



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.401 Of 2014

BETWEEN

GARISSA COUNTY GOVERNMENT.....PETITIONER

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CLERK, GARISSA COUNTY ASSEMBLY.....2ND RESPONDENT

AHMED DUALE AHMED.....3RD RESPONDENT

ABDILADIF AHMED HARET.....INTERESTED PARTY

JUDGEMENT

Introduction

1. The Petitioner herein is one of the 47 County Governments in Kenya established under **Schedule 1** of the **Constitution of Kenya, 2010**.
2. The 1st Respondent is the National Land Commission (NLC), a constitutional commission duly established under **Article 67** of the **Constitution** while the 2nd Respondent is the Clerk of Garissa County Assembly, who serves as the administrative head of the Assembly.
4. The 3rd Respondent, Ahmed Duale Ahmed, is an adult male working for gain in Garissa County as is the Interested Party Abdiladif Ahmed Haret.
5. The dispute occasioning the instant Petition concerns the procedure of recruiting likely appointees for membership of the Garissa County Land Management Board.
6. The Petitioner, by the Petition dated 8th August 2014 prays for:

a. A declaration that the conduct of the NLC of replacing the name of ABDILADIF AHMED HARET with that of AHMED DUALE AHMED infringed upon ABDILADIF AHMED

HARET's right to fair administrative action as envisioned in Article 47 (1) of the Constitution of Kenya, 2010, as the same was discriminatory, unlawful, not reasonable and not procedurally fair.

b. An order of PROHIBITION do issue prohibiting the 2nd Respondent from presenting or causing to be presented, the list of successful candidates for vetting and/or approval by the Garissa County Assembly.

c. An order of CERTIORARI do issue quashing the decision of the 1st Respondent of replacing the name of ABDILADIF AHMED HARET with that of AHMED DUALE AHMED.

d. An order of MANDAMUS do issue compelling the 1st Respondent to replace the name of AHMED DUALE AHMED with that of ABDILADIF AHMED HARET and to forward the correct list bearing the name of ABDILADIF AHMED HARET to the 2nd Respondent for presentation for the purpose of vetting and approval by the Garissa County Assembly.

e. An order of PROHIBITION do issue prohibiting the 3rd Respondent from assuming office as a member of Garissa County Land Management Board.

f. Costs of this Petition and interest thereon.

g. Any other relief that this Honourable Court may deem fit and just to grant.

6. These prayers are based on grounds that:

a. On 18th September 2013, the NLC made invitations in sections of the media inviting applications for membership to the Garissa County Land Management Board after which the Interested Party submitted his application to be a member of the said Board.

b. Respondent's website that he had been short-listed for the interviews for the position, which he later attended.

c. From the minutes reflecting the proceedings of the interviews, it is apparent that the Interested Party was one of the candidates who qualified for membership of the Board as his name was among the list of those who had scored the best points after consideration of the criteria that had been set.

d. Without any legal right or justification in law, the 1st Respondent, having excluded the name of the Interested Party from the list, wrote to the Governor of Garissa County informing him of the other candidates names that had qualified.

e. The 1st Respondent had unilaterally, arbitrarily and capriciously decided to replace, on the list, the name of the Interested Party, with that of the 3rd Respondent.

f. The conduct by the 1st Respondent of substituting the name of the Interested Party herein contravenes the express provisions of the Constitution of Kenya, 2010 in so far as the said conduct is contrary to the national values and principles of good governance enumerated in Article 10 (c) of the Constitution and the said conduct was not in keeping with good governance, integrity, transparency and accountability.

g. The said conduct by the 1st Respondent infringes the Interested Party's right to fair administrative action provided for in Article 47 (1) of the Constitution in that the replacement of his name was not lawful, reasonable or procedurally fair.

h. The 1st Respondent has contravened Chapter 6 of the Constitution to the extent that its conduct was not in keeping with the principles of leadership and integrity as envisioned in Chapter 6 of the Constitution of Kenya, 2010.

The Factual Background

7. The facts giving rise to the instant Petition are fairly simple and are not disputed. They are set out here below.

8. In accordance with its constitutional and statutory mandate, the NLC invited applications for membership to the Garissa County Land Management Board in sections of the national media sometime in 2014.

9. The Interested Party submitted his application for consideration to be a member of the said Land Management Board. He later learnt that he had been shortlisted for interviews through advertisements in *The Daily Nation* and *The Star Newspapers* and through the 1st Respondent's website.

10. He then attended the interviews whose panel consisted of NLC and Garissa County government representatives and which were held on the 27th and 28th June 2014 at Almond Hotel, Garissa and he scored 75.5%. The said score was reflected in the minutes of the interview proceedings and on the list of the 7 persons who had qualified, in which the Interested Party was named 5th. The list is reproduced here below:

- i. Mr. Hussein Haret Borle, 68%- Male
- ii. Mr. Ahmed Mohamed Ibrahim, 87.8%- Male
- iii. Mr. Ahmed Aden Abdow, 85%- Male
- iv. Ms. Maryan Dadle Dagane, 75.8%- Female
- v. Mr. Abdiladif Ahmed Haret, 75.5%- Male**
- vi. Ms. Shamsa Abdikadir Dahir, 77.1%- Female
- vii. Mr. Mohamed Mohamud Gurhan, 84.5%- Male

11. In a letter dated 9th June 2013, the 1st Respondent wrote to the Governor of Garissa County informing him that the successful candidates were the following in order of merit:

- i. Mr. Hussein Haret Borle
- ii. Mr. Ali Hirsi Ahmed
- iii. Mr. Ahmed Aden Abdow
- iv. Ms. Maryan Dadle Dagane
- v. Mr. Ahmed Duale Ahmed
- vi. Ms. Shamsa Abdikadir Dahir
- vii. Mr. Mohamed Mohamud Gurhan

12. The 1st Respondent had apparently therefore replaced the name of the Interested Party with that of the

3rd Respondent, an act the reasons for which have not been provided to the Petitioners.

