



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

**PETITION NO. 24 OF 2018**

**OKIYA OMTATAH.....PETITIONER**

**VERSUS**

**JOSEPH KINYUA.....1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION..2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. In his petition filed on 23<sup>rd</sup> March, 2018, the petitioner averred among others that:

a. The petitioner is aggrieved that the 1<sup>st</sup> respondent has given himself powers and a mandate unknown in law as the occupant of the non-existent office of the Head of the Public Service, and has, in contemptuous violation of express provisions of the Constitution of Kenya 2010, the Public Service Commission Act 2017, and the statutory Instruments Act 2013 issued a statutory instrument (Circular Ref. No. OP/CAB.9/1A of 27<sup>th</sup> February, 2018) purporting to amend existing subsidiary legislations on the mandatory retirement age of 60 years in the public service, and the six year maximum tenure for CEO's of public bodies allowed under the law.

b. The petitioner is inviting the Honourable court to intervene and determine the constitutional and legal validity of the impugned Circular and also of the designation of the 1<sup>st</sup> respondent as Head of the Public Service. Further and in particular.

- *The circular is self-preserving since the 1<sup>st</sup> respondent himself is well above the mandatory retirement age of 60 years.*
- *The circular is unreasonable to the extent that it requires the retention of pensioners in the public service in circumstances whereby Kenya has many young energetic, educated and vibrant citizens who are unemployed or underemployed.*

c. The petitioner is praying for orders declaring both the impugned circular and the designation of the 1<sup>st</sup> respondent as Head of the Public Service to be inconsistent with the Constitution and other laws of Kenya and therefore, invalid, null and void ab initio to the extent of the inconsistency.

2. The petition was based on grounds among others that:

a. Vide a circular Ref. No. OP/CAB.9/1A of 27<sup>th</sup> February, 2018 titled "Terms of service for state corporations chief executive officers, and addressed to all cabinet secretaries, the Attorney General and all principal secretaries, the 1<sup>st</sup> respondent signing of as the Head of Public Service, purported to exempt the said CEOs from the mandatory retirement age of 60 years and from the six year term limit set in law by the Public Service Commission.

b. The petitioner states that so called office of the Head of Public Service does not and cannot exist in law under the Constitution of Kenya 2010. The office of the Head of Public Service (or Head of the Civil Service) existed under the repealed constitution of Kenya but was abolished under the Constitution of Kenya 2010.

c. Under Article 260, the Constitution defines the "public service" to mean "the collectivity of all individuals, other than state officers, performing a function within a State organ".

d. Article 234 of the Constitution sets out the functions and powers of the Public Service Commission (PSC) and puts the commission in charge of all matters concerning the public service.

- e. Article 249 of the Constitution spells out the objects, authority and funding of commissions and independent offices, including that they protect the sovereignty of the people; secure the observance by all state organs of democratic values and principles; promote constitutionalism; are subject only to this constitution and the law; and are independent and not subject to direction or control by any person or authority.
- f. The petitioner posits that in the circumstances it is conceptually impossible to have the office of the Head of Public Service distinct from the PSC.
- g. The 1<sup>st</sup> respondent, the State House Chief of Staff, who purports to be the Head of the Public Service, is a person who, pursuant to the Article 234(4) of the Constitution was handpicked by the President to serve on his private staff and was never vetted by Parliament. In the circumstances, he cannot take it upon himself to superintend the public service, outside the President's private staff.
- h. The 1<sup>st</sup> respondent, having not been interviewed by the PSC, not vetted by Parliament, and being a person H. E. the President simply handpicked to manage his (the president's) personal staff, has no powers to superintend Principal Secretaries/Authorized Officers, and/or in any way whatsoever, to take over, control and/or to direct the functions and operations of the Public Service Commission.
- i. Having not been vetted by Parliament, the 1<sup>st</sup> respondent has no capacity under the law and cannot superintend Principal Secretaries and Authorized Officers as he purports to do in his impugned circular. Without being given authorization vide being recruited and interviewed by the PSC in a competitive process, being vetted by parliament, like say the Commissioners of the Public Service Commission were, the 1<sup>st</sup> respondent is a stranger to the public service outside the President's personal staff. Hence, he cannot legally superintend the public service, including by giving directions on the retirement age and tenure of CEOs of public bodies.
- j. Hence, the designation of the 1<sup>st</sup> respondent as Head of the Public Service is extremely irregular as it undermines the mandate and authority of the PSC and is inconsistent with the Constitution and other laws of Kenya and thereof invalid, null and void and of no consequence in law, to the extent of the inconsistency.
- k. The public service is a primary means at the disposal of the Government for translating policies into programmes and implementing projects for overall national development. It is the duty of the Public Service Commission (PSC) to ensure there is a professionally managed and functional public service.
- l. The 1<sup>st</sup> respondent's impugned circular constitutes gross misconduct on the part of the 1<sup>st</sup> respondent, and represents a gross violation of both the constitution and the Public Service Commission Act.
- m. The impugned circular invokes no law and is based on no law.
- n. The 1<sup>st</sup> respondent is not a regulation making authority under the law and therefore has absolutely no capacity to issue any directives.
- o. Article 260 of the Constitution defines 'legislation' to include "an Act of Parliament or a law made under authority conferred by an Act of Parliament".
- q. The rule of law applies equally to all persons. Hence, the government is bound to apply its statutory instruments, including circulars on retirement age, equally and without discrimination to all employees across the public service.
- r. Section 2 of the Statutory Instruments Act 2013 defines "statutory instrument" to mean "any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued".
- s. Pursuant to the above, Government circulars determining the mandatory retirement age in the public service are law and must be obeyed by all and must apply equally to all.
- t. Section 80 of the Public Service Commission Act (No. 10 of 2017), which commenced on 26<sup>th</sup> April, 2017 requires public officers to vacate office upon attaining the mandatory retirement age as may be prescribed in the regulations. Currently, the regulations set the retirement age at 60 years.
- u. The petitioner posits that CEOs of public entities like all other public officials employed in the public service are subject to the mandatory retirement age in the public service of 60 years of age.

