

REPUBLIC OF KENYA
IN THE STATE CORPORATIONS APPEAL TRIBUNAL AT NAIROBI
APPEAL NO SCAT 001 OF 2024

GATHONI KUNGU.....APPELLANT

VS

INSPECTOR GENERAL (CORPORATIONS).....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant served as member of the Kenya Films Classification Board (hereinafter referred to as the **KFCB**) from 21st October 2016 to 21st October 2024.
2. The Respondent is a public office in the executive office of the President, created pursuant to section 18 of the **State Corporation Act, Cap 446** Laws of Kenya with powers to levy surcharges and/or disallow any item of account against any person responsible in any state corporation.
3. On 21st November 2018, the Board requested the Human Resource and Administrative Committee to review and provide guidance on salary increment to its then Chief Executive Officer (hereinafter referred to as the **CEO**), one Ezekiel Mutua based on his performance among other considerations.
4. The KFCB held a full Board meeting on 31st January 2019 where the Board received and deliberated on the report by the Human Resource and Administration Committee for a salary increment in favour of the CEO. During the meeting it was observed from the minutes that divergent opinions were received from the sub-committee Chairperson and recorded in the minutes.
5. Nevertheless, the proposal to increase the CEO's salary was adopted by the Board thus increasing 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 subject to approval by the Cabinet Secretary.
6. On the same day, the Board, through its Chair and in order to actualize the increment, wrote to the Cabinet Secretary seeking his approval to effect its decision.
7. On 9th April 2019 during a full Board meeting and before a response had been received from the Cabinet Secretary, the Board resolved to implement the CEO's reviewed salary.
8. The then Chairperson of the Board Bishop Jackson Kosgei communicated the Board's decision to effect and increment of the CEO's salary to the Cabinet Secretary, Ministry of Information, Communication and Technology, vide a letter Ref: KFCB/HQS/CONF/01 VOL.V(70) dated 9th April 2019.
9. The Chairperson also wrote a letter REF: KFCB/2015066(14), and dated 9th April 2019, to the then CEO informing him about the salary increment.

10. In response to the letter dated 9th April 2019, (Ref: KFCB/HQS/CONF/01 VOL.V(70)), the Cabinet Secretary vide a letter Ref: MICT/CONF/12/17/VOL.D (89) dated 30th April 2019 wrote to KFCB and advised the Board not to implement the salary increment.
11. The Cabinet Secretary also directed the Board to recover any amounts that had been paid in respect of the purported salary increment in case the Board had implemented its resolution to increase the CEOs salary.
12. 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 amount that had been paid, which then gave rise to the instant matter.
13. The Respondent in exercising his powers under **Section 19** of the **State Corporations Act Cap 446** investigated the matter and surcharged the Appellant and other board members jointly and severally for the sum of **Kenya Shillings Twenty-Seven Million Six Hundred and Twelve Thousand Three Hundred and Sixty (Kshs. 27,612,360/-)** being the alleged amount lost because of the increment.
14. The Appellant herein was surcharged for the sum of **Kenya Shillings Two Million Seven Hundred and Sixty-One Thousand Two Hundred and Twenty-Six (Kshs. 2,761.236/-)** and was issued with a **Certificate of Surcharge No. SUR/007/2024** dated 8th October 2024.
15. The Appeal was canvassed by way of oral evidence and written submissions.

THE APPELLANT'S CASE

16. The Appellant being aggrieved by the Certificate of Surcharge No. SUR/007/2024 filed a Memorandum of Appeal dated 7th November 2024 together with a bundle of documents and later she filed a witness statement and a list of documents on 5th March 2025.
17. The Appellant, in her Memorandum of Appeal raised five (5) grounds of appeal namely:
 - a) That the inspector –General (Corporations) erred in law and in fact by condemning the Appellant unheard contrary to the rules of natural justice and fair administration action as he constructively served the Notice of intention to surcharge long after the time within which the Appellant was to show cause had lapsed thereby occasioning a serious miscarriage of justice to the Appellant.
 - b) That the inspector the inspector-general (Corporations) erred in law and in fact and misdirect himself when he surcharged the Appellant under circumstances that did not merit such action and when such powers had not procedurally accrued and thus the entire process was marred with procedural impropriety, breach of natural justice, improper exercise of discretion, illegality, abuse of power and bad faith thereby occasioning a serious miscarriage of justice on the justice on the part of the Appellant herein.
 - c) That without prejudice to the foregoing, the inspector-General (Corporations) erred in law and in fact and misdirected himself by finding

and holding that there was loss of Kshs. 27,612,360 at the Kenya Film Classification Board in absence of such evidence and/or proof thereby occasioning a serious miscarriage of justice on the part of the Appellant.