13. In a letter to the 1st Respondent dated 28th July 2014 and received on 30th July 2014, one Mr. Hire, the Garissa Executive Committee Member in-Charge of Lands, informed the 1st Respondent that the recommended persons (appointees) for membership of the Board are those that had been reflected in the minutes of the interviews, i.e. the first list that contained the Interested Party's names and not the second list that had been drawn up by the 1st Respondent.

14. On 4th August 2014, the Petitioner's Advocates wrote to the 1st Respondent informing them of the anomaly in the list but no response was received.

15. On the same day, 4th August 2014, the 1st Respondent wrote to the 2nd Respondent stating that it had received complaints and information from a cross-section of the leadership of Garissa County and was convinced thereby that six (6) out of the seven (7) original appointees adequately represented gender equality, ethnic diversity and regional balance as required by the provisions of **Sections 18 (6)** of the **NLC Act, 2012**, and the Interested Party's clan was already represented by a female applicant on the list and therefore, there was no plausible reason why the Interested Party could not be recommended for appointment to the Board.

16. Being of the view therefore that the reasons cited by the 1st Respondent for non-inclusion of the Interested Party were not satisfactory and that the action undertaken thereby was unlawful and unfair, the Petitioner then decided to file the present Petition.

The Petitioner's Case

17. Relying on the Petition dated 8th August 2014, an affidavit deposed by Mr. Ahmed Adan Hire also dated 8th August 2014, and written submissions dated 7th April 2016, the Petitioner's case is as detailed here below.

18. The Petitioner contends that between 27th and 28th June 2014, the 1st Respondent conducted interviews for membership of the County Land Management Board for Garissa County.

19. Further, that the NLC and representatives of Garissa County, having considered all the factors, including pertinent merits for serving on the Board, then formulated a list of 7 persons who were found suitable to serve on the Board, among whom was the Interested Party who was reflected on the list (fifth name) to have had a score of 75.5 % and also being the 8th in position in the interviews. That this was clear evidence that the Interested Party qualified to serve as a member of the Garissa County Land Management Board.

20. The Petitioner also contends that on 9th June 2013, the Chairman of the 1st Respondent wrote to the Governor of Garissa County, he, without any legal right or justification, unilaterally decided to replace the names of two candidates who had earlier qualified with other names of persons who had not been confirmed as successful during the interviews; one of the names replaced was that of the Interested Party.

21. In addition, according to the Petitioner, the 1st Respondent, by a letter dated 4th August 2014 from the Garissa Executive Committee Member in-Charge of Lands (the abovementioned Mr. Hire), attempted to justify the unilateral removal and replacement of the Interested Party's name from the list of persons who had qualified for appointment as a foresaid.

22. Furthermore, the reasons offered to justify the unilateral removal and replacement of the Interested Party's name from the list, were not satisfactory. The reasons offered were that:

- i. The 1st Respondent had obtained information from a cross-section of leadership in Garissa County and that it was convinced that six out of the seven original appointees adequately represent

gender equity, ethnic diversity and regional balance as required by **Section 18 (6)** of the **National Land Commission Act, 2012**;

ii. The 1st Respondent had been informed that both Maryan Dadle Dagane and the Interested party hailed from the same Sub-County and the same sub-clan of the larger Abdalla clan;

iii. The 1st Respondent in light of the above, had decided to substitute the name of the Interested Party with the 3rd Respondent, Ahmed Duale Ahmed, in the nominee's list.

23. The Petitioner's case is also that, as the County Government representing the people of Garissa County, it was aggrieved by the unilateral and illegal decision by the 1st Respondent and that in accordance with **Section 18** of the **NLC Act, 2012**, it is the statutory mandate of the NLC (not a cross section of leadership from Garissa County) to establish and constitute the Garissa County Land Management Board.

24. The Petitioner's case is further that the 1st Respondent is bound by **Article 10** of the **Constitution** on national values and principles of governance and that the 1st Respondent's unilateral and illegal conduct is an abuse of the **Constitution**, which calls for transparency and accountability. In this regard, that if the 1st Respondent was being transparent and accountable, the correct procedure of re-calling interview panelists for a meeting, considering all facts and fairly reviewing the list, would have been the right procedure to follow.

25. The Petitioner adds that in contravention of **Article 47** of the **Constitution**, which provides for reasonable and procedurally fair administrative action as well as provision of reasons for administrative action that impacts on one's fundamental rights, the 1st Respondent did not inform the Interested Party of the administrative decision taken nor the reasons therefor.

26. The Petitioner concludes by asking the Court to uphold the Petition and grant the prayers sought herein.

The 3rd Respondent's Case

27. The 3rd Respondent's case in opposition to the Petition is set out in his replying affidavit dated 10th September 2014 and in his written submissions dated 4th December 2014.

