

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI
ELRC PETITION NO. E046 OF 2025
(Before Hon. Lady Justice Hellen Wasilwa, J)

MOHAMED TACHE DIDA.....
PETITIONER

VS

NATIONAL COHESION AND INTEGRATION
COMMISSION.....RESPONDE
NT

AND

THE HON ATTORNEY GENERAL.....1ST INTERESTED
PARTY

DR. DANIEL MUTEGI GITI.....2ND INTERESTED
PARTY

JUDGMENT

- 1 By an Amended Petition dated 8th April 2025, the Petitioner sought for the following orders, writs and declarations: -
- A. A *DECLARATION* that that the Petitioner has a legitimate expectation to be interviewed and/or informed of reasons for failure to be shortlisted for the vacant position of the Secretary/Chief Executive Officer to the National Cohesion and Integration Commission.
 - B. A *DECLARATION* that the recruitment pursuant to the Vacancy Notice titled "Vacancy" in the position of "Commission Secretary/Chief Executive Officer (CEO), Job Grade NCIC 1 One (1) Post" as placed in the daily newspapers and other media on 21st January 2025 offends Articles 10, 24, 27, 31, 35, 47, 55, 232(1), (c), (d), (f) and 250(12) of the Constitution as read with Section 20 of the National Cohesion and Integration Act and is thus unconstitutional, unlawful, null and void.

- C. A DECLARATION that the requirement of 18 years of experience violates Article 10, 24, 27, 41 and 55 of the Constitution and Section 7(3) and Section 20 of the National Cohesion and Integration Act and is thus unconstitutional null and void.
- D. A DECLARATION that the Respondent's appointment of the 2nd Interested Party as its Secretary/Chief Executive Officer (CEO) is illegal, unconstitutional, null and void for the Respondent's failure to comply with Articles 10, 24, 27, 31, 35, 47, 55, 232(1), (c), (d), (f) and 250(12) of the Constitution as read with Section 20 of the National Cohesion and Integration Act.
- E. A DECLARATION that the failure to make public the names of all respondents and provide meaningful public participation in the recruitment process pursuant to the Vacancy Notice titled "Vacancy" in the position of "Commission Secretary/Chief Executive Officer (CEO), Job Grade NCIC 1 One (1) Post violates article 10, 35, (3), 232 (1) (d) (e) and (f) of the Constitution.
- F. AN ORDER OF MANDAMUS to issue compelling the Respondent to terminate the appointment of the 2nd Interested party as its Secretary/Chief Executive Officer for failure by the Respondent to comply with the Constitutional provisions in the process leading to the appointment.
- G. AN ORDER OF CERTIORARI to issue, quashing the appointment of the 2nd Interested Party as Secretary/Chief Executive Officer of the Respondent.
- H. AN ORDER compelling the Respondent to carry out a fresh and transparent recruitment process of filling the position of the Secretary/Chief Executive Officer to the National Cohesion and Integration Commission in accordance with the law constitutional and statutory provisions.
- I. Costs of this Amended Petition.
- J. Any other orders that this Honourable Court may deem fit for the purpose of enforcement of the Petitioner's fundamental rights and freedoms.

Petitioner's Case

- 2 The Petitioner avers that the Respondent advertised the position of its Commission Secretary/Chief Executive Officer on 21st January 2025 through its job application portal <https://jobs.cohesion.go.ke>. The applications were to be received on or before 4th February 2025.
- 3 The Petitioner avers that on or about the 25th or 26th March 2025, and conceivably after receiving information of the process of and filing of this suit, the Respondent hurriedly published in its website a “Commission Secretary/CEO Shortlist 2025” that indicated 15 persons as shortlisted. The Respondent further published a list of 67 applicants who had applied for the position including the Acting Commission Secretary and CEO, Harrison Gikonyo Kariuki, who was shortlisted.
- 4 It is the Petitioner’s case that the Acting Secretary/CEO has been in charge of the Secretariat and was actively involved in the receiving and processing of the applications despite being overtly interested in the vacant position and having a clear conflict of interest.
- 5 The Petitioner avers that the Respondent interviewed the shortlisted applicants between 26th and 28th March 2025 in complete secrecy despite the position being of public interest.
- 6 The Petitioner avers that on 1st April 2025, Dr. Daniel Mutegi Giti took the oath of office as the Respondent’s Commission Secretary/CEO in a swearing-in ceremony presided over and administered by Chief Justice Martha Koome.
- 7 He contends that it is quite telling that the events leading to the ceremony remained a mystery until the new appointee was sworn in and that the appointee is believed to have commenced undertaking the functions of that office.
- 8 It is the Petitioner’s case that the Respondent’s rush in shortlisting, interviewing and the appointment of the Secretary/CEO shows lack of transparency and failure to transmit to the public information that

is timely and accurate. All these were done after news of this suit had become public is evidently an effort to defeat justice

