



**Yoya v Kenyatta International Convention Center & 2 others; Mwaura
(Interested Party) (Employment and Labour Relations Petition
E060 of 2024) [2025] KEELRC 967 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 967 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E060 OF 2024
HS WASILWA, J
MARCH 27, 2025**

BETWEEN

TONGE YOYA PETITIONER

AND

KENYATTA INTERNATIONAL CONVENTION CENTER ... 1ST RESPONDENT

**MS REBECCA MIANO CABINET SECRETARY MINISTRY OF TOURISM &
WILDLIFE 2ND RESPONDENT**

**IRUNGU NYAKERA CHAIRPERSON BOARD OF DIRECTORS KENYATTA
INTERNATIONAL CONVENTION CENTER 3RD RESPONDENT**

AND

JAMES MBUGUA MWAURA INTERESTED PARTY

RULING

1. The matter before court is an application dated 12th June 2024 filed by the Respondents and a cross application dated 11th December 2024 filed by Petitioner. The court directed on 14th January 2025 that it will handle both applications concurrently as hereunder: -

Application dated 12th June 2024

Respondent’s Case

2. The Respondents through the Attorney General filed an application dated 12th June 2024 seeking orders that the application be certified urgent, be heard ex parte in the first instance, and that the Honourable Court be pleased to expunge from the record of the Petitioner several documents, including a letter dated 29th September 2023 from the 3rd Respondent to the 2nd Respondent, a letter



dated 22nd November 2023 from the 2nd Respondent to the Head of the Public Service, a letter dated 22nd March 2024 from the Head of the Public Service to the 2nd Respondent and a letter/invitation for a Special Full Board Meeting dated 28th March 2024 from the CEO of the 1st Respondent to the 3rd Respondent and members of the Board of Directors of the 1st Respondent.

3. The application was based on the grounds that the Petitioner had commenced these proceedings through a Petition dated 23rd April 2024 and an Affidavit in Support sworn on the same date, and that the Petition was anchored on the aforementioned documents. It was contended that the said documents were confidential and private in nature, were never directed or copied to third parties including the Petitioner, and that the Petitioner had not disclosed how he obtained them.
4. It was further asserted that the Petitioner never sought or obtained consent from the authors or recipients of the documents before using them as evidence, nor did he invoke the laid-down procedures for procuring information held by the State. The Respondents submitted that the documents ought to be expunged from the record and that it was in the interest of justice to grant the orders sought, as there existed no overwhelming hindrance to their issuance. The Respondents urged the Honourable Court to exercise discretion in their favour considering the peculiar circumstances of the case.
5. The Respondents filed a Supporting Affidavit sworn by John Ololuaa, Principal Secretary, State Department for Tourism, Ministry of Tourism & Wildlife. He stated that the Petition dated 23rd April 2024 relied on confidential documents, including letters exchanged between government entities, which were neither directed nor copied to the Petitioner. He contended that the Petitioner failed to disclose how these documents were obtained and did not seek consent from the authors or invoke the proper legal procedures for accessing state-held information. Relying on counsel's advice, he argued that the documents were unlawfully acquired and should be expunged from the record. He emphasized that allowing the application served the interests of justice and affirmed the truth of his deposition to the best of his knowledge.

Respondent's Written Submissions

6. The Respondents filed written submissions dated 15th July 2024 in support of their application to expunge certain documents from the court record, arguing that the documents were obtained illegally and in violation of due process. They contended that the documents, which were confidential in nature, were never directed to or copied to the Petitioner, who failed to disclose how he obtained them or whether he had the consent of the authors or recipients.
7. The Respondents maintained that access to such documents should have been sought in accordance with Article 35 of *the Constitution* and the *Access to Information Act*, particularly under Sections 8 and 9, which set out the procedure for obtaining official records. The Respondents submitted that the Petitioner's failure to adhere to these procedures rendered the documents inadmissible.
8. They relied on Article 50(4) of *the Constitution*, which provides that evidence obtained in violation of a fundamental right must be excluded if its admission would render the trial unfair or be detrimental to the administration of justice. Additionally, they invoked Section 37 of the *Data Protection Act, 2019*, which restricts the use of personal data for commercial purposes without consent or legal authorization. The Respondents argued that the Petitioner's claim that the documents were used in the public interest was misleading, asserting that the Petition was filed in pursuit of the individual interests of Patricia Ondeng. They pointed to the reliefs sought, including an order of mandamus directing the gazettement of Patricia Ondeng as CEO of the 1st Respondent and an order restraining her termination, to demonstrate that the Petition served private rather than public interests.