28. The 3rd Respondent contends that Ahmed Adan Hire, who swore the supporting affidavit on behalf of the Petitioner, is not authorised to bring this matter before this Court, nor is he authorised to swear any affidavits on behalf of the County Government. He contends thus because according to him, Ahmed Adan Hire is a British citizen born in Kismayu, who holds a passport number 3058761637 issued by the Government of the United Kingdom and that because in accordance with **Section 35 (3)** of the **County Governments Act, 2012** a foreigner cannot purport to hold office as a County Executive.

29. Further, the 3rd Respondent claims that in accordance with the holding in **Charles Okello Mwanda v Ethics and Anti Corruption Commission & Others [2014] eKLR**, a Petition must be supported by an affidavit, yet the instant Petition is not supported by a proper affidavit and is therefore not a proper Petition or at all.

30. The 3rd Respondent further contends that he submitted his name and credentials for a position in the Garissa Land Management Board and was shortlisted as a successful applicant to be interviewed for that position. That although he was actually interviewed during the interviews that took place on 27th and 28th of June 2014 at Almond Hotel Garissa, he did not know of the decision of the interview panel until the instant Petition was filed.

31. Further, according to him, he is aware of information from a cross-section of the leadership of Garissa

County and also from the Chairman of the 1st Respondent to the effect that the Interested Party and one of the other interviewed candidates Maryan Dadale Dagane hail from the same Sub-County and the same Sub-Clan of the larger Abdalla Clan and also that, the 1st Respondent, having communicated the reason for its decision to the Petitioner, did not act unilaterally and the Petitioner has not provided any evidence that can be relied on to justify the replacement of the 3rd Respondent's name with that of the Interested Party.

32. The 3rd Respondent in addition, underscores that the 1st Respondent acted in accordance with **Section 18 (1) and (6) of the NLC Act, 2012, and Articles 10, 47 and Chapter 6 of the Constitution.**

33. In the above regard, he contends that the Petitioner has failed to demonstrate, in accordance with the principles espoused in the cases of **Anarita Karimi Njeru v AG (No.1) 1979 Klr 154 and Meme v Republic & Another [2004] eKLR**, that a single right in the Bill of Rights that has been violated, and the manner in which the right has been violated.

34. He also contends that in accordance with the **NLC Act, 2012**, the role of the 1st Respondent in establishing County Land Management Boards is consultative and it can therefore not be inferred that the 1st Respondent requires the explicit approval of the Petitioner in establishment of any Land Management Board. Accordingly, the Petitioner cannot seek to control the 1st Respondent's actions merely because it is not satisfied with its consultative or advisory role.

35. Relying on the case of **Republic v Commissioner of Customs Services Ex-Parter Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR**, the 3rd Respondent states that as judicial review cannot be used to curtail statutory bodies from the lawful exercise of power within their mandates, the Petitioner herein is not entitled to judicial review orders as the 1st Respondent adhered to all procedural requirements and acted reasonably, and proportionally, all within its statutory mandate of establishing County Land Management Boards.

36. He adds that the 1st Respondent did not flout any principles of natural justice, as the law does not require that a party must be heard on all occasions before a decision concerning them is made.

37. Further, while the Court has discretion to grant remedies in judicial review and must in accordance with the pronouncements in the cases of **Republic v Kenya Revenue Authority & Another Ex-Parte Bear Africa (K) Limited Misc. Appl. 285 of 2013 and R v Kenya National Commission on Human Rights Ex Parte Uhuru Kenyatta (2010) eKLR**, it must maintain a delicate balance between individual rights and those of the public and it would be against the public interest to issue the orders sought by the Petitioner

38. The 3rd Respondent further contend that he believes the Petitioner's case to be riddled with falsehood and to be intended to hoodwink the Court into granting the orders sought, against the interests of justice, as the Petitioner has clearly come before this Court without clean hands. That therefore the Petition ought to be dismissed with costs.

1st and 2nd Respondent's and Interested Party's Responses (s)

39. This Court notes that neither the 1st or 2nd Respondent, nor the Interested Party has in any way (written or otherwise) contested the facts alleged and evidence provided by the Petitioner in support of its position in this matter. These parties have however appeared before this Court and before The Hon. Lady Justice Ngugi on varied dates on which this matter was being mentioned for directions.

Determination

40. I have read and considered all the pleadings and submissions presented by the parties in the instant Petition. I note that the Petition concerns an allegation of infringement of the Interested Party's right to

fair administrative action but I also note that there are preliminary issues raised by the 3rd Respondent that require apposite resolution before I can proceed to probe the foremost imminent issue.

41. In that context, the 3rd Respondent submits that the Petition before this Court is not accompanied by an affidavit and must therefore be struck out due to lack of evidence. He also submits that Mr. Ahmed Adan Hire, who as earlier mentioned serves as County Executive Committee Member in the Garissa County Government and who swore the supporting affidavit for this Petition on behalf of the Petitioner, is not authorised to do so nor is he authorised to swear any affidavits on behalf of the County Government because he is a British citizen and therefore, in accordance with the **Section 35 (3) of the County Governments Act, 2012** cannot purport to hold office as a County Executive being a foreigner.

