



**Commission for Human Rights and Justice (CHRJ) v Kenya Shipyards Limited & 2 others (Petition 3 of 2022) [2022] KEELRC 13097 (KLR) (4 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13097 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
PETITION 3 OF 2022  
B ONGAYA, J  
NOVEMBER 4, 2022**

**IN THE MATTER OF ARTICLE 1, 2, 3(1), 4, 10, 19, 21, 22, 23, 35, 73 AND 232 OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 35, 73, AND 232 OF THE CONSTITUTION OF KENYA IN THE MATTER OF SECTIONS 3, 4, AND 6 OF THE STATE CORPORATIONS ACT IN THE MATTER OF THE KENYA SHIPYARDS LIMITED IN THE MATTER OF APPOINTMENT OF MANAGING DIRECTOR OF KENYA SHIPYARDS LIMITED**

**BETWEEN**

**COMMISSION FOR HUMAN RIGHTS AND JUSTICE (CHRJ) .... PETITIONER**

**AND**

**KENYA SHIPYARDS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**STATE CORPORATION ADVISORY COMMITTEE ..... 2<sup>ND</sup> RESPONDENT**

**INSPECTORATE OF STATE CORPORATION ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed the petition on February 8, 2022 through Shabaan Associates LLP. The petitioner stated that it is a human rights organisation whose mandate is to act as a human rights watchdog including in the areas of law, governance, social economic justice and democracy. The 1<sup>st</sup> respondent is a state corporation incorporated under the *Companies Act*, 2015, Laws of Kenya. The 2<sup>nd</sup> respondent is the statutory committee mandated to review and investigate the affairs of state corporations and makes recommendations to the President as deemed necessary. The 3<sup>rd</sup> respondent is a public office established under the *State Corporations Act* Cap. 446 whose purpose is to oversee state corporations in efforts to promote good governance. The 4<sup>th</sup> respondent is the Honourable Attorney General sued in his capacity as the constitutional principal legal adviser and representative of the government.



2. It is the petitioner's case that the exhibited company registry records show that the 1<sup>st</sup> respondent was registered on September 29, 2020 with Kshs. 7,500,000,000.00 nominal share capital and 7,500,000 ordinary shares (each valued at 1, 000.00). The registered sole shareholder is the Cabinet Secretary to the Treasury of Kenya holding all the shares. Daniel Omondi Odeny is registered as Secretary and Robert Karuki Kibochi as Director. It is the petitioner's case that a company registered under the Ministry of Defence ought to have a representative of the Ministry as a shareholder or director. Further, it is suspicious as to why a state company is registered as a private limited company if not a plan orchestrated by specific individual to part with taxpayers' money and resources – because a state company is aimed to benefit the general public and not specific individuals.
3. The petitioner's further case is as follows. The corporation director is a high ranking officer in the Kenya Defence Forces housing the Navy which is a major beneficiary of the corporation activities and therefore need for transparency and accountability and as provided in the code of governance of state corporations.
4. Further case is that on January 5, 2022 the petitioner discovered that sometimes in May 2021 and in the discharge of constitutional duty the President appointed the Managing Director of the 1<sup>st</sup> respondent. The petitioner's case is that the appointment did not abide by provisions of Article 10 and 232 of *the Constitution* because there was no gazettement or shortlisting of persons to the position. Further by gazette notice No. 11120 dated September 22, 2021 Monica K. Juma, Cabinet Secretary, Ministry of Defence in exercise of the powers conferred by section 6(1) (e) of the *State Corporations Act*, appointed Reshma Shah; Danmaris Lilech; and Maryanne Karanja to be members of the Board of Directors of the Kenya Shipyards Limited, the 1<sup>st</sup> respondent, for a period of three (3) years effective October 1, 2021. It is urged that the appointment was in disregard to the procedure, out of order and a cover up to the unprocedural appointment of the Managing Director best described as "Putting a cart before the horse." The petitioner states that the Managing Director had assumed the helm without a supervisory board being in place. It is the petitioner's further case that the code of governance for State Corporations was intended to ensure accountability so that failure of having a board in place prior to the Managing Director's appointment to oversee the Managing Director was irregular making the running of the 1<sup>st</sup> respondent a one-man show. It is urged that the appointment of the Managing Director was unconstitutional, wrong, unprocedural and illegal because the appointment was not based on values and principles of public service in Article 232 of *the Constitution* with adherence to accountable administrative acts and transparency; Article 10 on national values and principles of transparency, good governance and accountability was violated; and section 6 of the *State Corporations Act* that requires the board to include permanent secretary of the parent ministry (in this case defence) was breached. The appointment is said to have also violated Article 73(2) that obligates that decisions are made with impartiality and objectivity and not influenced with improper motives. It is further stated that section 15 of the *State Corporations Act* empowers the board to be responsible with the management of affairs of the corporation.

