

REPUBLIC OF KENYA
IN THE STATE CORPORATIONS APPEAL TRIBUNAL AT NAIROB1
APPEAL NO. SCAT /010 OF 2024

JOHN NYAGA.....APPELLANT

VERSUS

INSPECTOR- GENERAL (CORPORATIONS)..... RESPONDENT

JUDGEMENT

BACKGROUND:

1. The Appellant, in the year 2015 was a member of the board of the Kenya Medical Training College, a state corporation established under section 3 of the **Kenya Medical Training College Act, cap 261** Laws of Kenya
2. The Respondent is a state 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. The respondent herein issued a Certificate of Surcharge No. **SUR/KMTC/006/2024** against the Appellant on the **28th November 2024** for an amount of **KShs 1,837,355/-**.
4. The Appellant herein, being dissatisfied and aggrieved by the said decision of the Respondent, lodged this appeal against the decision on 23rd December, 2024.
5. The said surcharge was in respect of remuneration paid to one Dr. Miriam Ndunge Muthoka who was said to have been irregularly recruited from the 13th of November 2015 to the 11th of January 2022, to the position of the Corporation Secretary of the Kenya Medical Training College.
6. The Appellant's appeal is founded on seventeen (17) grounds namely:

- i. The decision of the Inspector-General (Corporations) to surcharge the Appellant was biased, fuelled by ulterior and improper motives, since there was no loss of public funds.
- ii. The Inspector- General (Corporations) erred in law by surcharging the Appellant in breach of Fair Administrative action provisions, in violation of his rights to fair hearing and bereft of rules of Natural Justice.
- iii. The Respondent erred in issuance of Surcharge Certificate when the Board of Kenya Medical Training College (KENYA MEDICAL TRAINING COLLEGE) where the Appellant served was merely implementing the Respondents own recommendations of its report dated the 16th November 2020.
- iv. The KENYA MEDICAL TRAINING COLLEGE is a body corporate established pursuant to section 3 of Kenya Medical Training College Act Cap 251 laws of Kenya.
- v. The Appellant acting in good faith, in the best interest of KENYA MEDICAL TRAINING COLLEGE and jointly with other members appointed Dr. Miriam Muthoka in accordance with section 13(3) of the Kenya Medical Training College Act as its Corporation Secretary as a Deputy Director.
- vi. The Recruitment of the Corporation Secretary was validated and approved by the State Corporations Advisory Committee (SCAC) whose one of the responsibilities is to render advisory of the terms and conditions of employment of the staff of State Corporations.
- vii. The Respondent reviewed its own recommendations by issuance of the surcharge certificates without affording the Appellant the opportunity to ventilate contrary to the provisions of the law.
- viii. Contrary to the provisions of the Constitution on right to Fair Administrative Action and Fair Hearing, the Respondent failed to bring to the attention of the Appellant's their intention to take an adverse action ad mandatorily required under the Law.
- ix. Further, in contravention the Provisions of Fair Administrative Actions Act, the Respondent erred in not undertaking the following.
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;

- (c) notice of a right to review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative section.

x. The Respondent in issuance of the Certificate of Surcharge abused their powers having made recommendations that were long implemented only to turn around subject the Appellant through double jeopardy.

xi. The Respondent abdicated its statutory mandate when it abandoned its reasoned position pursuant to its report dated the 16th November 2020 to pursue other body's interests that do not have a role or conform to the provisions of the State Corporations Act, CAP 446 of the Laws of Kenya.

xii. The Respondent erred in fact by surcharging the Appellant a sum of Kshs.1,837,355/= for the following reasons; -

- (a) Dr. Miriam Muthoka was duly recruited as a Corporation Secretary in accordance with the existing legal and Institutional framework at the time. Specifically the recruitment was undertaken prior to development of Human resource instruments that were duly approved by the State Corporations Advisory Committee (SCAC) in August 2017.
- (b) Dr. Miriam Muthoka's recruitment was competitive and merit based in accordance with the terms set by the Board at the time of engagement.
- (c) Despite review of the Institution's organization structure, staff establishment and career progression guidelines, The SCAC recommended that the terms of the serving Corporation Secretary be reserved on a "personal-to-holder" basis.
- (d) The SCAC being the body with mandate to approve Human Resources Instruments of State Corporations rendered advisory on the need for reservation of Corporation Secretary's which position remains uncontroverted to date and

therefore the Respondent acted *ultra-vires* the provisions of State Corporations Act Cap 446 in issuing the Certificate of Surcharge.

