



**Yoya v Kenyatta International Convention Center & 2 others; Mwaura (Interested Party)
(Petition E060 of 2024) [2025] KEELRC 2561 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2561 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E060 OF 2024
HS WASILWA, J
SEPTEMBER 23, 2025**

BETWEEN

TONGE YOYA PETITIONER

AND

KENYATTA INTERNATIONAL CONVENTION CENTER ... 1ST RESPONDENT

**THE CABINET SECRETARY MINISTRY OF TOURISM &
WILDLIFE 2ND RESPONDENT**

HON ADELINA MWAU 3RD RESPONDENT

AND

JAMES MBUGUA MWAURA INTERESTED PARTY

JUDGMENT

1. By a Petition dated 23rd April 2024, the Petitioner sought for the following reliefs; -
 1. A declaration that gazette notice number 3753 Vol CXXVI-No. 37 dated 25th March 2024 appointing James Mbugua Mwaura as the Chief Executive Officer for the 1st Respondent is unconstitutional, illegal null and void.
 2. A declaration that the purported concurrence between the head of public service and the 2nd Respondent on appointment of the Chief Executive Officer is unconstitutional, null and void.
 3. An order of mandamus be and is hereby issued directing the 2nd Respondent to duly gazette the name of Mrs. Patricia Ondeng's as the Chief Executive Officer for the 1st Respondent in line with communication letter of the 3rd Respondent dated 29th September 2023.



4. An Order restraining the Respondents either by themselves, employer, employees, servants and/or agents from harassing, intimidating or terminating the employment of Mrs. Patricia Ondeng' before the lapse of her 3 years Contract.
5. Costs of this Petition be borne by the Respondents.

Petitioner's Case

2. The Petitioner avers that on 25th March 2024, the 2nd Respondent, Hon (Dr.) Alfred N. Mutua, vide gazette notice number 3753, Vol. CXXVI – No. 37 duly appointed Mr. James Mbugua Mwaura, the Interested Party herein, as the 1st Respondent's Chief Executive Officer (CEO) contrary to Section 48 of the *Tourism Act*.
3. The Petitioners aver that appointment was done notwithstanding the fact that the 3rd Respondent in her capacity as the Chairperson for the 1st Respondent forwarded the name of Mrs. Patricia Ondeng' to the 2nd Respondent's predecessor (Hon. Penina Malonza) vide a letter dated 29th September 2023 recommending her to be appointed as the CEO following the outcome of the interview conducted by the 1st Respondent's Board of Management for the said position.
4. The Petitioner avers that in an open violation of Section 48 of *Tourism Act*, the 2nd Respondent while acting together with his predecessor purported to seek concurrence from the Chief of Staff and the Head of Public service, Mr. Felix Kosgey for the gazetting of the Interested Party as the CEO instead of appointing Mrs. Patricia Ondeng'.
5. In fear of reprisal by the Chief of Staff and the Head of Public service, the 2nd Respondent and his predecessor complied with the unconstitutional and illegal directive requiring concurrence on the 1st Respondent's appointment of its CEO which is not anchored on any provision of the law.
6. It is the Petitioner's case that the shortlist, interview and appointment of the Interested Party was a charade, deliberate and open violation of the law as he does not have the requisite qualification of having served in senior managerial position in tourism for the last ten years as required by section 48(2) of *Tourism Act*, which requirement is well captured in the 1st Respondent's advert for the position.
7. The Petitioner avers that upon illegal assumption of office, the Interested Party has since purportedly used his position to immediately confer benefit upon himself by instructing execution of a consent between his advocate Main Njuguna & Associates and the Hon. Attorney General backdated to 27th March 2023 compromising his pending case number E382 of 2022 without the 1st Respondent's board resolution authorizing the same.
8. He further avers that in open defiance and conflict of interest, the Interested Party is purporting that the 1st Respondent has withdrawn the show cause letter dated 8th April 2022 while he has withdrawn his case number E382 of 2022 before the Employment Court without orders as to cost.
9. The Petitioner avers that vide an urgent notice dated 28th March 2024, the Interested Party convened a meeting of the 1st Respondent's board meeting with one of its agenda being "To consider proposal by the Claimant to withdraw the matter in cause No. ELRCC E 382 of 2022 – James Mwaura (Applicant/ Claimant) versus KICC(Respondent)" essentially negotiating for the termination of notice to show cause letter dated 8th April 2022 and suspension letter dated 13th May 2022.
10. It is the Petitioner's case that the appointment of the Interested Party beats logic as he was not qualified to be shortlisted for lack of the requisite 10 years in senior management position in the tourism sector and with pending disciplinary case.



