing the said proceedings as required by the HR policy Manual. Third, some



of the matters involved, including the intended surcharge, were earlier on settled amicably according to the letter by the CEO dated 8.12.2020 which stated that:

“Show Cause Why - continued Improper Work Performance

Reference is made to our letter dated 9<sup>th</sup> September 2020 and your representation at the Human Resource Committee (HRC) of the Board on 6<sup>th</sup> October 2020 on the above subject matter.

Further to your representation at the HRC, this letter serves to retire the above subject matter forthwith. Please return a signed copy of this letter upon receipt.

Yours sincerely,

Martin Chesire

.....”

74. Some of the issues settled vide the above letter was surcharge for alleged losses caused to the respondent by the petitioner’s alleged improper performance. According to the letter, that matter was settled after he made representations to the HRC of the Board. Consequently, this court must intervene in the said proceedings by barring the respondent from revisiting the performance and surcharge issues which were settled as per the said letter. Allowing the respondent to go against its own word would be violating the petitioner’s right to legitimate expectation that the settled matters would not be revisited. Consequently, the respondent can only charge the petitioner for improper performance after 8.12.2020 and surcharge for losses incurred after that date, if any.

**Whether the transfer of finance and accounts function from the petitioner’s docket was a violation of his right to legitimate expectation, fair labour practices and fair administrative action.**

75. The petitioner averred that he was first relieved of his responsibility over the functions of finance, ICT and CPR by the CEO vide the letter dated July 1, 2019 which transferred the said roles to petitioner’s deputy to report to the CEO directly. The CEO justified the said action as being necessary to enable the alignment of the functions in a more effective and result oriented manner.
76. Again on August 3, 2020 his terms were changed from permanent and pensionable to 4 years contract as Chief Manager Corporate Services. The petitioner does seriously contest the conversion of his first contract of employment from permanent and pensionable terms to the contractual one. He does not also seek any remedy for breach of this contract. However, he is contesting the second removal of the Finance and Accounts from his docket as Head of Corporate Affairs Directorate under the new contract *vide* the Internal Memo dated February 25, 2021.
77. The petitioner averred that he had legitimate expectations that he would continue to discharge his duties under his contract of employment as the Head of Corporate Affairs Directorate. He therefore contested the removal of financial and accounting functions from his directorate *vide* the letter dated July 1, 2019 and the Internal Memo dated February 25, 2021. Whereas in the letter dated July 1, 2019, the CEO indicated that the Board of Directors had resolved that the said roles be transferred from the petitioner’s docket, the internal memo dated February 25, 2021 did not indicate that the transfer of the said roles were sanctioned by the Board of directors.
78. The CEO’s Internal Memo dated February 25, 2021 to all staff made further organizational changes in the Corporate Services Directorate and stated that:

“ ...



Subject: CEO-COM 01/2021- Organizational Changes in the Corporate Services Department

...

Since mid-November 2020 my office has placed significant focus on activities of the functions under the Corporate Services Directorate with a view to better understand their orientation, challenges, opportunities to improve delivery, efficiency and accountability in serving all of us. As a result, the operating structure of Corporate Service Directorate will change as follows:

Administration Section and Record Management Section will now report directly to the Chief Manager, Corporate Services. The two sections were formerly under the Manager, Human Resource and Administration. Finance and Accounts Department is now moved to the Executive Directorate. The Manager, Finance and Accounts will report to the CEO Human Resource and Administration Department and Human Resource Division will be under one head (Manager, Human Resource) who will still report to the Chief Manager, Corporate Services. Information Communication Technologies Division remains unchanged.

All the changes described are effective immediately.”