- 9 The Petitioner avers that for over 19 years, he has built a career in public service, international development, and high-level program management. His professional journey has allowed him to traverse across versatile multidisciplinary, multicultural and multi stakeholder terrain enabling him to serve in diverse roles - from leading large government departments, to designing and implementing complex, multi-donor, multi-sectoral projects.
- 10 On academic qualifications, the Petitioner has a Masters in Electrical & Electronics Engineering from the University of Boumerdes in Algeria (2005) and a Bachelor of Science in Electrical & Electronic Engineering from the same institution (2002).
- 11 Additionally, his articles and opinion pieces published in leading national newspapers since 2016 including; *“Let’s Dare Fight Negative Ethnicity”*; *“Reject Those Advocating Divisive Ethnicity”*; *“Stop Too Much Politicking and Build the Nation”*; and *“Embrace Ruto’s Choice of Peace over Sword”* reflect his unwavering belief that a united, inclusive Kenya is essential for progress and prosperity of all.
- 12 The Petitioner avers that in applying for the position and meeting all the qualifications and requirements, had legitimate expectation that there would be a fair and expeditious recruitment process which to his dismay was not the case. He also had an expectation that the Respondent would adhere strictly to the law in the recruitment exercise but this expectation has been breached.
- 13 It is the Petitioner’s case that as a candidate in the impugned recruitment and appointment process, he was not given a fair chance and his right to fair labour practices under Article 41 of the Constitution was violated.

- 14 The Petitioner avers that the office of the Commission Secretary/CEO is an important public office and the recruitment must comply with Articles 10, 27, and 35 of the Constitution and sections 7 (3) and 20 of the National Cohesion and Integration (NCI) Act, and the Respondent's Human Resource (HR) Recruitment Policy. The recruitment, selection and appointment process should be open, transparent and competitive.
- 15 He asserts that the office is created under Section 20 of the NCI Act and is crucial to bolstering cohesion and national unity and recruitment process should be beyond reproach, apprehension of interference, conflict of interest or manipulation whatsoever.
- 16 The Petitioner avers that the recruitment process was unconstitutional; it was not open, transparent and accountable as prescribed under Article 10 of the Constitution. Additionally, the decisions made in the course of the recruitment process are arbitrary and in contravention of Article 47 of the Constitution and the Fair Administrative Action Act.
- 17 He avers that the Respondent introduced on its website additional higher qualifications that were neither indicated in vacancy notice to the public nor are provided in the NCI Act. This automatically discriminated against and locked out of the recruitment process Kenyans who would have otherwise qualified under the Constitution and the law.
- 18 The Petitioner avers that the Respondents did not conduct public participation on the requirement of the minimum experience level of 18 years and there has been no amendment to Section 20 of the NCI Act to increase the threshold, contrary to Articles 10, 24, 27 and 232 of the Constitution.
- 19 The Petitioner avers that despite being an applicant for the vacant office, the Respondent's failed to declare conflict of interest in contravention of the law. He is the substantive director in-charge of

Human Resources with duties to receive and process all applications, and throughout the recruitment process and to date, the Acting CEO continues to discharge his duties.

- 20 The Petitioner avers that Respondent did not make public its decisions or relevant information on the receipt of applications, longlist of applicants and its analysis, analysis on shortlisting; interview schedule, interview scorecards, interview results analysis and, how the 2nd Interested Party was evaluated as the best and most suited candidate.
- 21 It is the Petitioner's case that the Respondent contravened its own HR Manual Section 3(10)(2) which states that "*The Commission Secretary/CEO shall be appointed by the Commission through an open, competitive, fair and merit-based process. While making the appointment, the Commission shall adhere to national values and principles of Governance and the values and principles of public service as set out in the Constitution*".
- 22 The Petitioner pointed out that the current office bearers at the Respondent consists of persons from one area, the Mt. Kenya region. This includes the Chairman, his deputy and now the Secretary/CEO, flouting the provisions of Section 7 of the NCI Act. Additionally, in its own study "*Ethnic and Diversity Audit of Commissions in the Country*", the Respondent found that some tribes/areas, hog constitutional commission jobs.

Respondent's Case

- 23 In opposition to the Petition, the Respondent a replying affidavit dated 1st July 2025 sworn by its Chairperson, Rev. Dr. Samuel Kobia.
- 24 The Respondent avers that it published a public advertisement in the mainstream media inviting applications from suitably qualified candidates for the position of Commission Secretary/CEO on 21st January 2025.