3. The 1<sup>st</sup> respondent opposed the application and filed a replying affidavit in which he deposed in the main that:

- a. That I have been advised by my advocates on record which advise I verily believe to be sound that the Petition is misconceived and should be struck out in limine on the grounds that:

- Indeed the petition does not specify a specific labour related complaint to warrant invocation of the jurisdiction of the Employment and Labour Court.
- The Employment and Labour Relations Court jurisdiction in constitutional matters must be based on a specific labour relations dispute.
- In this case, there is no aggrieved party hosting a labour related complaint to warrant the jurisdiction of the court. This would ideally be a constitutional court petition.
- The petition's outline of violations do not point to any particular grievance to an aggrieved person so affected by the circular as to allege its discrimination, fair labour practices, or breach of fair administrative action.
- The petition alleges that extension of contracts occurs as a result of the circular, without specification as to how this occurs or the risk of its occurrence given the role of Boards in the competitive merit based recruitment of CEOs and the guiding principles of Mwongozo. In this section, the petition is wild with innuendo and bare on facts.
- The petition conflates discrimination and distinction, suggesting that the distinction that exists today as regards persons serving on contract and the lack of application of certain provisions regarding retirement thereof are discriminatory. One cannot retire from a contract.
- The petition annexes documents that were not in the public domain, or which were not sought under the Access to Information Act and should be struck out in light of the Supreme Court ruling in Raila Odinga Vs Uhuru Kenyatta on illegally obtained evidence.

b. That I am aware that the office of CSHPS is an office established to undertake the day to day operational tasks of the President as mandated under Article 132 of the Constitution and more specifically, to aid in execution of the President's mandate of co-ordination of ministries, departments and agencies.

c. That I was appointed substantively by the Public Service Commission as Chief of Staff and Head of Public Service in the year 2013.

d. That I am also aware that sometimes in the year 2016, the Public Service Commission concluded the process of rationalization of the offices at State House, Office of the President and Office of the Prime Minister including the office of the Chief of Staff and Head of Public Service.

e. That the terms of reference of the Chief of Staff and Head of Public Service are contained in Instructions for the Discharge of Government Business (Presidential Circular No. 1 of 2016) which include:

- Overall organization of the machinery for the execution of government policies and delivery of the programmes of the Government of the day, while safeguarding the long term values, motivation and morale of the whole Civil Service.
- Coordination of the activities of public servants
- Ensuring all agencies are adequately staffed for performance of their functions.
- Performance of the public service and coordination of government operations
- Chair of the Central Human Resource Management Committee and monitors the implementation of delegated human resource functions in ministries.
- Approval of all travel for Cabinet and Principal Secretaries on behalf of the President, including approval of itinerary when performing official duties outside headquarters.
- Approval of leave of Principal Secretaries upon recommendation of the Cabinet Secretary.
- Cabinet and Principal Secretaries are to keep the HoPs informed of their operational problems and major policy issues.

f. That in response to paragraphs 4, 5, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of the Petition I wish to state that Article 132(4) (a) of the Constitution allows the President of the Republic of Kenya to establish an office in the Public Service with the recommendation of the Public Service Commission and that I was duly appointed pursuant to this mandate.

g. That I have been advised by my advocate on record which advice I verily believe to be true that the Petitioner misunderstands the functions of the 2<sup>nd</sup> respondent as it is not responsible for the internal staffing organization or re-organization once establishment and appointments to offices has been concluded. Further, that the petitioner ignores the directing and coordinating mandate of the president in the organization of government, upon the conclusion of the 2<sup>nd</sup> respondent's mandate, in accordance with Article 132(3) (b) of the Constitution.

h. That I am further advised by my advocate on record which advice I verily believe to be true that the petition erroneously asserts that vetting is to be undertaken for all officers appointed in the public service, and further presumes that all offices, including offices coordinating vetted public officers are to be established in the constitution for them to undertake the designated mandate.

i. That in response to paragraphs 25, 26,27,28,29,30,31,32, 33,34,35,36,37,38,39,40,41,42,43,44,45,46,46,48,49,50,51,and 52 I wish to state that the 2<sup>nd</sup> respondent herein whose core mandate is the management of the human resource in public service is a creation of Article 233(1) of the Constitution of Kenya with its mandate outlined under Article 234(2) of the Constitution.

j. That Article 234(3) however, inter alia exempts State offices from the 2<sup>nd</sup> respondent's mandate which is defined under Article

260 of the Constitution to inter alia include Cabinet Secretaries, Attorney General and Principal Secretaries who were the addressees in the impugned circular and therefore not subject to its mandate.

k. That I am aware that the State Corporations Act section 7 grants the President power to issue directives to State Corporation Boards of a general or specific nature and the Boards are to give effect to those directions. This power is then operationalized through the CSHPS whose office is established for the sole purpose of effecting presidential directives. The impugned circular is thus deemed issued under the same mandate.

l. that the Circular No. OP/CAB/.9/1A dated 27<sup>th</sup> February, 2018 (the impugned circular) amounted to directions from the office of the President to the state offices and a clarification of the government's position on the prevailing position regarding CEOs of state corporations.

m. That the issuance of the impugned circular was necessitated by the various contradictory interpretations that were being undertaken as regards the tenure of Chief Executive officers of State corporations who had attained the age of 60 years.

n. That in some instances, CEOs contracts were being terminated mid-stream on account of their attaining 60 years; in other cases, renewals for second terms were being pegged to the age of 60 years, or were therefore being varied to the CEOs 60<sup>th</sup> birthday; in other cases, the state corporations were being sued for seeking to remove CEOs who had passed the 60 year age limit despite the terms of their contracts.

o. That this has resulted in unnecessary public misinterpretation as to the application of circular on retirement, and to various legal contestations surrounding the tenure of various Chief Executive Officers with those seeking to remove, and others to remain in office creating confusion, inconsistency and general disorder in the management of terms of CEOs of State Corporations.

p. That indeed as a result of the confusion, the Government has faced significant risk of financial loss of compensation of CEOs for the remainder of their terms, where forced removals were effected contrary to contract.

