



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.203 OF 2016**

**BETWEEN**

**ADRIAN KAMOTHO NJENGA.....PETITIONER**

**AND**

**CABINET SECRETARY, MINISTRY OF INFORMATION,**

**COMMUNICATION & TECHNOLOGY.....RESPONDENT**

**AND**

**COMMUNICATIONS AUTHORITY OF KENYA.....1<sup>ST</sup> INTERESTED PARTY**

**PAUL KUKUBO.....2<sup>ND</sup> INTERESTED PARTY**

**MUGAMBI NANDI.....3<sup>RD</sup> INTERESTED PARTY**

**DAVID CHERUIROT KITUR.....4<sup>TH</sup> INTERESTED PARTY**

**LEVI OBONYO OWINO.....5<sup>TH</sup> INTERESTED PARTY**

**CHRISTOPHER GUYO HUKA.....6<sup>TH</sup> INTERESTED PARTY**

**PATRICIA W. KIMAMA.....7<sup>TH</sup> INTERESTED PARTY**

**KENTICE L. TIKOLO.....8<sup>TH</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petitioner, Adrian Kamotho Njenga moved this Court by way of his Petition dated 20<sup>th</sup> May, 2016 and simultaneously, filed a Notice of Motion Application dated 20<sup>th</sup> May, 2016 seeking the following interim orders:

*(a) This Application be certified urgent and heard forthwith ex-parte in the first instance.*

***(b) Pending the hearing and determination of the application inter parties this Honourable Court be pleased to issue an interim order suspending the operation of Gazette Notice No.3152 by the Respondent dated 29<sup>th</sup> April and published on 4<sup>th</sup> May, 2016.***

***(c) Costs or incidentals to this Application be provided for.***

***(d) This Honourable Court be at liberty to grant any further orders/relief that may be just and expedient.***

2. The Petition, on its part, seeks the following orders:

***(a) A declaration that the actions of the Respondent are in violation of Articles 10 and 27 of the Constitution of Kenya.***

***(b) A declaration that the actions of the Respondent are in violation of Section 6B(10)(c) of the Kenya Information and Communication Act.***

***(c) A declaration that the Gazette Notice No. 1267 dated 25<sup>th</sup> February and published on 26<sup>th</sup> February, 2016 is invalid and an order of certiorari quashing the said Gazette Notice. (sic)***

***(d) A declaration that the Gazette Notice No. 3152 dated 29<sup>th</sup> April and published on 4<sup>th</sup> may, 2016 is invalid and an order of certiorari quashing the said Gazette Notice. (sic)***

***(e) An order of mandamus directing the Respondent to comply with the gender requirement and ensure that at least four of the twelve appointees to the Board of the Communications Authority of Kenya are of opposite gender.***

***(f) Costs of or incidentals to this Petition.***

***(g) This Court be at liberty to grant any further orders/relief that may be just and expedient.***

3. The grounds relied upon in the Notice of Motion and the Petition are similar as summarized below:

***(a) The current composition of the Communications Authority Board fails to abide by Article 27 of the Constitution and is the epitome of gender segregation and insensitivity.***

***(b) The appointments to the Communications Authority of Kenya Board are flagrantly in breach of the outright provisions of Section 6B (10)(c) of the Kenya Information and Communications Act which obligate the Respondent to ensure that the appointees reflect the interests of all sections of society and that no candidate from the legally recognized body of ICT professionals was included despite meeting the appointment criteria.***

***(c) The discrimination by the Respondent against members of the ICT professional community while constituting a Board meant to govern ICT sector contradicts the national values of inclusivity and good governance enunciated under Article 10 of the Constitution.***

***(d) In failing to abide by the constitutional, statutory and gender requirements, the Respondent has fallen short of the values and principles of public service espoused under Article 232 of the Constitution.***

***(e) The actions of the Respondent are contrary to Article 19 of the Constitution which envisages the dignity of individuals and realization of the potential persons of all gender.***

**Petitioner's case**

4. The Petitioner is a Kenyan citizen, who at the time of filing the Petition was the Secretary General of the Information Communication Technology Association of Kenya (ICTAK). His case is as contained in the Notice of Motion Application dated 20<sup>th</sup> May, 2016 and the Petition of even date; the undated Supporting Affidavit filed on 20<sup>th</sup> May, 2016 and the submissions dated 1<sup>st</sup> July, 2016 as well as further submissions dated 2<sup>nd</sup> August, 2016.

5. The Petitioner in a nutshell challenges the appointment of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties as members of the Communications Authority of Kenya Board (**the Board**). His case is that firstly, he challenges the short-listing process of the said parties and submits that, it did not comply with **Section 6B (10) (c)** of the **Kenya Information and Communication Act, Cap 411A Laws of Kenya, (KICA)** which requires that such an exercise ought to take into account the requisite gender balance by ensuring that not more than two-thirds of the candidates shortlisted are of either gender.

