REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

HUMAN RIGHTS & CONSTITUTIONAL DIVISION

PETITION NO 471 OF 2016

BETWEEN

GODFREY MUSAINA……..……1ST PETITIONER

GEOFFREY MOMANYI……..2ND PETITIONER

VERSUS

CABINET SECRETARY FOR TOURISM……..…..1ST RESPONDENT

BOARD OF TRUSTEES OF TOURISM FUND….2ND RESPONDENT

THE ATTORNEY GENERAL……..3RD RESPONDENT

HENRY KOSGEI…….……..1ST INTERESTED PARTY

MARK GATHURI……..2ND INTERESTED PARTY

CALEB KOSITANY……..…3RD INTERESTED PARTY

ANGWENYE ZEPHANIAH NGAIRA……....4TH INTERESTED PARTY

KIPROP CHIRCHIR……..5TH INTERESTED PARTY

CAROLINE NG'ANG'A…….6TH INTERESTED PARTY

JULIE SCOTT……...7TH INTERESTED PARTY

JOSEPH CHERUTOI……...8TH INTERESTED PARTY

JUDGMENT

1. In a petition dated and filed in Court on 11th November 2016, **Godfrey Musaina** and **Geoffrey Momanyi,** petitioners, sued the **Cabinet Secretary for Tourism, Board of Trustees of Tourism Fund, The Attorney General, Henry Kosgey, Mark Gathuri, Caleb Kositanyi, Angwenya Zephania Ngaira, Kiprop Chirchir, Caroline Ng'ang'a, Juliet Scott** and **Joseph Cherutoi,** respondents, seeking

the following reliefs.-

i. A declaration that the composition of the 2nd respondent Board is unconstitutional and unlawful to the extent that the appointment of the interested parties contravened Articles 10, 27 and 250 of the constitution will as (sic) ***section 67 of the Tourism Act*** 2011.

ii. An order declaring the decisions of the 2nd respondent Board as illegal and null and void abinition in view of its unlawful composition.

iii. Any other orders in relief that this court will be pleased to issue.

iv. Costs of this petition.

2. The petition is supported by an affidavit sworn by **Godfrey Musina,** 1st petitioner, in which he deposed that by virtue of **Gazette Notice No. 107 Vol. CXVII** of 2nd October 2015, the 1st respondent in exercise of powers conferred by Section 67 of the Tourism Act, 2011(**the Act**), appointed the 2nd to 7th interested parties to serve as Trustees of the Tourism Fund for a period of 3 years with effect from 2nd October 2015. It was further deposed that by virtue of Gazette Notice of 18th March 2016, the President, exercising powers conferred on him under **Section 66(4)** of the Act appointed the 1st interested party as chairperson of the Tourism Fund (**The Fund**) for a period of 3 years from the date of appointment.

3. The 1st petitioner deposed that although the 1st interested party is a person who has held various ministerial positions and holds a degree in Chemistry from the University of Nairobi, he was not competent to be appointed the chairperson. The petitioners stated that according to Section 67(4) under which chairperson to the Trust Fund should be appointed, requires such a person should to have competence in finance which the 1st interested party does not possess.

4. The 1st petitioner further deposed that from the surnames of the 1st, 3rd, 5th and 8th interested parties, they are all members of the Kalenjin community from Rift Valley region, while the 2nd, 4th and 6th interested parties are from Central Kenya region. It was further deposed that only two persons out of the eight are of the female gender. The 1st petitioner also deposed that the 3rd interested party does not have the qualifications required for one to be appointed to the Board.

5. The 1st petitioner therefore, stated that from the above facts, the composition of the 2nd respondent **Fund** contravened the Gender equality principle under Article 27 (8) of the **Constitution** and **national values** and **principles** under Article 10 of the constitution. There was a further deposition that the appointment of the 2nd to 7th interested parties was done on the same day in violation of the requirement of Section 67(6) of the Act that appointments be staggered. Regarding regional balance, it was deposed that the law was not followed either.

6. The 1st and 3rd respondents filed grounds of opposition to the petition. They also filed a replying affidavit sworn on 19th January 2017 by **Fatuma Mohamed.** She deposed that the President, as the appointing authority, exercised powers granted to him under **Section 67(4)** of the Act in appointing the 1st interested party as chair of the 2nd respondent. She also deposed that the Cabinet Secretary, the 1st respondent herein, exercised his powers under Section 67(4) (d) in appointing the 2nd to 7th interested parties.

7. M/s Mohamed deposed that the appointment of the 1st interested party under Section 66(4) was a typographical error and, therefore, the allegation by the petitioners that the 1st interested party was appointed under a non-existent provision should be disregarded.

