

REPUBLIC OF KENYA
IN THE STATE CORPORATIONS APPEAL TRIBUNAL AT NAIROBI
APPEAL NO SCAT 002 OF 2024

EZEKIEL MUTUA.....APPELLANT

VS

INSPECTOR GENERAL (CORPORATIONS).....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant served as the Chief Executive Officer (hereinafter referred to as **CEO**) and member of the Kenya Films Classification Board (hereinafter referred to as **KFCB**) -a statutory body created under The Films & Stage Plays Act Cap 222, for two terms between 26th October 2015 and October 2021.
2. The first term was from 26th October 2015 to 21st October 2018 pursuant to a Gazette Notice No.8233 and the second term was from 26th October 2018 to October 2021 on the appointment by the board vide its letter of 7th June 2018.
3. The Respondent is a public officer appointed under Section 18 of the State Corporations Act Cap 446 L.O.K who is mandated *inter alia* to issue surcharge certificates under Section 19 of the Act.
4. On nearing the expiry of his first term, the Appellant requested for its renewal, and by a letter of 14th May 2018, addressed to the then Cabinet Secretary of Sports and Heritage, the Chairman of the board requested for the renewal of the Appellant's contract as the CEO of the board.
5. The Cabinet Secretary vide a letter of 29th May 2018 responded that the Government did not intend to have the contract renewed.
6. However, and contrary to the Cabinet Secretary's response, the board through its letter of 7th June 2018, went ahead to renew the contract of the Appellant as the Chief Executive Officer for a further period of three (3) years with effect from 26th October 2018.
7. Following the renewal of the Appellant's term by the Board for a further three (3) years, the Board further in its meeting of 21.11.2018 directed its Human Resource and Administration Committee to review and provide guidelines on the salary increment of the Appellant based on his past performance from the previous term.
8. The KFCB during a meeting held on 31st January 2019 received and deliberated on the recommendation by the Human Resource and Administration Committee for a salary increment in favor of the Appellant.

9. During the meeting, as was observed from the minutes, there was a divergent opinion from the said sub-committee's Chairperson who felt there was need for further consultation before the increment could be effected.
10. Nevertheless, the proposal to increase the Appellant's salary was adopted by the majority of the members of the Board thus increasing the Appellant's salary from Kenya Shillings Three Hundred and Forty-Eight Thousand Eight Hundred and Forty (Kshs.348,840/-) to Kenya Shillings One Million One Hundred and Fifteen Eight Hundred and Fifty Shillings (Kshs.1,115,850/-) on a "*personal to self*" basis.
11. On the same day, and in order to actualize the increment, the board wrote to the Cabinet Secretary seeking his approval to effect the Board's decision.
12. On 9th April 2019 the Board met again before the response from the Cabinet Secretary had been received and resolved to implement the Appellant's reviewed salary increment and which decision the Chairperson of the Board, a Bishop Jackson Kosgei, communicated to the Cabinet Secretary vide a letter Ref: KFCB/HQS/CONF/01 VOL.V(70) dated 9th April 2019.
13. The Cabinet Secretary vide a letter Ref: MICT/CONF/12/17/VOL.D (89) dated 30th April 2019 wrote to KFCB and advised it not to implement the increment.
14. The Cabinet Secretary also directed the Board to recover any amounts that may have been paid in respect of the proposed salary increment in case the board had implemented its resolution.
15. From the facts of the matter, it appears that the Board never implemented the directions of the Cabinet Secretary to stop the increment or recover the amounts that may have been paid, which then gave rise to the instant matter.
16. The Appellant proceeded to serve his full term of three (3) years and during which period he continued to draw the reviewed salary of Kshs.1,115,850/=.
17. The Respondent caused an investigation into the matter and formed an opinion that the payment of the reviewed and increased salary of Appellant occasioned loss of public funds for which, a Surcharge certificate had to issue against the Appellant
18. The Appellant being dissatisfied with the decision of the Respondent to surcharge him as above preferred the present appeal.
19. The Appellant in his Memorandum of Appeal lists four (4) grounds of appeal namely:
 - a) The Inspector General erred in find that there had been an irregular salary overpayment by the Kenya Film Classification Board when the decision to award and budget for the said salaries was legally made by a duly constituted and empowered Board as provided under the Film & Stage Plays Act and The Stage Compensations Act.

- b) The Inspector General has not provided for reaching the conclusion that there has been any irregular overpayment and neither has he given the Appellant a fair administrative hearing and due process as required under the Fair Administrative Action Act which contravenes the Appellant's constitutional rights.
- c) The Inspector General has not shown any loss incurred by the Kenya Films Classification Board to warrant such a discharge.
- d) The amount indicated on the Surcharge has not taken into account decisions and taxes already remitted and it amounts to a double payment and therefore unjust.