- d) That the inspector-General (Corporations) erred in law and in fact and misdirected himself by surcharging the Appellant for actions she committed, as a member of Kenya Film Classification Board, within the parameters of the law and under financially, procedurally, and reasonably justifiable circumstances thereby occasioning a serious miscarriage of justice on the part of the Appellant.
- e) That the Inspector-General (Corporations) entire process, findings and decisions made therein were contrary to Law and per incuriam and the entire reasoning and conclusions were plainly wrong and therefore erroneous.

18. She contended that the Inspector General (IG) condemned her unheard, contrary to the rules of natural justice and fair administrative action.

19. To demonstrate that, she pointed that the Notice of the Intention Surcharge and requiring her to show cause why the surcharge could not be levied against her was served long after the period to comply had lapsed.

20. That the circumstance obtaining at the material time did not support the decision of the Respondent to surcharge her and the whole process was marred by procedural shortfalls.

21. She contended that while a member of the Board, she acted within the law and guided by financially justifiable parameters.

22. The Appellant, during hearing testified that she had in fact held a divergent view, along side some members, requiring that any implementation of the questioned increment of salary of the then CEO, be approved by the Cabinet Secretary for Information first before being effected.

23. She pointed to the Board's minutes of 9th April 2019 where she was the proposer to the position taken by a member-one June Gachui, that the implementation of the CEO's salary increments to await a response from the Cabinet Secretary and which proposal was seconded by another member- one Nereah Okanga.

24. This contention as will be seen later in this judgement, shall be the fulcrum upon which the judgement shall heavily rely.

25. The Appellant further contended that in the subsequent board meetings she, and some of the members, maintained the position that implementation would only follow the approval by the CS, but unfortunately that position was never recorded and she was not responsible for taking of the minutes -which were incomplete and apparently doctored.

26. She, however did not produce the said minutes but laid blame on the Chairman who signed the minutes after members had gone through and confirmed them. In her

testimony, she averred that the Chairman and CEO would have a chance to doctor them hence the apparent inaccuracies in the minutes.

27. Besides, it was her contention that the CS in fact later wrote a letter dated 30th April 2019 nullifying the increment and demanding that any money paid out to the CEO, pursuant to the increment be recovered.
28. It was thus her position that she ought not to have been surcharged since she was of a divergent view of increasing the CEO salary subject to the approval from the CS and the approval having been declined, she could not be held liable for money paid out against the recommendation of the CS.
29. The Appellant also argues that the IG has not shown any loss incurred by the KFCB to warrant the surcharge.
30. She concluded by urging this Tribunal to allow the appeal and vacate and set -aside the Surcharge certificate with a declaration that the decision of the Respondent was illegal, irregular, null and void.

THE RESPONDENT'S CASE

31. The Respondent, on the other hand, argues that the Appellant served as member of the Kenya Films Classification Board (KFCB) from 21st October 2016 to 21st October 2022.
32. The Respondent argues further 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 of her being present and part of the Board when the decision to effect the said increment was made.
33. The Respondent also contends 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 **Salary and Remuneration Commission Act** which mandates the Salaries and Remuneration Commission (SRC) to approve the remuneration and benefits of Public Officers (in this case the CEO).
34. 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.
35. 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.
36. The Respondent also contends that he complied with the provisions of **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.

37. The Respondent thus concluded by urging the Tribunal to dismiss the appeal and uphold the Certificate of surcharge No. SUR/007/2024 and award him costs.

