



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE
STATE CORPORATIONS ADVISORY COMMITTEE

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OFFICE OF THE SECRETARY
KICC, 9TH FLOOR
P.O. Box 42145 – 00100
NAIROBI, KENYA

Ref. No. OP/SCAC 9/21/2 II (45)

14th December, 2023

Dr. Chris K. Kiptoo, PhD., CBS.,
Principal Secretary
The National Treasury
Treasury Building, Harambee Avenue
NAIROBI

**RE: ADVISORY ON APPROVAL OF RECRUITMENT OF STAFF FOR
STATE CORPORATIONS AND PUBLIC UNIVERSITIES**

This has reference to letter Ref. No. PSC/LEG/GEN/23/VOL. III/33 of 5th December, 2023 (**Annex I**) vide which the Public Service Commission has issued a "directive" to the National Treasury regarding approval of recruitment of staff for State Corporations.

Due to the contentious nature of issues raised vide the letter under reference, the State Corporations Advisory Committee (SCAC) met on 11th December, 2023 and noted that: -

- a) While the matter relating to jurisdiction of Public Service Commission (PSC) in the space of State Corporations is alive and being canvassed at the High Court, PSC has acted in contempt by arrogating to itself powers of the Court and "directing" the National Treasury to note that "SCAC does not have the requisite legal authority to approve Human Resource management Instruments" and that "only PSC has been constitutionally and legally mandated to approve Human Resource management Instruments".

b) As you may recall, the matter of the jurisdiction of PSC over human resource matters of State Corporations was before the same High Court by the same Petitioner (KATIBA Institute) under Constitutional Petition No. 331 of 2016 where the Court, under paragraph 93 of the judgement, determined the powers of PSC over State Corporations to be defined as provided under the Constitution to apply mainly on matters of values and principles of public service. With that finding and based on the provisions of Sections 5(3) and 27 of the State Corporations Act, SCAC has never ceased (status quo) to provide required advisory for respective Cabinet Secretaries to consider while approving the terms and conditions of service for staff of State Corporations.

The Committee consequently observed that: -

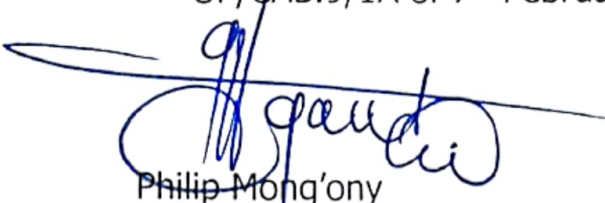
- i. PSC misinterpreted the advisory of the Attorney General (AG), which is being contested in the High Court, to have conferred a mandate to SCAC over State Corporations when in fact the AG was only making a clarification on matters of law;
- ii. PSC had misinterpreted the interim order of injunction issued by the High Court as having gagged SCAC from continuing to perform its mandate under the law;
- iii. The PSC letter had been circulated on many social media platforms and to all State Corporations with the undesirable effect of causing much confusion in the sector;
- iv. Whenever there is need for clarification on any Constitutional or Legal provision or even interpretation of a Judicial ruling, the Constitution under Article 156 has created the Office of the Attorney General as the source of reference being the "Principal Legal Advisor to the Government; and
- v. PSC's action of arrogating to itself the mandate of the AG and issuing legal advisories to the service was not only sowing confusion but is also an affront to constitutionalism.

Accordingly, the Committee reiterated the need for:-

1. The National Treasury and all organs of Government to stand guided on interpretation of legal matters by the Office of the Attorney General;
2. State Corporations to note that the interim order issued by the High Court requiring observance of status quo meant that SCAC was to continue

performing its mandate under the law as had been the practice (status quo) prior to the opinion of the AG; and as advised to SCAC vide letter Ref. No. AG/CPT/OP/150/2023 of 25th September, 2023 (**Annex II**).

3. All State Corporations to be guided on matters relating to recruitment of staff by Government policy as promulgated vide Circular Ref. No. OP/CAB.9/1A of 7th February, 2022 (**Annex III**).



Philip Mong'ony
CHAIRMAN

Copy to: Hon. Justin B. N. Muturi, EGH.,
The Honourable Attorney General
The State Law Office
NAIROBI

Mr. Felix K. Koskei
Chief of Staff & Head of Public Service
Executive Office of the President
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NAIROBI

Mr. James Mungai Warui
Ag. Inspector General (Corporations)
Executive Office of the President
NAIROBI

Chief Executive Officers
All State Corporations



PUBLIC SERVICE COMMISSION

Our Ref: PSC/LEG/GEN/23/VOL.III/33

5th December, 2023

Your Ref: TBA

Dr. Chris Kiptoo, CBS
Principal Secretary
The National Treasury
Treasury Building
P. O. Box 30007-00100
NAIROBI