q. That there was therefore need for firm clarity as to the protocol to be adopted in such circumstances to avoid variances that may lead to allegations of discrimination.

r. That consequently, following consultation with the Office of the Attorney General as regards the legality and propriety of issuing the revised circular No. OP/CAB 9/1A dated 27<sup>th</sup> February, 2018 and in order to provide clarity to the various interpretations that were causing distortion and confusion in the sector, the Head of Public Service prepared the final version of the circular as dispatched. The circular's intent is not to vary prescribed statutory or regulatory prescriptions, but rather to secure consistent interpretation by the various Boards of State Corporations and line ministries as regards the terms and conditions of Chief Executive Officers of State corporations.

s. That the circular does not alter any existing regulation or vary the retirement period for public servants as alleged in the petition. The circular simply asserts that:-

- Persons serving on contract terms are subject to the contract terms and no other considerations outside the contract terms including age unless the same is incorporated as a specific term of contract.
- That notwithstanding how long a CEO has served a current term, or expectation of serving a second term, the renewal of CEO contracts shall be subject to performance, business requirement and approval of respective Boards.

t. That the circular is not a regulation or statutory instrument as alleged. Consequently the assertion that the Head of Public Service purports to act as a regulatory making body is as absurd.

u. That the circular seeks to clarify the multiple interpretations that have rendered the above confusion and misinterpretation possible and indeed recognizes that there are enabling legislation, policy prescriptions and sector guidelines that determine the terms of service of CEOs in its introduction and acknowledges that these prescriptions guide the terms and condition of CEOs.

v. That the circular does not alter Mwongozo or the two term limit set therein or in legislation. Where misinterpretation of the circular has occurred, the same has been clarified by the CSHPS an opportunity the Petitioner should similarly have sought and which clarification would have been provided.

4. In his submissions in support of the petition he stated that:

a. The petition concerns the management of the public service, including the creation of offices in the public service by the President, and the appointment of persons into those offices after they are created.

b. The petition contests the constitutional and legal validity of the office of the Head of the Public Service as created by the President to superintend the public service, and the handpicking and appointment by the President of Mr Joseph Kinyua, the 1<sup>st</sup> respondent, as the Head of the Public Service, and then assigning him duties that usurp the core functions of the Public Service Commission.

c. The Petition also contests the constitutional validity of the Circular Ref. NO OP/CAB.9/1A of 27<sup>th</sup> February 2018 issued by Mr Joseph Kinyua purporting to exempt Chief Executive Officers of State Corporations from the mandatory retirement age of 60 years in the public service, which set in legislation, and to extend their tenure from a maximum period of six years to ten years.

d. The petition was filed in the public interest to move this Honourable Court to enforce the rule of law in the affairs of the public service commission (PSC) including by enforcing its autonomy from the office of the President in the execution of its functions, and upholding its mandate to recruit and appoint persons into public office.

e. The petitioner is aggrieved that, as matters stand, the office of the President has through the impugned office of the Head of Public Service based in the office of the President, effectively encroached on, captured and emasculated the Public Service Commission. Indeed the PSC has formally ceded its mandate to the President contrary to the Constitution. Irrefutable evidence of this is contained in the following passage contained in the Public Service Commission's statutory instrument titled, Human Resource Policies and Procedures Manual for the Public Service May 2016, wherein it is provided that allocation of functions to states departments shall be as set out in Presidential Circulars issued to the Service from time to time.

f. The petitioner has invited the Honourable Court to intervene and determine the constitutional validity of the Office of the Head of Public Service as currently constituted and occupied.

g. The petitioner is challenging the constitutional validity of the administrative action purporting to create the office of the Head of Public Service in the public service without adhering to the laid down constitutional values and principles of constitutionalism, the rule of law, public participation and reasonableness.

h. The petitioner is also challenging the constitutional validity of the appointment of the 1<sup>st</sup> respondent, made directly by the President without reference to any law and without the involvement of the Public Service Commission and without adhering to the laid down constitutional values and principle and procedure of the rule of law, fairness, inclusiveness, competitiveness, merit and openness in public appointments.

### **Whether the petitioner has locus standi to institute these proceedings?**

i. The petitioner submits that Articles 22 and 258 of the Constitution of Kenya 2010 are tailored for the community and they enact into the constitution of Kenya the doctrine of public interest litigation. They vest every person with locus standi to institute proceedings for the protection of rights and fundamentals freedoms, and of the Constitution.

j. Under Article 22(2) of the Constitution, a person may institute court proceedings to claim that its rights and/or fundamental freedoms have been denied, violated or infringed, and/or to act on behalf of other persons whose rights are also being violated, or to act in the public interest.

k. Under Article 258 of the Constitution, a person may institute court proceedings to claim that has been contravened, or is threatened with contravention.

l. Hence, the petitioner submits that Articles 22 and 258 of the Constitution, take away the notion of "locus standi" which meant that only an aggrieved party demonstrating damage or harm, can approach the court seeking legal remedy.

m. The petitioner submits further that public interest cases encompass more than just the parties to a particular matter since public interest litigation is meant to benefit the wider public and not just the individual directly affected.

n. In the case of **Kiluwa Limited & Another Vs Commissioner of Lands & 3 Others [2015] eKLR**, the court held, inter alia:

a. "23 Section 60 of the repealed Constitution of Kenya, has effectively been replaced by Article 159(d) of the Constitution of the Second Republic, which expressly mandates the court to do justice to all without regard to either status or procedural technicalities. In addition Article 22 and 258 and no less Article 3 and 48 of the constitution, grant every person not only access to courts, but also the right to protect, defend and uphold the Constitution."

o. In the case of **Timothy Otuya Afubwa & another Vs County Government of Trans Nzoia & 3 Others [2016] eKLR**, It was held that:

p. "13 That their petition is on behalf of the public and they have invoked the provisions of Article 258 (2) (c) and 22(1) of the Constitution. Article 22 deals with the Enforcement of bill of Rights and provides that every person can bring court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied violated or infringed and the same can be brought by a person acting on behalf of the public. This Article in my view is so wide and the drafters of the constitution intended that nobody would be locked out of the mercy sit of justice when his interest or those of the public are threatened.

