



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 196 OF 2015

**THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI
AND PROHIBITION**

AND

**IN THE MATTER OF GAZETTE NOTICE NO. 2831 DATED 17TH APRIL 2015 AND
PUBLISHED ON 27TH APRIL 2015**

AND

**IN THE MATTER OF THE PURPORTED APPOINTMENT OF THE INTERESTED PARTY AS
THE CHAIRMAN OF THE BOARD OF DIRECTORS OF THE ANTI-COUNTERFEIT
AGENCY**

AND

IN THE MATTER OF THE ANTI-COUNTERFEIT ACT

AND

IN THE MATTER OF THE STATE CORPORATIONS ACT

AND

IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT

AND

AND IN THE MATTER OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

AND

IN THE MATTER OF THE VALUES AND PRINCIPLES OF PUBLIC SERVICE

AND

IN THE MATTER OF

REPUBLIC APPLICANT

VERSUS

THE HON ATTORNEY GENERAL.....1ST
RESPONDENT

THE ANTI-COUNTERFEIT AGENCY..... 2ND
RESPONDENT

CS, INDUSTRIALIZATION & ENTERPRISE DEVELOPMENT..... 3RD
RESPONDENT

POLYCARP IGATHE.....INTERESTED
PARTY

EX-PARTE: TOM ODOYO OLOO

JUDGEMENT

Introduction

1. By a Notice of Motion dated 30th June, 2015 the *ex parte* applicant herein **Tom Odoyo Oloo** seeks the following orders:

1. An order of certiorari to bring into this honourable court and quash Gazette Notice No. 2831 dated 17th April 2015 on published on 27th April 2015 appointing the Interested Party as the Chairman of the Board of directors of the 2nd Respondent.

2. An order of Prohibition to issue against the 1st Respondent, on behalf of the Government, from purporting to appoint the Interested Party as a director of Chairman of the Board of Directors of the 2nd Respondent or any other person whatsoever under the provisions of the state Corporations Act or under any other legal provisions save for the Anti-counterfeit Act.

3. An order of prohibition to issue against the 2nd Respondent from treating or in any other was holding out or according the Interested Party and treatment as a director or chairman of its board of directors on the strength of Gazette Notice NO. 2831 dated 17th April 2015 and published on 27th April 2015.

4. An order of Mandamus to issue as against the 3rd Respondent to compel the 3rd Respondent to proceed and appoint the chairman of the board of directors of the 2nd Respondent as required by the Constitution and the Anti-counterfeit Act.

Applicant's Case

2. According to the applicant, by way of Gazette Notice No. 2831 dated 17th April 2015 and

- published in the Special Issue of the Kenya Gazette on 27th April 2015 the Interested Party was purportedly appointed as the chairman of the 2nd Respondent under the provisions of section 7(3) of the **State Corporations Act**. It was however the applicant's case that the said appointment was made in excess and/or without power and jurisdiction in that the **State Corporations Act** at Section 7(3) does not allow or permit the appointment of the Interested Party.
3. It was therefore the applicant's case that the invocation of the provisions of the **State Corporations Act** in the purported appointment of the Interested Party when there is a substantive legal provision for the appointment of the chairman of the board of directors under the **Anti-counterfeit Act** is erroneous, illegal and wrong and was in excess and/or without power and jurisdiction in therefore illegal and a nullity *ab initio*.
 4. To the applicant, the law is very clear and unambiguous in the appointment of the chairman of the board of directors of the 2nd Respondent under the provisions of the **Anti-Counterfeit Act** under which section 6 provides that the chairman of the board of directors of the 2nd Respondent is appointed by the Cabinet Secretary responsible for matters for the time being to do with industrialization. To the applicant, it is therefore abundantly clear that the aforesaid appointment was made by a stranger to the law, a non-appointment authority and is therefore clearly in excess of power and jurisdiction. In his view, the appointment of the Interested Party is a product of the usurpation of power and is therefore unsustainable in law.
 5. It was further disclosed that the appointment of the chairman of the 2nd Respondent is a two stage process and the Interested Party was not subjected to the 1st stage or process and therefore this procedural irregularity in the purported appointment can only be remedied by an appropriate order of certiorari quashing the said appointment. Further, the chairman of the board of directors of the 2nd Respondent must by law meet certain qualifications under the provision of the **Anti-Counterfeit Act** and there are obvious and clear matters to consider in the appointment of the chairman of the board of directors of the 2nd Respondent which include but not limited to matters of conflict of interest.
 6. To the applicant, the Interested Party suffers from serious, inexcusable and incurable conflict of interest issues that makes his appointment contrary to public interest and the legitimate expectations of the public as follows:-
 - a. The Interested Party is presently the Managing director of Vivo Energy, a complainant to the 2nd Respondent in matters counterfeiting especially in the energy sector.
 - b. The Interested Party is presently the chairman of Petroleum Institute of East Africa (PIEA), an umbrella body of intellectual property rights owners and a complainant to the 2nd Respondent as agent in matters counterfeiting in the energy sector.
 - c. The Interested Party is also presently the chairman of the board of directors of the 2nd Respondent, a body to which abuse of intellectual property rights is made by entities he is in control of as aforesaid.
 - d. The Interested Party as chairman and director of the 2nd Respondent is by law an inspector within the meaning of Section 22 of the **Anti-counterfeit Act** and therefore vested with the powers to enforce measures to combat counterfeiting.
 - e. The foregoing conflict of interest situation makes the Interested Party a partial participant in matters counterfeiting and therefore he cannot be expected to be impartial, fair and objective in dealing with members of the public suspected of engaging in counterfeiting.
 - f. The Interested Party has a direct vested, beneficial and pecuniary interest in matters counterfeiting especially in the energy sector and therefore he is susceptible to use his position to victimize, zealously, industry competitors under the false guise of fighting counterfeiting.