Dear

RE: ADVISORY ON APPROVAL OF RECRUITMENT OF STAFF FOR STATE CORPORATIONS AND PUBLIC UNIVERSITIES

Background information

1. It has come to the attention of the Commission that whenever State Corporations and Public Universities request for approval from the National Treasury to recruit their staff, they are required to submit, among other things, confirmation that their human resource instruments have been approved by the State Corporations Advisory Committee (SCAC) based on a Circular Ref. OP/CAB.9/1A dated 7th February, 2022 from the then Head of the Public Service (HOPS).
2. There have been several State Corporations and Public Universities that have been making phone calls to the Commission to inquire into the above position as they are now confused as to who between the Commission and SCAC approves their human resource management instruments thereby hampering efficiency and effectiveness in the public service within State Corporations and Public Universities.
3. This requirement from the National Treasury is against the Circular and Guidelines dated 8th August, 2023 that had been issued by the Commission on the development and review of human resource management instruments for State Corporations and Public Universities.

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4. It is against the above background that the Commission has deemed it necessary to proffer this advisory to the National Treasury on this issue so that State Corporations and Public Universities are lawfully facilitated through the requisite approval from legally mandated entities so as to conduct the recruitment of their staff whenever vacancies arise in various positions within their establishments.

The obtaining legal position

5. The question as to which entity has the requisite constitutional and legal mandate to approve human resource instruments in the public service and specifically for State Corporations and Public Universities has been settled by the courts of law in this country.
6. In a judgment delivered on 25th January, 2022 in the case of Manyara Muchui Anthony -vs- Communications Authority of Kenya & 3 Others, [2022]eKLR, (copy attached as PSC-1) the Court (Hon. Monica Mbaru, J) found and held inter alia that:
 - i. *Section 5(3) of the State Corporations Act to be is in conflict with Article 234(2) as read together with Article 260 of the Constitution on regulation of the public service and definition of who a person in the public service is.*
 - ii. *The entity given constitutional authority to employ, issue terms and conditions of service, review, audit and advice with regard to public service is the Public Service Commission. Employees in the service are subject to the constitutional mandate of the Public Service Commission.*
 - iii. *The regulation of the human resource of state corporations fall squarely under the constitutional mandate of the Public Service Commission.*
[Emphasis added]
7. In a judgment delivered on 13th April, 2022 in the case of Consumer Federation of Kenya (COFEK) -vs- National Social Security Fund Board of Trustees & 2 Others, [2022]eKLR, (copy attached as PSC-2) the Court (Hon. Dr. Jacob Gakeri, J) found and held *inter alia* that:

[95.] There are sufficient constitutional, statutory provisions and judicial articulations to the effect that employees of state corporations are public officers in the public service.

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

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

[111.] The committee (SCAC) appear to have been exercising powers it did not have ab initio.

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

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

2. If, with respect to any particular matter—

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

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

[113.] What the Court gathers from these provisions is that because the responsibility of issues of human resource in state corporations is now specifically vested in the Public Service Commission as a constitutional imperative, the provisions of Article 234 of the Constitution prevail over Sections 5(3), 27 or any other provisions of the State Corporations Act.

Finally, a cursory glance of the Act reveals that it is yet to be aligned to the provisions of the Constitution of Kenya, 2010.

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

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

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

8. The above decisions have since been affirmed in the decision delivered on 13th July, 2023 in the case of Mombasa ELRC Judicial Review Application No.E001 of 2022 Republic -v- Kenya Ports Authority Board of Directors & 3 Others Ex Parte Commission for Human Rights Justice (copy attached as PSC-3).
9. Further, in a judgment delivered on 27th July, 2023 in the case of Nairobi ELRC Petition No.E149 of 2023 Enos Namasaka & 9 Others -v- Kenya Medical Supplies Authority & Others, (copy attached as PSC-4) the court emphasized on the role of the Commission to establish and abolish offices in the public service including State Corporations by declaring as unconstitutional, null and void the decision by Kenya Medical Supplies Authority (KEMSA) to declare redundancy thereby leading to abolition of public offices in the said State Corporation without the approval of the Commission or without a delegation instrument issued to its Board of Directors by the Commission to either establish or abolish offices therein.
10. The above decisions have neither been varied/stayed nor set aside by any Superior Court of record in Kenya.
11. It is as a result of the foregoing that on 8th August, 2023, the Commission issued a Circular on the development and review of human resource instruments for State Corporations and Public Universities (copy attached as PSC-5). At the same time, the Commission issued Guidelines to that effect (a copy can be obtained from the Commission's website www.publicservice.go.ke). In the two documents, the Commission reiterated the correct legal position that human resource instruments for

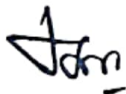
State Corporations and Public Universities must be approved by the Commission before the same can be implemented.