- (e) The Kenya Medical Training College complied with the recommendations of the Respondent and conveyed such compliance to their parent ministry, the ministry of Health in response to their letter dated the 23rd December 2020, seeking status report on the implementation of the actions recommended by the Inspectorate of State Corporations.
- (f) Dr. Miriam Muthoka drew her remuneration commensurate to her title at level KMTC 2.
- (g) Therefore, the question of loss do not arise, as the office of the Corporation Secretary remained occupied between the years 13th November 2015 to 11th January 2022.
- (h) Therefore, surcharge for sums of Kshs.1,837,355/= is misconceived and non-existent loss since Dr. Miriam served and earned remuneration for work satisfactorily done.
- (i) The allegations of favouritism and nepotism cannot be merely alleged without particularisation and were therefore engineered to support unlawful issuance of certificate against the Appellant.

xiii. The Respondents report dated the 16th of November, 2020 recommended censorship of the Board members by the Cabinet Secretary, Ministry of Health whom upon receipt of the implementation status report considered the matter fully settled.

xiv. That the decision of the Appellant for the sum of Kshs.1,837,355/= as the former Board member KENYA MEDICAL TRAINING COLLEGE is without a legal basis and is a gross abuse of the process.

xv. The Appellant finds the surcharge amount to be ambiguous and without any evidential support. Further, even if the amounts were a computation of Dr. Miriam Muthoka's remuneration, the said computation failed to take into consideration the statutory deductions.

- xvi. The decision of the Inspector-General (Corporations) to surcharge the Applicant has caused further and continuing prejudice to the applicant.
- xvii. The Respondent's action is an afterthought, bereft of formal and procedural validity.

7. The Appellant also filed a Notice of Preliminary Objection dated 30th May 2025 wherein he contended that the Certificate of Surcharge dated 28th November 2024 is statute barred by dint of Section 4(1)(d) of the Limitation of Actions Act Cap 22, the cause of action having arisen on 13th November 2015.
8. The Respondent filed a replying affidavit on the 9th of January 2025, sworn by one **James Mungai Warui** together with documents attached thereto in support of the case opposing the appeal.
9. The Appellant further responded to the said replying affidavit by filing a further affidavit sworn by him on the 24th of January, 2025.
10. The Appeal was set down for hearing on the 25th March 2025 and 25th June 2025 and was adjourned at instance of the Tribunal and on request by counsel respectively to 6th and 7th August 2025.
11. However, on the 6th August 2025, when the appeal came up for hearing, the parties' advocates agreed by consent, to proceed with hearing of the appeal by way of written submissions and the Tribunal allowed the matter to so proceed.
12. The parties thereafter were directed to file their respective submissions in support of their cases for consideration by the Tribunal when writing this judgement and on 25th September 2025 we confirmed that each party had filed their respective submissions and we slated delivery of this judgment on the 4th December 2025.

THE APPELLANT'S CASE

13. The Appellant does not dispute that he served as a member of the KENYA MEDICAL TRAINING COLLEGE board representing the Principal Secretary in line with the Kenya Medical Training College Act, CAP 261 in the Year 2015.