7. It was averred that the impugned appointment of the Interested Party as the chairman of the board of directors, a public office, of the 2nd Respondent was made contrary to the critical values and principles that govern and regulate appointment to public office and therefore illegal. To the applicant the values that were violated with impunity in the impugned appointment of the Interested Party are, *inter alia*, the following:-
 - a. Fair competition and merit as the basis of appointment.
 - b. Affording adequate and equal opportunities for appointment at all levels of the public service.
8. The aforesaid values and principles, among others, it was contended require that the vacancy, if any, of the chairman of the board of directors of the 2nd Respondent be notified to the public and that the public be afforded an opportunity to apply since qualifications are clearly provided by statute, the ***Anti-Counterfeit Act***. It was however contended that the appointment of the Interested Party was opaque, unilateral, exclusive, illegal, unconstitutional and shrouded in mystery to such an extent that the matters or factors that were considered in the appointment can only be said to constitute irrelevant considerations and therefore contrary to public interest and legitimate expectations. In addition, the appointment of the Interested Party as chairman of the board of directors of the 2nd Respondent is marred by manifest procedural impropriety, illegality and non-compliance with the law.
9. The applicant stressed that the appointment authority under the ***Anti-Counterfeit Act*** is the Cabinet Secretary for Industrialization and Enterprise Development and there are clear statutory guidelines and factors for the said Cabinet Secretary to consider in the appointment of the chairman of the board of directors of the 2nd Respondent. Therefore, the default by the Cabinet Secretary for Industrialization and Enterprises Development to appoint the Interested Party into the chairmanship of the board of directors of the 2nd Respondent is not only a violation of the express provisions of the law but also an inexcusable and manifest procedural impropriety and illegality that should be immediately remedied by an appropriate order of this honourable court. The process leading to the appointment of the Interested Party as the chairman of the board of directors of the 2nd Respondent having been opaque and shrouded in mystery was therefore exclusive, discriminative, selective and involved considerations other than those provided by statute.
10. To the applicant, in the present legal and constitutional dispensation every appointment to public office must abide the law and that any appointment that is contrary to law is null and void *ab initio* and cannot and should not be allowed to stand. Since the appointment of the Interested Party as the chairman of the board of directors of the 2nd Respondent was made by a stranger to the law not authorized to make such an appointment and therefore the appointment was made in excess of jurisdiction, is *ultra vires* the powers under the statute through which the appointment as allegedly made and is therefore contrary to law and public policy.
11. It was reiterated that the process leading to the appointment of the Interested party as the chairman of the board of directors of the 2nd Respondent was made contrary to the relevant values and principles of governance espoused in the constitution together with the values and principles that regulate appointments into public office as expressed in the constitution and therefore such appointment is illegal and invalid.
12. To the applicant, it is in the interest of justice, public interest, the rule of law, accountability for public exercise of power, fair and expedient in all circumstances of the case that my application be allowed.