25 The Respondent avers that the position expressly required candidates to hold, at minimum the following requirements for appointment:

- i. Cumulative period of 18 years in a relevant field in the Private or Public Sector, 8 of which must have been in a Senior Management position;*
- ii. Bachelor's Degree in either Peace and Conflict Resolution, International Relations, Conflict Resolution and Humanitarian, Computer Science, Statistics, Public Administration, Law, Information Technology, Governance, Audit or any other relevant qualification;*
- iii. Master's Degree in either Criminology, Anthropology, Conflict Management, International Relations, Law, Conflict Resolution, Humanitarian Assistance, Public Administration, Security Studies, Disaster Management, Gender Development, Diplomacy & Peace Studies, Public Administration, Security Studies, Forensics, Data Communication, Computer Science, Statistics or any other Social Science;*
- iv. Certificate in strategic leadership, corporate governance course or equivalent qualification from a recognized institution;*
- v. Computer proficiency;*
- vi. Meet the requirements of Chapter 6 of the Constitution;*
- vii. Demonstrated managerial, administrative, and professional competence in work performance and results; and exhibited a thorough understanding of national goals, policies, objectives and ability to relate them to the NCIC.*

26 The Respondent avers that it received a total of 67 applications by the deadline of 4th February 2025, the Petitioner being among the applicants. The list of all applicants and those shortlisted was published on the Commission's website and remains accessible to date for public reference.

- 27 The Respondent avers that it established that the Petitioner's academic qualifications and professional experience did not meet the minimum eligibility criteria as stipulated in the vacancy advertisement. The Petitioner possessed a Master of Science in Electrical Engineering, a qualification which, though commendable, falls outside the scope of the social sciences as contemplated in the call for applications.
- 28 The Respondent avers that the Petitioner did not submit evidence of membership to any recognized professional body or have any certification or training in strategic leadership, governance or public administration which were mandatory requirements.
- 29 Additionally, the Petitioner's public sector experience is confined to service at the County Government of Marsabit as Principal Administrative Secretary (2017-2022) and more recently as County Chief Officer. These roles, while significant, are not comparable in depth or scope to those of the shortlisted candidates, many of whom possessed national and international leadership experience.
- 30 The Respondent avers that the Petitioner did not meet the mandatory requirement of having served in a senior management position for at least eight years. His tenure commenced in or about August 2017, and as at the close of the application period in February 2025, he had accumulated only seven years and six months of such experience. This falls short of the prescribed threshold under the vacancy criteria.
- 31 It is the Respondent's case that the Petitioner was not shortlisted, following a rigorous, competitive, and merit-based shortlisting process that culminated in the selection of 15 candidates. Furthermore, his unsuccessful application was duly communicated to him by way of a letter dated 15th April 2025, following the conclusion of the recruitment process.

- 32 The Respondent avers that the recruitment process was conducted openly and in strict adherence to the provisions of the Constitution, the National Cohesion and Integration Act, the Public Service (Values and Principles) Act, and all other applicable laws, regulations, and policy guidelines.
- 33 The Respondent avers that the call for applications was made through an open and public advertisement published on 21st January 2025 in the *MyGov* newspaper, and on its official website. The advertisement clearly outlined the requisite qualification criteria for the vacancy, specified the mode and address for submission of applications, and indicated the deadline by which all applications were to be received.
- 34 The Respondent avers that upon closure of the application period, the Commission undertook a rigorous evaluation exercise, and on 25th March 2025, duly published on its official website both the longlist and shortlist, thereby affirming the transparency and procedural regularity of the recruitment process.
- 35 The Respondent asserts that the publication of the longlist and shortlist was independent of and antecedent to any knowledge of these proceedings. The pendency of this petition was first reported in the media prior to service, with the earliest publication appearing on Citizen Digital on 26th March 2025 at 4:39 p.m., and subsequent coverage by other outlets on 27th March 2025. Additionally, service upon it was not effected until 27th March 2025.
- 36 The Respondent avers that its evaluation and selection process is conducted in a strictly confidential manner, with access limited solely to duly authorized officers. The confidentiality of the process is a deliberate and essential procedural safeguard instituted to insulate the recruitment exercise from any form of canvassing,

external interference, or improper influence, and to uphold the integrity, impartiality, and fairness of the process.

- 37 The Respondent avers that the details of the process are not disclosed to the Commission's general staff or any third parties until the outcome is formally published. Accordingly, it stands to reason that the Petitioner or any other person could only have accessed such information upon its official publication on its website, and not through any prior or informal source.
- 38 In the alternative, and without prejudice, if the Petitioner is to be believed that he obtained such information from sources other than the Commission's official website, the same amounts to an admission of canvassing, an act that is expressly prohibited and unlawful in public recruitment processes.
- 39 It is the Respondent's case that by his own averments, the Petitioner may have effectively confessed to engaging in improper conduct, thereby undermining the integrity of the process and rendering his application fatally defective and unmeritorious in its entirety.
- 40 The Respondent avers that the constitutional requirement of public participation as set out under Article 10(2)(a) and (c) does not apply to the recruitment of public officers. The process of appointment and promotion within the public service is governed exclusively by the principles enumerated under Article 232 of the Constitution that it be based on fair competition, merit, and inclusivity, and does not envisage or require public participation as a condition precedent to a valid recruitment process.
- 41 It is the Respondent's case that the recruitment process was conducted in an open, transparent, competitive and accountable manner, with the general public being adequately informed at every material stage.