14. The Appellant further testified that a Presidential directive conveyed through the Head of the Public Service circular dated the 28th of April, 2015 on implementation of the executive order 7 required full implementation of the Code of Corporate Governance for State Corporations -‘Mwongozo’ in 2015.
15. It was the Appellant’s case that under the *Mwongozo* Code, the KENYA MEDICAL TRAINING COLLEGE Board, like all Boards, was under an obligation and mandated to recruit a Corporation Secretary based on such qualifications and competencies to be determined by the Board.
16. The Appellant further admitted that the KENYA MEDICAL TRAINING COLLEGE Human Resource Instruments did not provide for the positions of a Corporation Secretary but, owing to the circular alluded to above, it necessitated the recruitment without necessarily changing the Human Resource Instruments first, on the basis of “comply” or “explain” principle.
17. The Appellant testified that the Board reallocated funds within its approved budget for payment of the Corporation Secretary’s remuneration prior to the recruitment.
18. The Appellant further testified that the requirement for recruitment of a Corporation Secretary being urgent, the re-allocation was necessary and the Human Resource Instruments would be looked at later to align with the directive-a position which the State Corporations Advisory Committee approved vide their letter of 20th November 2017 – according to the Appellant.
19. According to the Appellant, the requirements for the person to be recruited were set out with Board and appeared in the advertisement calling for interested applicants to apply and Dr. Miriam Ndunge Muthoka was among the applicants.
20. It was the Appellant’s case that after the interviews were carried out, the said Dr. Miriam Ndunge Muthoka emerged as the most qualified and was thus properly appointed the Corporation Secretary by the Board.
21. As a consequence of the foregoing, it’s the Appellant’s position that remunerations made to Dr. Miriam Ndunge Muthoka was proper and no loss of public funds was incurred.

22. Besides, she was excellent in the discharge of her duties and all appraisals of her performance were positive, including that by the Institute of Certified Secretary naming her the second runners-up of the Company Secretary of the Year Award, 2019.
23. The Appellant concluded by asserting that no loss of public funds was occasioned by the recruitment of Dr. Miriam Muthoka and that the decision to surcharge the Appellant was ill advised, made in bad faith and ought to be quashed and/ or set aside.
24. Further, the Appellant referred the Tribunal to the Respondent's own report of audit report of 16th November 2020 which though finding that the recruitment of Miriam Ndunge Muthoka was irregular, recommended only a censure of the board members who sat on the board meeting of 13th November 2015 that made the irregularly appointment but no finding was made on the alleged lost public funds and hence the surcharge was an afterthought and ill advised.

THE RESPONDENT'S CASE

25. The Respondent, in opposing the Appeal, took the position that, on the 8th of November 2019, the Secretary/ Chief Executive Officer, Ethics and Anti-Corruption wrote to the Principal Secretary (PS), Ministry of Health and copied to the Respondent, a letter citing allegations of malpractices at the Kenya Medical Training College (KENYA MEDICAL TRAINING COLLEGE).
26. Following the receipt of the letter, the Respondent constituted a team of Inspectors to carry out a special audit to ascertain the veracity of the allegations raised by the Ethics and Anti-Corruption Commission and the same was communicated to the Permanent Secretary- Ministry of Health.
27. After the audit the team ascertained, among other things that

"Ms. Miriam Ndunge Muthoka was appointed to the position of the Corporation Secretary, Job group M16, on permanent and pensionable terms on the 13th of November 2015 even though she did not meet all the requirements as advertised."

28. The findings of the audit were communicated to the Head of Public Service and other public bodies; among them the Ethics & Anti-Corruption Commission vide a letter of 16th November 2020.
29. That the EACC took up the matter of the recruitment of the said Corporation Secretary and, upon further investigation, the said commission established that Dr Miriam Muthoka was not competent for the position of the Corporation Secretary and she was liable to restitute the income earned during her tenure of employment and be dismissed from service.
30. That the recommendations of the EACC were in agreement with the audit findings of the Respondent.
31. The Respondent pointed out that the said findings of irregular recruitment were confirmed by the High Court in **ELRC Const. Petition No. E018 of 2022, Dr. Miriam Ndunge Muthoka Vs KENYA MEDICAL TRAINING COLLEGE** when it held that the recruitment was flawed and irregular and that the appointing authority (KMTC) do surcharge the Board members for the loss resulting from the respondent.
32. The Respondent maintained that a loss occurred and all Board members, the Appellant included were liable and hence the surcharge for an amount of Kshs. 1,837,355/= against the Appellant and each of the rest of the Board Members who were present when the decision to recruit Ms. Miriam Ndunge Muthoka as Corporation Secretary was made.
33. The amount was the prorated amount equally distributed to each member of the board from the original total loss of Kshs. 23,885,615/= a colossal sum of public money lost.
34. The Respondent thus defended the surcharge order No. SUR/KMTC/006/2024 for Kshs.1,837,385/= against the Appellant and prayed for the dismissal of the appeal with costs.