20. The Appellant further filed his submissions on 10.4.2025 in support of his Appeal.

21. The Respondent on the other hand filed a Replying Affidavit sworn on 14.2.2025, a bundle of documents dated 18.3.2025 and written submissions dated 16.4.2025 in opposing the Appeal.

22. The Appeal was canvassed by way of written submissions.

The Appellant's case

23. The Appellant agrees that he was the CEO of the Kenya Film Classification Board from 26th October, 2015 to October, 2021 for two terms of three (3) years each.

24. The first term lasted from 26th October, 2015 to 21st October, 2018 and the Appellant's monthly salary was 348,840.

25. The Appellant avers that upon expiry of the first term, he requested for a renewal of his term vide a letter of 14.5.2018 addressed to the then Acting Chairman of the Kenya Film Classification Board.

26. It is the Appellant's contention that under Section 11C (1) The Films & Stage Plays Act Cap 222, the Board was not bound by the recommendation of the Cabinet Secretary and it was seized of the power to renew his term as a CEO since the appointment of a CEO under the said provision put the responsibility solely on the Board.

27. The Appellant took the view that the review could, and was, properly undertaken by the board without regard to the recommendations of the CS which were not mandatory nor binding but merely intended to guide the Board.

28. The decision of the Board to renew the appointment of the Appellant was supported by recommendations of the Human Resource and Administration Committee of the Board and with the presence of the nominee of the CS on the Board who did not register any objection to the renewal from the CS.

29. The Appellant contented that he did not constitute the Board himself and he should not be found at fault for decisions of the Board,

30. That because the letter of the CS advising the board of the intention of Government not to renew the term of the CEO having been addressed to the Chairman, and not the Appellant personally, the Appellant was of the view he was not to blame for any fault of the board not to abide by the advice.
31. The Appellant further contented that after the renewal of his term, the Board sat, and rightly so, to approve his salary increment and the same was approved on 31.1.2019 by a majority of the Board Members.
32. The increment was communicated to the CS seeking his approval and on 9.4.2019, the Board, again rightly so, made a decision to effect the increment notwithstanding that the approval from the CS was yet to be received.
33. The Appellant continued to work and earn the new salary without any objections, reservations and/or queries from the CS and the Appellant was thus made to believe that he was discharging his duties legitimately and that he had been properly appointed by the Board.
34. The Appellant took issue with failure by the CS not to stop the increment and the payment of the new salary to the Appellant throughout the three years period of the second term.
35. The Appellant thus saw lack of action from the CS to mean he was properly appointed and that he legitimately earned the reviewed salary for work done hence the reason to question the actions of the Respondent to surcharge him.
36. Accordingly, the Respondent was at fault to surcharge the Appellant for salaries properly earned.
37. The Appellant further questioned the calculations undertaken by the Respondent in arriving at the surcharge amount of Kshs.27,012,360 and thus disagreed with the figure as incorrect.
38. The workings of the Appellant, according to his submission, showed that the overpayment came to Kshs.23,002,200 and not the surcharged amount.
39. The Appellant further accused the Respondent of not according the Appellant an opportunity to be heard as required by the Fair Administrative Action Act.
40. The Appellant faulted the failure by the Respondent to give reasons for his decision and for not showing how the calculations were made so as to arrive at the surcharged amount especially in respect of tax deductions applicable.
41. According to the Appellant, the Respondent had all 'the minutes of the Board meetings and relevant material facts supplied by the Appellant to his reply to the letter to show cause letter from 'the Respondent but the same were not considered by the Respondent before the surcharge decision was made.

42. The Appellant concluded by bringing to the attention of the Tribunal the existence of a case being **Milimani High Court, Anti-Corruption and Economic Crimes Suit No. ACECE045/2024 Between EACC Vs. The Appellant and Twelve others** in which the EACC is seeking to recover the same amounts as those in the surcharge certificate, hence subjecting the Appellant to several claims, consequently resulting in abuse of the Appellant's rights, his exposure to great expenses and harassment as he defend himself in multi-claims.
43. In view of the above, the Appellant prayed that the Tribunal do find there was no illegality nor irregularity in the increment of his salary and that there is no proof of loss of public funds and that the surcharge certificate No. SUR/001/2024 issued to him be set aside/discharged and/or quashed with costs.