8. On the contention that the 1st interested party did not possess the required competence, M/s Mohamed

deposed that the 1st interested party has had immense experience in financial management having previously served in various ministerial positions since 1970's, including the Ministry of Tourism and, for that reason, he was qualified for the appointment.

9. The 2nd respondent filed a replying affidavit through **Joseph Cherutoi**, the 8th respondent and Chief Executive Officer **(CEO**) of the 2nd respondent, sworn on 21st November, 2016 and filed in court on the 22nd November, 2017. **Mr. Cherutoi** deposed that the 1st interested party was appointed by the President on 17th March 2015. The Gazette Notice which published his appointment erroneously stated that he was appointed pursuant to **Section 66(4)** of the Act, instead of Section 67(4). This restated, was a typographical error. He admitted that Section 66(4) did not exist but stated that the petition was challenging the appointment on a technicality based on a typographical error.

10. In response to the allegations that the 1st interested party was not qualified for appointment, Mr. Cherutoi stated that the 1st interested party is qualified and has the necessary competence to hold the position to which he was appointed. According to him, the 1st interested party has both academic and experience having held various positions in ministries in government which make him competent. He contended that the Act did not require one to have academic qualifications as a basis for appointment.

11. On the composition of the 2nd respondent, it was deposed that the Board is properly constituted, that the appointments were done in accordance with the provisions of the Act, and that the composition of the Board is in conformity with Article 27(8) of the Constitution in terms of gender equality. Cherutoi stated that the Board has 10 members out of which 6 are appointive, the number which is subject to the two third gender principle. Based on that, it was deposed, the Board is gender compliant since there are two women out of the appointive 6 in that Board. In any case, it was deposed, the principle of gender equality should be implemented progressively.

12. Regarding the contention by the petitioners that the appointment of the Board disregarded the requirement of the Act that appointments be staggered, Cherutoi stated that the appointments were made on the same day to cure a vacuum. The 8th respondent denied that the appointment of the Board failed to take into account regional balance as required by the Act and stated that there was no evidence that majority of Board members were from two specific regions only.

Petitioners' Submissions.

13. **Mr. Okubasu**, learned counsel for the petitioner, submitted, first, that the appointment of the 1st interested party was based on a non-existent legal provision. According to counsel, the gazette Notice referred to Section 66(4) of the Act when in fact there is no such a provision. Counsel submitted that **Article 159** of the Constitution could not be applied to cure a grave error on the appointment of the 1st interested party.

14. Counsel further submitted that the 1st interested party was not qualified to be appointed to the position of chairperson since he did not possess the required competence. Counsel contended that the 1st interested party did not possess competence in finance, a qualification for one to be appointed chairperson under section 67(4) of the Act.

15. Second, **Mr. Okubasu** argued that the Board was appointed in breach of the Act. According to counsel, the 2nd to 7th interested parties were appointed on the same day when the Act requires that appointments be staggered to avoid vacancies falling vacant on the same day. Counsel referred to the case of ***Republic V Cabinet secretary Ministry of Information and Communication & 8 others Exparte Adrian Kamotho Njenga & 2 others*** [2014]eKLR for the position that failure to comply with statutory provisions amounts to procedural impropriety.

16. Third, learned counsel submitted that the 3rd interested party was not qualified for appointment to the

Board. To fortify his contention, counsel argued that the 1st and 2nd respondents never refuted this contention that the 3rd interested party was indeed not qualified. His appointment, he contended, was because he had links with a political party associated with the ruling party. According to counsel, the Act requires that one should have competence in tourism, management and marketing which was not the case with the 3rd interested party.

17. Next submission was that the appointments to the Board were against the two -third gender principle as required by Article 27 (8) of the Constitution. Learned counsel argued that only 2 out of 8 Board members are women which is against the Constitution and the Act. Lastly counsel submitted that the membership to the Board did not reflect regional balance as required by both the Constitution and the Act. Counsel contended that the 1st, 3rd, 5th and 8th interested parties are from one community in Rift Valley, while the 2nd, 4th and 6th interested parties are from another community in Central region. Counsel argued that this is against pluralism of the country and depicts regional imbalance. He contended that due to the above anomalies, the Board is improperly constituted and all decisions it has made are illegal. He relied on the decision in the case of ***Julius Nyamotho V The Attorney General & 3 Others*** [2013]eKLR for proposition that any decisions by an illegally constituted Board were illegal and had no effect in law. He urged that the petition be allowed.

1st and 3rd respondents' submissions.