79. In addition to the above Memo, the petitioner was informed in person that he had been relieved of his responsibilities of supervision of the Finance and Accounts Department with immediate effect. The effect of these changes were that the petitioner was only left with providing strategic leadership and expert advice in the HR and Administration and ICT departments.
80. The petitioner responded to the Memo vide his letter dated 2.3.2021 by stating that as per section 10(5) of the *Employment Act*, the changes needed discussion before implementation as he had signed the 4 year contract dated August 3, 2020. The Petitioner’s functional competency was in the finance department. This is based on the fact that the Petitioner was first engaged as Deputy Director Finance and Administration and as a head of an accounting unit was vetted and required to resume work, as stated in the letter dated October 25, 2018. The removal of this function from the petitioner’s job description meant that he could not fully discharge his function as Chief Manager, Corporate Services Grade KENAS 2.
81. Section 10 (5) of the *Employment Act* provides:
- “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.”
82. There is no evidence that the petitioner was consulted prior to the review of his function. Hence this review of his duties and contract of employment was done unilaterally in disregard of section 10(5) of the *Employment Act*. Besides, the CEO did not secure approval from the respondent’s Board and the SCAC before altering the duties of the petitioner. This is because the alteration of these duties resulted to a change in the organizational structure and the functions of the Chief Manager, Corporate Services as set out under Clause 2.10.1 of the Career Progression Guidelines.
83. The SCAC in its letter dated May 15, 2017 had advised the respondent to comply with the Guidelines issue by the PSC being Human Resource (HR) Guidelines in May 2015. The respondent reviewed its organizational structure and HR instruments and on September 6, 2019 the SCAC approved



the implementation of organizational structure, staff establishment, career guidelines and Human Resource Policy and Procedures Manual.

84. Clause 1.13 of the Career Progression Guidelines provides that the guidelines are to be reviewed and approved by the Board of Directors. The legal and administrative framework of the HR Manual at Clause 0.7 includes the *State Corporations Act*, Guidelines from the PSC and letters of appointment. Therefore all these statutes, regulations and terms had to be complied with when altering the structure. Disregarding these legal and institutional framework means that it was purposeless to seek approval from SCAC before implementing the approved 2019 structure.
85. Section 27(1)(c) of the *State Corporations Act* provides one of the functions of the SCAC as;
- “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;”
86. Accordingly, the alteration of the petitioner’s function and the placement of some functions under the CEO meant the respondent had revised the organizational structure and staff establishment which had been approved by SCAC for implementation. Steps 5 and 6 of Guideline 2.2 of the Guidelines on Design of Organization Structures in the Public Service of May 2015 state that the organizational design is to be subjected to stakeholders for input and seek approval for implementation from of SCAC. Therefore, I find that the impugned unilateral redesigning of the organizational structure by the CEO required approval from the respondent’s Board and the SCAC. The failure to seek the said approval, prior to altering the petitioner’s functions, rendered the new organizational changes irregular, illegal, null and void.
87. The action also violated petitioner’s right to fair labour practices, right to fair administrative action, right to fair hearing and right to legitimate expectation because she was denied the right of being consulted before the transfer of key roles from his docket. The decisions made unilaterally by the CEO against the petitioner were enormous and amounted to condemning the petitioner unheard contrary to rules of natural justice that are now enacted under article 47 of the Constitution. The decision also has the effect of re-writing the petitioner’s contract of service contrary to his legitimate expectation that Finance and Accounts were to remain in his docket.

### **Whether the petitioner is entitled to the reliefs sought**

88. Based on my finding that the disciplinary proceedings and removal of the finance and accounts function from the petitioner were done arbitrarily and without the necessary approvals, I find that the petitioner is entitled to a declaration that the respondent’s action violated his rights under articles 41, 47 and 50 (1) of the *Constitution*, and therefore unlawful and unfair as prayed.
89. In view of the finding that all the charges against the petitioner as at December 8, 2020 were settled after his defence before the HRC of the Board, the respondent is permanently restrained from revisiting the settled issues in the impugned disciplinary proceedings.
90. Having found that the transfer of Finance and Accounts function from the petitioner’s docket was unlawful and unconstitutional, I direct that the said function be and is hereby reinstated to the petitioner’s docket forthwith.
91. The petitioner prayed for damages since the 9 show cause letters and Memos was tantamount to harassment and unfair labour practices which have caused mental anguish and suffering. However considering the fact that the petitioner is still employed by the respondent, and that in the past



the employer has amicably resolved disputes with him, I will not condemn the employer to pay the petitioner any damages.

92. In the end, I enter judgment for the petitioner as indicated above. Any other relief sought, and which is not expressly granted herein is dismissed. The petitioner is awarded costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY, 2021.**

**ONESMUS N. MAKAU**

**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 April 15, 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