The petitioner prays that the Court determines two issues:

- a. Whether the formation of Kenya Shipyards Limited meets the standard set for the formation of a state corporation.
- b. Whether the said appointment of the Managing Director of Kenya Shipyards Limited complied with the constitutional values and principles as envisaged under Article 10 and 232 of *the Constitution*.

It is prayed for the Court to order as follows:



- a. A declaration that the formation of the Kenya Shipyards Limited does not meet the required standards of a state corporation.
  - b. A declaration that the appointment of the Managing Director Kenya Shipyards Limited violates Articles 10 and 232 of the Constitution and is invalid, null and void.
  - c. An order compelling the respondent to do a proper appointment of the Managing Director of Kenya Shipyards Limited in consonant with Article 10 and 232 of the Constitution.
  - d. Costs of the petition.
  - e. Such other orders that the Honourable Court shall deem fit pursuant to Article 23(3) of the Constitution of Kenya, 2010.
5. The 1<sup>st</sup> respondent opposed the petition by filing on April 27, 2022 the replying affidavit of Dr. Ibrahim M. Mohamed, the Principal Secretary at the Ministry of Defence and the Director of the 1<sup>st</sup> respondent. The learned Special State Counsel v G Kabi for the Attorney General appeared for the 1<sup>st</sup> respondent and the interested party. It was urged for the 1<sup>st</sup> respondent as follows:
- a. The owner of equity in the 1<sup>st</sup> respondent is the Cabinet Secretary to the Treasury of Kenya who in law is a body corporate.
  - b. The petition has been precipitated by the 1<sup>st</sup> respondent's delay in responding to the frivolous demand by the petitioner through their Advocates on record dated January 21, 2022.
  - c. The petitioner has not exhausted the administrative mechanism provided for under the National Legislation establishing the 2<sup>nd</sup> Respondent prior to the institution of the petition herein.
  - d. The petitioner has failed to provide any tangible information in the incorporation and constitution of the 1<sup>st</sup> respondent as contained in its constitutive documents and as dictated by the Companies Act, No.17 of 2015 which are and continue to be in the custody of the Registrar of Companies, and this indolence by the petitioner should not be aided by the Court.
  - e. There is no evidence provided by the petitioner to establish the allegation that the 1<sup>st</sup> respondent has been illegally formed and continues to violate the law.
  - f. The description of the parties is admitted.
  - g. The locus standi of the petitioner is put to strict proof thereof. There exists no labour dispute between the petitioner and the respondent and the constitutional issues raised are not incidental to known labour issue between the petitioner and the 1<sup>st</sup> respondent. Thus, the jurisdiction of the Employment and Labour Relations Court to entertain the petition is challenged.
  - h. The 1<sup>st</sup> respondent is a private limited company under the Ministry of Defence wholly owned by the Cabinet Secretary to the Treasury of Kenya which was incorporated pursuant to Executive Order CAB/GEN.3/1/1 (60) dated August 14, 2020 on the approval of the National Security Council to address operational requirements of the Kenya Navy and other Ministry Departments and Agencies and utilize the excess capacity to generate revenue for the government by tapping into available local and regional market for construction, repair, and maintenance of ships and provision of other maritime services. The directors of the 1<sup>st</sup> respondent are the office bearers of the following offices: The Chief of the Defence Forces who