- 42 The Respondent avers that the fact that Mr. Kariuki, who previously served as Acting Commission Secretary/CEO and the Commission's sitting Director of Corporate Services, and Ms. Millicent Okatch the Commission's sitting Director of Research & Knowledge Management were not appointed to the substantive position further underscores the fairness, competitiveness, transparency, and impartiality of the recruitment process. Had the process been biased or tainted by impropriety, either Mr. Kariuki or Ms. Okatch would have been the presumptive beneficiary.
- 43 The Respondent avers that the Petitioner's allegation of tribal discrimination is not only devoid of evidentiary support but is also fundamentally misdirected. It pointed out that the Mr. Hassan Sheikh Mohammed, a distinguished member of the same ethnic community as the Petitioner, previously served as the Respondent's Commission Secretary/CEO for three consecutive terms between June 2010 and April 2019, thus, this conclusively rebuts any suggestion of systemic exclusion or ethnic marginalization within the Commission.
- 44 The Respondent avers that the 2nd Interested Party, Dr. Daniel Mutegi Giti, emerged as the highest-scoring candidate and was duly appointed as its Secretary/Chief Executive Officer (CEO) on 1st April 2025 before the Hon. Chief Justice and lawfully assumed his responsibilities as the substantive CEO.
- 45 It is the Respondent's case that the appointment and commissioning of Dr. Giti was widely publicized as national media outlets were present during the swearing-in ceremony held on 1st April 2025, and several mainstream and community-based stations carried news reports of the event. In addition, the Commission's official website and social media handles were promptly updated to notify the general public of Dr. Giti's appointment and formal assumption of office on the said date. These steps were taken to ensure full

transparency, public awareness, and accountability in the transition of leadership.

- 46 The Respondent avers that it is a matter of public record that it had been without a substantive Commission Secretary/CEO following the suspension and eventual exit of the previous officeholder on 5th April 2023. Thereafter, Mr. Harrison Kariuki was appointed to serve in an acting capacity, a fact that was the subject of proceedings in Nakuru ELRCJR/E003 of 2023. Following the determination of Nakuru ELRCJR/E003 of 2023 on 19th November 2024, the Commission immediately commenced the necessary steps to fill the vacancy in accordance with its mandate and applicable law.
- 47 The Respondent avers that by the time Dr. Giti was appointed, the Commission had operated without a substantive CEO for nearly two (2) years. The prolonged absence of a substantive CEO had significantly hindered its operations and institutional continuity. Given the heightened national tensions and civic unrest falling within the Commission's mandate on peacebuilding and national cohesion it was imperative to expeditiously fill the position to ensure the Commission could execute its constitutional functions effectively.
- 48 It is the Respondent's case that once the 2nd Interested Party was determined to be the most qualified and suitable candidate, there was no legal or practical justification to delay his appointment further, and it was necessary for him to immediately assume office and begin executing his duties in the public interest.
- 49 The Respondent avers that the mere act of submitting an application does not confer a right to appointment, nor does it establish a legally cognizable expectation of success or progression in the recruitment process. Therefore, the Petitioner's reliance on legitimate expectation is misconceived and misplaced.

50 It is the Respondent's case that the Petition is actuated by the Petitioner's personal dissatisfaction with the outcome of the recruitment process, rather than by any demonstrable irregularity or illegality capable of vitiating the process or warranting judicial intervention.

Petitioner's Submissions

51 The Petitioner submitted on six issues: Whether the constitutional values and principles of recruitment, selection and appointment were not adhered; Whether the requirement of the minimum experience level of 18 years was contrary to the constitutional principles and values; Whether the requirement that one must be registered by a relevant professional body is discriminatory and thus unconstitutional; Whether the publication of the longlist and shortlist of candidates complied with constitutional and statutory requirements on public participation; Whether there was a conflict of interest in the application for the vacancy by the then acting CEO of the 1st Respondent; and Legitimate Expectation

52 On the first issue, the Petitioner submitted that the Respondent failed to make public its decisions or relevant information on the receipt of applications, longlist of applicants and its analysis, analysis on shortlisting; interview schedule, interview scorecards, interview results analysis and, how the 2nd Interested Party was evaluated as the best and most suited candidate. Thus, it contravened its own HR Manual Section 3.10.2.1 which states that *"The Commission Secretary/CEO shall be appointed by the Commission through an open, competitive, fair and merit-based process. While making the appointment, the Commission shall adhere to national values and principles of Governance and the values and principles of public service as set out in the Constitution"*.