6. Secondly, the Petitioner questions the legality of the eventual appointment of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties to the Board on grounds that the composition thereof does not meet the requisite proportion of members of the female gender contrary to **Article 27** of the **Constitution** and **Section 6B(10) (c)** of the **KICA**. He urges the point therefore that the appointment process was unlawful and the appointments made to the Board.

7. On the basis of the said alleged illegality, the Petitioner *inter alia* seeks the revocation and consequent annulment of Gazette Notice No. 1267 dated 26<sup>th</sup> February, 2016, which published the names of all the applicants for the position of Board members as well as the names of the applicants later shortlisted by the selection panel. In the same measure, he asks the Court to quash Gazette Notice No. 3152 dated 29<sup>th</sup> April, 2016 which appointed the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties to the Board.

8. It is his further submission that the KICA requires that the appointment of Board members ought to be made in different phases so as not to create a vacuum in a situation where the terms of all members expire at the same time. He asserts therefore that the Respondent in contravention of that guideline, appointed all members of the Board to serve from the same date meaning that they would all leave office at the same time. Again, to that extent, the Petitioner submits that the appointments do not comply with the governing law.

### **Respondent's Case**

9. The Respondent is the Cabinet Secretary, Ministry of Information, Communication and Technology, a State Officer in charge of the State department responsible for matters relating to information technology, communication and media. In response, he relies on the Replying Affidavit sworn by Sammy Itemere on 27<sup>th</sup> July, 2016 and submissions dated 3<sup>rd</sup> August, 2016.

10. It is his submission that the appointments of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties to the Board were done procedurally, in accordance with the Constitution and the KICA in that the process adhered to the two-thirds gender rule provided for under **Article 27(6)** and **(8)** of the **Constitution** and further, that the selection panel selected seven (7) persons for appointment to the Board in line with **Section 6(1)** of the **KICA** which outlines the composition of the Board. In that regard, that membership to the Board comprises 11 members being the Chairperson appointed by the President, three (3) persons representing Principal Secretaries in the relevant ministries and seven (7) persons appointed by the Respondent.

11. The Respondent has also explained that the vacancies for the position of the seven (7) Board members arose after the High Court, in the case of **R v. Cabinet Secretary, Ministry of Information and Communication & 10 Others Ex parte Adrian Kamotho Misc. Civil. Appli. No. 401 of 2014; [2015] eKLR**, quashed the initial appointments the then Board members for non-compliance with the law necessitating that the Respondent commenced a new process of filling those vacancies.

12. Further, that in accordance with **Section 6B(1)(a)** of the **KICA**, the said positions were advertised in

Gazette Notice No. 698 of 5<sup>th</sup> February, 2016 and posted on the Ministry's website, inviting suitably qualified persons to apply for the said positions. Thereafter a selection panel was constituted pursuant to **Section 6B(6)** of the **KICA**, which commenced the process of sifting through the various applications, shortlisted and published in the *Gazette* the names and qualifications of all the applicants as well as those shortlisted for the interviews. The Petitioner was among the persons shortlisted for the interviews and was interviewed on 21<sup>st</sup> April, 2014 but was unsuccessful.

13. Upon conclusion of the interviews, the selection panel forwarded the names of fourteen nominees to the Respondent for eventual appointment of the requisite seven (7) persons and vide Gazette Notice No. 3152, the Respondent appointed the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties as members of the Board with effect from 29<sup>th</sup> April, 2016. It is the Respondent's position that in making the said appointments, due regard was made to the consideration of regional and gender balance as well as the performance of the individual candidates at the interviews. In the end, out of the seven(7) Board members appointed, two (2) persons are of the female gender and five (5) are male. In view of that fact, the Respondent submits that the current gender composition is in line with the two-thirds gender rule which requires that not more than two-thirds of the members appointed should be of the same gender.

14. It is the Respondent's further contention that he has no control over who is to sit as an alternate to the Principal Secretaries in the three ministries or who becomes the President's nominee. He stated that specifically the Board, as currently constituted, is comprised of the following members:

- i) Mr. Ngene B. Gituku(M)-Chairman, appointed by the President.**
- ii) Ms. Judy Munyinyi Mumo(F)-Alternate to the Principal Secretary, Broadcasting and Telecommunications.**
- iii) Ms. Beatrice Gathirwa(F)- Alternate to the Principal Secretary, National Treasury.**
- iv) Mr. John Njoroge(M)- Alternate to the Principal Secretary, State Department of Interior.**
- v) Mr. Paul Kukubo(M).**
- vi) Mr. Mugambi Nandi(M)**
- vii) Mr. David Cheruiyot Kitur(M)**
- viii) Prof. Levi Obonyo Owino(M)**
- ix) Mr. Christopher Guyo Huka(M)**
- x) Ms. Patricia W. Kimama(F)**
- xi) Ms. Kentice L. Tikolo(F)**

15. In light of the foregoing, the Respondent asserts that the gender ratio and composition of the Board members is in consonance with **Article 27(8)** of the **Constitution** since 4 out of the 11 members of the Board are women; representing at least a third of the total Board membership.