42. First and foremost, it cannot be true that the Petition before me does not have a supporting affidavit. The supporting affidavit deponed by Mr. Ahmed Adan Hire is clearly and properly on record as having been deponed on 8th August 2014. The same was responded to by way of a replying affidavit deponed by the 3rd Respondent himself on 10th September 2014. Having established as such, I need not delve any deeper into this claim by the 3rd Respondent.

43. Secondly, the citizenship of Mr. Hire and subsequently whether he holds office as County Executive Committee Member legally, is neither relevant at this juncture nor specifically to these proceedings altogether. I say this because, in my view, the relevant issue in the circumstances and which is also alleged by the 3rd Respondent, is that Mr. Hire has no capacity (*locus standi*) to bring this Petition for determination before this Court on behalf of the Garissa County. I will therefore determine that assertion.

44. **Article 258** of the **Constitution** states thus regarding institution of Court proceedings on infringement of rights in the Bill of Rights:

“1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

a. a person acting on behalf of another person who cannot act in their own name;

b. a person acting as a member of, or in the interest of, a group or class of persons;

c. a person acting in the public interest; or

d. an association acting in the interest of one or more of its members.”

45. **Article 22** encompasses the same provision in very similar terms but specifically with regard to the Bill of Rights.

46. In addition to the above, case law has provided apt guidance on determination of *locus standi* in cases concerning infringement of rights in the Bill of Rights, particularly when judicial review remedies are sought, as in the instant Petition.

47. That is why for example in **Republic v The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**, the Court held that under our **Constitution**, the issue of *locus* has been expanded and under **Article 258 (1) (b)** of the **Constitution**, every person has the right to institute Court proceedings claiming that the **Constitution** has been contravened, or is threatened with contravention. The Court added that such proceedings can be brought *inter alia* by a person acting as a member of, or in the interest of, a group or class of persons and concluded that similarly under **Article 22 (2) (b)** of the **Constitution**, every person has the right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated

or infringed, or is threatened.

48. Furthermore, in the case of **Republic v County Government of Mombasa Ex-Parte Outdoor Advertising Association of Kenya, Judicial Review Case No. 63 of 2013, H.C at Mombasa [2014] eKLR**, the Court, referring to **Article 22** opined thus:

“On locus standi, as a constitutional principle of public law and for promotion access to justice, the law makes generous provisions on standing over and above sufficient personal interest in the interest of enforcement of public law duties. See Articles 22 and 258 of the Constitution... It should not matter that such questions of fundamental rights or of interpretation of the Constitution arise in judicial review proceedings.”

49. Neither the **Constitution**, nor case law therefore make any exceptions on the capacity of any person to bring a matter concerning infringement of rights in the Bill of Rights for determination before this Court, even in the context of judicial review. In any case, I am of the opinion that the establishment of a Land Management Board which has, among others, functions of renewing land leases and allocating public land, is indeed a matter of public interest and the Petitioner would accordingly fall within the provision for *locus* in **Articles 258 (2) (c) and 22 (2) (c)** of the **Constitution**. I am, pursuant to this Court’s onus to provide access to justice, therefore not inclined to find that for the reasons offered by the 3rd Respondent, Mr. Hire, on behalf of the Petitioner, does not have the capacity to bring this matter for determination before this Court more so when he is doing so as a representative of lawfully established County Government and not in his personal capacity.

50. Further to the above, the Petition before me concerns infringement of **Article 47**, is brought under **Articles 22 and 23** of the **Constitution** and seeks judicial review remedies, I find it prudent to set out the germane guiding principles under the circumstances before proceeding any further.

51. In that regard, the Court in the case of **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR** was clear on the above subject when it held thus:

“The respondents’ submission that constitutional issues cannot be raised in judicial review proceedings was law prior to the 2010 Constitution. The law has now changed and the provisions of Article 22 (3) and 22 (4) of the Constitution as read with Article 47 of the Constitution and Sections 5 (2) (b) and (c) and Section 7 (1) (a) and (2) of the Fair Administrative Action Act suggests that violation of fundamental rights and freedoms can be entertained by way of statutory judicial review in an action commenced by Petition under the Rules made pursuant to Article 22 (3) of the Constitution. (See Legal Notice No. 117/2013 Protection of Rights and Fundamental Freedoms - Practice and Procedure Rules, 2013).”

52. The abovementioned **Section 5 (2)** of the **Fair Administrative Action Act, 2015** stipulates thus:

“2. Nothing in this section shall limit the power of any person to –

a. ...

b. apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law or

c. institute such legal proceedings for such remedies as may be available under any written law.”

53. This Court’s power to review administrative action therefore flows from the **Constitution** in **Articles 47 and 21** and from statute by way of the **Fair Administrative Action Act, 2016**.

54. Having so concluded, I shall now proceed to determine the key issues arising from the Petition and in sum, it is the Petitioner’s contention that the 1st Respondent, by way of substituting the name of the

Interested Party with the name of the 3rd Respondent and communicating the latter as one who had qualified to be part of the Garissa County Land Board, infringed upon the interested Party's right to fair administrative action. As earlier mentioned, neither the 1st, nor 2nd Respondent, responded to the Petition but the 3rd Respondent submits that the 1st Respondent acted legally, fairly and reasonably as it provided reasons for its decision and also made a decision that cannot be considered irrational or unreasoned.

55. In that regard, **Article 47** of the **Constitution** provides thus on administrative action:

“1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

56. Similarly, **Section 4** of the **Fair Administrative Act, 2015** provides thus:

“1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.”