9. The Respondents relied on several judicial precedents to support their position. In *Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others* [2018] eKLR, the court held that a party must specify the capacity in which they bring a claim under Articles 22 and 258 of *the Constitution*. They cited *Nairobi Law Monthly & Another v Kenya Electricity Generating Company Ltd* [2013] eKLR, where the court held that a petitioner must formally request information from the State rather than using clandestine means. In *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020] eKLR, the Court of Appeal ruled that parties must follow proper procedures in obtaining public documents and that documents obtained irregularly should be expunged.
10. Similarly, in *Evans Muriuki Muthuuri & 4 others v Attorney General & 2 others*, SC Petition No. 15(E022) of 2022 [2023] eKLR, the Supreme Court held that documents belonging to third parties must be obtained lawfully, and courts should not admit evidence obtained through self-help or clandestine means.
11. Further, in *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR, the Supreme Court held that access to information must follow constitutional procedures, and evidence obtained unlawfully must be excluded. They also relied on *John Muriithi & 8 others v Registered Trustees of Sisters of Mercy (Kenya) t/a The Mater Misericordiae Hospital & Another* [2013] eKLR, which distinguished between cases where documents were obtained lawfully by employees and those where third-party documents were misused. In *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board* [2015] eKLR, the court held that illegally obtained evidence should be excluded. The Respondents also referenced *United States v Alvarez*, arguing that foreign jurisprudence does not override well-established Kenyan principles on the admissibility of evidence.
12. Additionally, the Respondents relied on *Karuma, Son of Kaniu v The Queen* [1955] AC 197, where the Privy Council ruled that illegally obtained evidence should not be admitted if it affects the fairness of the trial. They cited *Reg. v Leatham* (1861) 8 Cox C.C.C 498, which stated that even stolen evidence may be admissible if relevant. However, they distinguished this case from *Olmstead v United States* (1928) 277 US 438, where the U.S. Supreme Court upheld the principle that common law did not exclude illegally obtained evidence. The Respondents also referred to *Helliwell v Piggot-Sims* [1980] FSR 356, which reinforced that civil cases must adhere to rules on lawful evidence procurement.
13. In conclusion, the Respondents submitted that the Petitioner had no lawful basis for obtaining or relying on the impugned documents. They urged the court to find that the documents were obtained in contravention of constitutional and statutory provisions, and in line with binding jurisprudence from the Supreme Court, Court of Appeal, and High Court, the court should expunge the documents from the record and allow the application with costs.

Petitioner's Case

14. The Petitioner opposed the Respondents' Notice of Motion dated 12th June 2024 through Grounds of Opposition dated 5th July 2024, arguing that the application was frivolous, vexatious, and legally irrelevant. The Petitioner asserted that Article 50(4) of *the Constitution* only excludes evidence obtained in violation of rights if its admission would render the trial unfair or compromise justice. The Respondents cited Section 37 of the *Data Protection Act, 2019*, which restricts the use of personal data for commercial purposes, but the Petitioner argued that the evidence in question was not for commercial gain but for public accountability in a recruitment process involving public funds.



15. The Petitioner contended that the letters and documents sought to be expunged were official government correspondence regarding the appointment of the CEO of the 1st Respondent and were therefore matters of public concern, not confidential information. Under Article 1(1) and (3)(b) of *the Constitution*, public officers are subject to scrutiny, and Article 10 mandates transparency and accountability. The Respondents' attempt to conceal recruitment details violated their constitutional duty under Article 35 to publish and publicize important public information. Suppressing this evidence would undermine Article 159, which emphasizes substantive justice over procedural technicalities.
16. The Petitioner relied on various judicial precedents to support the admissibility of the contested evidence. In *John Muriithi & 8 others v Registered Trustees of Sisters of Mercy (Kenya)* [2013] eKLR, the court held that illegally obtained evidence is admissible if it is relevant and does not affect the fairness of the trial. Similarly, in *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board* [2015] eKLR, the court ruled that the manner in which evidence is obtained does not automatically render it inadmissible, as long as it is relevant to the case.
17. The Privy Council in *Karuma, Son of Kaniu v The Queen* [1955] AC 197 and the English case of *Reg. v Leatham* (1861) 8 Cox C.C.C 498 both established the principle that even stolen evidence is admissible if relevant. The same position was taken in *Olmstead v United States* (1928) 277 US 438, where the U.S. Supreme Court held that common law does not exclude relevant evidence solely because it was illegally obtained. Further, in *Helliwell v Piggot-Sims* [1980] FSR 356, the court ruled that judges in civil cases lack discretion to exclude unlawfully obtained but relevant evidence.
18. The Petitioner argued that public interest outweighs any alleged procedural irregularities and that expunging the evidence would shield public officials from scrutiny. The Respondents had not demonstrated any prejudice they would suffer, whereas expunging the evidence would cause irreparable loss to the public. The Petitioner warned that striking out the evidence would necessitate further applications to introduce recruitment details, leading to unnecessary litigation. The Petitioner urged the court to uphold Article 159 and Sections 107-110 of the *Evidence Act*, which place the burden of proof on the party making the claim, and to dismiss the application with costs.

Petitioner's Replying Affidavit

19. The Petitioner, in a Replying Affidavit dated 11th December 2024, opposed the Respondents' application dated 12th June 2024, which sought to expunge evidence from the record. The Petitioner argued that the application was frivolous, vexatious, and an abuse of the legal process. The recruitment of James Mbugua Mwaura as CEO of the 1st Respondent, Kenyatta International Convention Centre, was publicly advertised and gazetted on 25th March 2024.
20. The Petitioner questioned why the intermediate recruitment process should remain confidential, despite involving public officers acting in their official capacity. This secrecy, the Petitioner contended, violated Article 35(3) of *the Constitution*, which mandates the State to publish important information affecting the nation.
21. The Petitioner further asserted that the Respondents failed to demonstrate how the acquisition of the impugned documents violated their right to personal data under Section 37 of the *Data Protection Act, 2019*. Since the Respondents acted in an official capacity, they could not claim personal privacy over official records. The Petitioner argued that Article 50(4) of *the Constitution* allows the exclusion of unlawfully obtained evidence only if its admission renders the trial unfair or is detrimental to justice, which was not the case. The public had a right to scrutinize the recruitment process, particularly where public resources were involved and irregularities had been alleged.



22. The Petitioner identified the contested documents, including a letter dated 29th September 2023 from Hon. Rosa Leteipan (3rd Respondent, Chairperson of the 1st Respondent) to then Cabinet Secretary Hon. Peninah Malonza, forwarding Patricia Ondeng' for appointment as CEO, copied to the Head of Public Service. Another letter dated 22nd November 2023 from Hon. (Dr.) Alfred Mutua, Cabinet Secretary for Tourism and Wildlife, to Mr. Felix Koskei, Chief of Staff and Head of Public Service, confirmed agreement with the earlier recommendation of Patricia Ondeng'. A letter dated 22nd March 2024 from Mr. Felix Koskei directed Hon. (Dr.) Alfred Mutua to appoint James Mbugua Mwaura as CEO, despite lacking the requisite qualifications. Lastly, a letter dated 28th March 2024 from James Mbugua Mwaura invited board members to a special meeting to discuss an out-of-court settlement regarding his pending employment dispute in ELRC Cause No. E382 of 2022.
23. The Petitioner submitted that expunging these documents would compromise the fair adjudication of the Petition and leave it without crucial evidence. The Petitioner relied on Article 159(2) of *the Constitution*, which mandates courts to administer justice without undue regard to procedural technicalities. The Respondents, as public officers, are trustees of public authority and must adhere to transparency and accountability under Article 10 of *the Constitution*.
24. The Petitioner argued that the Respondents would suffer no prejudice if the evidence remained on record, whereas the Kenyan public would suffer irreparable harm if evidence proving the unconstitutional nature of the recruitment process was expunged. The Petitioner insisted that the application was filed with ulterior motives to delay the Petition while allowing the Interested Party to remain unlawfully in office. The Petitioner urged the Court to dismiss the application with costs and allow the Petition to proceed on its merits.

Petitioner's Written Submissions

25. The Petitioner filed written submissions dated 26th January 2025 opposing the Respondents' Notice of Motion application dated 12th June 2024 and supporting the Cross Application dated 11th December 2024. The Petitioner argued that the application seeking to expunge crucial evidence from the Petition was misconceived, legally untenable, and anchored on an irrelevant provision of Section 37 of the *Data Protection Act, 2019*. The Petitioner asserted that Article 50(4) of *the Constitution* only excludes evidence if its admission would render the trial unfair or be detrimental to the administration of justice.
26. The Respondents had relied on Section 37, which limits the use of personal data for commercial purposes without consent, but the Petitioner contended that the evidence in question was obtained for public interest litigation, not commercial purposes. The Petition was filed under Article 258(1) and (2)(c) of *the Constitution* to uphold transparency and accountability in a public recruitment process. The documents sought to be expunged pertained to the recruitment of the Chief Executive Officer of the 1st Respondent, involving correspondence between government officials, which the Petitioner argued should be disclosed under Article 35(1) and (3) of *the Constitution*.
27. The Petitioner further contended that the Respondents' attempt to strike out the evidence while retaining the advertisement and gazettement of the appointment was an affront to justice. Public servants, including the 2nd and 3rd Respondents, acted on behalf of Kenyans and could not claim privacy over their official decisions. The Petitioner cited *John Muriithi & 8 Others v Registered Trustees of Sisters of Mercy (Kenya) t/a The Mater Misericordiae Hospital & Another* [2013] eKLR, where the court held that illegally obtained evidence is admissible if relevant and does not affect the fairness of the trial.



28. The same principle was upheld in *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board* [2015] eKLR, which cited *Karuma, Son of Kaniu v The Queen* [1955] AC 197, *Reg. v Leatham* (1861) 8 Cox C.C.C 498, *Olmstead v United States* (1928) 277 US 438, and *Helliwell v Piggot-Sims* [1980] FSR 356, all affirming that admissibility is determined by relevance, not the manner in which evidence was obtained. The Petitioner also relied on *United States v Alvarez* 567 US 709 (2012), where the U.S. Supreme Court struck down a law criminalizing false statements, affirming that evidence should not be excluded solely based on how it was obtained in civil cases.
29. The Petitioner argued that the Respondents had failed to demonstrate how the evidence violated their rights under Article 50(4) or how its admission would prejudice them. Instead of expunging documents, the court should compel full disclosure of all records related to the recruitment process, including board meeting minutes, interview records, and communications between government officials. The Petitioner submitted that transparency in the use of public resources was paramount, and any attempt to suppress evidence was a deliberate effort to shield officials from accountability.
30. The Petitioner emphasized that Article 10 of *the Constitution* binds all public officers to uphold integrity, transparency, and accountability, and that Article 159 requires courts to administer justice without undue regard to procedural technicalities. The Petitioner further noted that the Respondents' submissions attempted to introduce the *Access to Information Act*, which was not part of their original application, and urged the court to reject such an attempt.
31. The Petitioner maintained that the answers to the key issues for determination were negative: admitting the evidence would not render the trial unfair, it would not be detrimental to the administration of justice, and the Respondents had not proven that the evidence contained personal data obtained illegally for commercial use. The recruitment process, initiated through a public advertisement and concluded with gazettelement, was a matter of public concern and could not be deemed confidential.
32. The Petitioner contended that dismissing the Respondents' application and allowing the Cross Application would ensure that the Petition was determined on merit, holding public officials accountable for their actions. The Petitioner submitted that the Respondents' claims that the Petition was filed on behalf of Mrs. Patricia Ondeng for economic gain were unfounded and unsupported by evidence. The court was urged to grant the costs of the Cross Application to the Petitioner, citing *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR, where Mativo J affirmed that costs should compensate the successful party for the effort expended in litigation. The Petitioner concluded by urging the court to allow the Cross Application dated 11th December 2024 and dismiss the Respondents' application dated 12th June 2024 with costs.

Interested Party's Case

33. The Interested Party filed a Replying Affidavit dated 11th February 2025 in support of the Respondents' application dated 12th June 2024, seeking to expunge certain documents from the record. He stated that the documents in question were private communications within government circles and between civil servants. He asserted that under the law, citizens are required to follow prescribed procedures when seeking access to government-held information, and the Petitioner had failed to demonstrate how he obtained the impugned documents. The illegally obtained information is detrimental to the administration of justice and the provisions of Article 50(4) of *the Constitution*, he further argued that allowing such documents into evidence would violate Article 31 of *the Constitution*, which guarantees the right to privacy, including the privacy of communications.



Interested Party Written Submissions

34. The Interested Party filed written submissions dated 11th February 2025, seeking to expunge unlawfully obtained documents from the record. The Interested Party argued that the documents in question related to private communication within government circles and between civil servants and were unlawfully obtained. It was submitted that while Article 35 of *the Constitution* guarantees the right to access information held by the state or another person, Article 24 allows for the limitation of rights where necessary to ensure that the enjoyment of rights by one person does not prejudice the rights and freedoms of others.
35. The *Access to Information Act* provides the legal framework for obtaining information held by the state, and the Petitioner failed to follow the prescribed procedure under Section 8 of the Act. The Petitioner did not demonstrate how he came into possession of the impugned documents, nor was there any record of a formal request for the same or its unlawful denial. It was submitted that the use of such information before the court, accessed without following due process, rendered it inadmissible and affected its probative value.
36. The Interested Party contended that obtaining evidence without lawful authorization violated constitutional norms, particularly the right to privacy under Article 31 and Section 8 of the *Access to Information Act*. Article 50(4) of *the Constitution* provides that evidence obtained in violation of a right or fundamental freedom shall be excluded if its admission would render the trial unfair or be detrimental to the administration of justice. In *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition 4 of 2017)* [2017] KESC 45 (KLR) (Election Petitions) (11 December 2017) (Ruling), the Supreme Court held that a duty is imposed on citizens to follow prescribed procedures when seeking access to information, and failure to do so violates the principles of access to information and the rights of privacy under Article 31 and protection of property under Article 40.
37. Similarly, in *Kenya Railways Corporation & 2 others v Okoit & 3 others (Petition 13 & 18 (E019) of 2020 (Consolidated))* [2023] KESC 38 (KLR) (16 June 2023) (Judgment), the Supreme Court affirmed that admitting illegally obtained information is detrimental to the administration of justice and violates Article 50(4). It was held that such documents, even if their authenticity is not questioned, must be obtained and adduced in accordance with the law, failing which they are inadmissible.
38. Relying on these decisions, the Interested Party submitted that the Petitioner irregularly obtained the impugned documents without following due process, rendering them inadmissible and warranting their expunction from the record. The Interested Party further argued that the Petitioner violated the right to privacy of communication under Article 31 and that admitting the documents would be contrary to Article 24(1). The Interested Party prayed for the application to be allowed with costs.

Cross Application Dated 11th December 2024

39. The Petitioner filed a cross-application dated 11th December 2024, seeking urgent orders to compel the Respondents to produce crucial documents relating to the recruitment and appointment of the Chief Executive Officer of the 1st Respondent, Kenyatta International Convention Centre. The Petitioner sought production of board meeting minutes, shortlisting records, interview proceedings, correspondence between the Respondents, and letters concerning the appointment process, including a letter dated 22nd March 2024 from the Head of Public Service, Mr. Felix Koskei, to the then Cabinet Secretary for Tourism and Wildlife, Hon. (Dr.) Alfred Mutua.



40. The Petitioner also sought the production of letters dated 3rd November 2023, 2nd October 2023, and 22nd November 2023 from the 2nd Respondent's office to the Head of Public Service, as well as a letter dated 29th September 2023 from the 3rd Respondent, Hon. Rosa Leteipan, to the then Cabinet Secretary, Hon. Peninah Malonza, recommending the appointment of Mrs. Patricia Ondeng'. Further, the Petitioner requested the production of a letter dated 22nd November 2023 from Hon. (Dr.) Alfred Mutua to Mr. Felix Koskei confirming the recommendation of Mrs. Patricia Ondeng', a letter dated 22nd March 2024 from Mr. Felix Koskei directing the appointment of the Interested Party, James Mbugua Mwaura, despite his lack of qualifications, and a letter dated 28th March 2024 in which James Mbugua Mwaura invited the 1st Respondent's board members to a special meeting to discuss an out-of-court settlement in ELRC Cause No. E382 of 2022.
41. The Petitioner submitted that the appointment of the Interested Party through Gazette Notice No. 3753, Vol. CXXVI – No. 37, published on 25th March 2024, was in blatant violation of Section 48 of the *Tourism Act* 2022, which requires a competitive process and specific qualifications, including an advanced degree in marketing, business administration, or a related discipline and at least ten years' experience in senior management within the tourism or hospitality sector.
42. The Petitioner asserted that the 3rd Respondent had duly forwarded the name of the most qualified candidate, Mrs. Patricia Ondeng', to the then Cabinet Secretary, Hon. Peninah Malonza, but the appointment was unlawfully interfered with by the 2nd Respondent and the Head of Public Service. The Petitioner alleged that instead of appointing the recommended candidate, the 2nd Respondent and his predecessor, Hon. Peninah Malonza, improperly sought concurrence from the Head of Public Service, Mr. Felix Koskei, through letters dated 2nd October 2023 and 22nd November 2023, expressing their frustration over the delayed appointment of Mrs. Patricia Ondeng'. The Petitioner contended that Mr. Felix Koskei, without any legal authority, unilaterally directed the appointment of James Mbugua Mwaura through his letter dated 22nd March 2024.
43. The Petitioner further submitted that James Mbugua Mwaura did not meet the statutory qualifications for the position, as he had not served in a senior management role in the tourism or hospitality sector for the required ten years. His appointment as the Director of Corporate Services at the 1st Respondent had only been made on 1st February 2022. The Petitioner also highlighted that the 3rd Respondent failed to comply with Section 69(12) of the *Public Service Commission Act* 2020, which mandates notification of the Commission when a case is filed against a public body concerning a disciplinary matter.
44. The Petitioner alleged that the shortlisting and interview process for James Mbugua Mwaura was conducted clandestinely despite his pending disciplinary case in ELRC Cause No. E382 of 2022, where he had sued the 1st Respondent over a show cause and suspension letter dated 8th April and 13th May 2022, respectively.
45. The Petitioner further alleged that upon his irregular appointment, James Mbugua Mwaura immediately used his position to confer undue benefit upon himself by orchestrating a consent agreement between his advocate, Maina Njuguna & Associates, and the Hon. Attorney General, backdated to 27th March 2023, to compromise his pending case without a resolution from the 1st Respondent's board.
46. The Petitioner contended that in an open conflict of interest, James Mbugua Mwaura falsely claimed that the 1st and 3rd Respondents had withdrawn his show cause letter, leading to the withdrawal of ELRC Cause No. E382 of 2022 without any cost orders. The Petitioner argued that this manipulation of the legal process was further evidenced by an urgent board meeting convened by James Mbugua



- Mwaura on 28th March 2024 to formalize the withdrawal of his case, an act that underscored the abuse of office and lack of due process in his appointment.
47. The Petitioner asserted that the Respondents only proceeded with the appointment of James Mbugua Mwaura due to an unlawful directive from the Head of Public Service, acting in excess of his authority. The Petitioner described this as a clear case of abuse of office and discrimination against the duly selected candidate, Mrs. Patricia Ondeng’.
 48. The Petitioner contended that realizing they had no defense to the Petition, the Respondents sought to expunge crucial evidence, thereby attempting to weaken the case and evade accountability. The Petitioner submitted that as public officers, the Respondents had a constitutional duty under Article 10 and Article 35 of *the Constitution*, as well as Sections 4 and 5 of the *Access to Information Act* 2016, to ensure transparency and provide all documentation related to the recruitment process.
 49. The Petitioner maintained that unless the cross-application was heard and determined urgently, the people of Kenya would suffer irreparable loss by allowing an unqualified individual to unlawfully hold office at the 1st Respondent. The Petitioner argued that the Respondents would suffer no prejudice if the orders sought were granted. The Petitioner urged the Court to allow the cross-application and compel the Respondents to produce all relevant documents to facilitate the just determination of the Petition.
 50. The Petitioner filed a supporting affidavit of even date, stating that on 25th March 2024, Hon. (Dr.) Alfred N. Mutua, then Cabinet Secretary for Tourism and Wildlife, through Gazette Notice No. 3753, Vol. CXXVI – No. 37, appointed James Mbugua Mwaura as the Chief Executive Officer of the 1st Respondent, Kenyatta International Convention Centre, in blatant violation of *the Constitution* and the law.
 51. The appointment was contrary to Section 48 of the *Tourism Act* 2022, which mandates that the Chief Executive Officer must be appointed through a competitive process and possess an advanced degree in marketing, business administration, or a related field, along with at least ten years’ experience in senior management within the tourism or hospitality sector.
 52. The 3rd Respondent, in her capacity as Chairperson of the 1st Respondent, had forwarded the name of the most qualified candidate, Patricia Ondeng’, to the 2nd Respondent’s predecessor, Hon. Peninah Malonza, on 29th September 2023 for appointment. However, instead of appointing Patricia Ondeng’ as required, the 2nd Respondent, together with his predecessor, sought unlawful concurrence from the Chief of Staff and Head of Public Service, Felix Koskei, without any legal basis.
 53. The Petitioner asserted that in letters dated 2nd October 2023 and 22nd November 2023, both the 2nd Respondent and his predecessor highly recommended Patricia Ondeng’ and sought her gazettelement but were ignored. Instead, Felix Koskei, acting ultra vires, issued a letter on 22nd March 2024, purporting to direct the appointment of James Mbugua Mwaura, who lacked the requisite qualifications under Section 48(2) of the *Tourism Act* 2022.
 54. The Petitioner emphasized that James Mbugua Mwaura had never served in senior management within the tourism sector for the required ten years, as his appointment as Director of Corporate Services at the 1st Respondent had only taken effect on 1st February 2022. The 3rd Respondent, while chairing the recruitment process, also failed to comply with Section 69(12) of the *Public Service Commission Act* 2020, which requires notification of the Commission when a public officer facing a disciplinary case is under consideration for appointment.



55. The Petitioner contended that James Mbugua Mwaura's shortlisting and interview were conducted in a clandestine manner, disregarding his pending disciplinary case in ELRC Cause No. E382 of 2022, where he had sued the 1st Respondent after receiving a show cause and suspension letter dated 8th April and 13th May 2022. Upon his appointment, James Mbugua Mwaura allegedly used his position to benefit himself by instructing the execution of a consent agreement between his advocate, Maina Njuguna & Associates, and the Hon. Attorney General, backdated to 27th March 2023, to compromise his pending case without board approval.
56. The Petitioner further alleged that he falsely claimed that the 1st and 3rd Respondents had withdrawn his show cause letter, leading to the withdrawal of ELRC Cause No. E382 of 2022 without cost orders. Additionally, he convened a board meeting on 28th March 2024, citing an agenda to consider a proposal to withdraw the case.
57. The Petitioner submitted that James Mbugua Mwaura's appointment was a result of unlawful directives issued by the Chief of Staff and Head of Public Service, which the Respondents obeyed in fear of reprisal, leading to the blatant disregard of the rights of Patricia Ondeng' and undermining the integrity of the recruitment process. The Petitioner contended that the Respondents, realizing their lack of defense in the matter, sought to expunge critical evidence to weaken the Petition.
58. The Petitioner argued that, as public officers, the Respondents had a duty to be transparent and accountable to the people of Kenya as required by Article 10 and Article 35 of *the Constitution*, as well as Sections 4 and 5 of the *Access to Information Act* 2016, and should therefore be compelled to produce all board minutes and relevant correspondence regarding the appointment.
59. The Petitioner emphasized that unless the cross-application and the Petition were heard urgently, the people of Kenya would suffer irreparable loss by allowing an unqualified individual to unlawfully occupy office. The Petitioner asserted that the Respondents would suffer no prejudice if the orders sought were granted. The Petitioner urged the Court to compel the Respondents to provide all relevant documents and allow the Petition to proceed on its merits in the interest of justice.

Interested Party's Case

60. The Interested Party filed a replying affidavit dated 12th February 2025, opposing the Petitioner's cross-application dated 11th December 2024. He stated that the application was vexatious, frivolous, and an abuse of the court process. He asserted that the Petitioner had a duty to follow prescribed procedures when seeking access to information and that there was no record of the Petitioner having made a formal request for the documents, nor any proof that such a request had been unlawfully denied. He contended that the right to institute the instant action could only crystallize after the Petitioner had requested the information from the Respondents and been denied access.
61. He further argued that the documents sought in prayer number 4 of the cross-application were already in the Petitioner's possession, as they had been availed in the affidavit in support of the Petition dated 23rd April 2024. He stated that the cross-application was an afterthought, filed only after the Respondents had filed their application dated 12th June 2024, seeking to have unlawfully obtained documents expunged from the record. He maintained that the cross-application was devoid of merit and prayed for its dismissal with costs to the Interested Party. He affirmed that the contents of his affidavit were true to the best of his knowledge, information, and belief.



Interested Party's Written Submissions

62. The Interested Party filed written submissions dated 12th February 2025 in opposition to the Petitioner's cross-application dated 11th December 2024, which sought production orders for documents in the custody of the Respondents. The Interested Party argued that the application was vexatious, frivolous, and a gross abuse of the court process. He contended that Article 35 of *the Constitution* guarantees every citizen the right to access information held by the State or another person when required for the exercise or protection of a fundamental right, but this right is subject to procedures established under the *Access to Information Act*, 2016.
63. He submitted that the Petitioner had a duty to follow the prescribed procedure under Section 8 of the Act before seeking redress from the Court. He relied on the Court of Appeal decision in *Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992)*, which held that where there is a clear procedure for addressing grievances prescribed by *the Constitution* or statute, that procedure must be strictly followed. He argued that there was no record of the Petitioner having requested the documents from the Respondents or having been unlawfully denied access.
64. The interested Party e further relied on the Supreme Court decision in *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others (Presidential Election Petition 4 of 2017) [2017] KESC 45 (KLR) (11 December 2017)*, which held that citizens must follow the prescribed legal procedures when seeking access to information and that failure to do so constitutes a violation of constitutional principles. He submitted that the right to institute the instant action could only crystallize after the Petitioner had made a formal request for the documents and had been denied access.
65. He further argued that the Petitioner's cross-application was filed in bad faith as the documents sought were already in his possession, having been availed in his affidavit in support of the petition dated 23rd April 2024. He contended that the application was an afterthought, filed only after the Respondents' application dated 12th June 2024, which sought to have unlawfully obtained documents expunged from the record. He submitted that the Petitioner was attempting to sanitize the irregular acquisition of documents. He maintained that the application was baseless and that the Court lacked jurisdiction to entertain it, as the Petitioner had not exhausted the statutory procedure for accessing the requested information. He prayed that the application be dismissed with costs to the Interested Party.
66. I have examined all the arguments and submissions of the parties herein. Concerning the 1st application raised by the Respondents in this application and supported by the Interested Parties, it is conceded by the Applicant/Petitioner that he obtained the documents contended but allege that the Article 50 (4) of *the Constitution* only excludes evidence obtained in violation of rights that would render a trial unfair or compromise justice.
67. The Petitioner also averred that Section 37 of the Data Protection Act does not apply to data for personal use. I have looked at Section 37 (1) of the Data Protection Act which states as follows:-

“A person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person—

 - a. has sought and obtained express consent from a data subject; or
 - b. is authorised to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject.”



68. Indeed as provided, the data envisaged herein is restrictive if it is for commercial use. The current data illegally obtained is not for commercial use as such it cannot fall under the restriction placed under section 37 (1) of the Data Protection Act.
69. I have also considered the precedents cited and in particular Nicholas Ombija vs. The Judges & Magistrates Vetting Board (2015) eKLR which held that all admissible evidence is relevant notwithstanding the manner in which it was obtained. In this case the Petitioner also relied on the Supreme Court of America case United States vs. Alvarez 567 US 709 (2012), where the court struck down a law criminalizing false statements affirming that evidence should not be excluded solely based on how it was obtained in civil cases.
70. Having found as above, it is my finding that the application by the Respondents seeking to strike out the documents filed by the Petitioner is not merited and is declined.
71. As concerns the 2nd Applicant having ruled in the above application that the documents sought to be struck out are admissible, I find the application superfluous but in any case valid in case of documents not already filed by the Petitioner. Costs of the application shall be in the Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF MARCH, 2025.

HELLEN WASILWA

JUDGE