16. The Respondent's further contention is that, indeed the competence of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties is not in question and that the Petitioner does not challenge the selection process for lack of transparency or fairness. Accordingly, the Petitioner's allegation of discrimination solely on grounds that members of ICTAK were not duly considered for the Board membership positions are without basis in that suitably qualified persons were eventually appointed and in any case, there is no specific provision under KICA that members of ICTAK ought to be given special consideration in the appointment to the Board. In conclusion, he urges the Court to dismiss the Petition with costs.

## **1<sup>st</sup> to 8<sup>th</sup> Interested Parties submissions**

17. The above Interested Parties rely on the Replying Affidavit sworn by Mr. Francis Wangusi on 27<sup>th</sup> June, 2016 and submissions dated 19<sup>th</sup> July, 2016.

18. The 1<sup>st</sup> Interested Party is the Communications Authority of Kenya, an independent regulatory authority for the communications sector established pursuant to **Article 34(5) of the Constitution** and the **Kenya Information and Communications (Amendment), Act, 2013**. The 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties were appointed on 29<sup>th</sup> April, 2016 by the Respondent, to the 1<sup>st</sup> Interested Party's Board.

19. In opposing the Petition and the Notice of Motion Application, the Interested Parties submit that the Petitioner has not given the name of any female candidate who was overlooked in the process of the appointment of the members of the Board and neither does the Petitioner impugn the qualifications of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties to sit on the said Board. Further, that the Petitioner does not allege, neither has he shown proof, that the shortlisting and the interview process as well as the eventual recommendation of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties for appointment to the Board was not based on merit. In that regard, it is their submission that the Petitioner's allegations of discrimination are without basis.

20. On the Notice of Motion Application, the Interested Parties submit that the conservatory orders sought therein have been rendered academic in light of the fact that the Petition had already been scheduled for hearing and is the prime subject of determination now. They state that the conservatory orders sought cannot in any event be properly determined at a preliminary stage since they are final in nature in that the practical effect of the suspension of the operations of the Board as prayed, would culminate in the removal of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties from the Board, at a preliminary stage.

21. In addition, they submit that the Petitioner has not placed any compelling evidence before this Court showing how he or any female candidate have suffered prejudice if the conservatory orders sought are not granted. They argue therefore that the Notice of Motion Application does not meet the threshold set in the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others Application 5 of 2014; [2014] eKLR* and ought to be dismissed with costs as should the Petition.

## **Determination**

22. Flowing from the foregoing, the following issues crystallize for consideration;

*(a) Whether conservatory orders should be granted suspending the operation of the Gazette Notice No. 3152 dated 29<sup>th</sup> April, 2016 appointing the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties as members of the Communications Authority of Kenya's Board.*

*(b) Whether the two-thirds gender rule entrenched in Article 27(6) and (8) as well as Section 6B (10)(c) of the Kenya Information and Communication Act was adhered to in the shortlisting and the appointment of the members of the Board of CAK.*

*(c) Whether the membership of the Board of CAK as presently constituted meets the constitutional and statutory threshold in light of its gender composition.*

*(d) Whether Gazette Notices Nos. 1267 and 3152 should be annulled.*

**(a) Whether conservatory orders should be granted suspending the operation of the Gazette Notice No. 3152 dated 29<sup>th</sup> April, 2016 appointing the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties as members of the Communications Authority of Kenya's Board.**

23. By a Notice of Motion Application dated 20<sup>th</sup> May, 2016, the Petitioner sought interim orders suspending the operation of Gazette Notice No. 3152 dated 29<sup>th</sup> April, 2016 pending the hearing and

determination of the Application. That Application, filed under a certificate of urgency was never argued as it was later subsumed in the main Petition. The orders sought in the Application are of a conservatory nature as they seek to suspend the operation of Gazette Notice No. 3152 pending the hearing and determination of the substantive matter. Ordinarily, such an application should have been disposed of first before delving into the merits of the Petition. In this case however, that did not happen and both the Petition and the Notice of Motion were to be heard at the same time and it is worth noting that the grounds upon which the conservatory orders are sought are similar to those on which the Petition is grounded. Consequently, it emerges that due to the factual overlap between the Notice of Motion Application and the Petition, the determination of the Application would in effect impact on the crux of the Petitioner's case, which is whether the consequent appointment of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties was lawful. In that regard, it would be superfluous to interrogate the merits of the Application at this stage since the determination of the Petition will certainly settle the whole controversy.