ISSUES FOR DETERMINATION

35. Based on the documentary evidence and affidavit adduced, together with written submissions by both parties the Tribunal framed the issues for determination as follows:

- i. Whether the process of surcharging the Appellant and issuance of the Certificate of Surcharge was fair, proper and complied with the provisions of the **Constitution, The State Corporations Act, Cap 446 and The Fair Administrative Action Act, 2015 and The Limitation of Actions Act Cap 22 LOK.**
- ii. Whether, by the appointment of Dr. Miriam Ndunge Muthoka as the Corporation Secretary of KENYA MEDICAL TRAINING COLLEGE, there occurred a loss of public funds,
- iii. Whether, the surcharged amount is proper and justified

ANALYSIS AND DETERMINATION

- i. **Whether the process of surcharging the Appellant and issuance of the Certificate of Surcharge was fair, proper and complied with the provisions of the Constitution, The State Corporations Act, Cap 446 and The Fair Administrative Action Act, 2015 and The Limitation of Actions Act Cap 22 LOK.**

36. In the present case, the Inspector General (Corporations), exercising his Statutory powers under **Section 19 (1) (d)** of the **State Corporations Act, Cap 446**, issued a Certificate of Surcharge No. SUR/KMTC/006/2024 dated 28th November, 2015 requiring the Appellant to pay an amount of Kshs.1,837,355/= being an amount arising from the irregular appointment of one Dr. Miriam Ndunge Muthoka (hereafter referred to as Dr. Muthoka) between 13th November, 2025 and 11th January, 2022 to the position of Corporation Secretary of the Kenya Medical Training College.

37. The said amount was part of the remuneration paid to the said Dr. Muthoka, who according to the Respondent received a total of Kshs.23,885,515/= during the period of the irregular employment and which sum had been equally distributed for purposes of recovery to each Board member who was present and participated in the irregular recruitment process.

38. A look at the minutes of the Board of Kenya Medical Training College of 13.11.2015, thirteen (13) were present, including the Appellant and resolved to appoint Dr. Muthoka as the Corporations Secretary of Kenya Medical Training College.

39. The Surcharged amount is thus a portion of Kshs.23,885,615/= that is said to be the total remuneration received by Dr. Muthoka during the entire period of her irregular employment.

40. The question to pose at this stage, and which is central to this appeal, is whether indeed the recruitment of Dr. Muthoka was irregular and thus leading to a loss that supports the decision of the Respondent to surcharge the Appellant and the rest of the Board members who participated in the recruitment.

41. The evidence adduced by the Respondent is that there were clear requirements that were to be met by a candidate who would have ended up being recruited as a Corporation Secretary.

42. Those requirements were set by the Board itself and appeared in the advertisement that was sent out by the Chairman inviting applications for the position. The requirements were for a candidate to meet were:

- i. Hold a Master's degree in business administration from a university recognised in Kenya.
- ii. Certificate in Certified Public Secretary (CPS).
- iii. Have served in a position of management/teaching for a period of at least three years.
- iv. Interpersonal and communication skills.
- v. Passion for continuous professional development.
- vi. Knowledge and experience in project review, monitoring and evaluation.
- vii. Knowledge of higher learning institution's training and programs.
- viii. In addition, candidates will be required to submit copies of membership association, certificate from Kenya Revenue Authority (KRA), Ethics and Anti – corruption Commission (EACC); and provide Certificate of Good Conduct from the Criminal Investigations Department (CID).