11. The Petitioner contends that the 2nd and 3rd Respondents only bowed to an unlawful and an illegal order by the Chief of Staff and Head of Public Service in fear of reprisal and gazetted the Interested Party as the 1st Respondent's Chief Executive Officer while shortchanging Mrs. Patricia Ondeng', the qualified candidate purely on basis of considerations only known to themselves.
12. It is the Petitioner's case that not only does Mrs. Patricia Ondeng' stand to suffer but the rest of Kenyan citizens stand to suffer unimaginable harm without deterrence of the Chief of Staff and the Head of Public Service's unconstitutional.
13. It is the Petitioner's case that the Respondents' actions violated Articles 21, 3, 10 (1), 10 (2), 21 (1), 22 (1), 23 (1), 27, 28, 35, 41, 162 (2) of *the Constitution* of Kenya, Section 5(1) of the *Employment Act*, Section 48 of *Tourism Act* and Regulation 65 of the Public Service Regulations 2020.
14. The Petitioner avers that the Respondents have violated his right to fair labour practice and administrative action that is expeditious, efficient, just, lawful, reasonable and procedurally fair by shortchanging the duly appointed CEO, Mrs. Patricia Ondeng' and appointing the Interested Party who does not possess the requisite qualifications as per the law.
15. The Petitioner avers that the Respondents are duty bound by *the Constitution*, *Tourism Act*, Public Service Act and Regulations together with *Employment Act*, *Fair Administrative Action Act* and international best practices on employment and treatment of employees to fulfill the legitimate expectation of Mrs. Patricia Ondeng and the people of the Republic of Kenya by appointing her as the 1st Respondent's CEO.
16. The Petitioner avers that the Interested Party has demonstrated contempt for the people of the Republic of Kenya by using the position to cut deals and accrue personal benefits to himself in sharp contrast to ethics of the said office and in open conflict of interest.
17. The Petitioner avers that the petition is rightly before this court as it is clothed with jurisdiction pursuant to Article 162 of *the Constitution* and Section 12 of Employment and Labour Relations Court; as the matter emanates from employer being 1st Respondent, who is a creation of Section 40 of *Tourism Act* as a public entity drawing its funding from appropriation by the parliament or exchequer and Mr. James Mwaura having been unlawfully appointed via gazette notice dated 24th March 2025 and being paid through exchequer.
18. The Petitioner further avers that Article 258 (1) & (2) of *the Constitution* states that

‘every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or threatened with contravention in addition to acting on the court proceeding may be instituted by a person acting in Public interest.’

Respondents' Case

19. In opposition to the Petition, the Respondents filed a Replying Affidavit dated 13th June 2025 sworn by John Ololuaa, the Principal Secretary of the State Department for Tourism.
20. The Respondents aver that 1st Respondent is a State Corporation established under Section 40 of the *Tourism Act*.



21. The Respondents aver that the Ministry plays a critical role in appointment of CEO as outlined under Section 48 (1) of the *Tourism Act* which provides that:

'... the Cabinet Secretary shall, in consultation with the Board of the Convention Centre, appoint a person to be the Chief Executive Officer of the Convention Centre through a competitive process...'
22. It is the Respondents' case that the 1st Respondent is fully aware of its constitutional, statutory, policy obligation and responsibility to ensure that any appointments, and removal of its Chief Executive Officer is done in a transparent, open, and fair manner in accordance with laid down legal mechanisms.
23. The Respondents aver that the position of the 1st Respondent's CEO was advertised on 1st August 2023 and the period for applications closed on 22nd August 2023. Subsequently, the Public Service Commission (PSC) undertook the selection process between 23rd August 2023 and 27th September 2023 and prepared a report containing the long list, shortlist and outcome of the face to face interviews.
24. Thereafter, the 3rd Respondent, vide a letter dated 29th September 2023 requested for the concurrence of the Ministry to progress the appointment of the next CEO of the Convention Centre and she then forwarded three (3) names being; Mrs. Patricia Terer Ondeng', Mr. Hashim Ahmed Hussein and Mr. James Mbugua Mwaura to the 2nd Respondent and a copy to the Chief of Staff and Head of Public Service.
25. The Respondents aver that vide a letter dated 22nd November 2023, the 2nd Respondent requested the Chief of Staff and Head of Public Service for the concurrence to progress the appointment of the next Chief Executive Officer of KICC.
26. The Chief of Staff and Head of Public Service responded vide a letter dated 22nd March 2024 and granted his concurrence to the appointment of Mr. James Mbugua Mwaura to serve as the next CEO on the ground that its office had received negative reports from investigative agencies regarding the other two (2) candidates.
27. The Respondents aver that on 25th March 2024, Mr. James Mbugua Mwaura was appointed as the 1st Respondent's CEO Gazette Notice Vol. CXXVI-No. 37.
28. The Respondents aver that by virtue of the Circular dated 25th November 2022, the office of the Chief of Staff and Head of Public Service is to give its concurrence for all the appointment of chairpersons, board members and Chief Executive Officers of State Corporations and autonomous bodies.
29. It is therefore the Respondents' case that the Chief of Staff and Head of Public Service was within the ambit of his powers when he responded to them and communicated his decision to settle on Mr. James Mbugua Mwaura from the list of three names forwarded by the Board. Further, he justified his decision on the ground that the other two (2) candidates had negative reports from investigative agencies.
30. Additionally, the other two shortlisted candidates; Mrs. Patricia Terer Ondeng' and Mr. Hashim Ahmed Hussein have personally not filed any court case challenging the reasons put forth by the office of the Chief of Staff and Head of Public Service and/or complained of the same.
31. The Respondents aver that Gazette Notice Vol. CXXVI-No. 37 and dated 25th March 2024 is not illegal as it was as a result of due procedure having been followed and adhered to.
32. The Respondents aver that Section 48 (2) of the *Tourism Act* provides that for a person to be appointed as Chief Executive Officer, he must have an advanced degree in marketing, business administration