12. The Commission's Circular and Guidelines aforementioned in effect superseded any other directive from any other person to the contrary and as such, the National Treasury should not rely on the circular from the Head of the Public Service Ref. OP/CAB.9/1A dated 7th February, 2022 as that Circular neither supersedes the Commission's constitutional and legal mandate nor the pronouncements by the courts of competent jurisdiction on the Commission's constitutional and legal mandate to approve the human resource instruments for the public service and specifically for State Corporations and Public Universities.
13. The above notwithstanding, the State Corporations Advisory Committee or any other expert may assist State Corporations and Public Universities in the development of their human resource management instruments but the eventual approval of the said instruments before implementation must be sought and obtained from the Public Service Commission.
14. The Commission is also aware that the Hon. Attorney-General vide a letter Ref. No.AG/CONF/2/C/31 VOL. VI dated 27th July, 2023 had issued an advisory that is contrary to court pronouncements on this matter. Consequent to the said advisory, SCAC issued a Circular Ref. No.OP/SCAC 9/21/2 II/(31) dated 8th August, 2023 in that regard in which it attempted to undermine the Commission's constitutional and legal mandate as clarified by the Courts. It should be noted that the two letters from the Attorney-General and SCAC respectively have since been challenged in court and an order issued barring and/or staying their implementation. This is vide a court order issued on 22nd September, 2023 by Hon. L.N. Mugambi, J in NRB HC Constitutional Petition No.E303 of 2023 – John Githongo & Ano. -v- State Corporations Advisory Committee & Others. (copy attached as PSC-6)
15. Accordingly, on the strength and authority of *inter alia* the Constitution, the Public Service Commission Act, 2017, the Public Service Commission Regulations, 2020 and various court pronouncements outlined above, the National Treasury is advised and directed as follows:
 - a. The State Corporations Advisory Committee (SCAC) does not have the requisite legal authority to approve the human resource management instruments (Organization Structure, Grading Structure, Staff Establishments, Career Progression Guidelines and Human Resource Management Policies & Procedures Manual) for State Corporations and Public Universities.

- b. Only the Public Service Commission has been constitutionally and legally mandated to approve the human resource management instruments for State Corporations and Public Universities.
- c. The human resource instruments for State Corporations and Public Universities must first be approved by the Public Service Commission before the National Treasury can approve the recruitment of staff in those entities.
- d. The National Treasury should ensure that there is strict compliance with the Commission's Circular and Guidelines dated 8th August, 2023 by all State Corporations and Public Universities before approval is granted to them for the recruitment of staff within their establishments.
- e. Any human resource management instruments for State Corporations and Public Universities that have not been approved by the Public Service Commission are unconstitutional, null and void.

Be guided accordingly and take necessary action.

Yours



FCS DR. SIMON K. ROTICH, CBS
SECRETARY/CEO
PUBLIC SERVICE COMMISSION

Encl/

Copy to: **Mr. Felix K. Koskei**
Chief of Staff & Head of the Public Service
Executive Office of the President
NAIROBI

Hon. Moses K. Kuria, HSC
Cabinet Secretary
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Mr. Philip Mong'ony
✓ Chairperson
State Corporations Advisory Committee
NAIROBI

All Chief Executive Officers
State Corporations

All Vice Chancellors
Public Universities



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

ANNEX II
STATE CORPORATION ADVISORY COMMITTEE
03 OCT 2023
RECEIVED
P.O. Box 42145 - 00100 NAIROBI

Our Ref: AG/CPT/OP/150/2023
You Ref: OP/SCAC 9/9/1(7)

Date: 25th September, 2023

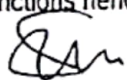
Secretary/CEO
State Corporations Advisory Committee
Harambee Avenue, KICC, 9th Floor
P. O. Box 42145 - 00100,
NAIROBI

RE: NRB PETITION NO E303 OF 2023
JOHN GITHONGO & ANOTHER-V- STATE CORPORATION ADVISORY COMMITTEE &
ANOTHER

We refer to the above matter and further to our letter dated 21st September, 2023.

Please find enclosed herewith a copy of the interim order dated 22nd September, 2023 which has directed the parties to maintain status quo and stayed the effect of the advisory opinion from the Attorney General dated 27th July, 2023 Ref AG/CONF/2/C/31 VOL.VI as well as the letter from State Corporation Advisory Committee (Scac) dated 8th August, 2023 Ref OP/SCAC/9/21/2 III(31) pending the hearing and determination of the notice of motion application.

The import of the said interim order is that the status quo to be maintained and Scac to continue discharging its functions prior to the issuance of the said letters which in any case did not alter the functions hence there is no need for us to appeal against the said interim order.