57. Several things are notable from the above provisions. Firstly, the action in question has to fall under the definition of “administrative action.” Secondly, only when an action has been defined as “administrative action” can the Court then probe it to determine if it is indeed “***expeditious, efficient, lawful, reasonable and procedurally fair.***” Consequently, if the action in question does not constitute “administrative action,” any remedies or recourse that would flow from invoking **Article 47** will not cogently ensue.

58. Let me state from the outset that I appreciate the importance of fair administrative action and that is why I am in agreement with Majanja J who held thus in the case of **Moses Kiarie Kairuri & 4 others v Attorney General & 3 others, Petition No. 280 of 2013 in H.C at Nairobi [2014] eKLR:**

“The Constitutional guarantee of the right to fair administrative action is aimed at instilling discipline to administrative action so that the values and principles of the Constitution are infused in matters of public administration.”

59. I return to the definition of “administrative action” in order to determine whether the action in question in the Petition herein constitutes administrative action. In my view and in agreement with the Petitioner, the action in question is the 1st Respondent's action of removing the name of the Interested Party from the first list and replacing it with the 3rd Respondent's name, and later communicating the list without the Interested Party's name to the Garissa County Clerk as the list of persons who had qualified to be appointed as members of the Garissa Land Management Board. I am of course focused on the circumstances before me and note in this regard that what constitutes administrative action would depend upon the circumstances of each case. However, legislation provides guidance on the precise and comprehensive definition of administrative action.

60. In its interpretation section, the **Fair Administrative Action Act, 2015** stipulates thus:

“administrative action” includes—

i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;”

61. In that context, the 1st Respondent took the **decision** to remove the Interested Party's name from the list and further acted by replacing the name on the list with that of the 3rd Respondent and later

communicated the list without the Interested Party's name to the Garissa County Clerk as the list of persons who have qualified to be members of the Land Board, an action which at the least affected the Interested Party's **interest** of serving in a position for which he had applied, and was successfully interviewed.

62. More specifically, the decision and actions taken by the 1st Respondent, I find, at the most, affected the Interested Party's right to be treated equally under the law as the names of persons contained in the 1st list, with the exception of his and one other person's, remained on the list and were therefore communicated as persons who had qualified to be members of the Land Board, yet they all had (including the Interested Party) undergone interviews and they all had (including the Interested Party) been selected after the interviews based on the fact that they had performed well enough to be adjudged as being among the best therein. I say so because I have held and continue to hold the same opinion as I did in the case of **Pravin Bowry v Ethics & Anti-Corruption Commission [2015] eKLR** where I observed thus on discrimination:

“one can allege discrimination if in ordinary circumstances, he has been afforded some differential treatment or different standards have been applied as against him in comparison to another person of an equal situation as him.”

63. Informed by the definition provided in law therefore, I resolve that the 1st Respondent's action indeed constitutes administrative action in line with my reasoning above.

64. In view of the foregoing therefore, I resolve that the Court can undertake judicial review of the action in question and should therefore proceed to determine whether the judicial review remedies sought by the Petitioner can be granted. In this regard, I will confine myself to interrogating the procedure applied by the 1st Respondent in reaching the decision and taking the actions in question. This is in accordance with the decision in the case of **Ericsson Kenya Limited v Attorney General and Others Nairobi Petition No. 506 of 2013[2013] eKLR**, where the Court held thus:

“During judicial review, the Court is not concerned with whether the petitioner is entitled to the amount [the merits] but whether the process afforded was one that complied with the dictates of Article 47 of the Constitution.”

65. The above is also in accordance with the holding in **R v Judicial Service Commission Misc. Civil Application No. 1025 of 2003** where the Court confirmed thus:

“The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or the individual judges for that of the authority constituted by law to decide the matter in question.”

66. The preceding are also similar to the holdings in the case of **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd. Civil Appeal No. 185 of 2001** and the case of **R v Commission for Higher Education Ex-Parte Peter Shoita Shitanda [2013] eKLR** where both Courts held the same view.

67. However, I wish to highlight that in some cases where proportionality has been considered under judicial review, the Courts have proceeded to determine the merits therein. In the case of **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR** the Court held thus on the subject:

“The test of proportionality leads to a “greater intensity of review” than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a

much greater role. Proportionality invites the court to evaluate the merits of the decision...In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.”

68. I however reiterate that for the instant Petition, I will confine myself to the procedure of the decisions taken by the 1st Respondent in keeping with the above case law and also because proportionality of the 1st Respondent’s decision has not been pleaded herein as a ground for judicial review. I will therefore seek to determine whether the decision making process in question was as required by law, expeditious, efficient, lawful, reasonable and procedurally fair.

69. I note at this juncture that due to the intersections between judicial review and allegations of infringement of a constitutional right, the standard to which the present Petitioner has to set out and prove his case, as would normally apply in any other constitutional matter, remain applicable in the present case.

70. On the above, the Court in **Anarita Karimi Njeru v AG (No.1) 1979 KLR 154**, held thus:

“...we would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

71. Similarly in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others**, Civil Appeal No. 290 of 2012 [2013] eKLR, the Court reiterated thus:

“We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

72. Therefore, to succeed in its claim, the Petitioner has to demonstrate to a reasonable degree of precision and specificity how the administrative action in question was not expeditious, efficient, lawful, reasonable and/or procedurally fair. In determining thus, I will take into account the **Constitution**, case law and the new **Fair Administrative Action Act, 2015** which applies retrospectively in accordance with its **Section 14 (1)** which provides:

“In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done.”