Respondents' Case.

13. On behalf of the 2nd Respondents, the following grounds of opposition were filed:

- 1. That the application herein is unmerited and therefore an abuse of the due processes of the court.**

2. That appointment was properly done under Section 7(3) of the State Corporations Act Cap 447 Laws of Kenya

3. That the President has powers under the Section 7(3) of the State Corporations Act Cap 446 Laws of Kenya to revoke the appointment of any member of the board and may himself nominate a new member.

4. That it was necessary for the president to appoint a new member of the board especially at this time when our market is experiencing a challenge of fake counterfeit products.

5. That the Applicant has not given any reasons to justify issuance of the orders herein and the same should be dismissed with costs to the Respondents.

14. It was submitted on behalf of the Respondents that that the appointments were done by the President who has powers under the law to make such appointments. Based on the provisions of section 7(3) of the *State Corporations Act*, it was submitted that the President has power to appoint any member of the board and the chairman of state corporations. To the Respondents, the said provision is a discretionary/enabling provision giving the President a discretionary mandate and has never been declared unconstitutional hence the President was guided by the said law when he made the appointment. It was therefore submitted that an order of certiorari cannot and should not be issued as the appointments were done in accordance with the law. Similarly an order of *mandamus* cannot and should not be issued. There are no defined parameters for the president to act. In support of these submissions the Respondents relied on Kenya National Examination Council v R (Civil Appeal No.266 of 1996 and Associated Provincial Pictures House Ltd vs. Wednesbury Corporation (1974) 2 ALL ER 680

15. The Respondents were of the view that If the applicant was dissatisfied with his removal as the Chairman of the 2nd Respondent, he ought to have exhausted the other avenues before coming for Judicial Review by filing a suit in the appropriate forum for challenging the decision of the president to remove him.

Determinations

16. I have considered the application, the affidavit filed in support of the application, the grounds of opposition as well as the submissions filed.

17. These proceedings were provoked by the publication of the Kenya Gazette Vol. CXVII dated 27th April, 2015 by which several appointments were made by His Excellency the President, Hon Uhuru Kenyatta. One such appointment was for the Chairperson of the Anti-Counterfeit Agency Board which was made vide Gazette Notice No. 2831 in the said Volume and was dated 17th April, 2015 and by the said Gazette Notice, the President appointed **Polycarp Igathe**, the interested party herein as the chairperson of the said agency. The said appointment was expressed to be made pursuant to section 7(3) of the *State Corporations Act*, Cap 446. The said Notice also mentioned the *Anti-Counterfeit Act, 2008* though it did not cite any specific provision of the said Act.

18. Section 7(3) of the *State Corporations Act* under which the appointment was expressed to have been made provides:

Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board, the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of

any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine.

19. It is therefore clear that notwithstanding any provision of the written law, the President is empowered to revoke the appointment of any members of a Board and nominate a replacement for the remainder of the period of office of that member or constitute a new Board. This then brings to fore what the term “nominate” constitutes. According to *Black’s Law Dictionary*, 9th Edition at page 1148 the term means:

“To propose (a person) for election or appointment; To name or designate (a person) for a position.”

20. *Ballentine’s Law Dictionary*, at page 363, on the other hand defines “nominate” as:

“To name or to designate. To select or choose a person to be a candidate for office.”

21. Similarly, the term “appoint” is defined as:

“To select a person for a specific office, position, duty, or job. To select; to designate.”

22. It is therefore clear that the terms “appoint” and “nominate” can be applied interchangeably to refer to the same action or process. I accordingly do not agree that the President’s power is limited to nomination of a person for appointment and that he has no power to appoint the Chairman of the Agency.