18. For the 1st and 3rd respondents, it was submitted that the composition of the 2nd respondent is lawful and, that the 2nd to 8th interested parties were properly appointed through Gazette Notice No. 1734 Vol. CXVIII of the 2nd October 2015 by the Cabinet Secretary under Section 67(4) of the Act. It was contended that out of the 6 Board members 4 are male while 2 are female which meets the two third gender principle as required by **Article 27(8)** of the Constitution. It was also contended that even if the two third gender principle had not been it would still be proper because the rule is to be implemented progressively in terms of the decision of the **Supreme Court** in the ***Re the Matter of Gender representation in the National Assembly and the Senate*** [2012]eKLR.

19. On the question that the Board failed to meet regional balance, it was submitted that that allegation was not true. It was contended that one could not tell a person's place of origin by merely looking at his name. It was therefore submitted that the appointment to the Board met the requirements under Section 67(4) of the Act and the constitutional requirement of fair representation and merit. Reliance was placed on the case of ***Kituo cha Sheria V Hon. Attorney General and Cabinet Secretary for National Treasury*** petition no 398 of 2014, for the proposition that one of the principles of public service is the inclusion of Kenya's diverse communities in appointments. Further reliance was placed on the case of ***Consortium for Empowerment and Development of Marginalised communities & others V Chairman of the selection panel for appointment of chairperson and commissioners for the Kenya National Human Rights Commission*** petition No 385 of 2012 for the submission that it was not possible to have all communities represented in appointments where only a few positions are to be filled.

20. The 1st and 3rd respondents contended, therefore, that there was no evidence that there was violation of the Constitution or the Act. Reliance was placed on the case of ***Lt. Col. Peter Ngari & Others V Attorney General*** constitutional Petition No. 128 of 2016 for the submission that it is upon a petitioner to avail evidence of violation of the rights and freedoms and that the Court is deaf on speculation and imaginations, and must be guided by evidence of probative value.

21. On the contention that the Board was appointed on the same day contrary to Law, it was submitted that the appointment was necessary to fill the vacuum that had existed and any finding that the Board was improperly constituted would paralyze the operations of the Board in delivering essential services.

22. Regarding the contention that the 1st interested party was appointed under a non-existent provision of law, it was acknowledged by both respondents and interested parties that indeed Section 66(4) is non-existent, but this was said to be a typographical error. It was contended that it would be unreasonable to

remove the 1st interested party from office on the basis of a typographical error. That urged the court to uphold Article 159 of the Constitution and administer justice without undue regard to procedural technicalities.

23. Responding to the other contention by the petitioners that the 1st interested party did not have the required competence, it was submitted that competence was not limited to educational background only. It was submitted that the 1st interested party has competence based on his past work experience as a Minister in various ministries including that of Tourism, but also decuation given that he has both Bachelor and masters Degrees.

24. Finally on whether the composition of the 2nd respondent was illegal, it was contend that the composition of the Board was proper, lawful and its decisions are therefore legal. Reliance was placed on the case of ***Republic V Counsel of Legal Education & another Exparte Mount Kenya University*** [2016]eKLR for the proposition that where there are minor breaches which can be remedied, it would be appropriate to adopt the principle of proportionality in order to give relevant authorities a chance to remedy the defect rather than invalidate the whole enactment and thereby deprive society some useful decisions made by the authority concerned. It was urged that the petition be dismissed.

2nd respondent and Interested parties' submissions.

25. For the 2nd respondent and 1st to 8th interested parties, it was submitted that the Board as constituted is legal, that its composition adhered to Constitutional principles under **Articles 10, 27** and **250** of the Constitution and section 67 of the Act. It was further submitted that the petitioner invoked omnibus constitutional provisions without providing particulars of alleged infringement and manner of the alleged violations. Reliance was placed on the decision of ***Anarita Karimi Njeru V Republic (No 2)*** (1976-1980) KLR 1272 and ***Mumo Matemo V Trusted Society of Human Rights Alliance & 5 others*** [2013]eKLR for the proposition that where a person alleges contravention of a constitutional right, he must set out with precision the right alleged to have been violated, the particulars and manner of such infringement or threat and the jurisdictional basis for it.

26. There was a further submission that the petitioners alleged violation of **Articles 27** of the Constitution on equality and non-discrimination was not specifically proved, especially how the composition of the 2nd respondent contravened **Article 27.** It was also submitted that although **Article 250 (4)** of the Constitution requires that appointments to Commissions and Independent Offices take into account national values and reflect regional and ethnic diversity of the people of Kenya, the appointment of the interested parties did take this constitutional principle into account.