### **Whether the Court has the jurisdiction to entertain the petition?**

q. It is trite that the jurisdiction of a court or tribunal is derived from the Constitution, statute or by principle laid out in judicial precedent. **In Re the Matter of the Interim Independent electoral Commission eKLR**, Constitutional Application No 2 of 2011 at paragraphs 29 and 30, the Supreme Court held:

a. "(29) Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent...."

r. The same position was held in the case of **Samuel Kamau Macharia Vs Kenya Commercial Bank & Others (2012) eKLR**, where, at paragraph 68, the supreme court stated thus:

i. "(68) A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."

xix. The instant petition challenged the alleged violation by the respondents of specific provisions of the Constitution of Kenya 2010 and of legislation concerning matters reserved for this court's jurisdiction under Articles 162(2)(a) & 165(5)(b) as regards the management of the public service, including the creation of offices in the public service by the President, the appointment of persons into those offices after they are created, and the mandate of such appointed person.

xx. Articles 1(c), 4(2), 10,22,23,50(1), 159,162,165,258, and 259 of the constitution of Kenya, as read with Section 12 of the Employment and Labour Relations Court Act (No. of 2011), vest jurisdiction in the Employment and Labour relations Court, inter alia to hear any question regarding the violation of labour rights and workplace disputes; determining if acts or omissions are constitutional; and the interpretation of the constitution, including questions of contradiction between any law and the constitution and to protect the Constitution from any threats or violations.

xxi. In the ruling in the case of **Wilbert Kipsang Choge & 6 Others VBS Communication Authority of Kenya & Another, ELRC Petition No 14 of 201**, this court held:

"Whereas it is true that there is no contract of service between the Board and the company, the jurisdiction of this court is not confined by the narrow path that employer-employee relationship must exit for it to have jurisdiction. The court is granted jurisdiction by the constitution and the Employment and Labour Relations Court Act, over employment and labour relations and connected purposes and not employer-employee dispute only.

The dispute before me is between the appointing authority (Cabinet Secretary), the Communications Authority of Kenya on one Hand and the petitioners on the others, over their membership to the 1<sup>st</sup> respondent's Board. Whilst the act of appointment on the Board does not create an employer-employee relationship between the petitioners and wither the 1<sup>st</sup> respondent or Cabinet Secretary or both, its mere absence does not oust the jurisdiction of the court as observed earlier. The vesting of power by the Constitution and the Employment & Labour Relations Court Act on the Court to deal with disputes relating to employment and labour and connected purposes carries with it implied power as is necessary inherent in the nature of the exercise of that jurisdiction. The court therefore finds that it has jurisdiction.

**Whether the creation of the office of the Head of Public Service by the President and the Public Service Commission was unconstitutional and therefore, invalid, null and void. The petitioner submitted as follows:**

a. *The purported office of the Head of the Public Service, which the 1<sup>st</sup> respondent purports to hold, is an office that, both conceptually and practically, cannot itself be established under the Constitution, because the Chair of the Public Service Commission is already the head of the public service pursuant to Article 233(2) of the Constitution.*

b. Assuming that it was possible to create the office of Head of the Public Service distinct from that of the Chair of the Public Service Commission, which it is reiterated is totally impossible under the constitution, it is submitted that the process of creating the impugned office of the Head of the Public Service was a nullity in law ab initio to the extent that it was shrouded in secrecy.

c. The excerpt from the document titled, Presidential Circular No. 1/2016 instructions for the Discharge of Government Business, April 201, which the 1<sup>st</sup> respondent exhibits in his replying affidavit marked as "Annexure JKK-2 provides for the functions of the Chief of Staff and Head of the public service thus:

(i) The Chief of Staff and Head of the public service is responsible to the president for the general efficiency of the public service, for co-ordination of the activities of the public servants and for the overall organization of the machinery for the execution of the Government's policies. Towards this end, he or she is required to maintain close constant with all Principal Secretaries who have a corresponding duty to facilitate the maintenance of this contact.

(ii) The Chief of Staff and Head of the public service is ultimately responsible to the President for ensuring that all agencies of the Government are adequately staffed for the performance of their functions.

(iii) All Principal Secretaries have a duty to keep the Chief of Staff and Head of the public service informed of staffing and operational problems and major policy issues in their ministries.

d. The above is echoed in the public service commission's statutory instrument titled Human Resource Policies and Procedures manual for the Public Service may, 2016 wherein it is provided:

"A.4 The allocation of functions to State Departments shall be as set out in Presidential circulars issued to the Service from time to time".

e. *The above functions of the Head of Public Service are contrary to Article 234 of the Constitution, which provides for the functions and powers of the Public Service Commission.*

**Whether offices created by the President pursuant to Article 132(4)(a) are subject to the public service commission. He submitted**

as follows;

- a. The primary argument of the petitioner is that, since Article 132(4)(a) allows the president to establish an office in the public service in accordance with the recommendation of the Public Service Commission, the offices so created are offices in public service within the meaning of the constitution and, therefore persons serving in those offices are to be appointed and regulated by the constitutional framework applicable to public offices and public service.
- b. Having demonstrated that the purported office of the chief of Public service is a conceptual and practical impossibility under the constitution, and that even the 1<sup>st</sup> respondent purported appointment to the said office was done outside both the Constitution and legislation, it is submitted that the 1<sup>st</sup> respondent had absolutely no capacity in law to issue Circular Ref. No. OP/CAB.9/1A of 27<sup>th</sup> February, 2018.