73. Before embarking on determining the varied elements of the procedure, I will set out the relevant provisions of the law concerning establishment of County Land Boards and the role of the 1st Respondent therein. It is only with such legal and procedural background that this Court can determine violation of or adherence to **Article 47**.

74. In the above regard, **Section 18 (1) of the National Land Commission Act, 2012** states thus regarding the procedure of establishment of the County Land Management Boards:

“The Commission shall, in consultation and co-operation with the national and county governments, establish county land management boards for purposes of managing public land.”

Whether the administrative action was expeditious and efficient

75. An action would be considered expeditious if it is undertaken without wasting any time and therefore entirely achieved within a quick a time as is possible. In similar token, an action would be considered efficient if the best possible results are achieved therefrom, and under the subsisting circumstances, without wasting any effort or resources that are required to undertake the activity. I do not wish to proceed any further to determine whether the action in question was expeditious or efficient for the simple reason that no allegations have been made with regard to this particular characteristic of administrative action.

Whether the administrative action was lawful

76. Lawfulness of an action alludes to the action being undertaken in accordance with and in adherence to the law that sanctions that precise action.

77. Section 4 (6) of the Fair Administrative Act, 2015 provides thus on procedure set out in a law (lawful procedure):

“Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution the administrator may act in accordance with that different procedure.”

78. In the South African case of **Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others [2005] ZACC 14**, Chaskalson CJ opined thus about lawful administrative action:

“Lawfulness depends on the terms of the empowering statute. If the regulations [actions] are not sanctioned by the empowering statute they will be unlawful and invalid.

79. Comparably, in the case of **Republic v Kenya National Examinations Council, Ex Parte Ian Mwamuli, Nairobi HCMA No. 183 of 2013 [2013] eKLR**, the Court agreed that illegality occurs when a decision-making authority commits an error of law in the process of making the decision complained of; or acts without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles.

80. Providing more detail on the subject, Warsame J in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003** pronounced that where an officer is exercising statutory power he must direct himself properly in law and procedure as unlawful behaviour might be constituted by a misdirection on a point of law.

81. Therefore, guided by the above principles, I resolve that with **Section 18 (1)** of the **National Land Commission Act, 2012** serving as the empowering legal provision, the Garissa County Land Management Board would be considered to have been lawfully constituted **only** if the 1st Respondent worked in consultation and co-operation with the national and county government. I say so because the word used to qualify consultation and co-operation is “shall” and therefore these actions are not discretionary as the word “shall” is prescriptive. The role of the County in the establishment of the Board is therefore not merely advisory and cannot be easily dispensed with as the 3rd Respondent contends.

82. Consultation denotes discussion and exchange of views while co-operation denotes working together or assisting each other. Upon reflection therefore, I find that consultation and cooperation cannot exist where there has been no communication or other interaction. In my view proper consultation and cooperation would serve the purpose of ensuring that all parties to the process participate and are heard; and the resultant decision is therefore lawful and wholesome. Such interaction should also be useful and essential and I refute the contention that informing the Petitioner of a decision that has already been made or action that has already been taken constitutes co-operation and consultation.

83. Further, it is notable from the NLC minutes of 27th and 28th June 2014, marked as exhibit AAH3, that there was not a single representative of the National Government in attendance during the interviews of

the persons shortlisted for membership of the Garissa County Land Management Board, neither is there evidence of any communication or interaction with representatives of the national government in the selection process.

84. In addition, it is apparent from the evidence before me that the NLC did not communicate or interact with the Garissa County Members when it decided to remove the name of the Interested Party from the first list and replace it with the name of the 3rd Respondent when creating the second list. This despite the fact that Mr. Harun M Yussuf, Mr. Ahmed Aden Hire and Mr. Kalume Kashuru, all of whom are Garissa County Assembly members had been part of the interview and ranking process that resulted in the production of the first list of qualified appointees, that included the name of the Interested Party.

85. The claim by the 1st and 3rd Respondents therefore that the information that influenced the decision by the 1st Respondent was obtained from a cross section of leadership in Garissa County is accompanied by no proof of the leaders who were consulted, when they were consulted and what specific information they each provided and the claim is therefore wholly insufficient as a demonstration of consultation and co-operation.

86. With the above findings in mind, I find that in making the decision to remove the Interested Party's name that had been placed in the list following a joint and consultative process, the 1st Respondent undertook administrative action that was contrary to the provisions of the relevant law; the 1st Respondent in acting in this manner unilaterally (without consulting and co-operating with National and County Government representatives) acted *ultra vires* the Constitution and the relevant Statutes and the administrative action undertaken was therefore unlawful.

Whether the administrative action was reasonable

87. In the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB** the Court articulated three "logical principles" (the Wednesbury principles) to be followed in making a decision on reasonableness, thus: to take into account all relevant considerations; not to take into account an irrelevant consideration; and not to take a decision which is so unreasonable that no reasonable person properly directing him-self could have taken it.

88. Following the reasoning in the above case, I can only hazard to add that an action or decision can only be deemed reasonable if it is undertaken or reached following a process that is well reasoned and logical, so that even if a reasonable person would disagree with the action taken or decision reached, the person would still deem the process leading thereto as coherent and sensible.