27. Submitting on the contention that the 1st interested party was appointed pursuant to a non-existent provision of the law, namely **Section 66(4)** of the Act, it was argued that this was merely a typographical error which did not vitiate the appointment which ought to have been under **Section 67(4) (a)** of the Act. It was, therefore, contended that a typographical error cannot invalidate the appointment of the 1st interested party as that will be contrary to the letter and spirit of **Article 159** of the Constitution. Reliance was placed on the case of ***Commission of Administration of Justice V Attorney General & Another***[2013]eKLR for the proposition that courts in Kenya are obliged to operate from and within the principles in **Article 159 (2) (a) (b)** and **(d)** of the Constitution to do justice to all irrespective of status, that justice should not be delayed and that justice be administered without undue regard to technicalities. The court was urged to uphold the appointment of the 1st interested party the typographical error notwithstanding.

28. On the second assault directed at the appointment of the 1st interested party on account of competence, it was submitted that this challenge had no basis. According to the 2nd respondent and 1st to 8th interested parties, the requirement that Chairperson should have competence in finance did not mean one had to have academic qualification in finance. Reliance was placed on the decision in the case of ***Kimutai V Lenyongo Peta & 2 others*** [2005]eKLR for the proposition that grammatical meaning of

words alone is a strict construction which no longer has favour with true construction of statutes, and that interpretation of a statute should adopt construction that would promote the general legislative purpose underlying the provision. It was therefore urged that the court should adopt interpretation of the word competence in its ordinary meaning and give effect to the legislative intent. Reference was also made to the case of ***Moi University V Counsel for Legal Education 7 another*** [2016]eKLR which cited the ruling in ***Mc Grath V McDermott[1988] IR*** 258 where it was stated that the function of the court in interpreting a statute is strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved.

29. It was contended that the 1st interested party had competence given that he had a bachelor and Masters degrees, and had held positions in various ministries as a cabinet minister.

30. On the contention by the petitioner that the 2nd respondent's composition did not meet the constitutional and statutory requirement on regional balance, it was submitted that the 2nd respondent was properly constituted and had regional balance in its composition. Reliance was placed on the decision in the case of ***Community Advocacy and Awareness Trust and Others V Attorney General*** petition no. 243 of 2011, for the proposition that the process of complying with provisions in the Constitution seeking to ensure regional and ethnic diversity representation was not intended to be an exact science carried out with precision, and that the Court in evaluating the evidence and facts before it should not substitute itself as the appointing authority. It was therefore submitted that there was indeed compliance with **Section 67(4) (a)** and **(d)** of the Act, and that any issue on regional balance ought to have been dealt with by parliament during approval of such appointments.

31. Regarding the allegation that the appointment did not comply with **Article 27 (8)** of the Constitution on the two third gender principle, it was submitted that the composition of the 2nd respondent complied with both the Constitution and the law. It was contended that whereas the 2nd respondent has 10 members, only 6 are expressly appointed and out of those 6, two are female and 4 male which meets the two third gender principle.

32. In answer to the second issue, that the appointment was done on the same day as opposed to the appointments being staggered, it was contended that the purpose of the appointment of the Board was to fill a vacuum given that the vacancies had arisen on the same date and, therefore, granting the orders sought would result in the same scenario which would lead to an absurdity. Reliance was placed on the case of ***Centre for Rights Education and Awareness V Electoral and Boundaries Commission Exparte Reuben Ombima Anjeyo*** [2013]eKLR, ***Nderitu Gachagua V Thuo Mathenge & 2 Others [***2013]eKLR, ***Mhutugu & 4 others and state*** case no CCT/25/94 and ***Juma & 2 others and the state*** case no CCT/4/94 to support this submission.

33. On the challenge to the validity of the decisions of the Board as constituted, it was contended that the decisions made by the Board were valid, that the composition of the Board meets gender requirement, reflects regional balance and meets Constitutional and Statutory requirements. Reliance was once again placed on the decision in the case of ***Republic v Council of Legal Education and another Exparte Mount Kenya University (supra).*** They sought to have the petition dismissed.

Analysis and Determination

34. I have considered the petition, responses thereto, submissions on behalf of the parties and authorities relied on. Based on these, I have identified three issues for determination, namely; Whether the appointment of the 1st interested party complied with the law; Whether the composition of the 2nd respondent is in line with the gender principle and regional balance as required by the constitution and the Act; and whether decisions of the 2nd respondent are legal.

Whether the appointment of the 1st interested party complied with the law.

35. The appointment of the 1st interested party has been attacked from two fronts. First, that the appointment was based on a non-existent provision of law; and second, that he was not qualified. I will deal with the issue of qualification first.