**Whether the Chief Executive Officers of public bodies are subject to the mandatory retirement age of 60 years for public servants, and are subject to the mandatory two three-year term limit imposed on them by the Code of Governance for State Corporations (MWONGOZO). The petitioner submitted as follows:**

- a. A plain reading of the impugned circular clearly demonstrated that the 1<sup>st</sup> respondent purported to declare that executive officers of public bodies are not subject to the mandatory retirement age of 60 years for public servants, and are subject to the mandatory two three-year term limit imposed on them by the Code of Governance for State Corporations (Mwongozo).
- b. The law requiring public servants to retire at 60 years of age pursues the legitimate aims of staff retention (by providing younger employees with promotion opportunities); and facilitating planning in the public service (by knowing when vacancies were to be expected).
- c. The current laws (ie statutory instruments) in existence when employment contracts for CEOs of public bodies are made and signed limit employment in the public service by setting the mandatory retirement age at 60 years.
- d. It is submitted that, government circulars, which are made in compliance with the Statutory Instruments Act 2013, or pursuant to Section 27 of the Act which predate the Act, are valid law that must be obeyed by all and applied equally to all.
- e. It is the petitioner's submission that existing law supersedes any contract made thereunder. Hence, any employment contract is void to the extent that it provides that the employee would continue in office even after she/he attained the mandatory retirement age of 60 years.

5. Mr Gatonye for the 1<sup>st</sup> respondent submitted as follows;

- a. Article 132(4) (a) of the Constitution allows the President of the Republic of Kenya to establish an office in the Public Service with the recommendation of the Public Service Commission and that he was duly appointed pursuant to that mandate.
- b. The state Corporations Act section 7 grants the President power to issue directives to State Corporations Boards of a general or specific nature and the Boards are to give effect to those directions. This power is then operationalized through the CSHPS whose office is established for the sole purpose of effecting presidential directives. The impugned circular is thus deemed issued under the same mandate.
- c. The jurisdiction of this Honourable Court is guided and limited by Section 12 of the Employment Labour Relations Court Act, Cap 234B and Article 162(2) of the Constitution.
- d. Section 12(1) of the employment and Labour Relations Act provides that an application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. These class of people may be represented before the court either in person, an advocate duly authorized to practice law under the Advocates Act or duly appointed and authorized Trade Union Official. There is no provision for any other representation.
- e. The petitioner before this Honourable Court is not clear on whose behalf his petition has been brought save that he is a member of the public. However, on the face of it the petition does not fit into any of the categories of persons listed under Section 12 of the Act. We submit that the petition does not fall within the remit of the kind of constitutional petition over which the Employment and Labour Relations court has jurisdiction (see case of **Kenya Council of Employment and Migration Agencies & Another Vs Samuel Mwongera Arachi & 2 Others [2015] eKLR**).
- f. The petitioner asserts his locus under Article 22 of the petition's content does not fall under Article 22 petitions as it is not a bill of rights pursuit and does not specify the bill of rights provision violated or threatened with violation.
- g. Moreover, the petition does not plead any specific labour related complaint to warrant invocation of the jurisdiction of the employment and Labour Relations Court.
- h. A perusal of the petition clearly demonstrate that the petitioner is challenging the existence of the office of Chief of Staff and Head of Public Service and whether the holder of that office has mandate under the law to issue a circular as was issued by the 1<sup>st</sup> respondent herein.

i. At best this is a case which ought to have been dealt with by the High court pursuant to its jurisdiction under Article 165(3) of the Constitution. This petition deals with issues on the interpretation of the Constitution and whether acts said to have been done under the authority of the Constitution are indeed constitutional.

j. In **Geoffrey Oriaro Vs Cabinet Secretary Ministry of Labour Social Security and Services & 4 Others 2015 eKLR**, the petitioners were challenging the appointment of the respondents to the Board of Trustees of the NSSF. The court found that there does not exist an employer and employee relationship between the appointees and the respondents nor is there an employment relationship between the members of NSSF and the Fund itself or the Cabinet Secretary.

k. In the case before this honourable court, there is no employment dispute between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent. The petition largely amounts to a frivolous invocation of the constitutional jurisdiction of this court.

l. We respectfully submit that the Employment and Labour Relations Court jurisdiction in constitutional matters ought to be based on a specific labour related dispute and that none has been raised in the petition before this court. It is largely a case about whether the office of the Chief of Staff and Head of Public Service was created within the constitution and whether having so been created it has powers to issue the impugned circular. The petition herein amounts to a frivolous invocation of this court's constitutional jurisdiction and on that account it be struck out/dismissed with costs.

m. The Public Service Commission, the 2<sup>nd</sup> Respondent herein informed court by way of a replying affidavit sworn by its Secretary/CEO Alice Otwala at paragraphs 5, 6 & 7 thereof as follows:-

i. That on 18th April, 2013 the public service commission received a request from the President on the need to establish certain offices in public service to facilitate effective discharge of executive functions.

ii. That the public service commission deliberated on the request and recommended the establishment of the Office of the Chief of Staff which decision was communicated to the office of the President on 22nd April, 2013.

iii. That in the year 2016 the public service commission in consultation with the Government Departments, reviewed organizational structures in all Government Departments and in the process established more offices in the Executive Office of the President, including the establishment of the Office of Chief of staff and Head of Public Service.

n. Clearly, from the foregoing, it needs no belaboring that the office of the Chief of Staff and Head of Public Service was established by the President with recommendation of the Public Service Commission under the provision of Article 132(4) of the Constitution.

**Whether the 1<sup>st</sup> Respondent was lawfully appointed to hold the office of the Chief of Staff and Head of Public Service. He further submitted:**

a. The Office of the Chief of Staff and Head of Public Service having been created within the law, the 1<sup>st</sup> respondent was appointed substantively by the Public Service Commission as Chief of Staff and Public Service in the year 2013. A redacted copy of his letter of appointment has been attached to his replying affidavit. Indeed the appointment letter on the face of it confirms that he was appointed by the president to the office of the Chief of Staff and Head of Public Service.

b. The office of the Head of Public Service is established to undertake the day to day operational tasks of the President as mandated under Article 132 of the Constitution and more specifically, to aid in the execution of the President's mandate of coordination of ministries, departments and agencies. Contrary to what has been pleaded by the petitioner, it is not a personal office of the President-indeed, no office in the public service exists as a personal office of the president.