- 53 On the second issue, the Petitioner submitted that the Respondent did not conduct public participation on the requirement of the minimum experience level of 18 years. Further, there has been no amendment to Section 20 of the National Cohesion and Integration Act (NCI) Act to increase the threshold, which is contrary to Article 10, 24, 27 and 232 of the Constitution.
- 54 The Petitioner submitted that the requirement of the minimum experience level of 18 years violated Article 10 that requires state organs to adhere to the principle of inclusiveness, equality and non-discrimination, since it locks out persons who would have otherwise been entitled to apply for the CEO position.
- 55 He further submitted that the decision unlawfully discriminates against people with less than 18 years' experience since they cannot apply for the said position in violation of Article 27 of the Constitution. The decision further amounted to unfair labour practices under Article 41 of the Constitution as it denied Kenyans, who would have otherwise been eligible to apply.
- 56 It is the Petitioner's submission that the NCI Act is silent on the number of years of experience to be considered for the position of Secretary/CEO, thus, the Respondent cannot couch, this requirement in mandatory terms.
- 57 He placed reliance in ***Henry Mutundu v Independent Electoral and Boundaries Commission & another; Attorney General (Interested Party) [2019] KEELRC 1889 (KLR)*** and ***Masinde v Law Society of Kenya & another [2015] KEHC 507 (KLR)*** and submitted that the Respondent ventured outside its mandate in setting minimum requirements on the number of years' experience one needed to possess.
- 58 On the third issue, the Petitioner submitted that Article 36(2) of the Constitution of Kenya guarantees every person the right to freedom of association, which explicitly includes the freedom not to be

compelled to join an association of any kind. Therefore, the requirement that one must be registered by a relevant professional body is not a justifiable limitation for applicants to a vacancy in a public body such as the Respondent. Membership to such bodies must remain strictly voluntary.

59 On the fourth issue, the Petitioner submitted that the publishing of the longlist and the shortlist of applicants was done hours to the commencement of interviews for the then vacant position. It was done on the Respondent's website, a medium which a very small percentage of the public readily accessed.

60 It is the Petitioner's submissions that the rules of natural justice require that applicants for public office be confronted with the concerns raised by the public at the interview stage to enable them to respond before the recruitment panel can decide that an applicant meets the threshold expected of public office.

61 The Petitioner submitted that the Respondent failed to provide, as required, a reasonable opportunity for the public to participate at some stage in the process leading to the appointment. This was in breach of the requirement of public participation as envisaged by Article 10(2)(a) and (c) of the Constitution.

62 He submitted that publication of names of the applicants and that of those who were shortlisted ought to have been timely, in line with the provisions of Sections 7(1) and 8(2) of the Public Service (Values and Principles) Act. Additionally, the publication of the longlist and the shortlist of applicants and the subsequent publishing of the news on the appointment of the 2nd Interested party on the Respondent's website, which has a low public viewership, fell short of the constitutional right to disclosure of such information and failed to meet the dictates of Mwongozo Code of Corporate Governance.

- 63 On the fifth issue, the Petitioner submitted that Mr. Harrison Kariuki (the then acting CEO) was the substantive director in-charge of Human Resources. His duties included receiving and processing all applications for the advertised position of a substantive Secretary/CEO and that he participated in drawing or approving the indent for advertisement of the vacancy; as it has not been shown that he had nothing to do with processing the list of applicants for the position.
- 64 The Petitioner submitted that the Respondent has failed to provide evidence to refute the assertion that Mr. Kariuki participated in the meetings on the recruitment process. It can be inferred that in his role as Director in-Charge of HR, Mr. Kariuki had unfair insider information while he participated in the recruitment process. He ought to have avoided the conflict of interest by not participating as a candidate. He cited ***Maad CHRP v Council of the Institute of Human Resource Management & 3 others; Kanisa (Interested Party) [2024] KEELRC 268 (KLR)***.
- 65 On the final issue, the Petitioner submitted that the Respondent, as a public organ, invited qualified persons to apply for the position of CEO/Secretary. It thus created a legitimate expectation that the process of appointing the new CEO/Secretary of the NCIC would be open, transparent, competitive, procedurally sound, accountable and not shrouded in secrecy. The Respondent violated this expectation as the process was not transparent, competitive, procedurally sound, accountable.
- 66 The Petitioner placed reliance in ***Kevin K. Mwiti & Others v Kenya School of Law & 2 others [2015] eKLR*** the Court held that the protection of legitimate expectation is at the root of the constitutional principle of the rule of the law, which requires predictability and certainty in dealings with the public.

Respondent's Submissions

- 67 The Respondent submitted on six issues: Whether the recruitment and subsequent appointment of the 2nd Interested Party met the threshold of transparency and procedural fairness envisioned under the Constitution and the governing statutory framework; Whether the Respondent flouted public participation regulations; Whether the Respondent's application of minimum qualifications complied with constitutional principles of merit and fair competition; Whether the recruitment process was discriminatory; Whether there was conflict of interest in the application for the vacancy by the then acting CEO Mr. Harrison Kariuki; Who should bear costs of the suit.
- 68 On the first issue, it was submitted that the Respondent has established that the vacancy was publicly advertised on 21st January 2025 in the *MyGov* newspaper, (a free newspaper with country wide coverage available to the public in both physical print and digital PDF format) and simultaneously uploaded onto the Commission's official website. The advertisement expressly enumerated the qualification criteria, clearly set out the mode of application, and transparently directed applicants to the website for full and detailed job specifications.
- 69 The Respondent submitted that the dual publication satisfied the transparency obligations under Articles 10, 35, and 232 of the Constitution, as well as the Public Service (Values and Principles) Act. Thus, the Petitioner's allegation that the Commission "introduced new requirements" on its website is demonstrably false; the advertisement explicitly guided applicants to consult the website for the comprehensive criteria.
- 70 The Respondent submitted that upon closure of applications, the Commission acted transparently by publishing both the longlist of 67 applicants and shortlist of 15 candidates on 25th March 2025, despite there being no legal obligation to do so, as affirmed in ***Ayieko v National Industrial Training Authority & another [2024] KEELRC 2307 (KLR)***. Additionally, the Petitioner admitted

that he became aware that 67 individuals had applied and that he had not been shortlisted; this is concrete proof that the information was already in the public domain, fatally undermining his claim that the process was concealed.

- 71 The Respondent submitted that upon completion of the interview process that was competitive, merit-based assessment, the 2nd Interested Party attained the highest score and was publicly sworn into office by the Honourable Chief Justice on 1st April 2025. The oath-taking was conducted openly and widely covered by national media outlets. Thereafter, the Commission published his appointment on its official website, thereby formally notifying the public. This orderly and public sequence of events decisively negates any allegation of secrecy or opacity in the recruitment or appointment process and underscores the transparency with which the Commission executed its mandate.
- 72 It is the Respondent's submission that the longlist and shortlist were published online on 25th March 2025, whereas, the coverage of this petition by the media occurred on 26th and 27th March 2025 and service was not effected upon the Commission until 27th March 2025. Therefore, the publication of the longlist and shortlist preceded both awareness of the petition and formal service. Any allegation that the publication was a reaction to these proceedings collapses entirely in the face of this documentary timeline.
- 73 The Respondent submitted that the Petitioner's contention that the confidential nature of the evaluation process amounts to a lack of transparency is legally untenable. Confidentiality in recruitment deliberations is a mandatory safeguard in public-service hiring, designed to insulate the process from lobbying, canvassing, improper influence, and undue interference.
- 74 The Respondent submitted that if the Petitioner privileged information about the recruitment process from sources other than

public publication, such conduct would amount to prohibited canvassing, thereby tainting his own participation. In his further affidavit, the Petitioner produced the Respondent's internal Human Resource Manual, a document not available to the general public; strongly suggesting that he may have accessed privileged materials, thereby undermining both the credibility of his allegations and the propriety of his own conduct.

- 75 On the second issue, the Respondent submitted that Section 3 of the Public Service (Values and Principles) Act does not impose a blanket participatory obligation in all public-service decisions. It provides that public participation is required only in the promotion of the values and principles of public service or in public-service policy-making.
- 76 It is the Respondent's submission that recruitment to an administrative office such as the Commission Secretary/CEO is neither a "value," nor a "principle," nor a "policy" within the meaning of that provision, and therefore does not trigger the statutory participatory obligation as claimed.
- 77 The Respondent submitted that legally there is no constitutional or statutory duty to publish the shortlist and longlist prior to interviews. Therefore, even had the Respondent chosen not to publish either list, the recruitment process would still have complied fully with the law. Additionally, the Petitioner's assertion of illegality fails factually as the lists were indeed published.
- 78 The Respondent submitted that the law regulates advertisement, not post-advertisement processes such as shortlisting or publication of candidate names, thus, the Petitioner's reliance on Section 37 of the Public Service Commission Act is wholly misplaced.
- 79 It placed reliance in ***Sheria Mtaani Na Shadrack Wambui v Public Service Commission & 2 others [2021] eKLR*** wherein the court held: "A careful consideration of the entire of section 37

reveals that the same is only intended to cause the Commission to advertise vacancies.....The provision does not have anything to do with the post- advertisement processes like selection. If the legislature intended the provision to apply to the post- advertisement events like shortlisting, nothing could have been easier than it expressly providing so.”

80 The Respondent submitted that the National Cohesion and Integration Act does not require public participation in the recruitment of the Commission Secretary/CEO, nor does it prescribe publication of the longlist, shortlist, or interview details. The Petitioner has identified no constitutional provision, statute, regulation, or policy obligating the Respondent to undertake such steps. As the Courts have repeatedly emphasized, public participation is contextual, arises only where expressly required, and cannot be judicially imposed absent a clear legislative mandate as held by the Supreme Court in ***British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (Affected Party) [2019] KESC 15 (KLR)***.

81 It is the Respondent's submission that the office of Chief Executive Officer/Commission Secretary is not a constitutional office established under the Constitution. It therefore does not attract the heightened public-participation obligations applicable to the recruitment of State officers or holders of constitutional offices as clarified in ***Havi & 2 others v Kenya Medical Supplies Authority & 4 others; Ramadhani (Interested Party) [2023] KEELRC 2010 (KLR)***.

82 On the third issue, the Respondent submitted that the National Cohesion and Integration Act prescribes no statutory qualifications for the office of the Secretary to the Commission. Section 20 merely establishes the office and provides that the holder shall be

“appointed by the Commission upon such terms and conditions as the Commission may determine.”

- 83 The Respondent submitted that in the absence of a legislatively defined criteria, it was entitled to exercise its discretion to determine the requisite competencies necessary for effective discharge of the CEO’s functions.
- 84 It is the Respondent’s submission that as part of its discretionary mandate, the Commission looked to the *Mwongozo* Code of Governance for State Corporations, not because it is legally bound by it, but because *Mwongozo* represents the recognized governance benchmark and articulates best-practice standards for chief executives within the public sector. Reliance on *Mwongozo* therefore enhanced, rather than undermined, the constitutional principles of fair competition and merit.
- 85 The Respondent submitted that *Mwongozo* Code prescribes objective, competency-based standards for chief executives, including: possession of a relevant bachelor’s degree; a minimum of ten (10) years of demonstrable sectoral experience, with at least five (5) years at senior leadership level; integrity, professionalism, and compliance with Chapter Six of the Constitution; demonstrable strategic, financial-management, and human-resource leadership capacity; and a track record of delivering institutional results within complex public or regulatory environments.
- 86 The Respondent submitted that *Mwongozo* operates as a governance baseline, prescribing minimum standards below which qualifications may not fall. However, it does not bar a public body from prescribing higher or more specialised criteria where justified by its statutory mandate, thus, the Petitioner’s assertion is legally untenable. Further, the Petitioner has neither shown that the enhanced standards were unreasonable nor that they were discriminatory, *ultra vires*, or tainted by improper purpose.

- 87 The Respondent submitted that the uplift to 18 years' experience reflects a reasoned and context-specific assessment that professionally seasoned leadership is indispensable. Membership in a relevant professional body ensures continued professional development, sectoral discipline, and adherence to ethical norms. Consequently, the qualifications it adopted were rational, objectively connected to the statutory functions of the office, and wholly consistent with Articles 10 and 232 of the Constitution. The Petitioner has failed to demonstrate that the criteria were discriminatory, irrational, or *ultra vires*.
- 88 It is the Respondent's submission that the Petitioner was independently disqualified on substantive grounds that he lacked the requisite grounding in any relevant social-science discipline; possessed no certification in governance or strategic leadership; had experience confined to county-level administrative roles; and did not meet the minimum eight (8) years of senior-management experience. These cumulative deficiencies rendered him ineligible for shortlisting irrespective of the additional criteria he now seeks to contest. His exclusion was therefore lawful, rational, and constitutionally compliant.
- 89 On the fourth issue, the Respondent submitted that its inaugural Chairperson, Mr. Hassan Sheikh Mohammed, hailed from the Petitioner's own ethnic community, served three consecutive terms between June 2010 and April 2019; an historical fact that directly undermines any insinuation of systemic ethnic exclusion.
- 90 The Respondent further submitted that the shortlist demonstrates broad ethnic, gender, and disability representation, including Ms. Justa Wawira Mwangi, a person living with a disability, as well as Mr. Abdikadir Omar Aden, a Kenyan Somali from Garissa, like the Petitioner, of Cushitic origin. This composition is wholly consistent

with the Commission's constitutional obligations under Articles 10, 27, and 232 on equality, inclusivity, and non-discrimination.

91 The Respondent submitted that the Petitioner's allegation of tribal discrimination is vague, unparticularised, and wholly unsubstantiated.

92 On the fifth issue, the Respondent submitted that the Petitioner has produced no document, email, minute, affidavit, or internal record evidencing that Mr. Harrison Kariuki participated in shortlisting, contributed to evaluations, influenced scoring, attended interview deliberations, or interacted with the process in any capacity.

93 The Respondent submitted that the insinuation of internal favouritism is untenable. Although, two internal officers, Mr. Kariuki and Mrs. Millicent Okatch, were shortlisted, neither was appointed, therefore, this affirms that the recruitment remained competitive, merit-based, and procedurally insulated.

94 The Respondent further submitted that Clause 3.10.2.1 of its HR Manual states: - *"The Commission Secretary/CEO shall be appointed by the Commission through an open, competitive, fair and merit-based process."* This framework leaves no functional or legal space for an acting CEO or any staff member to influence the outcome.

95 On costs, the Respondent submitted that it is just, equitable, and consistent with the overarching need to deter abuse of the judicial process that the Petitioner, having failed to establish any of the allegations pleaded, bear the costs of the petition. It thus urged the court to award it and the 2nd Interested Party costs.

96 I have examined all the evidence and submissions of the parties herein. The issues for this court's determination are as follows:

1 Whether the recruitment process of the respondents CEO was flawed.

- 2 Whether the respondent breached the petitioners constitutional rights
- 3 What remedies to grant in the circumstances.