**(b) Whether the two-thirds gender rule as per Article 27(6) and (8) as well as Section 6B (10) (c) of the Kenya Information and Communication Act was adhered to in the shortlisting and the appointment of the members of the Board of the CAK.**

24. In this matter, it must be recalled that the Petitioner challenges the short-listing process aforesaid and submits that it did not comply with **Section 6B (10) (c)** of the **KICA** which requires that such an exercise ought to take into account the requisite gender balance by ensuring that not more than two-thirds of the candidates shortlisted are of either gender. In that context, the Petitioner argues that the eventual appointment of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties as members of the 1<sup>st</sup> Interested Party's Board was contrary to **Article 27(8)** of the **Constitution**.

25. In the above regard, the two-thirds gender rule is a principle introduced by the **Constitution** by virtue of **Article 27(8)** which provides thus:

***“In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”***

26. Whereas **Article 27(8)** of the **Constitution** prescribes the gender ratio in the composition of the Board aforesaid, **Section 6(B)(10)** of **KICA** goes further to provide that the two-thirds gender rule should be observed beginning at the selection and shortlisting processes and ultimately reflecting on the actual appointments. In particular, **Section 6(B)(10)** of **KICA** provides that;

***“In selecting, shortlisting and appointing the Chairperson and members of the Board, the President and the Cabinet Secretary shall-***

***(a) ensure that the appointees to the Board reflect the interests of all sections of the society;***

***(b) ensure equal opportunities for persons with disabilities and other marginalized groups; and***

***(c) ensure that not more than two-third of the members are of the same gender.”***  
[Emphasis added.]

27. In this regard, the Petitioner argues that the Respondent completely disregarded the commands of **Section 6(B)(10)(c)** in the selection and shortlisting of candidates for the interviews and referred the Court to exhibit FW.2 which is the Gazette Notice No. 1267 dated 25<sup>th</sup> February, 2016 which contains the list of all candidates that applied for the position of Board members. He submits that it is evident from the said Gazette Notice that there were 29 female candidates who had applied for the position of Board member and who, in his view, were highly qualified and therefore he questions why only 9 female applicants were eventually shortlisted for the interview and later only 2 were appointed to the Board, yet no evidence had been tendered to show that the other female applicants had failed to meet the

appointment criteria under the KICA.

28. In that context, the criteria for the appointment and the requisite qualifications of the Communications Authority of Kenya Board members is provided for under **Section 6A** of the **KICA** which provides thus:

***(1) A person shall be qualified for the appointment as a chairperson or member of the Board under subsection (1)(a) and (e), if that person is-***

***(a) A citizen of Kenya;***

***(b) Holds a degree from a University recognized in Kenya, in any of the following fields-***

***(i) Law***

***(ii) Telecommunications, information and communication technology;***

***(iii) Broadcasting;***

***(iv) Postal regulation;***

***(v) Humanities and social sciences; or***

***(vi) Any other relevant field;***

***(c) Has experience in the relevant sector for a period of at least ten years in the case of the chairperson and five years in the case of any other member; and***

***(d) Satisfies the requirements of Chapter Six of the Constitution.***

***(2) Despite subsection (1)(b) and (c), a person may be qualified for appointment as a chairperson or member of the Board, if such person, not being a degree holder, demonstrates that he or she has a distinguished career of not less than twenty years in the information, communication and technology sector.***

***(3) A person shall not be qualified for appointment as a chairperson or member of the Board under Section 6(1)(a) and (e) if that person-***

***(a) In the last six months immediately preceding the appointment, had personal direct or indirect commercial interest in the sector regulated under this Act;***

***(b) Is an office-bearer or employee of any political party;***

***(c) Is a public officer;***

***(d) Is an undischarged bankrupt;***

***(e) Suffers from physical or mental infirmity that would render him or her incapable of discharging the functions of the Board;***

***(f) Has been convicted of a felony and sentenced to a term of imprisonment;***

***(g) Has been convicted of an offence under this Act; or***

***(h) Has been compelled to resign or has been removed from office on account of abuse of office.***

29. The appointment procedure for Board Members is also detailed out in **Section 6B (1)** of the **KICA** as follows:

*(1) Within fourteen days of the occurrence of the vacancy in the office of the Chairperson or member, the President or the Cabinet Secretary, as the case may be, shall-*

*(a) By notice in the Gazette and on the official website of the Ministry, declare a vacancy in the Board, and invite applications from qualified persons; and*