43. The successful candidate, including Dr. Muthoka had to satisfy all the above requirement to be considered for appointment and eventual recruitment by the Board.

44. Both parties were in agreement that as of 13th November 2015, Dr. Muthoka was not a Certified Public Secretary (CPS) within the meaning of Section 19 of the Certified Public Secretaries of Kenya Act, Cap 543 which requires a qualified Certified Public Secretary to be registered with the Board of Registration of the Certified Public Secretaries.

45. It was apparent that, Dr. Muthoka, besides not being a qualified Certified Public Secretary, was not a member in good standing of the Institute of Certified Public Secretaries.

46. A look at page 13 of the *Mwongozo*: The Code of Governance for the State Corporation, which guides Boards and which the Kenya Medical Training College Board also relied on in the recruitment process, at code 1.20, Governance practice 1 (c), requires the Board to ensure that the Corporation Secretary is qualified in terms of the provisions of the Certified Secretaries Public Secretaries of Kenya Act, Cap 543. Further, at Governance Practice 1(a), the *Mwongozo* provides that the Board should ensure that the Corporation Secretary "is a member of the Institute of Certified Public Secretaries of Kenya in good standing."

47. Clearly the Board was bound by the law and the *Mwongozo* to ensure that in recruiting the Corporation Secretary, the suitable person ought to have been a registered Certified Public Secretary of good standing, a qualification that Dr. Muthoka lacked and to that extent alone, the recruitment of Dr. Muthoka as a Corporation Secretary was irregular and unlawful.

48. The members of the Board, including the Appellant, went against their own requirements that they had set for the suitability of the right candidate and against their legal duties and trust bestowed upon them to act within the law and in the best interests of the Kenya Medical Training College.

49. It is the finding of this Tribunal that the recruitment of Dr. Muthoka and payment of remuneration to her amounting to Kshs.23,885.615/= for the period between 13th November 2015 and 11th January 2022 was unlawful and sum paid was thus recoverable from all Thirteen (13) members of the board of Kenya Medical Training College, who include the Appellant, who participated in the recruitment process.

50. Section 19(3) and (4) of the State Corporation Act provides as follows:

19(3) “For the purposes 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.**

19(4)A person shall not be freed from liability to surcharge under this section by reason only of the fact that, in the matter giving rise to the liability, he acted in pursuance of any resolution of a Board, or of any committee thereof, if that resolution was contrary to law.

51. The Respondent was therefore right in issuing the Certificate of Surcharge No SUR/KMTC/006/2024 to the Appellant pursuant to Section 19(1) which provides the powers of the Respondent as follows:

19(1) In any investigation conducted under this Act, the Inspector-General (Corporations) shall have power—

- (a) to disallow any item of account which is contrary to the law or to any direction lawfully given to a state corporation;**
- (b) to surcharge the amount of any expenditure so disallowed upon the person responsible for incurring or authorizing the expenditure;**
- (c) to surcharge any sum which has not been duly brought to account upon the person by whom that sum ought to have been brought into account;**
- (d) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred;**
- (e) to certify the amount due from any person upon whom he has made a surcharge.**

52. Further, under Section 19(2) the Respondent is directed in mandatory terms to

“As soon as practicable, after certifying the amount of surcharge; furnish the person surcharged with a certificate of surcharge in the prescribed form.”

53. Even if this Tribunal would be in doubt of its above finding, it finds persuasion in the judgement in **ELR Const. Petition No E018 of 2022, Dr. Miriam Ndunge Muthoka Vs. Kenya Medical Training College** delivered on 22nd September by Justice M. Mbaru, in a matter in which Dr. Muthoka challenged her termination by Kenya Medical Training College, and which termination was based on the ground that Dr. Muthoka's recruitment on 13th November 2015 had been irregular and which recruitment is also in issue in the present appeal.