THE RESPONDENT'S CASE

44. The Respondent in opposing the appeal, took the position that on 8.10.2024 a decision was taken by the Respondent to surcharge the Appellant pursuant to Section 19 of the State Corporation Act.
45. The surcharge amount was Kshs.27,612,360 being an amount of money received by the Appellant following an irregular and illegal salary increase while he served as the CEO of the KFCB thus occasioning a loss of public funds.
46. The basis for the surcharge was that the KFCB made a decision to renew the term of service and review upwards, the salary of the Appellant as its CEO against the advice of the Cabinet Secretary for Sports and Heritage and against the law generally.
47. The Respondent pointed out that the Appellant served his first term as CEO of KPCB from 26.10.2015 to 21.10.2018 on terms that were governed by the Guidelines for Terms and conditions of Service for Service for State Corporations issued vide Circular Ref. No. OP/CAB.19/21/2A/VOL.II/43 of 22nd November, 2004 and the letter of State Corporations Advisory Committee(hereinafter referred to as **SCAC**) dated 8th April, 2013 which categorized KFCB as a Regulatory Corporation PC6B.
48. That further, on the 7th of December, 2017 the Salaries and Remunerations Commission (hereinafter referred to as **SRC**) undertook a job evaluation at the KFCB and increased the Appellant's salary to Kshs.348,840 which salary the Appellant earned throughout his first term of three (3) years ending 21st October, 2018.
49. The Respondent contends that the term of service of the Appellant was irregularly and unlawfully renewed without an input from SRC, SCAC and an approval of the CS.
50. The Respondent further took the position that since both the CS concerned and the applicable laws were ignored by the Board in its decision to renew the term and review upwards the salary of the Appellant, the increment was illegal and occasioned loss of public funds.

51. The Respondent reiterated that the Board's decision to increase the CEO's salary from Kenya Shillings Three Hundred and Forty-Eight Thousand Eight Hundred and Forty (Kshs.348,840/-) to Kenya Shillings One Million One Hundred and Fifteen Eight Hundred and Fifty Shillings (Kshs.1,115,850/-) on a "personal to self" basis was unlawful and irregular; and that the Appellant ought to be surcharged as a consequence having sat in the board and benefited directly.
52. The Respondent also contended that the Board of the KFCB failed to comply with the provisions of Article 230 of the Constitution of Kenya 2010 and Section 11 of the SRC Act which mandates the Salaries and Remuneration Commission (SRC) to approve the remuneration and benefits of Public Officers (in this case the Appellant).
53. The Respondent also argues that to promote uniformity the government usually issues circulars regularly to guide implementation of the SRC Act within the Public Sector.
54. Finally, the Respondent contends that the Appellant and the Board of KFCB failed to comply with the terms of Section 11C (1) of the Films and Stage Plays Act Cap 222 which provides that the terms and conditions of appointment of the CEO are subject to approval by the Minister.
55. The Respondent also contends that he complied with the provisions Section 4 of the Fair Administrative Action Act which mandates the Respondent to give all the details and reasons/calculations on how he came up with the figures demanded under the Surcharge Certificate.
56. Finally, the Respondent supported the issuance of the surcharge certificate and urged the Tribunal to uphold the same and dismiss the appeal.

ISSUES FOR DETERMINATION

57. Upon careful consideration of the Pleadings, the affidavits, documents and submissions filed by parties as well as the law, a number of issues emerge. This tribunal has taken liberty to narrow down the issues raised by the parties to the following three issues for determination of this matter: -
- i. *Whether the increase of the Appellant's salary as a Chief Executive Officer was legal and regular.*
 - ii. *Whether the Appellant was subjected by the Respondent to a fair administrative process as envisaged by the Constitution and the Fair Administrative Actions Act prior to the decision to surcharge.*
 - iii. *Whether the decision to surcharge and the amount surcharged were justified.*
 - iv. Having set out the issues we will now proceed to analyse and determine each of the above matters separately.