36. The petitioners have questioned the qualification of the 1st interested party to be appointed as chairperson of the 2nd respondent. The contention is that whereas section 67 of the Act requires one to have competence in finance to qualify for such appointment, the 1st interested party does not have that competence on account of his education. The respondents and interested parties have on their part argued that the 1st interested party is qualified because he has both a Bachelor and Master of Science Degrees coupled with experience acquired in various Ministerial positions he has held over the years.

37. Section 67(4)(a) of the Act which is central to this issue provides that the Board of Trustees of the Fund shall consist of a Chairperson appointed by the President, who shall be a person with *competence* in finance matters. According to this section, it is clear that for a person to be appointed chairperson he should have competence in finance. The Act does not define the word **"competence"** which means the Court must turn elsewhere to ascertain the meaning of this word.

38. ***Black's Law Dictionary,*** 9th Edition; defines the word 'competence' to mean ***a basic or minimum ability to do something.*** The ***Concise Oxford English Dictionary,*** Twelfth Edition, defines the same word to mean ***"the quality or extent of being competent",*** or ***"having the necessary ability or knowledge to do something successfully"***.

39. From the above definitions, competence can be said to be ability, knowledge or skill that enables a person to understand and act effectively in a job situation. It would appear that it is not necessary for one to have academic qualifications in order to be competent to do a certain job or assignment. It would suffice if, in such a case, one has sufficient capacity to deal with financial matters.

40. In arriving at this conclusion, one has to look at the language used in the statute with a view to ascertaining the intention of the legislature. The word used is that one should have competence in financial matters which is not the same as saying, one should have ***academic qualifications in finance.*** The legislature did not intend that one must be a degree. If the legislature intended that one should have academic qualifications in finance, it would have said so in no uncertain terms. It is possible for one to have competence in a certain field out of practice and experience, for instance, having undertaken similar duties in a similar or related field for some time. Such experience would make the person competent without necessarily having attained higher academic qualification in that field. In its plain and ordinary meaning, the word "*competence"* means minimum ability to do that particular job or work, the legislature intended that one should have knowledge and understand financial matters for him to qualify for appointment

41. As was stated in ***Rahill v Brady*** (1971) IR 69, at page 86 quoted in ***O'neil & another v Governor of Castle rea Prison & Others*** (2003) IEHC 83(27 March 2003).

> ***"In the absence of some technical or acquired meaning the language of a statute should be construed according to its ordinary meaning and in according to the rules of grammer. While the lateral construction generally has prima facie preference, there is also a further rule that in seeking the full construction of the section of an Act, the whole Act must be looked at in order to see what the objects and intention of the legislature were, but the ordinary meaning of the words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature."***

42. The 1st interested party has held various ministerial positions in government including that of Minister for Tourism, and has Bachelor and Masters degrees. With these academic qualifications coupled with long public life engagement, it cannot be said that the 1st interested party lacked competence to be appointed chairperson of the 2nd respondent. For that reason, I am unable to agree with the petitioners

that the 1st interested party was not qualified to be appointed to the position of chair of the 2nd respondent.

43. The second and more critical assault against the 1st interested party's appointment, was that the appointment was based on a non-existent provision of law. The 1st interested party was appointed pursuant to a ***Gazette Notice No 1734*** dated 17th March 2015, and published on 18th March 2015. The Gazette Notice stated that the 1st interested party's was pursuant to Section 66(4) of the Tourism Act as chairperson of the Tourism Fund. The Gazette Notice was signed by the President as the appointing authority. The appointment is for a period of 3 years with effect from 18th March 2016.

44. It has been submitted on behalf of the petitioners, and conceded by both the respondents and interested parties, that the Gazette Notice cited Section 66(4), a non-existent provision. The respondents and interested parties have however argued that this was a typographical error, and that in fact, the appointment was made under section 67(4) and not 66(4).

45. A perusal of the Act shows that there is no Section 66(4). Section 66 has two subsections (1) and (2). The 2nd respondent is established under Section 67(1). Section 67(2) constitutes the 2nd respondent as a body corporate, Section 67(3) establishes the Headquarters and Section 67(4) provides for membership of the Board, their qualifications and the appointing authorities. Subsection 5 provides that names of persons proposed for appointment have to be laid before the National Assembly for approval, while subsection 6 provides that the appointments should be staggered to avoid their terms ending on the same dates. It is therefore correct as contended by the petitioners, that the appointment was based on a non-existent provision of law. What then is the effect of this anomaly? Was it so fatal as to render the appointment unlawful and illegal?

46. The Act is intended to provide for the development, Management, marketing and regulation of sustainable tourism and tourism related activities and services in the country**.** That means appointments to any of the positions created by the Act, is to be with the aim of achieving the objectives of the legislation. Any person or authority making appointments must do so in accordance with the requirements and provisions of the Act.