54. The High Court in that case dismissed the petition and had this to say about Dr Muthoka's recruitment.

"For lack of meeting the minimum threshold for the advertised position, the appointment of the Petitioner (Dr. Muthoka) by the respondent (Kenya Medical Training College) was irregular and wrongful. The appointment of the Petitioner by the Respondent was contrary to Article 232 of the Constitution, 2010 on values and principles of Public Service which included failure to afford fair competition and merit as the basis of appointment...".

"The petitioner benefited from an eschewed process of recruitment and the offer to be allowed to acquire the requisite qualifications after the fact cannot apply to sanitize irregular, wrongful and unlawful process. The appointment was wrongful from the start."

55. The court went further to recommend that;

"The appointing authority, the Respondent and its board members ought to be surcharged for the loss".

56. We are bound by the findings of the High court and shall add no more to reiterate that the surcharge against the Appellant was lawful and proper.

57. The contention that the Respondent contravened the provisions of the Fair Administrative Actions Act for not notifying the Appellant of the intention to surcharge, and not according the Appellant an opportunity to be heard prior to the decision to surcharge being made, finds no favour in law nor with this Tribunal.

58. The same applies to the surcharge itself.
59. We say so because, the powers of the Inspector General (Corporation) to surcharge are granted 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.’
60. The section does not require the Inspector General (Corporation) to invite the person for a hearing before the surcharge certificate is issued.
61. Further the section does not also make it a requirement that the Inspector General (Corporation) must accord reasons for his decision to the person to be surcharged before issuance of the Certificate of Surcharge.
62. Besides, the Surcharge Certificate clearly pointed out the right of the Appellant to demand for reasons from the Inspector General (Corporation) for making the decision to surcharge as provided for by section 20 of the State Corporation Act and the same requires the reasons to be given within 14 days of the demand. The section is in mandatory terms and the Inspector General must comply.
63. In the present case, the Appellant never sought the reasons but chose to appeal to the Tribunal instead, pursuant to section 22 of the Act and which was purely within his right.
64. In our view, the mischief sought to be cured by the provisions of the Fair Administrative Action Act being not being condemned unheard is properly cured in the procedure set out in the State Corporation Act by allowing the aggrieved to seek reasons and also appeal against decision of surcharge.
65. The Inspector General’s decision is thus not final as it is subject to another administrative process which is quasi-judicial in nature and accords the Appellant/aggrieved party an opportunity to be heard and challenge the surcharge decision making process in this Tribunal.

66. Besides, the party aggrieved by the decision of the Tribunal has another opportunity to further challenge the surcharge decision in the Hight Court by dint of the provisions of section 23 of the State Corporations Act.

67. The Tribunal thus finds that the Appellant is not prejudiced in any way and neither have the provisions of the Constitution especially Article 47 nor Section 4(3) of the Fair Administrative Action Act breached by the Inspector General in issuing the surcharge certificate prior to giving the Appellant notice of the intended decision and reasons for the decision.

68. In any case the decision to surcharge was not final but subject to various avenues of challenging it if the appellant had good grounds so to do and exonerate himself.

69. It is noteworthy, that during the pendency of the appeal the recovery of the surcharge amount is stayed by interpretation of section 24(1) of the Act and shall await the outcome of the appeal and this further re-enforces the finding that the Appellant is not prejudiced in any way but accorded ample opportunity to fight the surcharge and defend himself.

70. The Appellant has also contended that the certificate of Surcharge No. SUR/KMTC/006/2024 was statute barred by dint of Section 4(1)(a) and 4(3) of the Limitation of Actions Act, the purported cause of action having arisen on or around 13th November 2015 which is approximately 9 years.

71. We must observe that indeed this contention raises a serious jurisdictional issue. Indeed, if the Tribunal were to find this issue in favour of the Appellant, we would have to drop our tools of trade and allow the appeal *ab initio*.

72. In our view, the question that the Tribunal ought to determine in this instance revolves solely on whether the Appellant herein was “*an employee*” of KMTC and when the contractual breach occurred.