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Principal State Counsel
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DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUE P.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. E303 OF 2023

=BETWEEN=

JOHN GITHONGO 1ST PETITIONER
KATIBA INSTITUTE 2ND PETITIONER

=VERSUS=

STATE CORPORATIONS ADVISORY COMMITTEE 1ST RESPONDENT
ATTORNEY GENERAL OF KENYA 2ND RESPONDENT

=AND=

PUBLIC SERVICE COMMISSION 1ST INTERESTED PARTY
SALARIES AND REMUNERATIONS COMMISSION 2ND INTERESTED PARTY
LAW SOCIETY OF KENYA 3RD INTERESTED PARTY

IN COURT ON 21ST SEPTEMBER, 2023
BEFORE HON. JUSTICE L.N MUGAMBI

ORDER

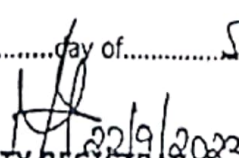
UPON THIS MATTER coming up for mention for directions on 21.09.2023 before Hon. Justice L.N. Mugambi in the presence of counsel for the 1st Petitioner, counsel for the Respondents, counsel for the 1st Interested Party, counsel for the 2nd Interested Party and counsel for the 3rd Interested Party AND UPON hearing the parties' submissions;

IT IS HEREBY ORDERED THAT:

1. In the Interim and pending the hearing of the present application the status quo be maintained; the effect being that the Respondent's letter of 27/07/2023 – AG/CONF/2/C/31 VOL.VI and the letter of 8/8/2023 ref. OP/SCAC/ 9/21/2 II/(31) are hereby stayed.
2. The Petitioners shall file and serve submissions to the application within the next seven (7) days.
3. Upon service, the Respondents and Interested Parties to file their responses to the application seven (7) days thereafter.
4. Petitioner may file a rejoinder to the submissions upon receipt of the responses within 3 days.
5. Parties that have not effected service to do so by close of business today.
6. Mention for further orders/directions on 25.10.2023.

GIVEN under my hand and seal of this Honourable court this 21st day of September, 2023.

ISSUED at Nairobi this 22nd day of September 2023.


DEPUTY REGISTRAR
HIGH COURT OF KENYA, NAIROBI

Ref E303/2023
DEPUTY REGISTRAR
HIGH COURT OF KENYA



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EXECUTIVE OFFICE OF THE PRESIDENT
HEAD OF THE PUBLIC SERVICE

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STATE HOUSE
P.O. Box 40530-00100
Nairobi, Kenya

Ref. **OP/CAB.9/1A**.....
and date

February 7, 2022 20.....

The Attorney General

All Cabinet Secretaries

All Principal Secretaries

All Chairpersons and Chief Executive Officers, State Corporations

RE: RECRUITMENT OF NEW STAFF

Reference is made to Circular Ref: OP/SCAC.9/21/1/1 of 15th May 2017 where all State Corporations are required to submit the four Human Resource Instruments to the State Corporations Advisory Committee (SCAC) for approval, to aid in determination of optimal staffing needs for State Corporations.

Further reference is made to Circular Ref: OP/CAB.39/4A of 28th July 2017 which froze recruitment of any new staff, unless in exceptional circumstances where agencies are required to seek approval from this office.

It has however been noted that several State Corporations have achieved a good level of compliance, and have had respective Human Resource Instruments approved by the Committee. They therefore have in place optimal structures for effective delivery of mandates.

In view of the above, it has been decided as follows:

- (i) State Corporations with SCAC approved Human Resource Instruments will henceforth be exempt from the requirements of Circular Ref: OP/CAB.39/4A of 28th July 2017, and can therefore

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recruit staff, including replacement of staff, in line with the SCAC approved Staff Establishment.

- (ii) The recruitment as in (i) should however only be undertaken upon:
- a) Alignment with the approved Human Resource Instruments
 - b) Possession of a written confirmation of requisite budgets for the recruitment and sustainability thereof, from the National Treasury
 - c) Existence of Board resolutions approving the recruitment
- (iii) State Corporations whose Human Resource Instruments have not been approved by SCAC don't fall within this exemption and will be required to continue complying with Circular No. OP/CAB.39/4A of 28th July 2017 for all recruitments including replacement posts.

Therefore, it is re-iterated that henceforth, State Corporations with SCAC approved Human Resource Instruments are exempt from Circular Ref: OP/CAB.39/4A of 28th July 2017. A freeze on recruitment is however still in place for Agencies whose Human Resource Instruments are yet to be approved by the Committee.

Please take necessary action.



JOSEPH K. KINYUA, EGH
HEAD OF THE PUBLIC SERVICE

Copy to: **Ms. Wanjiku Wakogi, EBS**
Secretary
State Corporations Advisory Committee
Office of the President
NAIROBI

Ms. Theodora Gichana
Ag. Inspector General (Corporations)
Office of the President
Harambee Annex
NAIROBI

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