47. The argument by the respondent and the interested parties is that mention of Section 66(4) (a) was a typographical error, and that the appointment should be taken to have been under section 67(4) (a) of the Act, the section that gives power to the appointing authority. There cannot be an appointment to a position if there is no power conferred by law. In this case, the Act has a provision in Section 67 (4) which confers power to the President to appoint chairperson to the Board. The only complaint is that the instrument through which the appointment was made cited a wrong provision.

48. It would be difficult for a Court of law to take a legal instrument such as a Gazette Notice signed by an appointing authority to be legal where there is no provision granting such authority. Such an appointment would be out rightly unlawful if it is not anchored on any law. That is different from situation where the instrument cited a wrong provision. Where a wrong provision is cited like in this case, it amounts to a procedural irregularity which can be corrected. It is not that the appointing authority acted without jurisdiction or authority, rather a wrong provision was cited. A curable procedural error is not so much fatal as to invalidate an otherwise lawful act or appointment. The error can be cured through a ***corrigenda*** or even a revocation of the appointment altogether and a new one made.

49. Although, I agree with the petitioners that the instrument appointing the 1st interested party cited a wrong provision of law, I do not think such an appointment should be invalidated on that ground alone. In my view, it is an error that can be remedied. For that reason, it does not violate or defeat the spirit of the Act.

50. The petitioners also attacked the appointment of the 3rd interested party that he was not qualified to be appointed to the Board. Section 67(4)(d)(ii) requires that members of the Board should be persons qualified and have competence in the field of tourism, financial accounting, management or marketing.

The petitioners contended that in view of the fact that the respondents and interested parties have not denied this it should be taken that the allegations are true.

51. It is a principle of law in an adversarial system that it is the duty of the person who asserts that must prove his claims. That is **he who asserts must prove** and not otherwise. That is why Section 107(1) of the Evidence Act provides that;

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"***

52. Section 109 of the same Act also provides that ***the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

53. The above principles of law were reiterated by the Court of Appeal in the case of ***Jenifer Nyambura Kamau v Humprey Mbaka Nandi*[2012]eKLR** where the Court stated that Section 108 of the Evidence Act is clear that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. And in the case of ***Kirugi & Another v Kibaya & 3 Others [1987]KLR 347*** the same Court emphasized that the burden was always on the balance of probabilities. From both the law and pronouncements, the petitioners were under obligation to prove that the 3rd interested party did not qualify rather than shift the burden to the 3rd interested party. From this perspective, therefore, the petitioners have not met the threshold of proof as required by law, that the 3rd interested party was not qualified for appointment to the Board.

Whether the composition of the 2nd respondent complied with the Constitution on gender, regional and ethnic diversity.

54. The petitioners contended that the appointments to the 2nd respondent violated **Article 27(8)** of the Constitution. The Article provides that no one gender should comprise more than two- thirds of appointments in elective or appointive positions, and further that the State should take necessary steps to ensure that the above principle is realized. The two-thirds gender principle is a constitutional requirement. Article 3(1) of the Constitution provides that every person has an obligation to respect, uphold, and defend the Constitution. Article 10 of the Constitution binds the State and other bodies at both levels of government with regard to the constitutional principles. The national values and principles of governance, in Article 10 include, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

55. The petitioners have complained that the 2nd respondents' composition did not take into account the two-thirds gender parity, arguing that the Board comprising 10 members has only two women. The respondents, on their part, have contended that only 6 members of the Board were appointed and out of the 6 two are women while 4 are men. According to the respondents and Interested Parties, this composition meets the two thirds gender principle. They have also argued citing the **Supreme Court** decision in ***Re the Matter of Gender Representation in the National Assembly and the Senate*** (supra), that gender representation should, in any case, be achieved progressively.

56. It must be pointed out that the Constitution is clear that no one gender should occupy more than two-thirds of appointive or elective positions in one body or organization. In that regard, the two-thirds gender requirement is a right enshrined in the Constitution. Appointments to the 2nd respondent Board were an administrative act done in exercise of discretion that did not require legislation to implement. The appointing authority was bound to comply with the Constitution and the law in making these appointments, given that the appointments did not require legislation to implement.

57. There is no doubt that Article 27(6) and (8) of the Constitution were designed to address historical injustices that women in this country have faced for long. Women, as a marginalized group have always been left out of Socio Economic and Political engagement. The Article was intended to narrow the gap

and give women a chance to take part in national development. That informed why the Constitution placed a caveat on both appointive and elective position, so that neither gender should occupy more than two thirds in any body or organization. This would in a way remove any form of discrimination based on gender, and encourage women to take their rightful place in national development.