ANALYSIS AND DETERMINATION

Whether the increase of the Appellant's salary, as a CEO was legal and regular

58. There is no doubt that the Appellant was the CEO of the Kenya Films Classification Board (KFCB) for two terms between 26th October 2015 and October 2021.
59. Based on the documents filed before this Tribunal it is also not in dispute that the Board of the KFCB for which the Appellant also served as a member decided to increase the Appellant's salary from Kenya Shillings Three Hundred and Forty-Eight Thousand Eight Hundred and Forty (Kshs. 348,840/-) to Kenya Shillings One Million One Hundred and Fifteen Eight Hundred and Fifty Shillings (Kshs. 1,115,850/-) on a "*personal to self*" basis.
60. What is disputed between the parties is whether the aforesaid increase was regular and whether it complied with the relevant statutory and/or legal provisions.
61. The parties in canvassing this issue relied on the provisions of the Constitution, The Films and Stage Plays Act Cap 222, The State Corporations Act Cap 446, The Salaries and Remuneration Commission Act Cap 412D and the Code of Governance for State Corporations "Mwogozo".
62. The key issue that needs to be addressed by the Tribunal when determining whether the increase of the Appellant's salary was legal and regular is whether the process was followed and whether the same complied with the provisions of Article 230 of the Constitution of Kenya and Section 11 of the Salaries and Remuneration Commission Act.
63. The second aspect in determining this issue relates to compliance with the provisions of Section 11 of the Films and Stage Plays Act Cap 222. Based on this provision of the law, was the approval of the Cabinet Secretary required in implementing the salary increase of the Appellant?
64. With regards to the first issue on compliance with the provisions of Article 230 of the Constitution of Kenya and Section 11 of the SRC Act, the Tribunal observes that the provisions of the Act are couched in mandatory terms.
65. Article 230 of the Constitution establishes the Salaries and Remuneration Commission (SRC). The body is independent and is responsible for setting and regularly reviewing the remuneration and benefits of all state officers. It also advises the national and county governments on the remuneration of all other public officers.
66. Section 11 of the SRC Act on the other hand requires the input of the SRC in determining the remuneration and benefits of Public Officers (in this case the Appellant). In the instant case, the Tribunal observes that the SRC's input was sought in determining the salary increments in December 2017 as seen on page 2 of the Respondent's Bundle of Documents dated 18th March 2025 wherein the Appellant's salary was increased from Kshs. 340,000/- to Kshs. 348,840/-.

67. In our view; and having regards to the provisions of Article 230 of the Constitution of Kenya 2010 and Section 11 of the SRC Act; a similar process ought to have been followed and the failure to seek the SRC's input subsequently when increasing the Appellant's salary from Kenya Shillings Three Hundred and Forty-Eight Thousand Eight Hundred and Forty (Kshs. 348,840/-) to Kenya Shillings One Million One Hundred and Fifteen Eight Hundred and Fifty Shillings (Kshs. 1,115,850/-) was unlawful.
68. The failure to comply with the aforesaid mandatory provisions in our view, rendered the increment unprocedural, null and void; least to point out the fact that the Cabinet Secretary made this observation in his letter dated 30th April 2019 and noted that the increment violated the provisions of Article 230 of the Constitution of Kenya 2010.
69. Indeed, we are puzzled by the fact that the members of the Board, including the Appellant herein, opted to disregard the Cabinet Secretary's directions and proceeded to implement the new salary for the Appellant and failed to recover any overpayments as directed by the CS.
70. The Tribunal further took cognizance of the role of the Appellant as the accounting officer with a higher responsibility under section 79 of the Public Finance Management Act Cap 412D Laws of Kenya to ensure lawful and prudent utilization of public funds.
71. According to the Tribunal, the Appellant breached that duty and in particular when he failed to appreciate and declare that he was conflicted in the matter.
72. In fact, the Appellant actively participated in the deliberations of the board as a member when he ought to have declared his conflict of interest and left the board on its own to deliberate on the issue of the increment without his involvement.
73. The Appellant was further under a duty, by virtue of his office, to ensure that no illegality was to be committed in the increment of his salary and that proper processes set in law and best governance practices were adhered to in safe guarding public funds.
74. Additionally, the Tribunal agrees with the Respondent's observation that there was a circular, to wit, Circular Ref No OP/CAB.9/21/2A/LII/43 dated 23rd November 2004 issued by the Executive Office of the President through the Head of Public Service which outlined the terms of service for Chief Executive Officers of State Corporations which was still in force at the time the KFCB recruited the Appellant as its CEO and up until and through the request for renewal of his contract for a second term.
75. In our view, this ought to have formed the basis for deciding the Appellant's salary or any increment therein but it was not followed nor complied with.
76. On the second issue regarding the requirement for approval of the Appellants terms and conditions of appointment by the Cabinet Secretary, we observe that the provisions of Section 11 (C)(1) of the Kenya Films and Stage Plays Act Cap 222 are not couched in mandatory terms.

77. The Act provides that, *“There shall be a chief executive officer of the Board who shall be appointed by the Board on such terms and conditions of service as the Cabinet Secretary may approve.”* (emphasis ours)

78. The Appellant has argued that the Board was mandated to carry out its duties under the provisions of the Act and that it was empowered to do all that was incidental towards the proper performance of its functions.

79. Whereas we observe that the Cabinet Secretary’s approval of the terms and conditions of the CEO is not a mandatory provision, we reiterate that his opinion ought to have been considered by the Board before the increment was made (or at least after he advised that it was unlawful); having regards to the fact that the process failed to comply with Article 230 of the Constitution.