23. What then is the criteria for the appointment of a Chairman of the Anti-Counterfeit Agency? Section 6(1) of the *Anti-Counterfeit Act, 2008* as amended by the *Statute Law Miscellaneous Amendment Act, 2014*, however provides that the Chairman of the Anti-Counterfeit Agency is to be appointed by the Cabinet Secretary from amongst the members appointed under paragraph (h) thereof which provides for two members appointed by the Cabinet Secretary not being public officers, and who hold a degree from a university recognised in Kenya and have at least ten years’ experience in matters relating to (i) intellectual property rights; (ii) consumer protection, or (iii) trade. In other words for a person to qualify as a Chairman of the Counterfeit Agency, he or she must have been appointed under section 6(1)(h) of the Act under which he is required to possess the qualifications stipulated thereunder.

24. Apart from that in exercise of the powers conferred upon the President under section 7(3) of the *State Corporations Act*, the President is required by law to satisfy himself that a Board has failed to carry out its functions in the national interest. Accordingly the President’s powers under the said provision are not unfettered and he can only lawfully exercise those powers in strict compliance therewith lest he is accused of abusing the same. As was held in *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others* [2007] 2 KLR 240:

“it is implied that power given to authorities or persons by an Act of Parliament must be exercised fairly, and the court has the power to reach out where the exercise of that power is unfair and I further endorse Lord Scarman’s quote in *Reg vs. Secretary of State for the Environment Ex Parte Nottingham Shire Country Council* [1986] AC where he stated: “A power which is abused should be treated as a power which has not been lawfully exercised.”

25. Abuse of power, it has been held, takes several forms, one of which is where power is exercised for collateral purpose by reneging thereon without adequate justification. In my view a power that is being exercised arbitrarily is a power that is being abused. In the instant case the statute requires that before the President exercises his powers under section 7(3) of the *State Corporations Act* it must appear to him that ***a Board has failed to carry out its functions in the national interest.*** In my view the term “appear to him” must necessarily mean the same thing as “hold the opinion” which term was equated to “consider” in *Onyango Oloo vs. Attorney General* [1986-1989] EA 456. In that case the Court of Appeal held based on *The Chambers Twentieth*

Century Dictionary New Edition at 276, that:

“To ‘consider’ is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion...‘Consider’ implies looking at the whole matter before reaching a conclusion.”

26. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, I expressed myself *inter alia* as hereunder:

“Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya...Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit”

27. The question that arises is whether in exercising his powers under section 7(3) of the ***State Corporations Act*** the President ought to have had regard to the provisions of section 6(1) of the ***Anti-Counterfeit Act, 2008***. In my view there are good reasons for providing a criteria for the appointment of the Chairperson of the Anti-Counterfeit Agency. To my mind, it is meant to ensure that the Agency is headed by a person qualified and competent to undertake the mandate expected of him or her as the chair of the said important Agency. It shows the importance the Legislature attached to that post.

28. Under Article 10 of the Constitution, the national values and principles of governance therein bind all State organs, State officers, public officers and all persons whenever any of them *inter alia* enacts, applies or interprets any law; or makes or implements public policy decisions which in my view is what the President sets out to do when exercising power under section 7(3) of the ***State Corporations Act***. Some of these values and principles are expressed to be good governance, integrity, transparency and accountability, sustainable development and participation of the people. However since Article 10 employs the word “includes” it means that the values and principles enumerated therein are not exclusive but are capable of being expanded and expounded on. It was accordingly held by **Rawal, J** (as she then was) in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331** that:

“Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.”

29. In **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57** the Court of Appeal expressed itself as follows:

“The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle.”

See **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130**.

30. That the law must of necessity, adapt itself to the changing social conditions and not lay still was similarly appreciated in **Kimani vs. Attorney General [1969] EA 29**.

31. Adopting that position, it is my view that sustainable development necessarily requires that the persons tasked with managing public resources and affairs be persons who are competent to undertake the tasks entrusted to them. This must be necessarily so because under Article 232 of the Constitution, the values and principles of public service include high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making; accountability for administrative acts; transparency and provision to the public of timely, accurate information; and subject to affording adequate and equal opportunities for appointment, training and advancement, at all levels of men and women, the members of all ethnic groups and persons with disabilities; fair competition and merit as the basis of appointments and promotions. These values and principles of public service apply to public service in all State organs in both levels of government and all State corporations.
32. These provisions are not lofty aspirations and as was appreciated in **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004:**

“A constitution must not be considered in a narrow and pedantic manner and that construction most beneficial to the widest amplitude of its power must be adopted... The concept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament is not acceptable since the Constitution is not an Act of Parliament. It exists separately in the statutes. It is supreme law and its provisions ought to be interpreted broadly or liberally and not in a pedantic way i.e. restrictive way – Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the Constitution, of necessity has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document... The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile document; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.”