89. I need not explore the reasonableness of the considerations of age and clan that the 1st and 3rd Respondents claim informed the decision to remove and replace the name of the Interested Party in the list produced following the interviews of 27th and 28th June 2014 because as I said earlier in this judgement, I will confine myself to the procedure rather than the merits of the matter.

90. The above notwithstanding, directing oneself properly and with coherence, in my view, would surely comprise addressing oneself first and foremost to the legal requirements surrounding the taking of a decision. Therefore, not taking into account that the decision in question must be made in the context of consultation and cooperation with the relevant parties and therefore proceeding to make the decision unilaterally is not only an unlawful but also an unreasonable act on the part of the 1st Respondent.

91. In the present circumstances, such action as exhibited by the 1st Respondent, constitutes neglect of a key relevant consideration on the authority to act; a consideration that a reasonable person would not overlook. I need not say more because the decision taken was unreasonable.

Whether the administrative action was procedurally fair

92. **Section 4** of the **Fair Administrative Action Act, 2015** provides ample guidance on procedures that

gesticulate fairness in administrative action. I note that some of these procedures may also denote other aspects of acceptable administrative action. In any case, it provides thus:

“3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- a. prior and adequate notice of the nature of the proposed administrative action;***
- b. an opportunity to be heard and to make representations in that regard;***
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;...***
- e. notice of the right to legal representation, where applicable;***
- f. notice of the right to cross-examine or where applicable; or***
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

4. The administrator shall accord the person against whom administrative action is taken an opportunity to-

- a. attend proceedings, in person or in the company of an expert of his choice;***
- b. be heard;***
- c. cross-examine persons who give adverse evidence against him; and***
- d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”***

93. On fairness, Lord Mustill in **Doody v Secretary of State for the Home Department and other appeals** [1993] 3 All ER 92 (HL) held thus:

“ What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects...Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.”

94. Similarly, Chaskalson CJ in **Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others** [2005] ZACC 14 held thus:

“An individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns. The decisions may depend on particular facts and may sometimes involve disputes of fact that have to be resolved.”

95. On the same subject, the Court in the case of **Justice Amraphael Mbogholi Msagha v Chief Justice & 7 Others, Nairobi HCCC No. 1062 of 2004** [2006] 2 KLR 553, referring to Lord Wright in **General Medical Council v Sparckman** [1943] 2 All E.R. observed thus regarding unfair decisions where the decision maker does not hear the other side's version:

“If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared to be no

decision...”

96. Odunga J also fittingly added thus in **Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjihia & another [2016] eKLR**:

“In my view a proper consideration of a matter requires that the Tribunal considers all aspects of the case and all aspects of the case cannot be said to have been considered when the person against whom the complaint [action] is preferred has not been called upon to give his or her version of the issues in question”

97. I am in total agreement with the above expositions of the law and it would certainly be unfair if a decision that adversely affects someone is made without the person being granted an opportunity to be heard by the decision maker on why such action should not be taken against them. I however wish to expound on the other provisions in the **Fair Administration Act, 2015** that I find relevant to these proceedings.

98. To my mind: **prior notice** means informing a person in understandable terms that a certain type of administrative action will be taken against them, sufficiently early enough for the person being informed to be able to plan how to appropriately respond to the administrative action; **opportunity to make representations** means that keeping in mind the nature of administrative action, granting the person affected opportunity to make his/her representations, respond to the decision makers, provide any new information if necessary or raise any complaints; **adequate notice of any right to appeal or review** means informing the persons affected by the administrative action that they can challenge the administrative action within the auspices of the decisions maker, replete with timeline and procedure for such action/or by way of approaching the Courts for judicial review.

99. Taking into account all the above, and the affidavits and other documentary evidence before me detailing what has been confirmed by the Parties on record to be all communication between Garissa County Assembly and the NLC on the matter (exhibits AAH4, AAH5 and AAH7), I resolve that the action of taking out the name of the Interested Party from the list that was compiled following the interviews of the 27th and 28th June 2014 and replacing it with the 3rd Respondent's name was not procedurally fair for the reasons that the Interested Party, against whom the administrative action was taken: was not provided with prior notice of the administrative action in order to be able to prepare a response thereto; was not granted an opportunity to make representations and therefore be heard on why the administrative action should not be taken against him (even by way of providing written submissions); and was not given adequate notice and direction on his right to appeal the administrative action taken against him.

Written reasons

100. I wish to interrogate the provision for written reasons for administrative action, in relation to the instant Petition as the 1st Respondent offered reasons for its decisions to the Petitioner who hereby challenges its administrative decision and also because the 3rd Respondent contends that the 1st Respondent adhered to the requirement to provide written reasons.

101. **Article 47 (2)** of the **Constitution** provides thus on the subject:

“If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

102. Broadening the grounds for provision of written reasons for administrative action, **Section 4 (2)** of the **Fair Administrative Act, 2015** stipulates thus:

“Every person has the right to be given written reasons for any administrative action that is taken against him.”

103. I wish to remark at this juncture, that this right to written reasons differs from the right of access to information under **Article 35** of the **Constitution**. For the latter, a request for the information one wishes to access has to be made while for the former, the decision maker is required to offer written reasons for his decision to the person against whom he makes the decision when he makes that decision and not subsequently thereto. Therefore, for the administrative action that is the subject of this suit, (the administrative action that was taken against the Interested Party), the Interested Party had the right to be given written reasons therefor.