73. We say so having regards to the fact that the Appellant has relied on the case of Nathaniel Kipkorir Tum -vs- Inspector of State Corporations (2015) KEHC 7307(KLR). In the said case the learned judge in his obiter dictum observed that, “*Misappropriation by an employee is a contractual breach. An action to recover such a claim must be brought within 6 years in terms of Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya.*”

74. It is trite law that obiter dictum statements are persuasive statements in nature and ought to be applied based on the circumstances of the matter. The learned judge observed while making his comments that the issue was raised before the tribunal but was not taken up before him on appeal.

75. Whereas the Appellant did not attach a copy of the said judgement, we have taken trouble to read the contents of the case to determine whether the obiter dictum statement in the referenced judgement above is persuasive to this tribunal in the circumstances of this matter.

76. With respect to counsel, the Appellant in the referenced case was the Managing Director/CEO of the Kenya Seed Company Limited. He was therefore an employee of the said company and was surcharged in his capacity as an employee. To our understanding this was the basis under which the Learned Judge determined that the claim ought to have been brought within 6 years on account of the existing *employer- employee relationship*.

77. In the instant case, the Appellant was surcharged in his capacity as a Board Member. Board members are generally not considered employees by default; they are officeholders who are paid allowances, not salaries.

78. The tribunal therefore finds that the reliance on the obiter dictum statement made by the learned judge would not be applicable in the instant case as the Appellant was not "*an employee*" receiving salary; but a board member receiving allowances in the circumstances of the case.

79. In that regard, the provisions of Article 226(5), Article 201(d) and Article 232 (b) of the Constitution of Kenya 2010 which provide for the implementation of a surcharge against any accounting officer or public official whose actions of omissions lead to the loss of public funds would override those of the Limitation of Actions Act.

80. **Indeed, as stated by the Respondent in its submissions, a constructive reading of Article 226(5) seems in our view to override the provisions of the Limitations of Actions Act on timelines for prosecuting loss of public funds. The Article states that: -**

"If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not."

81. The provisions of Article 226(5), Article 201(d) and Article 232 (b) of the Constitution of Kenya 2010 provide for the implementation of a surcharge against any accounting officer or public official whose actions of omissions lead to the loss of public funds.
82. Article 226(5) specifically provides that, *"If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not."*
83. From a reading of the provision, recovery of funds can be done during or after the tenure of the public officer indicted for the said loss without mention of the time frame within which such recovery should be made (*emphasis ours*).
84. In addition to the said constitutional provision, section 42(k) of the Limitation of Actions Act provides that the Act shall not apply to, *"actions, including actions claiming equitable relief, in which recovery or compensation in respect of the loss of or damage to any public property is sought."*
85. For purposes of clarity, it behoves this Tribunal to examine and determine the meaning of the term "property".
86. Under the provisions of Section 3(1) of the Interpretation and General Provisions Act, *"property includes money, goods, choses in action, land and every description of property, whether movable or immovable; and also, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as herein defined;"*
87. Additionally, Section 45 of the Anti-Corruption and Economic Crimes No. 3 of 2003 provides that, *"public property means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body."*
88. Based on the above interpretations of the term property, we conclude that the applicable provisions with respect to Limitation of Actions would be Article 226(5) of the Constitution 2010 as read with Section 42(k) of the Limitation of Actions Act which exempt actions related to recovery of lost public funds from being statute barred.
89. The Tribunal therefore finds that the Respondent's decision to surcharge the Appellant was not statute barred based on the referenced provisions of the Constitution and various statutes referred to above.

ii) **Whether, by the appointment of Dr. Miriam Ndunge Muthoka as the Corporation Secretary of Kenya Medical Training College, there occurred a loss of public funds**

90. Having found that Dr Muthoka was not qualified to be appointed as a Corporation Secretary we proceed to examine the second issue as to whether her recruitment resulted to loss of funds.

91. There is no doubt that for the period between 13th November 2015 and 11th January 2022, Dr. Muthoka received a remuneration amounting to **Kshs.23,885.615/=**. The same was supported by evidence of payslips for the aforesaid period.