ISSUES FOR DETERMINATION

38. Upon careful consideration of the Pleadings, the oral testimonies, parties' documents/affidavits and submissions filed as well as the law, several 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 Chief Executive Officer's salary was legal and regular.*
- ii. *Whether the Appellant, as a member of the board of KFCB was party to the decision to increase the salary of the CEO and liable to be surcharged for any lost funds arising from the said decision.*
- iii. *Whether the decision to surcharge the Appellant and the amount surcharged was justified.*

39. Having set out the issues we will now proceed to analyze and determine each of the above matters separately.

ANALYSIS AND DETERMINATION

i. Whether the increase of the Chief Executive Officer's salary was legal and regular

40. There is no doubt that the Appellant served as member of the Kenya Films Classification Board (KFCB) from 21st October 2016 to 21st October 2022.

41. Based on the oral evidence and documents filed before this Tribunal, it is also not in dispute that the Board of the KFCB, on which the Appellant served, decided on 9th April 2019 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.

42. The parties seem to agree that in the absence of the approval to the increment by the CS, the aforesaid increase was irregular and unlawful only that the Respondent goes further to assert that there was also requirement for consultation of and input from SRC.

43. At this juncture, the key issue that needs to be addressed by the Tribunal when determining whether the increase of the Chief Executive Officer'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 2010** and **Section 11 of the Salaries and Remuneration Commission Act No. 10 of 2011**.

44. 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 CEO?

45. With regards to the first issue on compliance with the provisions of **Article 230** of the **Constitution of Kenya 2010** and **Section 11 of the SRC Act**, the Tribunal observes that the provisions of the Act are couched in mandatory terms.
46. **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.
47. **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 CEO). In the instant case, the Tribunal observes that the SRC's input was sought in determining the salary increments in December 2017, during the first term of the CEO -as seen on page 2 of the Respondent's Bundle of Documents dated 18th March 2025 wherein the CEOs salary was increased from Kshs. 340,000/- to Kshs. 348,840/-.
48. 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 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/-) was unlawful.
49. 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.
50. Indeed, we are puzzled by the fact that the Board opted to disregard the Cabinet Secretary's directions and proceeded to implement the new salary for the CEO and failed to recover any overpayments as directed by the CS.
51. 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 Dr. Mutua as CEO and up until and through the request for renewal of his contract for a second term.
52. In our view, this ought to have formed the basis for deciding the CEO's salary or any increment therein.

53. On the second issue regarding the requirement for approval of the CEOs terms and conditions of appointment by the Cabinet Secretary, we observe that the provisions of Section 11 (C)(1) of the Films and Stage Plays Act Cap 222 are not couched in mandatory terms.

54. 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)

55. 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.**

56. For these reasons the Tribunal finds that the salary increment for the CEO of KFCB was irregular and unlawful.

ii. Whether the Appellant, as a member of the board of KFCB was party to the decision to increase the salary of the CEO and liable to be surcharged for any lost funds arising from the said decision.

57. The Appellant sought to demonstrate that though she participated in the proceedings of the board that led to the decision complained, she was among the minority members who took the position that the implementation of the decision had to await an input and approval from the CS of Information, Communication and Technology.

58. She referred the Tribunal to the minutes of the board meeting of 9th April 2019, and which both parties referred to, and in particular page 4 thereof, which record that a member one June Gachui maintained a divergent view that there was to be no implementation of the increment of the CEO's salary until the CS responds to the issue.

59. The appellant supported that position as a proposer while another member, one Nereah Okanga, seconded.

60. What is apparent is that the chairman, pursuant to the resolution did write to the CS on the same day informing him of the decision of the board to increase the salary of the CEO, and the CS replied the Chairman, vide a letter of 30th April 2019 (D Ex 2) , pointing out that increment was against the Constitution and the State Corporation Act.

61. The CS went further to advise that by virtue of the CEO sitting on the board, the decision put the CEO in a conflict-of-interest situation and raised both ethical and integrity issues.

62. The Chairman was thus advised that the decision was null and void ought to be reversed and if any money had been paid out, the same was to be recovered immediately.

63. Obviously, the CS directive and remarks were ignored and the CEO continued draw the increased salary throughout the period of his tenured that ended in October 2021.

64. As we had earlier hinted in this judgement, we at this juncture turn to the role of the Appellant in the deliberation and ultimate decision of the board to increase the salary of the CEO.