c. The petitioner has also pleaded that the 1<sup>st</sup> respondent ought to have been vetted by Parliament as he supervises persons vetted by parliament as he supervises persons vetted by parliament which is an absurd proposition. We submit that not all offices in the Public Service are vetted. Other than the Chief Justice and the Deputy Chief Justice, judges are not vetted, neither are a larger percentage of public officers or staff of independent offices and commissions.

d. Such officers including the 1<sup>st</sup> respondent herein however serve under the tenets of Articles 10 and 232 of the constitution, and parliamentary oversight prevails in any circumstance under the powers of Article 125 of constitution. The assumption that vetting is the only mechanism for review of suitability of persons is misplaced given the broad powers of Parliament on any matter. Further, there is no constitutional or legal requirement for vetting of offices established in the public service, including those that are established by virtue of article 132. Indeed the petitioner has failed to point out to the court the exact Article of the constitution or statutory provision that provides for vetting of the holder of the office of the 1<sup>st</sup> respondent as a pre-requisite requirement to his appointment.

e. Accordingly and in light of the foregoing, we submit that the 1<sup>st</sup> respondent was lawfully appointed to hold office. As enumerated in his Terms of Reference, he is responsible to the President of the Republic of Kenya for the general efficiency of the Public Service, for coordination of the activities of the public service and for the overall organization of the machinery for the execution of Government's policies.

**Whether the 1<sup>st</sup> Respondent acted within the law to issue the Circular No OP/CAB/9/1A dated 27<sup>th</sup> February, 2018.**

a. Under Article 132(3) (b) of the Constitution of Kenya it is function of the President of the Republic of Kenya to direct and

coordinate the functions of Ministries and Government Departments. We therefore see the Office of the 1<sup>st</sup> Respondent as that created by the President to do exactly that. How such an office can be said to be unconstitutional as pleaded by the Petitioner therefore defeats logic.

b. We submit that the office of the chief of Staff and Head of Public Service is therefore a state office within the meaning of Article 260 of the Constitution of Kenya. For avoidance of doubt, Article 234(3) of the constitution exempts state offices from the mandate of the Public Service Commission. The other state offices exempted include Cabinet Secretaries, the Attorney General and Principal Secretaries and coincidentally those offices were the addressees in the impugned circular.

c. Relevant to the impugned circular, it is important to point out that section 7(1) of the State Corporations Act, Cap 446 grants the President power to issue directives to State Corporation Boards of a general or specific nature and the boards are to give effect to those directions. This power, we submit, is operationalized through the Chief of Staff and Head of Public Service established for the sole purpose of effecting presidential directives. The impugned circular is thus deemed issued under the same mandate as read with Articles 132(3) (b) & 4(a) of the Constitution.

d. The impugned Circular No. OP/CAB 9/1A dated 27<sup>th</sup> February, 2018 does not alter any existing Regulation.

e. The 1<sup>st</sup> respondent only gave a necessary clarification (through the impugned circular) of the government's position in reference to the retirement age of CEOs of State Corporations and it was directed to specific state offices Not the Public Service Commission. Needless to emphasize, state corporations are meant to assist the government of the day achieve its economic objectives. The clarification was therefore very necessary for the Government also needs considerable latitude to manage its human resource function in order to deliver on its policies. This position was acknowledged by the Court in **Okiya Omtatah Vs Head of Public Service & 3 Others (Petition No. 114 of 2016** where it was relevantly stated that:-

“On the other hand the government as an employer must, subject to the Constitution and stature be given the discretion to manage and control its human resource function in order to achieve policies and strategies of the Government in power in realization of what the political party in power might have pledged in its campaign manifesto. To achieve these strategies the government of the day may hire or retain where necessary some of the most experienced persons in the relevant field regardless of whether they are past retirement age”.

6. Mr Bitta for the second respondent submitted as follows:

**Whether the office of the Chief of Staff and Head of Public Service exists in law.**

i. Under Article 132 (4) (a) of the Constitution, the President of the Republic of Kenya may:

“Perform any other executive function provided for in this constitution or in a national legislation and, except as otherwise provided in this constitution, establish an office in the Public Service in accordance with the recommendation of the Public Service Commission”.

ii. The Public Service Commission, the 2<sup>nd</sup> respondent herein has informed court by way of a replying affidavit sworn by its Secretary/CEO Alice Otuala at paragraphs 5, 6 & 7 thereof as follows:

iii. That on 18<sup>th</sup> April, 2013 the Public Service commission received a request from the President on the need to establish certain offices in public service to facilitate effective discharge of executive functions.

iv. That the Public Service Commission deliberated on the request and recommended the establishment of the Office of the Chief of Staff which decision was communicated to the office of the President on 22<sup>nd</sup> April, 2013.

v. From the foregoing, it is clear that the Office of the Chief of Staff and Head of Public Service was established by the President with recommendation of the Public Service Commission under the provision of Article 32(4) of the constitution.

**Whether the petitioner's fundamental rights under the Bill of Rights have been violated.**

i. The petitioner has quoted a raft of Articles he alleges to have been violated, infringed and or threatened but has failed to demonstrate with precision how the same have been violated, infringed and/or threatened. The petitioner has alleged facts but not established facts. He has alleged violations of his constitutional rights but has not established the violations through evidence as required by law. To allege and to establish are two different things and the petitioner has failed to establish the alleged violations so that the allegations remain hollow. Article 22(1) of the Constitution provides thus: every person has the right claiming that a right or fundamental freedom in the Bill of Rights has denied, violated or infringed, or is threatened. The petitioner has not established any facts to prove any iota of violations of his rights under the constitution to warrant the orders sought.

ii. The petitioner has failed to appreciate the law creating the office of the Chief of Staff and Head of Public Service and its functions. He has instead erroneously proceeded on a constitutional litigation spree to vex the 2<sup>nd</sup> respondent. We respectfully submit therefore that this petition is largely a frivolous invocation of the constitutional jurisdiction of this court and that ought to be discouraged. It is the kind of vexatious constitutional litigation against a constitutional body that enjoys constitutional independence.

