

REPUBLIC OF KENYA
IN THE STATE CORPORATIONS APPEAL TRIBUNAL AT NAIROBI
APPEAL NO SCAT 005 OF 2024

JACKSON KOSGEI.....APPELLANT

VS

INSPECTOR GENERAL (CORPORATIONS).....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant served as the Chairperson of the Kenya Films Classification Board (KFCB) from 1st June 2014 to 1st June 2017; and was reappointed from 19th July 2018 to 19th July 2021 pursuant Gazette Notice No 4255 and Gazette Notice No 7258 respectively.
2. 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.
3. On 21st November 2018, during a Special Board Meeting the Board requested the Human Resource and Administrative Committee to review and provide guidance on salary increment to the Chief Executive Officer (CEO), Mr. 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.
5. During the meeting it was observed from the minutes that divergent opinions were received from the sub-committee Chairperson and recorded in the minutes.
6. 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.
7. On the same day, the Appellant (on behalf of the Board) and in order to actualize the increment, wrote to the Cabinet Secretary seeking his approval to effect the Board's decision.
8. On 9th April 2019 the Board met again before the response from the Cabinet Secretary was received and resolved to implement the CEO's reviewed salary. The Appellant again communicated the decision on behalf of the Board to the Cabinet Secretary vide a letter Ref: KFCB/HQS/CONF/01 VOL.V(70) dated 9th April 2019.
9. The Appellant wrote another letter to the CEO under REF: KFCB/2015066(14) communicating the board's decision to increase his salary.

10. 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. The Cabinet Secretary also directed the Board to recover any amounts that had been paid in respect of the requested salary increment in case the Board had implemented its resolution to increase the CEO's salary.
11. From the facts of the matter, it appears that the Board led by the Appellant herein 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.
12. 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 Sixty (Kshs. 27,612,360/-) being the alleged amount lost as a result of the increment.
13. The Appellant herein was surcharged for the sum of Kenya Shillings Two Million Seven Hundred and Sixty-One Two Hundred and Twenty-Six (Kshs. 2,761,236/-) and was issued with a Certificate of Surcharge No. SUR/002/2024 dated 8th October 2024.
14. The Appellant being dissatisfied with the Respondent's decision preferred the present Appeal which was lodged on 8th November 2024. The said Appeal was canvassed via written submissions.
15. The Appellant filed his submissions on 10th April 2025 while the Respondent filed its submissions on 15th April 2025.

THE APPELLANT'S CASE

16. The Appellant being aggrieved by the Certificate of Surcharge No. SUR/002/2024 filed a Memorandum of Appeal dated 7th November 2024 together with the Supporting Affidavit of Jackson Kosgei, the Appellant herein.
17. He contended that the Inspector General (IG) erred in finding that there had been an irregular salary over-payment by the KFCB when the decision to award and the budget for the said salaries was legally made by a duly constituted and empowered Board as provided for under the Films & Stage Plays Act and the State Corporations Act.
18. The Appellant also contends that the IG has not provided reasons for reaching the conclusion that there had been an irregular over-payment and neither has he given the appellant a fair administrative hearing and due process as required under the Fair Administrative Actions Act in contravention of the Appellant's constitutional rights.
19. The Appellant also argues that the IG has not shown any loss incurred by the KFCB to warrant the surcharge.

20. With respect to the amount surcharged the Appellant argues that the amount did not consider statutory deductions and taxes already remitted thus the amounts would subject the Appellant to double payment and would be unjust.

THE RESPONDENT'S CASE

21. The Respondent argues that the Appellant served as the Chairman of the Board of the Kenya Films Classification Board (KFCB) from 19th July 2018 to 19th July 2021 pursuant to his appointment vide Gazette Notice No 7258.
22. 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.
23. The Respondent also contends that the Board of the KFCB failed to comply with the provisions of Section 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 CEO).
24. 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.
25. 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.
26. The Respondent also contends that the IG 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.

ISSUES FOR DETERMINATION

27. Upon careful consideration of the Pleadings, the 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 was subjected 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 the Appellant and the amount surcharged was justified*
28. Having set out the issues we will now proceed to analyze and determine each of the above issues separately.

ANALYSIS AND DETERMINATION

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

29. There is no doubt that the Appellant served as the Chairperson of the Kenya Films Classification Board (KFCB) from as the Chairperson of the Kenya Films Classification Board (KFCB) from 1st June 2014 to 1st June 2017; and was reappointed from 19th July 2018 to 19th July 2021 pursuant Gazette Notice No 4255 and Gazette Notice No 7258 respectively.
30. Based on the documents filed before this Tribunal it is also not in dispute that the Board of the KFCB for which the Appellant served as Chairperson decided 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.
31. 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.
32. The parties in canvassing this issue have relied on the provisions of the Constitution, The Films and Stage Plays Act Cap 222, The State Corporations Act Cap 446 and the Mwongozo Code of Governance for State Corporations.
33. 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 SRC Act.
34. 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 Minister required in implementing the salary increase of the CEO?
35. 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 mandatory terms.
36. 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.
37. 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 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/-.

38. 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.
39. 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.
40. 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 CEO.
41. We observe further that based on the facts of the case, Appellant herein being the Chairperson of the Board abdicated his high calling which required him to give guidance to the rest of the Board Members on key procedural issues.
42. On the second issue regarding the requirement for approval of the CEOs terms and conditions of appointment, we observe that the provisions of Section 11 (C)(1) are not couched in mandatory terms.
43. 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)
44. 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.
45. 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.
46. For these reasons the Tribunal finds that the salary increment of the CEO of KFCB was irregular and unlawful and that the Appellant herein participated in this irregularity.

ii. **Whether the Appellant was subjected to a fair administrative process as envisaged by the Constitution and the Fair Administrative Actions Act**

47. 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.
48. 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:
"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."
49. 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 (Corporations) to invite the person for a hearing before the surcharge certificate is issued.
50. Nevertheless, we observe that the Appellant was invited by the Respondent on the 12th June 2020 vide a letter Ref: ISC/INS/POL/234/VOL II/28 to clarify and give explanations on the issue of review of the salary of the CEO, Dr. Ezekiel Mutua. According to the Respondent's submissions, the Appellant refused, neglected and/ or failed to make any response to the aforesaid letter.
51. Unfortunately, from the evidence tendered before the Tribunal the assertion that the Appellant failed to attend to the contents of the Respondent's letter inviting him for a hearing were never rebutted.
52. Besides, under Section 20 of the State Corporations Act, the Appellant has 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.
53. In the present case, the Appellant sought the reasons after he was served with the surcharge certificate and was provided with reasons by the Respondent in writing in accordance with the law.
54. 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.

55. 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.

56. We thus conclude that the contention by the Appellant that the Respondent breached the provisions of the Fair Administrative Action Act finds no favour in law nor with this Tribunal since the Appellant was invited for a hearing by the Respondent and was given the reasons for the surcharge when he requested for them.

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

57. 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. Consequently, we conclude that the Respondent's decision to surcharge was justified.

58. 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.

59. He also contends that the surcharge amount did not consider statutory deductions and taxes already remitted, which amount to double payment and therefore unjust.

60. 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.

61. 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.

62. 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.

63. Nevertheless, the Respondent 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

64. 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/002/2024 for the sum of Kshs. 2,761,236 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 VIRTUALLY ON THIS __22nd__ DAY OF __July____2025

AGGREY LUCAS KIDIAVAI
CHAIRMAN

BRUNO W. SITUMA
MEMBER

ANNE WANGECI
MEMBER