*(b) Convene a selection panel for the purpose of selecting suitable candidates for the appointment as the chairperson or member of the Board.*

30. Further, **Section 6B(6)** provides thus:

*The selection panel shall consider the applications, shortlist and publish the names and qualifications of all the applicants and those shortlisted by the panel in the Gazette and on the official website of the Ministry, within seven days from the expiry of the deadline of receipt of applications under subsection(4).*

31. In addition **Section 6(B)(7) & (8)** provides that:

*(7) The selection panel shall interview the shortlisted applicants within fourteen days from the date of the publication of the list of shortlisted applicants under subsection (6).*

*(8) Upon carrying out the interviews, the selection panel shall select-*

*(a) three persons qualified to be appointed as chairperson; and*

*(b) two persons, in relation to each vacancy, qualified to be appointed as members of the Board, and shall forward the names to the President or the Cabinet Secretary, as the case may be.*

32. A reading of the above quoted provisions would show that the Act provides for a systematic procedure on how to select and appoint persons to the 1<sup>st</sup> Interested Party's Board. The process begins when the President or the Cabinet Secretary declares a vacancy in the office of a Board member inviting suitably qualified persons to apply for the position. A selection panel is thereafter empaneled with the aim of shortlisting and interviewing suitable candidates for possible appointments to the Board.

33. In this case, the Petitioner questions why only 9 female applicants were shortlisted for the interviews out of the 29 female candidates who had applied for the position of Board members. The Interested Parties in response submit that the selection panel which conducts the shortlisting exercise is mandated to ensure that all the shortlisted candidates have the qualifications set out under **Section 6A** of the **KICA**. Further, that the Petitioner has not demonstrated that the female applicants were put under a different test than other male applicants thus placing them at a disadvantaged position.

34. In that regard, I take the position that a shortlisting process is not an exercise in vain. To begin with, the process is informed by the actual number of applications received and the minimum qualifications expected of all candidates. In this case, **Section 6A(1)** of the **KICA** sets out the qualifications required for persons to be appointed as members of the Board. Such persons must have relevant degrees from any of the recognized fields, be Kenyan citizens, have at least 5 years' relevant experience and above all, satisfy the requirements of **Chapter 6** of the **Constitution**. One may also be considered for appointment even without being a graduate, where such a person demonstrates that he or she has a distinguished career of not less than twenty years in the information, communication and technology sector.

35. Over and above the set qualifications, **Section 6A(3)** of **KICA** provides instances when a candidate may be barred from holding the Board's membership position where for instance such a person is: an

office bearer or employee of any political party; a public officer; an undischarged bankrupt; is suffering from mental or physical infirmity rendering him incapable of discharging the requisite duties; has been convicted of a felony and sentenced to a term of imprisonment or is convicted of an offence under the KICA; or is compelled to resign or has been removed from office on account of abuse of office or in the preceding 6 months before the appointment has had personal, direct or indirect commercial interest in the information, communication and technology sector.

36. The existence of the named guiding tools detailing qualifications and disqualifications of Board members shows that the mere act of applying for consideration as a Board member is not an automatic indication of eligibility. There is still a chance for disqualification, even where a candidate possesses the requisite qualifications. In essence, not every candidate who applies for the advertised positions, qualifies for shortlisting. Consequently, **Section 6B(10)(c)** which requires the shortlisting exercise to take into consideration the two-thirds gender rule must be seen in that light.

37. In addition, whereas the **Constitution** requires that the substantive appointments in both appointive and elective bodies must take into consideration the two-thirds gender rule, KICA demands more and provides that even in shortlisting and when making appointments, the President and Cabinet Secretary ought to ensure that not more than two-thirds of the persons so appointed are of the same gender. This is a bold provision in law which creates sufficient safeguards in ensuring the probability of meeting the commands and expectations of **Article 27(8)** of the **Constitution**.

38. In this particular case, I note that out of the 136 persons who had applied for the advertised positions of Board members, only 29 applicants were female. Upon considering the applications, the selection panel shortlisted 28 candidates; out of those 9 were women and 19 were men. The Petitioner's case is that the 9 female candidates shortlisted were few in comparison with the total number of female persons that had applied for those positions. Sadly for him, I find no merit in his argument in that regard since as already stated above, the shortlisting exercise is strictly guided by specific tests which determine how a candidate progresses from one stage of the process to another. I am not privy to the deliberations undertaken by the selection panel in shortlisting the candidates for the interviews and therefore, unless it is shown that the procedure provided for was not followed or that the selection panel acted in complete disregard of the relevant laws, or if there is evidence imputing impropriety or unfairness on the selection panel, then I would be hesitant to interfere with the decision of the said selection panel.