is the Chairperson of the Board of Directors. The Vice Chief of the Defence Forces. The Service Commander Kenya Army. The Service Commander Kenya Air Force. The Service Commander Kenya Navy. Principal Secretary responsible for Defence. Principal Secretary responsible for Industrialization. Principal Secretary responsible for National Treasury. Principal Secretary responsible for Maritime Transport.

- i. The 1<sup>st</sup> respondent's constitutive documents are the memorandum and articles of association deposited with the Registrar of Companies on 29.09.2020 together with the Executive Order CAB/GEN.3/1/1(60) dated August 14, 2020 and are public documents within the meaning of the law and due diligence would have aided the petitioner to secure the information on the composition and incorporation of the 1<sup>st</sup> respondent together with the legality thereof of the attendant process.
- j. Per section 6(1) (e) of the *State Corporations Act* Cap 446 Laws of Kenya as read with article 9(h) of the 1<sup>st</sup> respondent's articles of association, the Cabinet Secretary, Ministry of Defence, is empowered to appoint the three members of the Board of Directors of the 1<sup>st</sup> respondent as was done on October 1, 2021 by gazette notice no. 11120. The 1<sup>st</sup> respondent's articles of association do not require that board members' names be published in the Kenya gazette on their appointment. Throughout the 1<sup>st</sup> respondent's existence, the Board of Directors of the 1<sup>st</sup> respondent have continued to discharge their functions per the constitutive memorandum and articles of association of the 1<sup>st</sup> respondent. The interested party was appointed Managing Director at a time the Board of Directors had the necessary quorum per the 1<sup>st</sup> respondent's Articles of Association deposited with the Registrar of Companies. The interested party is an appointee of the Board of Directors of the 1<sup>st</sup> respondent and works under the supervision and resolutions of the Board.
- k. General Robert Kariuki Kibicho is at the material time the Chief of the Defence Forces and the Chairperson of the 1<sup>st</sup> respondent's Board of Directors. Brigadier Daniel Omondi Odeny is a Certified Public Secretary who served as the Company Secretary of the 1<sup>st</sup> respondent during its incorporation. Both are state officers and at no time have they discharged their duties to the 1<sup>st</sup> respondent in their capacity as private citizens, but rather, as public officers. The CR12 exhibited for the petitioner is not a conclusive prove of the composition and constitutive composition of the 1<sup>st</sup> respondent.
- l. The 1<sup>st</sup> respondent is funded from the public funds and therefore it is subject to audit by the Auditor General in order to ascertain that public money has been applied lawfully and in an effective manner. The owner of the equity in the 1<sup>st</sup> respondent reports to the President and is answerable to Parliament which has oversight committees to assure the peoples' representatives in Parliament of prudent financial management of the country's revenue and resources. The 1<sup>st</sup> respondent is therefore accountable and the suspicion and imagination by the petitioner that the registration of the 1<sup>st</sup> respondent is a plan to part with taxpayers' money and resources is not founded on facts, is baseless, and unmerited.
- m. The petitioner has not precisely and concisely articulated the violation in the Bill of Rights subject of the present petition.
- n. The petitioner seeks to paint the 1<sup>st</sup> respondent as an entity which has continuously been in violation of *the Constitution* and attendant legislation which is not true since the petition fails to holistically appreciate the plethora of statutes applicable to the 1<sup>st</sup> respondent, its functions and operations.