- or a related discipline and has at least ten years' experience at senior management level in tourism or hospitality or related sector.
33. The Respondents aver that shortlisting of James Mbugua Mwaura and eventual appointment as CEO was regular as: he holds an MBA from the University of Nairobi, Bachelor's degree in Business Administration from Kenya Methodist University; Certified Public Secretary of Kenya (CS), Certified Public Accountant (CPAK), he is an associate of Kenya Institute of Bankers (AKIB) and; has done Strategic Leadership Development Program (SLDP) among others.
 34. The Respondents further aver that James Mbugua Mwaura meets the requirement for possessing at least ten years' experience at senior management level in a related sector as he has over 16 years' experience as a Senior Manager as evidenced by his work experience.
 35. It is the Respondents' case that the 3rd Respondent was well aware of the case NRB ELRC CAUSE NO. E382 OF 2020- JAMES MWAURA VS. KICC and that the consent recorded in the matter was correctly dated, the same having been deliberated upon and forwarded to counsel on record on or about 9th October 2023.
 36. The Respondents contends that the consent was not an afterthought as alleged by the Petitioner as talks between the parties had been ongoing and the said negotiations resulted in the matter being withdrawn by consent of the parties. Seeking legal recourse in a court of law is a right recognized and protected under Article 22(1) of *the Constitution* and no one should be victimized over the same.
 37. The Respondents aver that the Petitioner has failed to state with precision and clarity the manner in which his rights were infringed upon as was stated in the Anarita Karimi vs. Republic case and as such, this court ought to dismiss the petition with costs to the Petitioner.
 38. The Respondents reiterate that they within their mandate in the shortlisting, recruitment and eventual appointment of the 1st Respondent's CEO and urged the court to dismiss the petition with costs to the Respondents.
 39. It is the Respondents case that this court lacks the requisite subject matter jurisdiction to entertain the matter in light of the provisions of Article 162 of *the Constitution* as read with Section 12 of the Employment and Labor Relations Court Act.
 40. The Respondents aver that the substratum of the Petition does not disclose an employer-employee relationship between the Petitioner and the 1st Respondent as is the finding in *Moi Teaching and Referral Hospital & 3 others v Gikenyi B & 152 others (Civil Appeal E107 & E116 of 2024 (Consolidated) [2025] KECA 937 (KLR)*.
 41. The Respondents aver that the entire Petition hinges on illegally obtained documents that violated the Data Protection Act No. 24 of 2019 hence an illegality deserving of dismissal orders.
 42. It is the Respondents' case that is ill conceived, capricious, bad in law and an abuse of the court process and ought to be dismissed with costs to them.

Interested Party's Case

43. In opposition to the Petition, the Interested Party filed a Replying Affidavit dated 11th June 2025.
44. The Interested Party avers that this court lacks jurisdiction to determine the petition as the Petitioner has originated the Petition not as employee of the 1st Respondent but as a citizen seeking to enforce the rule of law, therefore, there is no employer/employee relationship as required by Section 12 of the Act of the *Employment and Labour Relations Court Act* and Article 162(2)(a) of *the Constitution*.



45. The Interested Party avers that he applied for the position of the 1st Respondent's CEO and underwent a rigorous and competitive recruitment process. Subsequently, he was duly appointed as the CEO on 25th March 2024 vide gazette Notice Number 3753 Vol. CXXVI.
46. It is the Interested Party's case that the recruitment process and my subsequent appointment was guided by standards of objectivity, impartiality, integrity, merit and fair competition and any allegations to the contrary by the Petitioner have been made in bad faith and lack merit.
47. The Interested Party avers that met all the requirements for appointment as the CEO of the 1st Respondent as stipulated under Section 48(2) of the *Tourism Act*, Cap 381, as he had a cumulative work experience of 11 years at senior management in related sectors having worked as: Director Corporate Services with the 1st Respondent from 1st February 2022 till his appointment as CEO; Acting General Manager at Pest Control Products Board from 1st May 2020; Manager, Finance and Planning at Pest Control Board from 1st April 2017; Member, Audit Committee for the Presidency from 20th September 2017; and Officer in charge of accounts at Pest Control Board from March 2013.
48. The Interested Party further contends that he also met the requisite academic qualifications as he possesses the following qualifications, among others: Master in business administration from the University of Nairobi; Bachelor's degree in business administration from Kenya Methodist University; Certified Public Accountant; Associate, Kenya Institute of Bankers; Certified Public Secretary; and Strategic leadership development program.
49. The Interested Party avers that a total of three names of persons who had met all the qualifications as per the requirement under Section 48(2) of the *Tourism Act*, including his, were forwarded to the 2nd Respondent for consideration for appointment to the CEO position.
50. It is the Interested Party's case that Chief of Staff and Head of Public Service acted within his powers when he settled on his name from the list of three names forwarded by the Board; as the Circular dated 25th November 2022 requires that the Chief of Staff and Head of Public Service gives express approval prior to appointment of Chairpersons, Board Members and Chief Executive Officers of State Corporations.
51. The Interested Party avers that he neither aware that Mrs. Patricia Terer Ondeng' challenged the reasons put forth by the office of the Chief of Staff and Head of Public Service nor has she filed any complaint the decision or filed any suit challenging his appointment as CEO.
52. The Interested Party avers that the 3rd Respondent fully complied with the provisions of Section 69(12) of the *Public Service Commission Act*.
53. It is the Interested Party's case that Nairobi ELRC Cause No. 382 of 2022: James Mwaura vs KICC was amicably settled out of court vide a consent dated 27th March 2023 way before his interview and subsequent appointment as the CEO.

Petitioner's Submissions

54. The Petitioner submitted five issues that: whether the purported directive and/or concurrence by the Head of Public Service to appoint Mr. James Mwaura is unconstitutional, illegal thus null and void ab-initio; whether the Petition has merit and the Petitioner entitle to the relief sought; whether the Honourable court has jurisdiction to determine this Petition; whether the directive by the Head of Public Service to appoint Mr. James Mwaura was/ or is unconstitutional, Illegal thus null and void ab-initio; and whether Mr. James Mwaura has the requisite qualification of 10 years' experience to be appointed as Chief Executive Officer of the 1st Respondent.



55. The Petitioner submitted that to protect and safe guard public interest espoused in Article 22,27(4), 28, 41, 47, 201(d), 232 & 258 of *the Constitution* from being sacrificed on the altar of few individuals' interests, gazette notice Vol. CXXVI -No. 37 dated 25th March 2024 appointing James Mbugua Mwaura as the 1st Respondent's CEO was unconstitutionally done; therefore, it is illegal thus null and void ab-initio and should be declared as so.
56. The Petitioner submitted that the gazettment was done in contempt to the people of the Republic of Kenya through a flawed process that is not anchored on any known provision of the law.
57. The Petitioner submitted that the competitive recruitment process required by Section 48(1) of *Tourism Act* begun by public advertisement on 1st August 2023 which ran up to 22nd August 2023. The selection process was done between 23rd August to 27th September 2023 whereupon the shortlisted candidates were taken through psychometric and emotional intelligence assessment at the Kenya School of Government on 28th September 2023. Thereafter, the board of management under stewardship of the 3rd Respondent further conducted face to face interview and arrived at the scores and results as follows: Mrs. Patricia Terer Ondeng-77.4%; Mr. Hashim Ahamed Hussein-74.8 %; and Mr. James Mbugua Mwaura-69.6%.
58. The Petitioner submitted that subsequently, the 3rd Respondent wrote to the Cabinet Secretary on 29th September 2023 recommending Mrs. Patricia Ondeng to be appointed as the 1st Respondent's CEO having highly qualified with 27 years of experience in tourism industry and proven track record of success in leading and management through achievement of results.
59. The Petitioner avers that instead of appointing Mrs. Patricia Ondeng as recommended by the 3rd Respondent in line with Section 48 of *Tourism Act*, the 2nd Respondent, Hon. Dr. Alfred Mutua, purportedly wrote a letter dated 22nd November 2023 to the Chief of Staff and the Head of Public Service making reference to an initial letter dated 2nd October 2023 by his predecessor Hon. Penina Malonza, who also purportedly sought for permission to appoint Mrs. Patricia Ondeng as recommended by the board of management.
60. It is the Petitioner's submissions that the 2nd Respondent in an unconstitutional and unlawful venture rescinded his lawful duty and handed it over to the Head of Public Service outside any known provision of the law thus invalidating lawful competitive recruitment process where thousands of public resources had been expended at the expense of tax payers and in blatant violation of Article 201(d) & 232 of *the Constitution*.
61. The Petitioner submitted that it beats the logic of reasoning how the Head of Public Service in their appointment of Mr. James Mwaura, purports to have requested for fit and proper clearance of candidates from nations investigative agencies pursuant to Chapter IV of *the Constitution* and received negative report on some of the recommended candidates after the conclusion of public competitive process done pursuant to the law by the Board of Management.
62. The Petitioner submitted that the court must resist an invitation to validate the attempt by Head of Public Service to operate a government outside the provision of *the Constitution* by forming himself into another Board of Management and decides who gets a public position regardless of qualification single handedly conducting another round of selection in public recruitment where candidates do not have an opportunity to respond to serious allegations levelled against them in an open violation of Article 41, 47 & 232 of *the Constitution*.
63. It is the Petitioner's submission that the only reason for discrimination meted on Mrs. Patricia Ondeng is by the virtue of her sex as woman and probably on political consideration that suit the interest of the



- Head of Public Service against the dictates of Article 27(4), 41, 47 & 232 of the Constitution. The Head of Public Service directed appointment of Mr. James Mwaura who came distant 3rd in the interviews and has never served in senior managerial position in the Tourism Industry for the last 10 years as required by Section 48(2) of the Tourism Act and thus does not qualify to be appointed as the CEO.
64. The Petitioner submitted that Patricia Odeng' applied as a Kenyan, was shortlisted, vetted and ranked the most qualified and it is in the public interest that Kenyans are not short-changed due to vested personal interest serving only few individuals by appointing a non-qualified person.
65. The Petitioner submitted that if the Head of Public Service or investigative agencies had anything against Patricia Terer Ondeng or any other candidate, then they would have brought the same to the attention of the interviewing panel or the board of management who would have shared the allegations with Patricia for appropriate response in a fair administrative process envisaged by Article 47 & 232 of the Constitution for transparency and provision to the public of timely accurate information.
66. The Petitioner submitted that at the time of the unconstitutional and unlawful appointment of the Interested Party, he had an active disciplinary case whereupon he had filed case 382 of 2022 James Mwaura versus Kenyatta International Convention Center at the Employment and Labour Relations Court in Nairobi. In the said statement of claim, is a proof that the Interested Party was employed in a senior management as the 1st Respondent's Director Corporate Services on 1st February 2022, thus, by the time of his unlawful appointment he had only served as a senior manager in the tourism industry for 1 year and not the requisite 10 years as required under Section 48(2) of Tourism Act.
67. The Petitioner submitted that upon unlawful ascension to the office, the Interested Party immediately summoned the board of management on 28th March 2024 for a virtual board meeting to serve his personal interest by considering an agenda on proposal to withdraw the matter in ELRCC E 382 OF 2022 – James Mwaura versus KICC; and went ahead and purported to adopt a consent dated 27th March 2023 between his advocates and the Hon. Attorney General for KICC.
68. The Petitioner cited Section 12 of the Public Officer Ethics Act which states:
- “(1) A public officer shall use his best to efforts to avoid being in a position in which his personal interests conflict with his official duties.
- (2) Without limiting the generality of subsection (1), a public officer shall not hold shares or have any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties.
- (3) A public officer whose personal interests conflict with his official duties shall-
(a) declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and (b) refrain from participating in any deliberations with respect to the matter.
- (4) Notwithstanding any directions to the contrary under subsection (3)(a), a public officer shall not award a contract, or influence the award of a contract, to- (a) himself; (b) a spouse or relative; (c) a business associate; or (d) a corporation, partnership or other body in which the officer has an interest.
- (5) The regulations may govern when the personal interests of a public officer conflict with his official duties for the purposes of this section.



(6) In this section, “personal interest” includes the interest of a spouse, relative or business associate.”

69. It is the Petitioner’s submission that the Interested Party’s action of direct conflict of interest in compromising his disciplinary case immediately is a vindication to the board of management who found him unfit for appointment to the position of CEO and an indictment to the Cabinet Secretary and Head of Public Service who appointed him without the requisite qualification.
70. The Petitioner submitted that the Interested Party must face disciplinary action for abuse of office and the board deliberation of that day be declared null and void which should be expeditiously done by the Board of Management.
71. The Petitioner submitted that the court must not validate the Respondents’ unlawful action of appointing the Interested Party without compliance with the Articles 10, 41, 47 and 232 of *the Constitution* and Section 48(2) of *Tourism Act* 2022 read together with Section 5 of *Employment Act* 2007.
72. The Petitioner submitted that the gazette notice appointing the interested party should be declared unconstitutional, illegal, null and void ab initio and the 2nd Respondent and the Head of Public Service reprimanded for acting ultra vires to their lawful mandate as public officers. They should also be compelled to take personal liability by paying the damages to the people of Kenya for acting outside the bounds of *the Constitution* and the law.
73. On the second issue, Petitioner submitted that the country must be governed pursuant to the law and the 2nd Respondent and the Head of Public Service’s actions alongside the Interested Party does not meet the bare minimum threshold of the law and amount to cutting corners with matter of national interest exposing the public to suffer losses as few individuals serve their interest.
74. On the third issue, the Petitioner submitted that the question of Jurisdiction touching on Article 162 and Section 12 of the Act is well settled by the Supreme Court in the matter of Odongo v Clerk, Nakuru County Assembly & 5 others (Application E053 of 2023) [2024] KESC 29 (KLR) (Civ) (28 June 2024) (Ruling) where the court held that:
- “The above cases demonstrate that this Court has demarcated the jurisdiction of the Employment and Labour Relations Court in line with the provisions of article 162 of *the Constitution* as read with section 12 of the ELRC Act. The common theme in all the cases is that a dispute falling within the purview of the elrc should emanate from an employee-employer relationship and/or affect its status.”
75. The Petitioner submitted that this court is clothed with jurisdiction pursuant to Article 162 of *the Constitution* and Section 12 of Employment and Labour Relations Court. The petition emanates from an employee-employer relationship and/or affect its status with employer being 1st Respondent who is a creation of Section 40 of *Tourism Act* and a public entity drawing its funding from appropriation by the parliament or exchequer; and the employee being Mr. James Mwaura having been unlawfully appointed via gazette notice number Vol.CXXVI-No. 37 dated 25th March 2025 and being paid through exchequer.
76. It is the Petitioner’s submissions that upon unlawful gazette of the Interested party, the employer-employee relationship crystalized between the people having social contract with the government and all her employees.



77. On the fourth issue, the Petitioner submitted that the Respondent admitted that contrary to the qualified candidate communicated to in consultation between the Board of Management of KICC and the Cabinet Secretary, being Mrs. Patricia Ondeng Terer. They were unlawfully directed by the Head of Public Service vide his letter dated 22nd March 2024 to appoint Mr. James Mwaura alleging that after requesting for proper clearance that he (the Head of Public Service) Received some negative report on some of them and did not even bother to attach a copy of evidence in regards to the allegations for the so-called investigative agencies.
78. It is the Petitioner's submissions that the 2nd Respondent is required by section 48(1) of *Tourism Act* to appoint the 1st Respondent's Chief Executive Officer in consultation with the board of 1st Respondent through a competitive process and not seek for unlawful concurrence anywhere.
79. The Petitioner submitted that while the Head of Public Service is trying to carrying himself as the law unto himself, the qualified candidate Mrs. Patricia Ondeng Terer and her counterpart Mr. Ibrahim were cleared by the Ethics and Anti-Corruption commission and Directorate of Criminal Investigations.
80. The Petitioner submitted that the Respondents must be held accountable and Kenyans must be shortchanged after expending public resources in a recruitment. The 2nd Respondent's action to comply with directions to gazette the unqualified Interested Party thus unconstitutional, unlawful and null and void ab initio.
81. It is the Petitioner's submissions that it is in public interest that money is not lost in another round of recruitment and that Mrs. Patricia Ondeng Terer having been found qualified with over 27 years of experience in the tourism and hospitality sector and cleared by EACC and DCI be duly appointed within the law as provided by Section 48 of *Tourism Act*.
82. On the final issue, the Petitioner submitted that the Head of Public Service directed appointment of Mr. James Mwaura who came distant 3rd in the interviews and has never served in senior managerial position in the Tourism Industry for the last 10 years as required by Section 48(2) of the *Tourism Act* and thus does not qualify to be appointed as the CEO of the 1st Respondent.
83. The Petitioner submitted that Section 107 of *Evidence Act* provides that he who alleges must prove. The Interested Party's academic papers presented in court and purported experience gathered while working at Pest Control Board are not certified by commissioner for oaths and not verifiable as true copies of the original. In a public service bedeviled by fake certificate, authentication of academic documents is an ongoing process and some public servant have been terminated for acquiring employment with fake academic documents.
84. The Petitioner submitted that even if the court was given a benefit of doubt that Mr. Mwaura served for the number of stated years at Pest Control Board; the said qualification does not have any relations with tourism and hospitality industry. Pest Control falls in the Ministry of Agriculture cannot part of the same kind in interpretation of tourism and hospitality related sector according to the interpretation rule in "Ejusdem generis".
85. It is the Petitioner's submissions that the Respondents and the Interested Party have completely failed to adduce board minutes sanctioning the purported consent. They also failed to adduce before the court minutes of the board meeting that took place on 2nd April 2025 which Mr. Mwaura summoned to discuss dropping of his case.



Respondents' Submissions

86. The Respondents submitted on four issues: whether the recruitment process of the current Chief Executive Officer was flawed with irregularities; whether the Chief Executive Officer does not meet the prerequisite professional and academic qualifications/requirements outlined in the *Tourism Act*; whether the appointment of the Chief Executive Officer was a violation of Articles 21, 3, 10 (1), 10 (2), 21(1), 22 (1), 23 (1), 27, 28, 35, 41, 162 (2) of *the Constitution* of Kenya, Section 5(1) of the *Employment Act*, Section 48 of *Tourism Act* and Regulation 65 of the Public Service Regulations 2020; and who bears the costs of this petition.
87. On the first issue, the Respondents submitted that the Chief of Staff and Head of Public Service letter dated 22nd March 2024 to the 2nd Respondent over the appointment of the 1st Respondent's CEO granting his concurrence to the appointment of Mr. James Mbugua Mwaura to serve as the next CEO, on the ground that its office had received negative reports from the nation's investigative agencies regarding the other two (2) candidates.
88. The Respondents submitted that they acted within the ambit of their powers and more so that the Chief of Staff and Head of Public Service letter dated 22nd March 2024 clearly stated the reasons for the decision and further that the reasons given were valid, reasonable, fair and rational and that the Petitioner and/or the other candidates were not unfairly discriminated and/or victimized as averred by the Petitioner.
89. On the second issue, the Respondents submitted that the present CEO) of the 1st Respondent has over 16 years' experience as a senior manager in the service industry which is the nature of business of the Respondents' are involved in. Therefore, the Petitioner's argument lacks basis as the qualification of the CEO is as per the *Tourism Act*.
90. It is the Respondents' submissions that as per Section 107 of the *Evidence Act*, he who alleges must prove. Thus, without the Petitioner furnishing this court with any document and/or information to the contrary, the experience of the 1st Respondent's CEO is in a related sector, it follows that the Petitioner's averment falls and the same ought to be disallowed with costs to the Respondents.
91. On the third issue, the Respondents submitted that the Petitioner has failed to state with precision and clarity the manner in which his rights were infringed upon as was stated in the case of Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272 and as such, this court ought to dismiss the petition with costs to the Petitioner. He relied in *Okoit v Board of Directors, Tea Board of Kenya & 2 others; Mutai (Interested Party) (2024] KEELRC 1296 (KLR)* wherein the court observed:
- “we would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important if only to ensure that justice is done in the case that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and in the manner in which they are alleged to be infringed.”
92. The Respondents submitted that merely stating provisions of *the Constitution* without clearly illustrating the manner in which the particular rights were violated fails the test provide for by the courts and not only wastes precious judicial time but also hinders the court from addressing the real issues at hand as the same have not been properly defined. Consequently, the Petitioner is not entitled to the prayers sought and the Petition be dismissed with costs to the Respondent.



93. On costs, the Respondents submitted that costs follow the event. They relied in Cecilia Karuru Nyayu vs. Barclays Bank of Kenya & Another (2016) eKLR which adopted the decision in Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 where the court held that:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event. It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

94. The Respondents submitted that the role of this court is in relation to employment and labour relations disputes more so, recruitment and the appointment does not fall within its ambit as explained in the recent Court of Appeal case of Moi Teaching and Referral Hospital & 3 others v Gikenyi B & 152 others [2025] KECA 937 (KLR).

95. It is the Respondents’ submissions that the petition fails on inter alia that the Petitioner has failed to illustrate with precision how their rights were infringed upon and further that this court is not clothed with jurisdiction to entertain it or at all.

Interested Party’s Submissions

96. The Interested Party submitted that it is an established rule that jurisdiction is everything and without it a court of law must down its tools. He relied in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where the Supreme Court stated that:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

97. The Interested Party further relied in Court of Appeal case Moi Teaching and Referral Hospital & 3 others v Gikenyi B & 152 others [2025] KECA 937 (KLR) wherein the court made a finding that the ELRC has no jurisdiction in matters where there is no employer employee relationship as required by Section 12 of the ELRC Act as follows:

“The 1st to 7th respondents in their petition are challenging what they view to be an on opaque recruitment process, the requirement for boards of state corporations to seek concurrence of their appointments with the chief of staff head of the public service, appointment of chief executive officers of the said agencies during a period the statutory instruments had expired all being contrary to Article 1, 2, 3, 10, 27, 28, 35, 41, 43, 54, 55, 56, 73, 75, 94, 201 and 232 of *the Constitution*. The 1st to 7th respondents originated the petition not as employees of the four parastatals but as citizens seeking to enforce the Rule of law. There being no employer employee relationship as required by Section 12 of the Act, we are persuaded that the issues raised in the petition fall within the jurisdiction of the High Court.”



98. The Interested Party submitted that this court lacks jurisdiction to determine the instant petition as there is no employer/employee relationship between the Petitioner and 1st Respondent as required by Section 12 of the Act of the *Employment and Labour Relations Court Act* and Article 162(2)(a) of *the Constitution*. The Petitioner is challenging the constitutional validity of a recruitment process of the appointment of the Interested Party as the 1st Respondent's CEO and the Petitioner has originated the petition not as employee of the 1st Respondent but as a citizen seeking to enforce the rule of law.
99. On the second issue, the Interested Party submitted that the Petitioner's allegations that he did not meet the qualifications for appointment as the 1st Respondent's CEO are misplaced. To the contrary, the Interested Party met all the requirements for appointment as stipulated under Section 48(2) of the *Tourism Act*.
100. The Interested Party submitted that he has demonstrated that he met all the requirements stipulated under Section 48(2) of the *Tourism Act*. The Interested Party did provide evidence of his over 10 years' experience at senior management level in a related sector; and has also provided evidence that he has an advanced degree in marketing, business administration or related discipline. Specifically, he has a Masters in business administration from the University of Nairobi.
101. I have considered all the averments and submissions of the parties herein. The issues for this court's determination are as follows:
1. Whether this court has jurisdiction to entertain the subject petition.
 2. Whether appointment of the interested party was procedurally done.
 3. What remedies are available in the circumstances.

Issue No 1

102. As concerns the jurisdiction of this court, the Supreme Court settled this contention in the Kenya Tea Growers Association & 2 Others v The National Social Security Fund Board of Trustees & 13 Others (Petition E004 & E002 of 2023) KESC 42(KLR) where the Supreme Court held that this court is mandated to hear matters relating to employee-employee and any matters affecting employers and employees. The petition herein relate to the appointment of the CEO of the 1st respondent which in my view is an employment issue and the petitioner need not be an employee or employer to file this petition.

Issue No 2

103. As regards the appointment of the interested party as CEO the 1st respondent, I have looked at the process leading to his appointment. 1st in regard to the interested party's academic and professional qualifications I note that he has 11 years cumulative experience at senior management level and also the requisite academic qualifications as per the advertisement of the job in question.
104. It is also evident that the interested party applied for this job and was shortlisted as candidate no 6. The interested party was subsequently interviewed for the position. It is however apparent that upon the interview being done, the chairman the 1st respondent wrote to Mr Felix Koskei recommending the appointment of Mrs Patricia Ondeng for appointment due to the fact that she was highly qualified and had 27 years relevant experience in the tourism industry. This letter was written on 29/9/23.
105. In a turn of events, on 22/3/2024 the OP Chief of staff and head of Public Service wrote back to The cabinet Secretary Ministry of Tourism And Wildlife indicating that they had considered all CVS and



clearance form for the candidates and had received some negative reports on some of the candidates. He therefore requested for concurrence to appoint the interested party as the CEO of the 1st respondent.

106. The respondent and interested parties have submitted that the appointment of the interested party was according to the law and in tandem with the circular from the Office of President dated 25/11/22 which indicated as follows:

“the appointment of chairperson board members and CEOs of state corporations and autonomous bodies must receive the express approval of this office prior to gazette and/or appointment. This is to ensure that candidates are suitably vetted while also ensuring alignment with constitutional tenets on diversity. The government printer shall only gazette appointments upon receipt of express approval from this office”

107. It is indeed true that this is exactly what happened and despite the request to appoint Mrs Patricia T. Ondeng, the Office of President did not give concurrence and there was no gazette.
108. In view of the process followed and in accordance with the law and circular in place, it is my finding that the appointment of the interested party was procedural and there is no breach of any constitutional tenet demonstrated so far.

Issue No 3

109. In view of the above I find that the petition thus fails and is dismissed accordingly. There shall be no order of costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2025.

HELLEN WASILWA

JUDGE

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