39. Furthermore, although I acknowledge that the KICA has specifically provided that the shortlist should meet the two-thirds gender threshold, in my view, the utmost gender ratio composition should be on the substantive appointments in line with **Article 27(8)** of the **Constitution** and I therefore find no basis for invalidating Gazette Notice No. 1267 dated 25<sup>th</sup> February, 2016 which contains the names of the candidates shortlisted for the interviews.

40. With regard to whether the appointment of the 2<sup>nd</sup> to 8<sup>th</sup> Interested Parties met the two-thirds gender threshold, the Petitioner submits that the Board as presently constituted, does not do so contrary to **Article 27** of the **Constitution** and **Section 6B (10) (c)** of the **KICA** since only two (2) out of the seven (7) persons appointed to the Board are female.

41. The Respondent and the Interested Parties hold a contrary view and their position is that the existing gender ratio of two (2) female out of seven (7) Board members meets the requisite gender threshold provided for under **Article 27(8)** of the **Constitution**. In addition, they submit that the Board as currently constituted and in its proper composition, after factoring in the other four (4) appointees, comprises four (4) women and seven (7) men; to that extent they assert that the composition meets the two-thirds gender threshold.

42. The manner of effectively and correctly implementing the two-thirds gender principle propagated by the **Constitution** has been the subject of previous litigation in our Courts and for example in the case of **Federation of Women Lawyers Kenya (FIDA-K) & 5 Others v. Attorney General & Another, Petition No. 102 of 2011; [2011] eKLR**, the issue for determination was whether the Judicial Service Commission (JSC) had violated **Article 27** of the **Constitution** in making the recommendation of five Judges to the

President for appointment as Supreme Court Judges with only one being of the female gender. The question before the Court was similar to the one before me in that, the Petitioners therein had contended that having only two (2) persons of female gender vis a vis five (5) persons of male gender, was against the two-thirds gender principle in that the female proportion was below the recommended one-third.

43. In particular, it was contended that the JSC was under a duty to ensure that in the final analysis of its recommendation, no gender fell below the 33.3% ratio nor exceeded the 66.7% ratio hence in line with the contested mathematical reality that  $\frac{2}{7}$  is 2.3 and  $\frac{5}{7}$  is 4.7, and therefore the JSC should have considered that fact to avoid reducing the numbers below the constitutional minimum and avoid exceeding the constitutional maximum. Further, that the 2.3 figure ought to have been rounded off to 3 and 4.7 ought to have been rounded off to 4 which would have resulted in a constitutionally compliant ratio. It was also contended that with two (2) female judges and five (5) male judges in the Supreme Court, the percentage composition of the female gender would be 28.57% whereas the percentage composition of the male gender would be 71.43%, and therefore, the recommendation by the JSC was in breach of **Article 27** on the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

44. In addressing the said issues, the Court did not delve into the justiciability or the applicability of the mathematical formula adduced but instead addressed itself as to what the correct interpretation, the meaning and effects of **Article 27** of the **Constitution** would be in the specific circumstances of that case. In that regard, the Court noted thus:

***“We reckon that judicial appointments should be based on merits, non-discrimination and they must reflect the diversity of our people but in this case we have no evidence that JSC in exercise of its functions under Article 172 as read together with the JSC Act failed to comply with Article 27. We think that the JSC conducted the shortlisting, the interviews and the recommendations of the five Supreme Court Judges in accordance with the provisions of part V of the JSC Act, 2011, Section 30 of the said Act and all the relevant provisions of the Constitution.”***

45. The Court also noted that the key words in **Article 27** are equality and freedom from discrimination. Consequently, the Court remarked as follows:

***“If the point is to help the disadvantaged it should be based on something more than a female gender and unless one carries out an affirmative action from the grass root it would be difficult for the deserving persons to benefit from any kind of affirmative action. If the formula and criteria is not set properly, affirmative action would benefit an already advantaged lot.”***

The Court went further and observed:

***“When all is said and done, affirmative action is not meant to secure special people for any group within our society. We are saying so because the central issue in this dispute is the appointment of Judges to the Supreme Court. Without doubt persons to be appointed to any judicial office can be decreed to be learned persons who have gone through vigorous learning and experience. Judicial appointment cannot and is not meant for every Dick and Harry. It is only meant for people who have gone through Law school and who have attained a certain foundation of experience in their legal training and experience. Affirmative action is meant to incorporate every sector of our society and to bring up the less and disadvantaged members of our society.”***