- o. The petition is an abuse of court process and it is in the interests of justice that it is dismissed with costs.
6. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents were represented by the learned Senior State Counsel Njau E.M Mvoi, for Attorney General. Final submissions were filed for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as well as for the other parties.
7. The 1<sup>st</sup> respondent had on March 14, 2022 filed an application dated March 11, 2022 praying for orders that the Court finds that the petitioner does not legally exist in law; the petitioner does not have *locus standi* to institute the petition; the court lacks jurisdiction to entertain the petition as forum of 1<sup>st</sup> instance; and, the petition be struck out with costs. The petitioner opposed the application by filing grounds of opposition and the replying affidavit of Julius Ogogoh on April 6, 2022. The matter came up on July 1, 2022 and the Court ordered that the issues raised in the 1<sup>st</sup> respondent's application dated March 11, 2022 be determined together with the petition.
8. The Court has considered all material on record. The Court determines the pertinent issues as follows.
9. To answer the 1<sup>st</sup> issue for determination, the Court returns that the petitioner is a person in law for purposes of the instant petition. The 1<sup>st</sup> respondent in the application dated March 11, 2022 had urged that the petitioner does not exist because it was not registered and with due certificate of registration. In the replying affidavit thereto at paragraph 4, Julius Ogogoh stated that the registration of the petitioner was cemented sometimes on May 3, 2001 when the parent trust deed was endorsed by the registrar of documents on the May 3, 2001 at 11.00am and as was duly exhibited as JO-1. The court finds that the exhibit prima facie settles the matter. In any event [the Constitution](#) of Kenya, 2010 in Article 260 generously defines a person as including a company, association, or other body of persons whether incorporated or unincorporated. Thus, it appears to the Court that in absence of the certificate of registration, the trust deed by itself as registered constituted the trustees as an association or body of persons within the constitutional definition of a person.
10. It is submitted for the 1<sup>st</sup> respondent that the law governing registration of trusts on May 3, 2001 when the petitioner's trust deed was registered was the [Trustees \(Perpetual Succession\) Act](#), Cap 164 of 1981. Further, under section 3, upon registration, the trustees become a body corporate by the name described in the certificate. Clause 15.0 of the trust deed expressly provides that the trustees would apply for registration under the Act in due course of time. It appears they have not done so. However, the Court has found that while falling short of a body corporate, the deed constituted the trustees as an association or body of persons which are included in the definition of a person under [the constitution](#). The Court finds that the petitioner exists but not as a body corporate.
11. In the submissions, the 1<sup>st</sup> respondent appears to shift the argument to include as to how the petitioner as a body of persons or association being unincorporated should sue. The Court returns that such goes beyond the 1<sup>st</sup> respondent's case that the petitioner did not exist and the 1<sup>st</sup> respondent is bound by the scope of its pleaded case. Nevertheless, the Court equally finds that for the orders of the Court to be properly enforceable, it was necessary for the Trustees to be specifically named as the petitioners because being unincorporated body and in absence of a certificate of incorporation constituting the petitioner as a body corporate, the petitioner lacked the artificial legal personality to sue in its own name. The 1<sup>st</sup> respondent's submissions are upheld in that regard and the Court returns accordingly.
12. To answer the 2<sup>nd</sup> issue for determination, the Court returns that it has the necessary jurisdiction to hear and determine the dispute. It is submitted for the 1<sup>st</sup> respondent that the Court lacks jurisdiction because there exists no labour or employment dispute between the 1<sup>st</sup> respondent and the petitioner. Thus the jurisdiction of the Court has not been established per section 12 of the [Employment and](#)