7. The crux of this dispute is on two issues. First, whether the office of the Chief of Staff and Head of Public Service as currently held by the 1<sup>st</sup> respondent is properly constituted and or exists in law. Second whether the 1<sup>st</sup> respondent acted within the law to issue the circular No. OP/CAB/9/1A dated 27<sup>th</sup> February, 2018. The other issues as to whether the 1<sup>st</sup> respondent was properly appointed and whether his role and functions superintend the role and functions of the 2<sup>nd</sup> respondent are secondary and collateral to the outcome of these two questions.

8. The court while would like to avoid the never ending debate on the scope of jurisdiction of this court over constitutional issues would like to state that it is erroneous to apply the test of the existence of employer –employee relationship as the main criteria for deciding whether a constitutional question arising in that context can be determined by the court. Third parties towards whom there may be no employer–employee relationship may jointly or indirectly take decisions that affect employer-employee relationship. This makes them amenable to the jurisdiction of the court. The preamble to the ELRC Act provides:

“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”. (underlining mine)

9. This preamble is wide enough and cannot by any manner of interpretation be understood to confine the jurisdiction of the court to only situations where there is in existence an employer-employee relationship. That would be too narrow interpretation. The circular No. OP/CAB/1.9/1A dated 27<sup>th</sup> February, 2018 concerned employment contracts for CEO of State Corporations hence a matter over which the court has jurisdiction. Whereas the question of validity of the office of the 1<sup>st</sup> respondent alone may be a matter for the Constitutional Division of the High Court, it is so tied to the circular that makes it unreasonable to split and/or decline jurisdiction. Justice Paul L.G Brereton of Australia observed as follows in the case of **Dean Petty Vs Commonwealth Bank of Australia (2000) FCA 1072**.

“When a Federal Law confers jurisdiction on a court in respect of a “matter” arising under the constitution or a Federal Statute, the jurisdiction so conferred extends to authorize determination of the whole matter. It has long been established that a matter is “justiciable controversy” the determination of which may involve both Federal and state law. The accrual of state jurisdiction to the High Court, so that it could determine non- federal parts of a matter arising under the constitution or federal law has been recognized for many years. This means that once the jurisdiction of the High court is attracted by reason of the matter arising under Federal Law, the court is clothed with full authority essential for the complete adjudication of the matter and not merely the federal aspect of it. Subsequently, it was recognized that other courts exercising federal jurisdiction also had accrued jurisdiction”.

10. This therefore means that the vesting of power on the Employment and Labour Relations Court to determine constitutional questions relating to employment and labour relations carries with it such implied power as is necessarily inherent in the nature of the judicial power itself.

**11. Whether the Chief of Staff and Head of Public Service was properly constituted. Article 132 (4) (a) of the Constitution provides;**

“The President may-

(a) perform any other executive function provided for in this constitution or in national legislation and except as otherwise provided for in this constitution may establish an office in the public service in accordance with the recommendation of this Public Service Commission”.

12. The Public Service Commission, the 2<sup>nd</sup> respondent herein has stated through its Secretary/CEO, one Alice Otwala that on 18<sup>th</sup> April, 2013 the Public Service Commission received a request from the President on the need to establish certain offices in public service to facilitate effective discharge of executive functions. She further stated that the Public Service Commission deliberated on the request and recommended the establishment of the Office of the Chief of Staff and communicated to the President.

13. Ms Otwala further stated that in 2016 the PSC in consultation with Government Departments reviewed organizational structures in all government departments and in the process established more offices in the executive office of the President including the establishment of the Office of Chief of Staff and Head of Public Service. The foregoing factual information read together with article 132(4) (a) of the Constitution leads to the conclusion that the office of the Chief of Staff and Head of Public Service is properly constituted.

14. The petitioner contested the legality of the role of the 1<sup>st</sup> respondent as Chief of Staff and Head of Public Service arguing that the 1<sup>st</sup> respondent cannot possibly be the Head of Public Service since Public Service Commission already has a chairperson who is the Head of Public Service. Public service is defined under article 260 of the constitution to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. A state organ is stated to mean a commission, office, agency or other body established under the constitution.

15. The functions and powers of the Public Service Commission are set out under article 234 of the constitution. However, under article 234 (3) these powers and functions are not exercisable over an office or position subject to Parliamentary Service Commission, The Judicial Service Commission, Teachers Service Commission and the National Police Service Commission. These Commissions have their own Act of Parliament which define their powers and functions over offices and positions under them.

16. Under Article 260, a public officer means any state officer or any person other than a state officer, who holds a public office. A public office is further defined as an office in the national government, a county government or public service, if remuneration and benefits of the office are payable directly from Consolidated Fund or directly out of money provided by Parliament. What those constitutional definitions lead to is that whereas anyone holding a public office is a public officer, they are not all necessarily subject to Public Service Commission. Therefore assuming the petitioner is right in saying the Chair of the Public Service Commission (2<sup>nd</sup> respondent) is the Head of Public Service where is the enabling instrument or legislation over those commissions to which Public Service Commission is exempt? And would

not the involvement of the Chair of the Public Service Commission over Commissions expressly excluded the constitution be unconstitutional? The court thinks so.

17. The sovereign will of the people of Kenya under article 1(3) is delegated to parliament, national executive and the executive structures in the County Government and the Judiciary and Independent Tribunals.

18. The President as the Head of State and Government has the overarching role over state organs. As stated before a state organ includes a commission. It has been demonstrated above that the 2<sup>nd</sup> respondent is not the only commission and that there are those commissions over which it has been excluded by the constitution from exercising authority. Yet these commissions are in the public service hence answerable to the people of Kenya through the President as the Head of State and Government.

19. The office of the President is an institution and one cannot reasonably expect the person occupying that office to do everything by himself or herself. The 1<sup>st</sup> respondent made reference to Presidential circular No. 1/2016 which stated that:

“The chief of Staff and Head of Public Service is responsible to the President for general efficiency of public service for coordination of the activities of public service and the overall organization of the machinery for the execution of government policies”.

20. To this extent the court is not persuaded that the designation of the Office that the 1<sup>st</sup> respondent holds as Head of Public Service usurps the power of the Chairperson of Public Service Commission.