46. The Court also noted that the qualifications for appointment of the seven members of the Supreme Court are set out in **Article 166** and in particular **Article 166(2)** and **(3)** which lists the criteria to be fulfilled for persons to be appointed to the Supreme Court. The Court therefore took the position that where the qualifications for holding a particular office are clearly provided for and where there is no evidence imputing impropriety on the body in charge of appointing or recommending qualified persons for appointment, then it takes more than just a person's gender to determine eligibility. In this regard, the Court held:

*“It is clear, therefore that judicial appointments should be based on the concept of equal opportunity, non-discrimination and above all must reflect the diversity of the people of Kenya taking into consideration the values, beliefs and experience brought about by an individual appointed for a particular position. Women are just as likely as men to possess attributes of good judges and experience. It has come to be accepted democratically that a judiciary that does not reflect the diversity of the society at large will lose the confidence of the public upon which its authority ultimately rests. We think that the role and the powers of the JSC have been clearly defined by the JSC Act and by the Constitution. Generally, it can be assumed that any person who meets the criteria and standards set has a legitimate expectation to be recommended for appointment. Those who finish in the top group of the candidates counting judicial traits, academic promise, ethnic and geographical diversity and gender consideration are entitled to be recommended for appointment. It would be unfair, unjust and unconstitutional to exclude persons who come within the threshold set by Article 27, Article 172 and the JSC Act for appointment.”*

47. A similar issue of gender composition was also raised in the case of *Marilyn Muthoni Kamuru & 2 Others v. Attorney General and another* Petition No. 566 of 2012; [2016] eKLR. In that case, the question that was before the High Court was whether the nomination by the President and the approval of the National Assembly of persons for appointment to the positions of Cabinet Secretaries was done in contravention of **Article 27(8)** of the **Constitution**. The consequent issue was whether the Cabinet of the National Government, as was then constituted, violated **Article 27(8)** of the **Constitution** for its alleged failure to adhere to the two-thirds gender rule. In that particular case, the Cabinet was composed of 18 men and 5 women and in finding that the appointment of persons to the Cabinet violated the not more than two-thirds gender requirement, the Court observed, at paragraph 43 as follows:

*“I would therefore agree that Article 27(8), especially as far as the appointive positions are concerned, should be realized immediately in contrary to the submissions of Mr. Njoroge. In any event ensuring that not more than two-thirds of the same gender is the bare minimum. It has been over six years since the promulgation of the Constitution. It is loathsome that over six years later, the State still claims to realize some of these rights progressively. The moratorium ought to come to an end especially with regard to appointive positions.”*

48. A related issue also arose in an Advisory Opinion issued by the Supreme Court *In the Matter of the principle of Gender Representation in the National Assembly and the Senate*, Reference No. 2 of 2012; [2012]eKLR, wherein the Court was called upon to address itself on whether **Article 81(b)** as read with **Article 27(4), (6), (8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116** and **Article 125** of the **Constitution**, requires progressive realization of the enforcement of the one-third gender rule or require the same to be implemented during the General Elections scheduled for 4<sup>th</sup> March, 2013.

49. The Court in analyzing that issue, gave the example of the Judicial Service Commission (JSC), which due to the dictates of the **Constitution** ought always to have, in its membership at least 3 women out of its 11 members. The Court referred to **Article 171** of the **Constitution** which outlines the composition of the JSC to include *inter alia*; *one High Court Judge and one magistrate being, one a woman and one a man, two advocates being, one a woman and one a man and one woman and one man to represent the public* and observed that:

*“The foregoing examples demonstrates that, so far as the Judicial Service Commission is concerned, it is certain that the gender-equity rule of one-third-to-two-third is immediately realized....The Judicial Service Commission is both an appointive and elective body. As there is a clear provision on how the women are to be elected, the Commission will always have a minimum of three women out of the eleven members: which falls short of the one-third-to-two-thirds gender rule. But were the female membership of the Commission to rise to four out of eleven, then there would be no basis for claiming the existence of any breach of the terms of the Constitution. ...From the foregoing example, it is clear that the realization of a female membership for the Judicial Service Commission, of three, is immediate; but the attainment of the number of four is progressive, being dependent on the State’s further action.”*

50. In the end, the Court held that the rights under **Article 27(8)** of the **Constitution** ought to be realized progressively in certain instances.

51. In this particular case, I am not being asked to determine whether the rights under **Article 27(8)** of the **Constitution** are progressive or immediate. My analysis is limited to the determination on whether the 1<sup>st</sup> Interested Party's Board as currently constituted meets the requisite gender representation as mandated by **Article 27(8)** of the **Constitution** and I have stated that it does.