ISSUE NO 1

- 97 The petitioner has submitted that the advertisement and recruitment process of the respondents CEO was flawed. He averred that the advertisement itself was based on requirements not in law. The post of the CEO of the respondent is established under section 20(g) NIC act and under the act CEO is charged with the responsibility of administering the day to day management of the commission and control of other staff of the commission and also perform such other functions as may be assigned by the commission. Qualification for this post are not set out in the act.
- 98 In advertising for this post, the commission set out the qualifications for the post including a requirement of a minimum 18 years experience. Indeed the respondent have a duty to ensure that the holder of this office being the head of administration is beyond board and the holder possess the requisite qualifications for the office.
- 99 The petitioner submitted that the commission set out qualifications for the office not in law and cited **Joy Brenda Masinde vs LSK & Another Petition 54 of 2015 (2015) EKLr** where the court noted that the impugned advertisement had added qualification for the applicants outside the ambit of the act.
- 100 In the cited case, qualification for the office had been set out in the Act. In the instant case, a casual look at the NCA shows that qualifications for the CEO are not set out. The respondent thus had a duty to lay out qualification based on the office in question to ensure delivery of services.

- 101 The advert set out qualification in the advertisement which the petitioner has submitted were meant to exclude him from the position. It is my finding however that the respondent did not act in any way outside the NCA which is silent on qualification but also acted to ensure the CEO holds qualifications that are commensurate with the office.
- 102 The petitioner also submitted that the qualification set out were discriminatory whereby the respondent put up a requirement for one to be registered by a relevant professional body. As submitted above, the NCA does not set out any qualification for the CEO. The respondents commission however has functions which are set out under section 25 of NCA. To achieve these functions the commission must ensure it has relevant staff to help it deliver on its mandate.
- 103 Section 26(2) of the NCA states as follows:

“ 2 In the discharge of its functions under this act the commission (a) shall not be subject to the direction or control of any other person or authority....”

It is indeed true that the commission shall not be under control of any person in discharging its function. The insistence by the petitioner that the commission cannot insert a qualification for the CEO as advertised will be to clip its powers and hamper its performance. It is also not discriminatory to insist on certain qualification in the office of the CEO so long as the qualifications set out are reasonable in the circumstances.

- 104 Having analysed the advertisement and qualification thereon, I will address the issue of whether there was publication of longlist and shortlist of candidates and whether this complied with the law. The respondents had admitted publishing the long list and short list of candidates on 25/3/25. The petitioner however avers that members of the public were never invited to submit comments or adverse

reports on the suitability of the applicants. The respondents submitted that they have no legal requirement to publish the list but nonetheless did so and which the petitioner confirmed seeing.

- 105 Indeed, there is no requirement to publish the list under the law but it is clear that the respondent indeed published both the long and short list of the applicants and the fact that the same was published was an invitation to whoever saw it to make comments on the applicants if need be. The averment that this was concealed by the respondents does not therefore add up.
- 106 The petitioner also submitted that the interview process was shrouded in mystery on the period between the shortlist to the appointment of the Interested Party as CEO was only 3 working days. The respondents have submitted that they conducted their interview in integrity and the process was above board. They cited **British American Tobacco Kenya PLC vs cabinet Secretary Ministry of Health (2019) KESC 15(KLR)** where the Supreme Court held that public participation is contextual and arises only where expressly required and cannot be judicially imposed absent of clear legislative mandate.
- 107 Indeed the requirement of public participation is not mandatory depending on the nature of the appointment. The position of CEO of the respondent does not attract heightened public participation as applicable to state officers or holders of constitutional offices as the petitioners would expect.
- 108 Having analysed the advertisement and recruitment process of the respondent's CEO, I note that the advertisement was done within the law as per terms and conditions as determined by the commission. The long and short list was also published and the issue of public participation was not mandatory for the post given the level of the position. The issue of the process being flawed has therefore not been established and is therefore disregarded.

ISSUE NO 2

- 109 The petitioner submitted that the respondents breached the Constitution in the recruitment process of the respondent's CEO. The petitioner submitted that the respondent breached articles 10, 24,27,31,35, 41,47,and section 232(1) of the constitution.
- 110 The petitioner submitted that there was discrimination in terms of the advertisement qualification against him under article 27 of the Constitution. Article 28 deals with right to dignity. Article 31 guarantees right to privacy. Article 35 relation to right to information, article 41 on labour rights and article 47 on fair administrative action. The petitioner in his petition simply stated that these articles of the constitution were breached by the respondent but did not demonstrate how the breach was done.
- 111 I have analysed above how the entire process was done and I do not find any discrimination against the petitioner and neither do I find any other breaches under article 31, 35, 41 and 47 of the Constitution. The submissions that the petitioner's rights under the constitution were breached is therefore found without proof and is dismissed.

ISSUE NO 3

- 112 Having found as above, I do find that the petition as a whole lacks merit and is therefore dismissed accordingly.
- 113 There shall be no order of costs.

Dated, Signed and Delivered Virtually at Nairobi this 14th Day of January, 2026.

**HELLEN WASILWA
JUDGE**