104. In the case of **Judicial Service Commission v Hon. Justice Mutava Mbalu, Civil Appeal No. 52 of 2014**, Githinji JA held thus concerning the duty to give reasons for administrative action in accordance with **Article 47 (2) of the Constitution**:

“Reasons for decision should be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative action and not otherwise.”

105. Comparably, Mbaru J in **Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others [2014] eKLR** observed thus:

“Where a fundamental right is likely to be adversely affected by an administrative action, that person has a right to be given reasons for the action.”

106. I note that these decisions were rendered prior to the commencement of the Fair Administrative Act, 2015 which provides for written reason to be given, as a matter of right, to anyone against whom an administrative decision is taken. This provision, in my view, encompasses those whose rights are not affected by any administrative decisions taken against them as well as those whose rights are affected by any administrative decisions taken against them and therefore the jurisprudence on this subject is bound to expand accordingly.

107. In addition to the above, written reasons would only be considered sufficient if they clearly correspond to the decision taken and are sensible in that respect.

108. Taking the above into consideration, I determine that the letter marked exhibit AAH7, purporting to offer written reasons for the decision taken against the Interested Party, for the reason that it was not addressed to the Interested Party, does not constitute written reasons in accordance with the above legal requirements. The 1st Respondent did not altogether offer any written reasons to the Interested Party and therefore failed to honor this constitutional and statutory obligation.

Good governance, integrity and transparency

109. It is the Petitioner’s contention that the administrative action of the 1st Respondent that is the subject of the instant Petition, was contrary to the principles of good governance, integrity and transparency, all of which are values espoused in **Article 10** and **Chapter 6** of the **Constitution**.

110. While *good governance* denotes upright and wholesome means for making decisions and relating to members of the public, *integrity* embodies always being honest and driven by strong moral conviction, and *transparency* indicates operating in a manner that allows for the public to see how institutions arrive at decisions or perform actions.

111. The Courts have clarified the place of these values in administrative action. In the case of **Republic v Kenya Revenue Authority Ex-parte LAB International Kenya Limited [2010] eKLR**, the Court held thus:

“[By way of] Article 47 of the Constitution of Kenya, 2010 persons such as the applicant have a right to fair administrative action, which must not be denied whether by the respondent, or by the other Government agencies and mechanisms to which the respondent may happen to be operationally attached; the whole set of those agencies, which are statutory and public bodies,

are subject to Article 10 of the Constitution which, under the head, “national values and principles of governance”, requires “good governance, integrity, transparency and accountability.”

112. In addition, in the case of *Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 [2012] eKLR*, the Court held that national values and principles of governance articulated in **Article 10** including good governance, integrity, transparency and accountability must be infused in administrative action.

113. Majanja J was of the same view when he pronounced thus in *Geothermal Development Company v Attorney General [2013] eKLR*:

“...that certain values and principles of governance be infused into the decision-making process of any State organ. Such values as are relevant to these proceedings include good governance, integrity, transparency and accountability.”

114. I am in agreement with the above holdings on good governance, integrity and transparency. Guided thereby, I resolve that the impugned decision having been undertaken and executed unilaterally, without requisite consultation or co-operation and not being clear on how information considered was obtained, the administrative action in question was neither infused with good governance nor transparency.

Conclusion

115. Having comprehensively considered the content of expeditious, efficient, lawful, reasonable and procedurally fair administrative action, I conclude that the Petitioner has demonstrated in a manner that is precise and clear, that the 1st Respondent infringed upon the **Article 47** right of the Interested Party by way of its decision and action of removing the name of the Interested Party from the list of names that was produced after the 27th and 28th June 2014 interviews for membership in the Garissa County Land Management Board. Such infringement, not being provided for in the **NLC Act, 2012**, the law that sanctions the process of establishing County Land Management Boards nor to my knowledge, in any other written law cannot be considered justifiable and is therefore not constitutionally allowable.

Disposition

116. For the above reasons, I am satisfied that the Petition dated 8th August 2014 is merited and would grant the following reliefs:

a. I hereby declare that the conduct of the National Land Commission of replacing the name of ABDILADIF AHMED HARET with that of AHMED DUALE AHMED infringed ABDILADIF AHMED HARET’s right to fair administrative action as envisioned in Article 47 (1) of the Constitution of Kenya, 2010.

b. An order of CERTIORARI is hereby issued quashing the decision of the 1st Respondent of replacing the name of ABDILADIF AHMED HARET with that of AHMED DUALE AHMED in the first list of persons who qualified following the interviews of 27th and 28th June 2014 at Almond Hotel.

c. An order of MANDAMUS is hereby issued compelling the 1st Respondent to restore the name of AHMED DUALE AHMED in place of that ABDILADIF AHMED HARET in the first list of persons who qualified following the interviews of 27th and 28th June 2014 at Almond Hotel and proceed with the process of recruitment of Members of the Board from that point.

d. The nature of the dispute would necessitate that each party should bear its own costs.

117. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROB THIS 9TH DAY OF AUGUST, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Miss Nderu holding brief for Mr. Washika for 3rd Respondent

Mr. Mokuu holding brief for Mr. Mogaka for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE