Mohammed v National Mining Corporation & another; Kitilit (Interested Party) (Petition E090 of 2025) [2025] KEELRC 2101 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2101 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E090 OF 2025

B ONGAYA, J

JULY 17, 2025

IN THE MATTER OF THE EMPLOYMENT ACT NO. 11 OF 2007, THE PUBLIC SERVICE COMMISSION ACT NO. 10 OF 2017, AND THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF APPOINTMENT OF THE CHIEF EXECUTIVE OFFICER OF THE NATIONAL MINING CORPORATION

AND

IN THE MATTER OF UNFAIR, DISCRIMINATORY, AND IRREGULAR RECRUITMENT PRACTICES AT THE NATIONAL MINING CORPORATION

BETWEEN

HUSSEIN ADAN MOHAMMED ..... PETITIONER

AND

NATIONAL MINING CORPORATION ..... 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF MINING ..... 2ND RESPONDENT

AND

JOSEPH KITILIT ..... INTERESTED PARTY

JUDGMENT

1. The petitioner filed the petition and supporting affidavit dated 09.05.2025 through Duwane & Wethow Advocates. He prayed for orders that:

    i. A declaration that the 2nd respondent's action to appoint the interested party as the new chief executive officer of the 1st respondent violates Articles 27, 41, 47, and 232 of the *Constitution*.

ii. An order of prohibition restraining the interested party from assuming office as the new chief executive officer of the 1st respondent or executing the functions of the chief executive officer of the 1st respondent.

iii. An order of judicial review (*Certiorari*) quashing the decision of the 2nd respondent appointing the interested party chief executive officer of the 1st respondent.

iv. An order of Mandamus compelling the 2nd respondent to appoint and gazette the petitioner as the chief executive officer of the 1st respondent.

v. Any other relief this Honourable Court may deem fit and just.

2. The petitioner's case was as follows:

a. Sometimes in 2024, the 1st respondent's Board of Directors resolved to recruit a substantive chief executive officer (CEO) amongst other positions, following approval by the Cabinet Secretary, National Treasury and Economic Planning.

b. An advertisement for the recruitment of the CEO position was subsequently placed in the print media on 10.01.2025, and the 1st respondent's Board of Directors proceeded to interview the shortlisted candidates on 24.02.2025.

c. Arising from the said interviews, the petitioner emerged top and scored the highest marks. The Board of the 1st respondent thus recommended to the 2nd respondent the appointment of the petitioner as the CEO of the 1st respondent, through a letter dated 24.02.2025

d. However, in violation of the law and provisions of the *Mining Act*, 2016 and the *State Corporations Act*, the 2nd respondent proceeded to appoint the interested party and rejected the recommendation of the petitioner.

e. The advertisement, shortlisting and appointment process of the new CEO of the 1st respondent stands impugned due to credible allegations of discrimination, unlawful practices and undue political interference.

f. The 2nd respondent's failure to appoint the petitioner as the new CEO as against the recommendation is a violation of the petitioner's constitutional rights to fair labour practices, equal treatment devoid of discrimination, equality, public service values, and fair administrative action.

g. There is a need for urgent judicial intervention to halt a discriminatory and procedurally unfair recruitment conducted by the 2nd respondent, unlawfully appointing the interested party as the new chief executive officer of the 1st respondent.

3. The petitioner particularised the violation of the Constitution of Kenya by the respondents as follows:

i. The 2nd respondent's action appointing the interested party as the new CEO has created an unfair privilege and is tantamount to unjustifiable discrimination, in violation of Article 27, which stipulates that every person is equal before the law and has the right to equal protection and equal benefit of the law.

ii. By appointing the interested party instead of the petitioner, who has been recommended by the 1st respondent's Board, the 2nd respondent has violated the provisions of Article 10 requiring public participation, transparency and inclusivity.

iii. The 2nd respondent's action has abrogated the rights of the petitioner's legitimate expectation as underpinned in Article 41, which provides for equal opportunity for employment and fair recruitment.

iv. The 2nd respondent's act of bypassing the petitioner in the appointment of the CEO without valid reasons is contrary to Article 47, which provides for the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

v. The 2nd respondent's act of appointing the interested party instead of the petitioner violates the principles of public service as enshrined under Article 232, specifically the principle of transparency and accountability. The 2nd respondent has breached the principles of equal opportunity and transparency by preferring a restricted class of candidates for recruitment.

4. The 1st respondent filed a replying affidavit sworn on 30.05.2025 by Joseph Kitilit (also the interested party herein), through Issa Mahat & Company Advocates. They prayed that the Court dismisses the petition with costs to the 1st respondent. It was stated and urged as follows:

i. The petitioner has not demonstrated that the recruitment of the interested party as CEO was discriminatory and procedurally unfair, as the interested party was subjected to a rigorous and transparent recruitment process before the 1st respondent's Board submitted three names to the 2nd respondent for appointment of the CEO.

ii. In a meeting held on 09.02.2024, the 1st respondent resolved to prioritize the recruitment of 28 vacant positions, including that of the CEO. The approval to recruit had been granted by the National Treasury through a letter Ref. No. RES 1192/24/01 'A' dated 20.11.2024.

iii. The acting CEO constituted a management sub-committee for the recruitment exercise. In the advertisement for the CEO position, applicants were given 21 days to submit applications, after which the Board shortlisted seven candidates who were interviewed and ranked the top three as follows:

    i. CPA Hussein Mohamed Adan;

    ii. Eng. Joseph Kitilit;

    iii. Alice Mulimi Muthama.

    iv. On 24.02.2025, six of the seven Board members signed a Recruitment Report that included information for the 2nd respondent to consider. The Board submitted the aforementioned three names for consideration by the 2nd respondent.

    v. The 2nd respondent had the discretion to appoint any of the three candidates recommended by the Board, and if the petitioner was the sole preferred candidate, there would have been no need to submit additional names.

    vi. The highest score by the petitioner did not entitle him to automatic appointment as CEO, and in any event, the difference in marks between the petitioner and the interested party who came second was one (1) mark. Furthermore, the interested party has more than eight (8) years' work experience than the petitioner.

    vii. The petitioner has not stated with specificity which provisions of the *Mining Act* and the *State Corporations Act* the 2nd respondent violated. He also did not provide evidence

on the allegation of impropriety in the recruitment process, which he contradictorily seeks to benefit from.

viii. The petitioner has also not specifically pleaded the particulars of discrimination he alleges. If there is a claim of legitimate expectation, all three candidates would share a third of the expectation. The claims of unfair labour practices and legitimate expectation are therefore unfounded.

ix. The petitioner has misapprehended the law in respect of fair administrative action, as there is no legal requirement for the 1st and 2nd respondents to communicate to him the reasons why he was not appointed the CEO. In any case, he did not write to the 1st respondent requesting any information or explanation.

x. Therefore, there has been no violation of the petitioner's rights, as all three recommended candidates had a probability to be appointed CEO of the 1st respondent, and the position was not reserved for the petitioner post the interview process. The petitioner had one in three chances to be appointed.

xi. Prayer 2 as sought in the petition has been overtaken by events as the interested party was appointed and assumed office as CEO on 29.04.2025.

xii. The petitioner has not laid any basis for the quashing of the decision to appoint the interested party as the CEO of the 1st respondent. If this Court does quash the said appointment, there will be a vacuum and undermining of a lawful, costly recruitment process.

5. The 2nd respondent filed a replying affidavit sworn by Harry Kimtai on 16.06.2025, through the Attorney General. The 2nd respondent urged that the petition be dismissed with costs upon the following grounds:

i. The 2nd respondent received the names of the top three candidates from the 1st respondent for concurrence before appointment, in line with the Head of Public Service Circular Ref OP/CAB.9/1 dated 09.05.2008.

ii. While reviewing the recruitment report, the 2nd respondent observed that the top candidate, the petitioner herein, had 12 years of professional experience as opposed to the required 15 years provided as a mandatory qualification for appointment to the position of CEO.

iii. The 2nd respondent notified the 1st respondent of the anomalies observed, in a letter dated 11.03.2025, and advised the 1st respondent to repeat the recruitment exercise.

iv. The 1st respondent resolved to appeal the decision of the 2nd respondent and, in a letter dated 11.04.2025, clarified the concerns raised and requested reconsideration for a repeat recruitment exercise.

v. The 2nd respondent reconsidered his decision and notified the 1st respondent of his concurrence to appoint the interested party as the CEO of the 1st respondent through a letter dated 28.04.2025.

vi. The petitioner was ineligible for appointment as CEO of the 1st respondent, whereas the interested party met all the requirements and was subsequently appointed by the 1st respondent on 29.04.2025.

6. The 1st, 2nd, and 3rd respondents also filed a notice of preliminary objection dated 09.06.2025 signed by the learned State Counsel Beatrice Akuno for the Attorney General. It was urged that the petition be struck out in limine with costs upon the following grounds:

    a. The Court lacks requisite subject matter jurisdiction to entertain the dispute in light of provisions of Article 162 of the *Constitution* as read with section 12 of the *Employment and Labour Relations Court Act*.

    b. The substratum of the petition do not disclose employer-employee relationship between the petitioner and 1st respondent.

    c. The applicant originated the petition not as an employee of the respondents but as a citizen seeking to enforce rule of law.

    d. The Court of Appeal decision in *Moi Teaching and Referral Hospital & 3 others V Gikenyi B & 152 others* [2025] KECA 937 (KLR) held thus "....clearly bearing in mind the above definitions and the provisions of section 12 of the *ELRC Act* which requires the existence of an employer-employee relationship, it cannot be said that a person challenging the constitutional validity of a recruitment process like in this case falls within the definition of an employee."

7. The petitioner and the 1st respondent filed their respective written submissions.

8. The 2nd and 3rd respondents further relied on their notice of preliminary objection dated 09.06.2025, arguing that this Court lacks the requisite jurisdiction to hear and determine the petition as there is no employer-employee relationship between the petitioner and the respondents.

9. The 1st issue is whether the Court lacks jurisdiction for want of employer-employee relationship in reliance upon *Moi Teaching and Referral Hospital & 3 others v Gikenyi B & 152 others* (Civil Appeal E107 & E116 of 2024 (Consolidated)) [2025] KECA 937 (KLR) (23 May 2025) (Judgment).(JM Mativo, PM Gachoka & WK Korir, JJA). It appears to the Court that in that case the Court of Appeal found that the High Court had jurisdiction because while the subject matter in dispute being recruitment (falling within employment functions), the High Court nevertheless had jurisdiction to entertain the dispute in view that the petitioner had no employer –employee relationship with the respondents (and in which event, the High Court would not have had the jurisdiction at all). To that extent, it appears to the Court that in that case the Court of Appeal was not setting a holding that in pre-employment disputes, the Employment and Labour Relations Court (ELRC) lacked jurisdiction but that the High Court had jurisdiction, so to say, a concurrent jurisdiction. The primary dispute in that case was whether the High Court had or lacked jurisdiction and not whether, the ELRC, in similar facts and circumstances, lacked jurisdiction. Thus, the Court of Appeal in that case stated as follows:

> "62. We have read all the pleadings in the consolidated petitions. 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. Therefore, we find no reason to fault the learned judge for dismissing the objection based on this ground. As the High Court correctly noted, the grievance is not a dispute between employer and employee but rather an unconstitutional recruitment in contravention of the Constitution based on ethnic considerations and not meritocracy. In so finding we are guided by the Supreme Court decision in the KTGA Case that:

> "79. In our view, there is nothing in the Constitution, the *ELRC Act*, or indeed in our decision in the Karisa Chengo Case to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC court is precluded from determining the constitutional validity of a statute. This is especially so if the statute in question lies at the centre of the dispute. What it cannot do, is to sit as if it were the High Court under article 165 of the *Constitution*, and declare a statute unconstitutional in circumstances where the dispute in question has nothing or little to do with employment and labour relations within the context of the *ELRC Act*. But, if at the commencement or during the determination of a dispute falling within its jurisdiction, as reserved to it by article 162 (2) (a) of the *Constitution*, a question arises regarding the constitutional validity of a statute or a provision thereof, there can be no reason to prevent the ELRC from disposing of that particular issue. Otherwise, how else would it comprehensively and with finality determine such a dispute? Stripping the court of such authority would leave it jurisdictionally hum-strung; a consequence that could hardly have been envisaged by the framers of the Constitution, even as they precluded the High Court from exercising jurisdiction over matters employment and labour pursuant to article 165(5)(b). We are therefore in agreement with the appellants' submissions regarding this issue as encapsulated in paragraph 69 of this Judgment."

10. The Court therefore considers that pre-employment and post -employment disputes are the proper province of the ELRC. Pre-employment is particularly recognised as a matter for social partners and dialogue and falling for the general just, proportionate and expeditious determination by labour and employment dispute resolution systems. ILO Conventions and Recommendations, particularly the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111), mandate a national policy to promote equality of opportunity and treatment in employment and occupation, eliminating discrimination. Conventions like C111 address discrimination in recruitment processes, ensuring that selection criteria are relevant to the job and do not exclude individuals based on prohibited grounds. The ILO standards recognize that certain groups may face specific challenges in accessing employment. They allow for special measures to address these disadvantages and promote their integration into the workforce, while ensuring these measures are justified and do not create new forms of discrimination. It is for such disputes that may arise during pre-employment that the ELRC is established per Article 162(2) (a), 162(3), and 165 (5) (b) and with jurisdiction per section 12 of the *ELRC Act*.

11. In that regard, persons seeking employment are expressly protected and provided for in section 5 of the *Labour Relations Act*, 2007 and therefore bringing pre-employment disputes within the tripartite arrangements, the negotiations by social partners and the jurisdiction of the ELRC per section 12 of

the Act as a matter subject of collective and recognition agreements as well as formation of contracts of service. The section provides thus:

> "5.
>
> (1) No person shall discriminate against an employee or any person seeking employment for exercising any right conferred in this Act.
>
> (2) Without limiting the general protection conferred by sub-section (1), no person shall do, or threaten to do any of the following –
>
> (a) require an employee or a person seeking employment not to be or become a member of a trade union or to give up membership of a trade union;
>
> (b) prevent an employee or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings specified in this Act;
>
> (c) dismiss or in any other way prejudice an employee or a person seeking employment——
>
> (i) because of past, present or anticipated trade union membership; (ii) for participating in the formation or the lawful activities of a trade union;
>
> (iii) for exercising any right conferred by this Act or participating in any proceedings specified in this Act; or
>
> (iv) for failing or refusing to do something that an employee may not lawfully permit or require an employee to do.
>
> (3) No person shall give an advantage, or promise to give an advantage to an employee or person seeking employment in exchange for the person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act: Provided that nothing in this section shall prevent the parties to a dispute from concluding an agreement to settle that dispute."

12. Again, section 5 of the *Employment Act* defines employees to include persons seeking employment or applicants for employment or prospective employees. The section on discrimination in employment provides as follows:

> "(1) It shall be the duty of the Minister, labour officers and the Industrial Court (read ELRC) —
>
> (a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and,
>
> (b) to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.

(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

(4) It is not discrimination to—

(a) take affirmative action measurers consistent with the promotion of equality or the elimination of discrimination in the workplace;

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;

(c) employ a citizen in accordance with the national employment policy; or

(d) restrict access to limited categories of employment where it is necessary in the interest of State security.

(5) An employer shall pay his employees equal remuneration for work of equal value.

(6) An employer who contravenes the provision of the section commits an offence.

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

(8) For the purposes of this section—

(a) "employee" includes an applicant for employment;

(b) "employer" includes an employment agency;

(c) an "employment policy or practice" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment on disciplinary measures."