52. In addition to the above and with regard to the composition of the Board, **Section 6** of the **KICA** provides:

**(1) The management of the Authority shall vest on the Board which shall consist of-**

**(a) A chairperson appointed by the President in accordance with section 6B;**

**(b) The Principal Secretary for the time being responsible for matters relating to broadcast, electronic, print and all other types of media;**

**(c) The Principal Secretary for the time being responsible for matters relating to finance; and**

**(d) The Principal Secretary for the time being responsible for matters relating to internal security; and**

**(e) Seven persons appointed by the Cabinet Secretary in accordance with Section 6B.**

53. It is clear from the above provision that the Communications Authority of Kenya's Board is properly constituted if it is composed of eleven (11) persons being the Chairperson, three Principal Secretaries in the designated ministries and seven other persons appointed by the Cabinet Secretary and therefore, the seven (7) persons appointed by the Cabinet Secretary do not by themselves form the Board. Such persons must be joined by others in order for a Board to be properly constituted. Consequently, any examination of the question whether the Board as currently constituted meets the two-thirds gender principle must take into account the entirety of the Board and it would defeat logic for example, if one were to start confirming compliance with the two-thirds gender rule from the perspective of the seven (7) persons appointed by the Cabinet Secretary yet, even if it is found that the ratio therein conforms to the rule, the same process would still be repeated to confirm whether indeed the 'Board' when properly constituted meets the two-thirds gender rule. Of what benefit would it serve for example, if the seven (7) persons appointed separately by the Cabinet Secretary meet the two-thirds gender ratio yet the substantive Board when fully constituted falls short of the constitutionally accepted gender threshold?

54. In that context, **Article 27(8)** of the **Constitution** specifically provides that, "*not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.*" By use of the term, 'body', the Constitution contemplates the utmost structure recognized as the decision making unit composed of the requisite members whether appointive or elective or a combination of both. In this particular case, parties have placed before me different versions of what they deem to be the correct composition of the Board. According to the Petitioner, all the four (4) additional persons that form the Board, being the Chairperson and the three (3) Principal Secretaries representing specific ministries are all of male gender. The Respondent and the Interested Parties on the other hand submit that the two persons seconded to represent Principal Secretaries responsible for matters relating to finance and broadcasting and telecommunications are female.

55. My view is that the membership of the Board is a matter of public notoriety and I have therefore taken the liberty to examine the actual composition of the Board members. The Petitioner assumes that the substantive holders of the position of Principal Secretaries in the relevant State Departments or Ministry automatically become Board members. However the practice has been that each Principal Secretary nominates an alternate person to sit in the Board in a representative capacity. Indeed the Principal Secretary in charge of broadcasting and technology in the Ministry of Information, Communications and

Technology has sworn an affidavit on behalf of the Respondent stating that the Board as currently constituted is composed of:

- a. *Mr. Ngene Gituku (M)-Chairman, appointed by the President*
- b. *Ms. Judy Munyinyi(F)-Alternate to the Principal Secretary, Broadcasting and Telecommunications.*
- c. *Ms Beatrice Gathirwa(F)- Alternate to the Principal Secretary, National Treasury.*
- d. *Mr. John Njoroge(M)- Alternate to the Principal Secretary, State Department of Interior.*
- e. *Mr. Paul Kukubo(M)*
- f. *Mr. Mugambi Nandi(M)*
- g. *Mr David Cheruiyot Kitur(M)*
- h. *Prof. Levi Obonyo(M)*
- i. *Mr. Christopher Guyo(M)*
- j. *Ms. Patricia Kimama(F)*
- k. *Ms. Kentice Tikolo (F)*

56. In view of the above, it is clear that the current composition of the Board is four (4) persons of the female gender and seven (7) persons of the male gender. It is outrightly clear therefore, that no one gender falls below a third (?) of the total number of Board members. Consequently, I hold that the Board as currently constituted meets the two-thirds gender principle in line with **Article 27(8)** of the **Constitution** and **Section 6(B)(10)(c)** of the **KICA**. In the regard, I find no basis for annulling Gazette Notice No. 3152 dated 29<sup>th</sup> April, 2016. Issue No.(iii) which I see out to address above is thus answered.

### **Conclusion**

57. Having held as I have done above, I can only conclude that I see no merit in the Petition, the Petitioner's spirited and robust submission to the contrary notwithstanding.

58. Lastly, I apologise to the Parties for the delay in delivery of this judgment which was occasioned partly by my elevation to the Supreme Court and other factors beyond my control.

### **59. Disposition**

- 1) The Notice of Motion Application dated 20<sup>th</sup> May, 2016 is hereby dismissed (for clarity of the record).**
- 2) Petition No.203 of 2016 dated 20<sup>th</sup> May, 2016 is hereby dismissed.**
- 3) Parties to bear their own costs as I deem the Petition to have been filed in the public interest.**

60. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2017**

**ISAAC LENAOLA**

**JUDGE**

**DELIVERED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2017**

**E. CHACHA MWITA**

**JUDGE**