21. This brings me to the last issue in this petition which is Circular No. OP/CAB.9/1A dated 27<sup>th</sup> February, 2018 with regard to terms of service for state corporations’ Chief Executive Officers. The circular states in part as follows:

“RE: TERMS OF SERVICE FOR STATE CORPORATIONS CHIEF EXECUTIVE OFFICERS

The Government has noted a lack of clarity on term of service for chief Executive Officers of State Corporations and concerns at service period which has in some instances led to litigation.

The appointment of chief Executive Officers in State Corporations is guided by the general provisions of Section 5(3) of the State Corporations Act cap 446, the specific acts of parliament under which individual State Corporations are established, the Articles of Association for State Corporations established under the Companies Act Cap. 446 and the Regulations on the appointment of board of directors for public listed State Corporations issued under Capital Markets Authority Cap. 485 A Section 6(2) of the Act provides that the chief Executive Officer shall be appointed for a renewable period of five (5) years or shorter period as may be specified in the notice of appointment.

For avoidance of doubt, the Terms of Service for State Corporation Chief Executive Officers is contractual and renewable based on performance and business requirements. They are not subject to the general Public Service policy on mandatory retirement at 60 or 65 years or limit as to number of terms served. The Circular No. OP.CAB.2/7A of 20<sup>th</sup> March 2009 on Review of the Mandatory Retirement Age for Public Servants is therefore, not applicable to State Corporations’ chief Executive Officers.

The circular on the face of it states that it was informed by lack of clarity on terms of service for CEO of State Corporation and concerns over service period which has in some cases led to litigation.

22. According to the circular, the terms of service for State Corporations Chief Executive Officers are contractual and renewable based on performance and business requirement. They are not subject to the general Public Service policy on mandatory retirement age at 60 or 65 years or limit as to number of terms served. The circular No. OP.CAB.2/7A on review of the Mandatory Retirement Age for Public Servants was therefore not applicable to state corporations Chief Executive Officer.

23. This circular was issued by the 1<sup>st</sup> respondent in his capacity as the Head of Public Service. The functions of the Head of Public Service as outlined earlier in this judgement include:

- a. Overall organization of the machinery for the execution of government policies and delivery of the programmes of the Government of the day, while safeguarding the long term values, motivation and morale of the whole Civil Service.
- b. Coordination of the activities of public servants.
- c. Ensuring all agencies are adequately staffed for performance of their functions.
- d. Performance of the public service and coordination of government operations
- e. Chair of the Central Human Resource management Committee and monitors the implementation of delegated human resource functions in ministries.

24. Under Presidential Circular No. 1/2016 on Instruction for the discharge of Government Business Clause 69 provides as follows:

The Chief of Staff and Head of Public Service is responsible to the President for the general efficiency of the public service, for co-ordination of the activities of the public servants and for the overall organization of the machinery for the execution of the Government's policies. Towards this end, he/she is required to maintain close contact with all Principal Secretaries who have a corresponding duty to facilitate the maintenance of this contact.

25. From the foregoing it is deducible that the 1<sup>st</sup> respondent had the mandate to issue the circular concerned in his capacity as the Head of Public Service. The petitioner however has further complained that the circular is contrary to the constitution and Government policy as contained in Mwongozo. The petitioner although did not cite any specific provisions of the constitution that he considered the circular violated. The petitioner further conceded that as things stand now, there is no constitutional or statutory provisions governing retirement age in Kenya.

26. Whereas the Public Service Act talks of mandatory retirement age, the setting thereof has been left to circulars issued from time to time by the Head of Public Service. The court however notes that CEOs of State Corporations are usually hired on fixed term contracts and in some cases have been hired when they are past the mandatory retirement age for public servants. The fact that they are hired on local service agreement and for a fixed period without being pensionable therefore makes it logical that they cannot be subject to the mandatory retirement age.

27. The practice by the Government has been to deal with certain aspects of its human resource function through circulars as the case in point whilst this practice may in certain quarters be frowned upon as has the petitioner. It is a policy issue and as observed earlier in this judgement, policy guides but cannot bind the issuer. Governance through policy circulars or statements creates flexibility for the management to deal with exigencies of the moment and a court of law can only interfere where such policy contravenes the Constitution, Statutes or runs against public morals.

28. The circular No. OP/CAB.9/1A explains that its intention was to resolve the issue of applicability of the mandatory retirement age to of state corporations in order to control or reduce the avalanche of possible if not actual litigation on the matter. The circular proceeds to state that contracts of Chief Executive Officers of State Corporations would be renewable based on performance and business requirements.

29. Whereas the criteria for renewal may in the view of the court appear vulnerable to manipulation or misuse, the court cannot hamstring the Government as an employer from reviewing or qualifying its policy to resolve an emerging issue. The government, just like any employer ought to be let free to exercise its managerial discretion in order to realize its set objectives.

30. The court is alive to the great public interest in appointments to public offices. Under Article 232 of the Constitution, the values and principles of public service are stated to include involvement of people in the process of policy making and affording adequate and equal opportunities for appointment, training and advancement at all levels of public service of men and women, members of all ethnic groups and persons with disabilities. These values are specifically stated to apply to among others State Corporations.

31. In this regard, the court would frown upon and would not hesitate to declare unconstitutional the use of the circular OP/CAB.9/1A on terms of service for state corporations Chief Executive Officers to extend indefinitely terms and conditions of service for this cadre of public servants.

32. If any advice be sought I would recommend that whereas the terms of service for State corporations Chief Executive Officers would henceforth as per the circular, be renewable based on performance and business requirement such renewal ought to be subject to values and principles of public service as laid down under article 232 of the Constitution.

33. In conclusion, the court declines to grant the prayers sought in the petition with no order as to costs.

34. It is so ordered.

**Dated at Nairobi this 29<sup>th</sup> day of June, 2018**

**Abuodha J. N.**

**Judge**

**Delivered at Nairobi this 29<sup>th</sup> day of June, 2018**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

..... for the Claimant

..... for the Respondent