58. Article 259 of the Constitution states that the constitution should be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights, permits the development of the law; and Contributes to good governance. One of the values and principles of the Constitution is the two third gender principle.

59. As ***Onguto J*** stated in ***Maryln Muthoni Kamuru & 2 others v the Attorney General, & Another*** [2016]eKLR;

> "… ***by this provision*** (Article 27(6) ***the Constitution ensures that men and women are equal and it destroys the traditional contour the Kenyan Society has for long been constructed upon. In order to ensure men and women participate in the affairs of development of the Kenyan Society, Article 27(6) recognizes that there may be need to undertake extra measures … In my understanding, this provision reposes a positive command and obligation on the state to move by appropriate instruments to lay necessary equality rendering structure".***

60. The learned Judge then continued, **"it is in that spirit that Article 27(8) imposes upon** ***the state the obligation to redress gender disadvantage by enacting laws that may be needed and also undertaking other measures including affirmative action that would ensure women to redress any inequality that may manifest…."***

61. The question therefore is; does the composition of the Board comply with the two thirds gender requirement? To answer this question, one must look at the composition of the body under scrutiny and the enabling legislation. The Board, it has been admitted, has 10 members, some by virtue of the positions they hold. The board has two categories of members; the Principal Secretaries and those appointed. It is noticeable that by virtue of **Section 67(4)(d)** two members are appointed by registered National Tourism Associations, and four by the Cabinet Secretary. The other is the Chief Executive appointed by the Board, who is also the secretary. The President appoints the chairperson.

62. Section 67(4)(d) is clear that the appointment of the six members of the Board, shall take into account regional balance and gender parity. That means the appointments that have to be subjected to the two third gender rule and regional balance are for the six. The justification for this would appear to be that the two Principle Secretaries are members of the Board by virtue of their positions those of Finance and Tourism. The chairperson is appointed by the President, while the CEO is appointed by the Board after it is fully constituted.

63. From the reading of this section, the six appointed members of the Board are the ones whose appointment is to be subjected to the two third gender parity. Although the Board has 10 members including the Principal Secretaries, their membership to the Board is by virtue of their positions as Principal Secretaries as opposed to being appointed. The Chair Person is appointed separately after which the Board that he chairs appoints the CEO.

64. The Board has two women and 4 men. The respondents contended that that number squares well with the requirement of the Constitution and the Act. Taking section 67(4)(d) of the Act into account, it cannot be denied that two women out of six men is one third. In that regard, the composition of the 2nd respondent meets the gender requirement. I don't therefore agree with the petitioners that the 2nd respondent's, composition as far as gender parity is concerned, is in unconstitutional, taking into account clear provisions of Section 67(4)(d) of the Act.

65. The second attack regarding the composition of the 2nd respondent was that it did not reflect regional balance and ethnic diversity of the people of Kenya. The argument put forward by the petitioners was that the 1st, 3rd, 5th and 8th interested parties hail from Rift Valley region, and are of Kalenjin extract, while

the 2nd, 4th and 6th interested parties are from Central Kenya. Nothing has been said of the two Principal Secretaries who are also members of the 2nd respondent, though their members to the Board is by virtue of the positions they hold.

66. The petitioners have held the view that by virtue of their names, it is easy to tell that interested parties are from particular regions. I understood the petitioners' concern to be that only two regions are represented in the 2nd respondents Board. I must state that I am not persuaded by this submission. Kenya has many communities, and is now divided into 47 Counties. I must also add that the Constitution allows Kenyans to reside and work in any part of the Country. It is therefore not possible to prove ones identity or origin merely by looking at their names. Rather than use names to depict ones origin or ethnic extraction, it would have been appropriate for the petitioners to point out which Counties and ethnic community each of the persons named comes from. That way, it would have been reasonable to ascertain that indeed these people come from the same region or ethnic communities. I do not agree with the contention that a name can conclusively depict ones community or origin. This is because names may be shared even though those people may come from different communities or regions.

67. Once again, the petitioners have not established evidentially that their contention that both the Constitution and Section 67 (4) (d) which require that appointments take into account regional balance and the diversity of the people of Kenya were not complied with. It must be understood that it is always the duty of a petitioner or plaintiff, whatever the case may be to prove his case and, that the burden of proof never shifts unless the law expressly says so. As it stands, there is no evidence to show which Counties and or communities the interested parties come from. The contention that they are from the same regions or ethnic communities is unsubstantiated and cannot stand in law.