13. The Court therefore returns that pre-employment processes, advertisement of vacancies, recruitment, selection and appointment or promotions and re-designations are employment and labour relations functions which are expressly brought under the jurisdiction of the ELRC. The Court further holds that by express statutory provisions and International Labour Standards, employers and

employees include prospective employees or applicants for employment or potential employees in the circumstances and employer includes prospective employer or potential employers in the circumstances of the case. Prospective employers and employees in individual capacities or by way of trade union arrangements are expressly mentioned parties to disputes that may be brought to the Court. In any event the Court hastens to consider that strategic interest litigation or public interest litigation is not alien to the ELRC jurisdiction so that such litigation can be brought to the Court for the benefit of the vulnerable or voiceless individuals. It appears to the Court that such strategic or public interest litigation cannot be defeated for want of employer – employee relationship provided they are brought to the Court within the subject matter jurisdictional competence of the ELRC.

14. The Court finds that it has jurisdiction with respect to pre-employment recruitment, selection, and appointment or promotional disputes per the relevant provisions of the *Constitution*, *ELRC Act*, *Labour Relations Act*, and, the *Employment Act*. The jurisdiction is expressly conferred by statutory deeming of a prospective employee as an employee which imposes a non-discrimination obligation upon prospective employers. The jurisdiction flows from statute and Constitution as submitted for the petitioner and per Supreme Court (WM Mutunga, CJ, PK Tunoi, JB Ojwang, SC Wanjala & N Ndungu, SCJJ) in *Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling) thus,

> "1. A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law could only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law. The issue as to whether a court of law had jurisdiction to entertain a matter before it, was not one of mere procedural technicality; it went to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.
>
> 2. Where the Constitution exhaustively provided for the jurisdiction of a court of law, the court must operate within the constitutional limits. It could not expand its jurisdiction through judicial craft or innovation. Nor could Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution conferred power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

15. Accordingly, the preliminary objection is found unmerited. The statutory law, *Employment Act* and the *Labour Relations Act*, have expressly defined an employee to include an applicant for employment or prospective employee thereby making pre-employment transactions or relationships fall within the jurisdiction of the ELRC.

16. The 2nd issue for determination is whether the interested party was appointed in contravention of the cited constitutional provisions or in whimsical or arbitrary exercise of discretion by the 1st and 2nd respondents. The Court makes findings as follows:

    a. Circular Ref. No. OP/CAB.9/1 dated 09.05.2008 on recruitment of board chairmen, board members and chief executive officers (CEOs) for State Corporations was signed by Amb. Francis K. Muthaura, EGH, Permanent Secretary, Secretary to the Cabinet and Head of Public Service. Paragraph (ii) of the circular was on appointment of CEOs and it stated thus "In line with the Guidelines, Chief Executive Officers of State Corporations are selected competitively by the Boards themselves or through reputable recruitment agencies. In both cases the process

should select the best three (3) candidates who will be recommended to the Minister for appointment of one of them." The Court observes that in the instant case the circular and the provision have not been questioned as unconstitutional or unlawful in any material respect. The Court finds that the provision spells out the applicable procedure in recruitment of the CEO of a state corporation like the 1st respondent. Three names of successful candidates including the petitioner and the interested party are found to have been validly submitted to the board of the 2nd respondent by the board of the 1st respondent for consideration of the appointment.

b. The affidavit of Harry Kimutai was sworn on 16.06.2025. It confirms that the board forwarded to the Cabinet Secretary three names for selection of one of them for appointment as CEO. However, the Cabinet Secretary observed anomalies in the recruitment process as communicated in the letter dated 11.03.2025. In particular, the petitioner who was the top candidate had 12 years of professional experience instead of the prescribed 15 years of experience. The Cabinet Secretary directed a repeat of the exercise. However by letter dated 11.04.2025 the board requested the Cabinet Secretary to review the decision to repeat the exercise in view that it was invertently indicated that the recruitment report that the petitioner had 12 years of experience whereas he actually had the required 15 years; while the interested party indicated a higher salary than the prescribed salary scale, he was amenable to negotiating remuneration within approved 1st respondent's salary structure; while the third candidate Ms. Alice Mulimi Muthama scored 62.14% there was no prescribed pass mark of 70% and she could be considered for the appointment; the corporation needed stability as it had run for long without a substantive CEO; and it would be unbearably costly to re-advertise. The request by the board to the Cabinet Secretary was to reconsider the directive to re-advertise and consider appointing out of the three candidates a CEO for 1st respondent per circular Ref. No. OP/CAB.9/1 dated 09.05.2008. The cabinet Secretary then replied by the letter dated 28.04.2025 Ref. No. MIBEBA/SDM/NAMICO/15/26(20) stating in part "The Cabinet Secretary has evaluated your request and hereby approves the appointment of Eng. Joseph Kitilit as the Corporation Chief Executive Officer. You are therefore advised to make the necessary arrangements to have Eng. Kitilit assume that role with immediate effect."