*Labour Relations Court Act*, 2011. However, the issue in dispute is plainly whether the appointment of the interested party as the Managing Director of the 1<sup>st</sup> respondent was lawful and constitutional. The remedy prayed for is for a declaration that the appointment of the Managing Director Kenya Shipyards Limited violates Articles 10 and 232 of *the Constitution* and is invalid, null and void. The other remedy is whether the 1<sup>st</sup> respondent being a public body (and therefore the offices in its establishment such as that of the Managing Director) has been established in accordance with the relevant constitutional and statutory provisions. The Court has from time to time, and, again and again clarified that in public service all are the servants of the people per Article 73(1) (b) that authority vested in a state officer confers the responsibility to serve the people rather than the power to rule them. Further, employment as a public officer or a state officer is governed by a complex design of the applicable constitutional, statutory, lawful policy, and lawful practice arrangements. In those arrangements it may not be easily apparent that this or that person or authority is the employer – what is crucial is that they are all servants of the people. Even where specific person or authority is identifiable as the employer, the person or authority is merely an agent of the principal employer, the conglomeration of the people in whom the sovereign power is vested per Article 1(1) of *the Constitution* of Kenya 2010 which declares, “(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.”

13. The Court returns that the parties to the proceedings per section 12(2) of the Act include any person suing against an employer like in the instant case whereby the petitioner being a human rights watch organisation is suing the 1<sup>st</sup> respondent, an employer. The interested party is as well, invariably, an employee, employed by the 1<sup>st</sup> respondent as Managing Director and which employment is the subject dispute in the petition. The Court considers that the proceedings have satisfied provisions of section 12(2) of the Act which provides, “An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.” The Court construes the subsection to mean that under that provision, any person may sue or be sued before the Court as long as one of the mentioned categories of the parties is included as a party.
14. Section 12(1) of the *Employment and Labour Relations Court Act*, 2011 is clear that the Court has exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of the Act or any other written law. Section 12 (2) of the Act further provides that an application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose – and by that provision, it is clear that in the instant petition the petitioner (as a human rights watch-organisation) has by way of the petition lodged a complaint against the respondents. The Court further holds that by reason of section 12(2) of the Act the proceedings are not limited to parties listed in section 12(1) of the Act but the jurisdiction spreads to disputes about employment even by and against persons not being employees or employers or parties to the contract of service. The Court finds that to be the case especially in view of Article 162(2) as read with Article 165 (5) (b) of *the Constitution*. As submitted for the 1<sup>st</sup> respondent, the short title to the *Employment and Labour Relations Court Act*, 2011 reads, “An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes.” The disputes that come before the Court are those whose subject matter is employment, labour relations, or, those “relating” to employment or labour relations. In the opinion of the Court, a dispute relates to employment or labour relations if, it is about human resource functions or policies and arrangements governing such functions. Human resource functions



would include matters such as creation and abolition of offices, appointments and promotions, terms and conditions of employment, termination of employment, separation or retirement benefits, and, such other employer-employee relational functions. Human resource functions therefore entail such matters as are subject of the provisions of the *Employment Act, 2007* and even as they may be provided for outside that Act as for instance in constitutional and statutory provisions governing employment as a state officer or public officer. Thus section 12 (2) of the Act is designed to enable the Court to entertain matters that are incidental or collateral to employment and labour relations such as employment policy and institutional framework at the workplace. Such are matters which impact or revolve around employment and labour relations – falling out of the actual contract of service or labour relations (such as CBA or recognition agreement). Thus, an issue about accountability of a trade union may be urged before the Court by a public-spirited litigant as against the Registrar, a trade union or a union or federation of unions. Similarly, the petitioner appears to move the Court to pursue the 1<sup>st</sup> respondent about the employment of the interested party within the realm of accountability in public service employment. The Court finds that the subject matter in the cause of action squarely falls within the Court’s jurisdiction by subject matter as contemplated in the constitutional and statutory provisions establishing the Court.