80. For these reasons the Tribunal finds that the salary increment for the Appellant was irregular and unlawful.

Whether the Appellant was subjected by the Respondent to a fair administrative process as envisaged by the Constitution and Fair Administrative Actions Act prior to the decision to surcharge

81. The Appellant sought to demonstrate that the decision complained of is tainted with illegality, irrationality and procedural impropriety. He submits that there was failure to act fairly on the part of the Respondent who was the decision-making authority, in that, the rules of natural justice were not complied with in effecting the surcharge.

82. The powers of the Inspector General (Corporation) to surcharge are donated under section 19 of the State Corporation Act Cap 446 and in particular section 19 (2) which reads:

83. *“The Inspector - General (Corporations) shall, as soon as practicable after the amount of surcharge; furnish the person surcharged with a certificate of surcharge in the prescribed form.”*

84. Section 19 of the State Corporations Act does not require the Inspector General (Corporation) to accord reasons for his decision to the person to be surcharged before issuance of the Certificate of Surcharge. The section does not also require the Inspector General (Corporation) to invite the person for a hearing before the surcharge certificate is issued (emphasis) ours.

85. Nevertheless, we observe that the Appellant was invited by Respondent on 16th June 2020 vide a letter Ref: ISC/INS/POL/234/VOL II/21 to clarify and give explanations on the issue of review of his salary as the CEO. According to the Respondent’s submissions the Appellant refused, neglected and /or failed to make any response to the aforesaid letter.

86. Unfortunately, from the evidence tendered before the Tribunal, the assertion that the Appellant failed to attend to the contents of the Respondents letter inviting him for a hearing were never rebutted.
87. Besides, under Section 20 of the State Corporations Act, the Appellant had the right to demand for reasons from the Inspector General (Corporation) and the same section requires the reasons to be given within 14 days of the demand. From our reading of the section, the provisions therein are stated in mandatory terms and the Inspector General must comply.
88. On this issue, we also hasten to state that the right to appeal to the Tribunal affords the Appellant an opportunity to defend himself and indeed the Appellant noted this in the letter by his Advocates addressed to the Inspector General dated 4th November 2024.
89. Having regards to the aforesaid, we find that the mischief sought to be cured by the provisions of the Fair Administrative Action Act, i.e. the right not to be condemned unheard; is properly cured in the procedure set out in the State Corporation Act by allowing the aggrieved to seek reasons and/or appeal against the decision to surcharge.
90. We thus conclude that the contention by the Appellant that the Respondent breached the provisions of the Fair Administrative Action Act finds no favor in law nor with this Tribunal since the Appellant was invited for a hearing by the Respondent but he failed to appear and be heard.
91. Besides, the Appellant having preferred the present appeal has been accorded an opportunity to be heard and mount a challenge to the surcharge.

Whether the decision to surcharge the Appellant and the amount surcharged was justified

92. From our analysis of the matter, we have already made findings that the salary increment for the Appellant as the CEO of the KFCB was irregular and unlawful. Consequently, we conclude that the Respondent's decision to surcharge was justified.
93. However, the Appellant has also argued that he has been put to double jeopardy by government agencies which have instituted similar claims in different forums seeking the same remedies.
94. He also contends that the surcharge amount did not consider statutory deductions and taxes already remitted, which amounts to double payment and therefore unjust.
95. We find that, whereas the Appellant's claim could be well founded in logic, we must state that different bodies or entities in government play different responsibilities under the law.

96. In our view therefore, the issue of Statutory deductions would reasonably not have been ascertained by the Respondent and requiring him to do so would amount to asking the Respondent to exercise powers beyond its mandate.

97. Additionally, we are equally at a loss in determining the particulars of the alleged Statutory deductions which the Appellant contests ought to have been deducted since the same were never particularized nor established by the Appellant.

98. Nevertheless, the Appellant, in our opinion, has a chance and opportunity to follow up on the taxation and statutory deductions issues with the relevant government bodies for them to render to him appropriate administrative remedies available under the law.

FINAL DECISION

99. Based on the above analysis, the Tribunal makes the following orders: -

- i. The Appeal be and is hereby dismissed.
- ii. The Certificate of Surcharge SUR/001/2024 for the sum of Kshs. 27,612,360/= is upheld and confirmed against the Appellant.
- iii. With regards to the issue of costs each party shall bear its own costs

R/A 30 Days

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS 13th DAY OF June 2025

AGGREY LUCAS KIDIAVAI
CHAIRMAN

BRUNO W. SITUMA
MEMBER

ANNE WANGECI
MEMBER