68. It must also be appreciated that not all communities will have to be represented in any single appointment. In this case, there were only 7 appointive positions and that of a CEO. The Constitution and the law must be complied with. It would have been appropriate for the petitioners to do much more than merely allege that the interested parties come from only two regions to enable the Court interrogate such a claim and determine its veracity and whether indeed the appointments meet the constitutional and statutory test. As was stated in the case of ***Community Advocacy Awareness Trust and Others v Attorney General*** Petition No. 243 of 2011(Nairobi), the process of complying with constitutional provisions on regional and ethnic diversity as well as representation of marginalized and disadvantaged groups in appointments may not be done with precision. The Court in evaluating the facts and evidence before it is not expected to substitute itself as the appointing authority. Where a petitioner challenges such appointments, he has to put before court sufficient evidence to support their contention.

69. Kenya has many communities and they cannot all be represented in the limited positions available. Anyone who questions the legality of appointments based on regional or ethnic diversity, should do more than just allege. There must be empirical evidence on the regions and ethnicity to persuade the Court that indeed there was breach of or failure to comply with the constitution and the law. I am not therefore persuaded that this submission has any merit.

70. There was a further contention that members of the 2nd respondent were appointed on the same date contrary to Law. The argument put forward by the petitioners was that whereas the law requires that appointments be staggered to avoid vacancies falling vacant on the same day, the appointments were made on the same day. Section 67 (6) provides that members of the Board of Trustees shall be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times. The 2nd to 7th interested parties were appointed on 2nd of October 2015, which was said to be contrary to the provisions of Section 67 (6) of the Act.

71. The question here is whether that in itself, would invalidate the appointments to the extent of making them illegal. In construing the above provision, (Section 67(6)), it is important to look at the intention of the legislature when enacting that provision. From the reading of the section, the intention was to avoid the terms of the members of the Board expiring on the same date or at the same time there by creating a vacuum. Did the legislature then intend that failure to comply with this requirement would invalidate the

Board? In my view, such a construction would be too narrow and legalistic.

72. Although the sub-section uses the word ***shall,*** one has to look at the real intention of the legislature which was to avoid vacuum. That being the sole intention and no other, it cannot be said that the legislature intended that failure to comply with this requirement would completely invalidate appointments made on the same date and or time. Giving the section a different interpretation would, in my view, lead to an absurdity.

73. Furthermore, the section does not set the term of office of members of the Board. That means it is possible for the appointing authority to remedy the situation by make replacements just before the expiry of the term. Looking at the purpose of enacting the section, I do not think non-compliance with the provision would invalidate lawful appointments.

74. In the present case, the omission was a mere procedural irregularity which did not cause any substantive injustice. In the case of ***Chang Benetey and others v Tang Kin Fei and others*** [2011]SGCA 59 (4th November 2011), the **Court of Appeal** of **Singapore** stated that where the irregularity merely departs from the prescribed manner in which the thing is to be done without changing the substance of the thing, is a procedural irregularity which cannot invalidate the thing done. On the other hand, if the irregularity changes the substance of the thing to be done it amounts to substantive irregularity which will lead to invalidation of the thing done.

75. And in ***Regina V Soneji and Another*** 2005 UKHL 49, ***Lord Stayn*** stated that the correct test of determining the issue of invalidity of an administrative action for non-compliance with a procedural requirement in a statute is not whether the words used are mandatory or directory, but rather whether parliament intended that non-compliance would result in total invalidity of the action in question.

76. Applying the above principles to the present case, I do not think the legislature really intended that non-compliance with Section 67 (6) would invalidate the administrative act of appointing members of the Board of the 2nd respondent on the same day as opposed to different dates.

77. For the above reason it is my view that invalidating and disbanding the Board merely because its members were appointed on the same day which was a mere procedural irregularity would have adverse consequences of crippling its operations and any administrative decisions it has made. Such an action would be against public interest and would lead to a waste of public resources hence an economic loss to the Country. The appointments being were a procedural irregularity that did not substantive injustice.

78. The last issue is whether decisions of the 2nd respondent are lawful. Having determined that the ***Gazette Notice*** appointing the 1st interested party though cited a wrong provision cannot be invalidated for that reason alone, and that the Board is properly constituted, the legality of the 2nd respondent's decisions is not in doubt. And since all other claims of invalidity have fallen by the way side, it follows, therefore, that the answer to the above issue is in the affirmative. For avoidance of doubt, I find and hold that the 2nd respondent's decisions are legal and lawful.

79. The upshot, therefore, is that the petition dated 11th November 2016 is declined and is dismissed. As costs are discretionary, I order that each party do bear their own costs.

Dated, Signed and Delivered at Nairobi this 27th of July, 2017

E C MWITA

JUDGE