15. The Court follows its holding and opinion in *Trusted Society of Human Rights Alliance –v- Nakuru Water and Sanitation Services Company and Another* [2013] eKLR thus, “The court further holds that in mapping out the boundaries to determine jurisdiction, the court must consider the four crucial traditional elements of jurisdiction namely parties, territory or geographical area, remedies that may issue and subject matter in dispute. The court holds that the authority to decide will relate to the parties, the territory or geographical area of the dispute, the remedies that may issue and the subject matter involved. Depending on the authority to decide as may be conferred, all the four parameters may be pertinent or one or two of them may apply. In the opinion of the court, unless any of the four results into a bar to jurisdiction in the given case or circumstance, presence of any of the four as permitting jurisdiction will be sufficient for the court to assume jurisdiction and proceed to entertain and determine the case at hand.”
16. The Court considers that to be the sound interpretation of “related to employment and labour relations” as the scope of the subject of disputes for which the jurisdiction of the Court applies and which is consistent with the 1<sup>st</sup> respondent’s quotation from *Owners of the Motor Vessel “Lillian” S -Versus- Caltex Oil (Kenya) Ltd* (1989) KLR 1 where the Court of Appeal held, “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the areas over which the jurisdiction shall extend, or may partake of both these characteristics.”
17. The 1<sup>st</sup> respondent submitted and suggested that the Court lacked jurisdiction because the petition was premature for want of exhaustion of administrative procedures. The respondent appears to have urged that under section 27 of the *State Corporations Act*, the 2<sup>nd</sup> respondent performs advisory functions and prior to filing the petition, the petitioner ought to have sought and awaited the advisory and having issued the demand letter. The 1<sup>st</sup> respondent relied upon the 2<sup>nd</sup> respondent’s customer service charter filed for the 2<sup>nd</sup> respondent and which on redress mechanisms it is stated thus, customer complaints are welcome and will be resolved quickly; a complaint should be made in the first instance to the Head of Department; and, a customer care desk and a corruption reporting or suggestion is in place. The



Court finds the Service Charter to be a progressive 2<sup>nd</sup> respondent's internal administrative initiative. Its provision on complainants did not amount to such an alternative dispute resolution mechanism like the one subject of the instant petition. Indeed, by its own wording it was a complaints or grievance mechanism and not a dispute resolution system for resolving a dispute between the 2<sup>nd</sup> respondent or other respondents and other parties like the petitioner. The submissions on want of exhaustion of alternative dispute mechanism is found to have been misconceived. In any event, the 2<sup>nd</sup> respondent's redress mechanism referred to has not been shown to have been published to the petitioner or the public generally. The dispute was essentially against the 1<sup>st</sup> respondent and the service charter by the 2<sup>nd</sup> respondent had no role at all.

18. To answer the 3<sup>rd</sup> issue, the Court finds that the petitioner had the locus standi to institute the petition. The petitioner has established by its trust deed that it defends public interest. It had locus standi per provisions of Article 22 (2) (c) and Article 258 (2) (c) entitling a person acting in the public interest to institute proceedings claiming that a right or fundamental freedom has been denied, violated, infringed, or is threatened; or, claiming that the Constitution has been contravened or is threatened with contravention. The pleadings in the petition alleged contravention of Articles of the Constitution such as 10, 232 and 73.
19. To answer the 4<sup>th</sup> issue the Court returns that the 1<sup>st</sup> respondent is a public body and as submitted for the respondents, it is registered under the Companies Act, 2015. The sole shareholder is the Cabinet Secretary to the Treasury of Kenya who is a body Corporate pursuant to provisions of the Cabinet Secretary to the Treasury (Incorporation) Act, Cap 101, Laws of Kenya. The material before the court show that the 1<sup>st</sup> respondent is a company limited by shares, incorporated under the Companies Act, and, which is wholly owned or controlled by the Government. While the 1<sup>st</sup> respondent is indeed a private company limited by shares, it is also a state corporation under the state Corporations Act within the definition in the Act. Under the Cabinet Secretary to the Treasury (Incorporation) Act, Cap 101, the Cabinet Secretary to the Treasury of Kenya is established as a body corporate and under the State Corporations Act, the Cabinet Secretary to the Treasury of Kenya incorporated as such is not a state corporation. However, it should be obvious that though the Cabinet Secretary to the Treasury of Kenya is the sole shareholder of the 1<sup>st</sup> respondent, the two are separate legal entities, the 1<sup>st</sup> respondent being a state corporation or public body. The Court further considers that the Cabinet Secretary to the Treasury of Kenya duly incorporated is not a state corporation but, it is invariably a public body that expends public funds and would be chained by the provisions of Article 232 of the Constitution on the values and principles of public service including in matters of recruitment, appointment, and, disciplinary control of such public body corporate.
20. The 1<sup>st</sup> respondent is also "a public body" as defined under the Public Service Commission Act, 2017. Under section 2 of the Act, "a public body" includes:
  - (a) any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law;
  - (b) a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition;
  - (c) statutory public bodies; or,
  - (d) any public body brought under the jurisdiction of the Commission by an Act of Parliament for a specified function to the extent of that function."