92. Having already found that the recruitment of Dr. Muthoka as a Corporation Secretary was irregular, unlawful and contrary to the provisions of **Section 79 of the Public Finance Management Act, 2012 and Section 19 of the Certified Public Secretaries of Kenya Act, Cap 543**, it would be foolhardy of this Tribunal to conclude that there was no loss of public funds.

93. We therefore make a finding that there was loss of public funds in payment of remuneration to Dr Muthoka who had been irregularly recruited.

iii) **Whether, the surcharged amount is proper and justified**

94. Having found that the recruitment of Dr Muthoka was irregular and unlawful, and that it led to loss of public funds, we are of the considered view that the said funds were thus recoverable from all Thirteen (13) members of the board of Kenya Medical Training College, who include the Appellant, who participated in the recruitment process.

95. In making this finding, the Tribunal also relies on the provisions of **section 19(3) and (4) of the State Corporation Act** provide as follows:

19(3) "For the purposes 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.**

19(4)A person shall not be freed from liability to surcharge under this section by reason only of the fact that, in the matter giving rise to the liability, he acted in pursuance of

any resolution of a Board, or of any committee thereof, if that resolution was contrary to law.

96. We conclude therefore that the Respondent was right and justified in issuing the Certificate of Surcharge No SUR/KMTC/006/2024 to the Appellant pursuant to **Section 19(1)** of the Act which provides the powers of the Respondent as follows:

19(1) In any investigation conducted under this Act, the Inspector-General (Corporations) shall have power—

- (a) to disallow any item of account which is contrary to the law or to any direction lawfully given to a state corporation.***
- (b) to surcharge the amount of any expenditure so disallowed upon the person responsible for incurring or authorizing the expenditure.***
- (c) to surcharge any sum which has not been duly brought into account upon the person by whom that sum ought to have been brought into account.***
- (d) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred.***
- (e) to certify the amount due from any person upon whom he has made a surcharge.***

97. Indeed, under **Section 19(2) of the Act** the Respondent is directed in mandatory terms to:

“As soon as practicable, after certifying the amount of surcharge; furnish the person surcharged with a certificate of surcharge in the prescribed form.

98. Finally, we observe again from the judgement in ELR Constitutional Petition No E018 of 2022,

Dr. Miriam Ndunge Muthoka Vs. Kenya Medical Training College that the court went further to recommend that: -

“The appointing authority, the Respondent and its board members ought to be surcharged for the loss.”

99. We are bound by the findings of the High court and shall add no more to reiterate that there was loss of public funds because of Dr. Muthoka's appointment as Corporation Secretary KMTC and for which she drew a salary.

100. The Respondent exhibited all the pay-slips in respect of the remuneration to Dr. Muthoka of her irregular employment and which shows she earned a total of **Kshs.23,885.615/=**.

101. That is the amount that was to be repaid by the Thirteen (13) board members, including the Appellant herein, who had irregularly recruited the Corporation Secretary and each was

to bear equal liability thus the amount of the surcharge of **Kshs.1,837,355.58** for each board member then including the appellant.

102. That is the amount for which the Appellant like the of the board members, is called upon to pay back in the Certificate of surcharge No.**SUR/KMTC/006/2024**.

103. The Tribunal appreciates the need to call on the appellant to only pay sums properly and clearly worked out taking into accounts what the Appellant say was failure to take into account the statutory deductions unfortunately the Appellant did not point out the statutory deductions that were not factored in the computation and hence the Tribunal was not availed material on which to rely on and make a finding in that respect.

FINAL DECISION

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

- i. The Appeal be and is hereby dismissed.
- ii. The Certificate of Surcharge No. **SUR/006/2024** for the sum of **Kshs.1,837,355.58** is upheld and confirmed against the Appellant.
- iii. Each party shall bear his own costs

R/A 30 Days

DATED AT NAIROBI THIS.....DAY OF2025

AGGREY LUCAS KIDIAVAI-Chairman Signature.....

BRUNO SITUMA-----Member Signature.....

ANNE WANGECI-----Member Signature.....