17. The petitioner's case is that the 2nd respondent abrogated Article 232 on fair competition, equal opportunity and merit; section 5(2) & (3) of the *Employment Act* on non-discrimination of a prospective employee; and Article 27 on equality before the law; and, Article 47 on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, for an adverse decision, the petitioner was entitled to written reasons.

18. The Court has carefully examined parties' respective submissions and the evidence. The circular gave the Cabinet Secretary a discretion to appoint any of the three candidates. To that extent, the Court has already found that the conferment of the discretion to appoint one of the three candidates recruited competitively has not been attacked. It appears to the Court that in the letter appointing the interested party, the Cabinet Secretary made an evaluation. It is not said for the petitioner that he asked for particulars of the evaluation but he was denied information. The Court finds that the petitioner is making allegations of constitutional violations without relevant evidence to back up the allegations. While excellent performance at the interviews was crucial, it is also true that Article 232 of the Constitution makes provision for other considerations in making recruitment and appointments in public service. Article 232 (1) (g), (h) and (f) specifically provides that the values and principles of public service include –

(g) subject to paragraphs *(h)* and *(i)*, fair competition and merit as the basis of appointments and promotions;

(h) representation of Kenya's diverse communities; and,

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) the members of all ethnic groups; and,

(iii) persons with disabilities.

19. It appears to the Court that the petitioner emerged best per Article 232 (1) (g) but nothing is said of the overriding criteria in Article 232 (1) (h) and (i). In such circumstances and for want of due evidence, the Court finds that the petitioner has failed to establish the violation of the cited provisions in the Bill of Rights as was alleged.

20. It appears to the Court that within the savings or exceptions to discrimination in section 5(4) of the *Employment Act*, in absence of any other thing, the Cabinet Secretary exercised the discretion as per circular on appointment of CEOs and accordingly, the respondents have, on a balance of probability, discharged the evidential burden in section 5(7) of the *Act*. It could be that the petitioner might have made a discovery beyond the material exhibited and depending with the disclosures, the respondents would have had a higher obligation to discharge the evidential burden in section 5(7) of the *Act*. The Court considers that the burden could not be imposed by the Court beyond the petitioner's pleaded case and grievance as was done in the instant case.

21. In the circumstances it appears to the Court that the exercise of discretion by the 2nd respondent in appointing the interested party as the CEO was substantially within the boundaries of the applicable circular and cannot be described to have been unreasonable per Lord Green in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* (1947) 2ALL ER 680 at 682-683 thus, "It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonableness' in a rather comprehensive sense. It is frequently used as general description of the things that must not be done. For instance, a person entrusted with discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey these rules he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all these things largely fall under one head."

22. As submitted for the 1st respondent, the petitioner has not demonstrated that any irrelevant considerations influenced the 2nd respondent's decision and in absence of any other material, the 2nd respondent has been found to have selected the interested party for appointment and exercised the discretion in accordance with the applicable circular. The selection and appointment decisions have not been shown to have violated the cited constitutional provisions as was urged for the petitioner. The impugned selection and appointment decisions have not, be necessary evidence, been shown to have been concluded in a whimsical or arbitrary exercise of discretion.

23. The Court has considered the nature of the proceedings being in the realm of matters of general public service concerns and the margins of success including the failed preliminary objection and each party to bear own costs of the petition.

24. In conclusion the petition is hereby dismissed and each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 17TH JULY, 2025.

BYRAM ONGAYA,

PRINCIPAL JUDGE