21. Section 3 of the Act provides the Act is applicable to all public bodies and persons holding office in public service but subject to, amongst other provisions, section 28 of the [Kenya Defence Forces Act](#) No. 25 of 2012 and which provides as follows:

- “(1) The Defence Council shall recruit and appoint members of the Defence Forces, other than the members who are State Officers.
- (2) In developing the criteria for the recruitment, promotion and transfer of members of the Defence Forces, the Defence Council shall consult with the Public Service Commission.
- (3) The Defence Council shall advertise the designated recruitment centres for all the counties at least thirty days before recruitment.
- (4) The criteria developed under subsection (2) shall comply with [the Constitution](#) and this Act.
- (5) The Defence Council may, in the prescribed manner and on its behalf, appoint a person authorised to recruit service members into the Defence Forces.
- (6) The recruitment and appointment procedure under this Act shall comply with Article 232(1)(g), (h) and (i) of [the Constitution](#).”

22. The Court considers that even if the 1<sup>st</sup> respondent is formed for the purposes of the roles played by the Kenya Defence Forces, by itself it is a public body under the [Public Service Commission Act](#), 2007 and a state corporation under the [State Corporations Act](#). The constitutional and statutory provisions governing employment in the public service and the provisions of Article 232 of [the Constitution](#) will generally apply but subject to the relevant and lawful provisions of its articles and memorandum of association. The articles and memorandum of association have not been exhibited and it is difficult for the Court to tell the extent to which the provisions therein comply with the values and principles of public service in Article 232 of [the Constitution](#) particularly, on matters of recruitment, selection, appointment and promotions.

23. To answer the 5<sup>th</sup> issue, the material before the Court discloses that the 1<sup>st</sup> respondent was established as a wholly public owned company (the Cabinet Secretary to the Treasury of Kenya as the sole shareholder) to serve the specific purposes within the framework of the Kenya Defence Forces. The memorandum and articles of association have not been filed. It is therefore difficult for the Court to tell the procedures for the appointment of its Managing Director and under which the interested party was appointed. It might be that it was a promotional appointment within the framework of the Kenya Defence Forces laws and policies or such other provisions in the instruments constituting the 1<sup>st</sup> respondent – the Court can only speculate. The Court finds that the petitioner has failed to provide evidence showing that the interested party was appointed the Managing Director of the 1<sup>st</sup> respondent in contravention of the cited constitutional or even statutory provisions. There is also no material before the Court to show that the formation of the 1<sup>st</sup> interested party was in contravention of constitutional or statutory provisions. It appears to the Court that the allegation that the 1<sup>st</sup> respondent was formed in contravention of the law is not established at all especially that the provisions that may have been violated have not been shown or even alleged at all.

24. In view of the Court’s findings, the petition must therefore fail. The petition being in the public interest, the Court is reluctant to award costs. Each party will bear own costs.



25. In conclusion, the petition is hereby dismissed with orders each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 4TH NOVEMBER, 2022.**

**BYRAM ONGAYA**

**JUDGE**

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