65. The Appellant was present during the deliberations, and actively participated in the meetings in which the decision to increase the CEO's salary were made.

66. However, and from the minutes, especially those of 9th April 2019, the Appellant was among the four members namely, Joyce Wamucii, June Gachui, Nereah Okanga and herself, who took the position that it was important to have consultation with CS for concurrence before Implementation of the increment of the salary of the CEO.

67. In fact, the letter to the CS of 9th April 2019 we referred above was written at their behest with an understanding that the implementation of the increment would have to await a response from the CS.

68. Indeed, the response was negative and it meant the implementation would not be effected as advised by the CS.

69. The management of the KFCB, headed by the CEO, was responsible for the implementation of the directive of the CS not to pay the CEO the increased salary and that any amount that may have been paid out was to be recovered by the said management.

70. The Appellant having registered her view on the need to get concurrence of the CS on the increment cannot be blamed for the failure of the board and management to stop the implementation of the increment especially after the CS came out clearly advising against it.

71. Under **Section 19(3) of the State Corporation Act**, which we hereby quote;

“For the purpose of this section, a member of the Board shall be deemed to be responsible for incurring or authorizing an expenditure if, being present when the resolution of the Board or committee thereof incurring or authorizing the expenditure was passed-

- a) He voted in favour of it; or
- b) **He did not cause his vote against the resolution to be recorded in the Minutes (emphasis ours)**

72. The Appellant caused her position of seeking concurrence, prior to implementation of the increase of the CEO's salary, recorded when she proposed the contrary opinion of member June Gachui that a follow up letter be written to the CS for concurrence before implementation.

73. And in fact, the letter was written by the Chairman of the Board on the 9th April 2019 which got responded to by the CS advising against the increment and implementation of the increment.

74. The board having been directed by the CS, the position of the Appellant meant there would be no implementation and any departure from the directive could not be blamed on the Appellant unless she was a party to it.

75. It was not shown that the Appellant was party to subsequent deliberations and resolutions of the Board that decided to go against the advice of the CS and implemented the salary increment of the CEO.

76. This Tribunal is thus persuaded that the Appellant has demonstrated that had the Respondent considered her position of insisting on concurrence of the CS before implementation of the salary of the CEO, and which position was put in the minutes, the Respondent would not have surcharged her.

77. The Appellant was not a party to the actual decision to implement the increment and to that extent alone we allow the appeal.

78. At this point we wish to bring out a shortfall in the pleadings of the Appellant which did not properly bring out the aspect of none participation of the Appellant in the decision to implement but only dealt with it at length during the hearing.

79. The only saving grace for the appellant was the allegation in the Memorandum of Appeal that the Respondent "*misdirected himself in law in surcharging the Appellant in circumstances that did not merit such action*", although the alleged circumstance were not expressly pleaded and only came to fore during the hearing.

80. Be that as it may, we wish to also allude the Notice of Intention dated 10th July 2024 to the Appellant from the Respondent which if it had been properly served within time, would have accorded the Appellant an opportunity to ventilate her position and may be this appeal would not have been occasioned and the expense that come with it saved.

III. Whether the surcharged is justified

81. From our analysis of the issues, we have already made a finding that the salary increment for the CEO of KFCB was irregular and unlawful.

82. However, we have also made a finding that the Appellant was not a party to the decision to implement the increment which went against the directive by the CS and which directive she had insisted on as a condition precedent to the said implementation.

83. Further, we have also absolved the Appellant from blame and thereby find the surcharge against her by the Respondent was not justified.

84. The Appellant is therefore not liable to pay the surcharge amount of Kshs 2,761,236=.

FINAL DECISION

85. Based on the above analysis, the Tribunal makes the following orders

i. The Appeal be and is hereby allowed.

- ii. The **Certificate of Surcharge SUR/007/2024 for the sum of Kshs. 2,761,236/=** issued by the Respondent against the Appellant is hereby quashed.
- iii. Each party shall bear his/her own costs

R/A 30 Days

DATED SIGNED AND DELIVERED AT NAIROBI ON THIS _____ DAY OF _____ 2025

AGGREY LUCAS KIDIAVAI
CHAIRMAN

BRUNO W. SITUMA
MEMBER

FCPA ANNE WANGECI
MEMBER