33. In the Namibian case, **S. vs. Acheson**, 1991 (2) S.A. 805 the following passage (**Mahomed, A.J.**) appears (at p.813):

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals and....aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

34. If one was doubtful, the Constitution itself in Article 259(1) provides guidance on the manner of interpretation of the document by providing that:

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

35. Good governance can only be achieved when the persons who are qualified to perform the tasks for which they are appointed are the ones considered for such positions. In my view even the mandatory Constitutional considerations of gender, ethnic and regional balancing ought not to be an excuse for compromising on the quality of services being rendered to the people of Kenya. In other words, fair competition and merit, representation of Kenya's diverse communities, affording adequate and equal opportunities to men and women, the members of all ethnic groups and persons with disabilities are all factors which must be considered promotions and appointments.

36. I associate myself with the decision of Nyamu, J (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** where he held:

“On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance...From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism.”

37. Under Article 260 of the Constitution, “State office” includes the Presidency and “State officer” means a person holding a State office. Accordingly the President is enjoined to comply with Articles 10, 129 and 232 of the Constitution. Therefore in exercising the powers conferred upon him under section 7(3) of the *State Corporations Act* the President ought to have regard to the provisions of section 6(1) of the *Anti-Counterfeit Act, 2008* as well.

38. In this case it is contended that the interested party ought not to have been appointed to the position for which he was appointed by the President due to conflict of interest. Although the interested party was served, according to the affidavit of service filed herein, he declined to sign

the same. Similarly, the respondents have not filed any replying affidavit to controvert the issues raised by the applicant. Therefore the factual averments remain wholly uncontroverted.

39. That the appointment in issue was an appointment to a public office is not in doubt. A public entity under the interpretations section contained at section 2 of the *Leadership and Integrity Act* is defined as follows:

“public entity” means—

(a) the Government, including the National or County Government, or any department, State organ, agency, service or undertaking of the National or County Government;

(b) the National Assembly or the Parliamentary Service Commission;

(c) any corporation, council, board, committee or other body which has power to act under and for the purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; or

(d) a corporation, the whole or a controlling majority of the shares of which are owned by a person or entity that is a public body by virtue of any of the preceding paragraphs of this definition; and (e) statutory public bodies;

40. The section defines a “public officer” as having the meaning assigned to it under Article 260 of the Constitution under which it means any State officer or any person, other than a State Officer, who holds a public office. At section 52, the Act states that:

“pursuant to Article 80(c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 shall apply to all public officers as if they were State officers.”

41. In making appointments to public offices heed ought to be taken of the holding of by **Mumbi Ngugi, J** in **Benson Riitho Mureithi vs. J. W. Wakhungu & 2 others [2014] eKLR** where the learned Judge expressed herself as follows:

“It would appear from the material before the Court that the question of the Interested Party’s suitability for public office was not addressed in accordance with the requirements of the Constitution. The Cabinet Secretary, the 1st respondent, had power of appointment under section 51 of the Water Act... At section 2 of the First Schedule to the Act, it is provided that those proposed for appointment as Board members of Water Services Boards must be appointed on the basis of educational qualifications, experience, character and integrity of potential candidates for membership. Similar provisions are contained in section 22 of the Public Officers Ethics Act... The 1st respondent, however, had a duty, imposed on her by the people of Kenya, to consider the Interested Party’s suitability under the Constitution, and to make the appointment to the Board in accordance with the dictates of the Constitution... What does the Constitution require with regard to appointments to public office? As already observed, public officers must be appointed on the basis of the criteria set out in Chapter 6. They must also, in addition, be appointed in accordance with the national values and principles set out in Article 10... It has been conceded by Counsel for the respondents, however, that no-one knew or had any inkling that the Interested Party was going to be appointed as Chairman of the Water Services Board; and consequently, there was no opportunity for the petitioner or any other person to seek information about the appointment, or raise objections to the appointment, which objections would be expected to be considered by the Minister, and if found to be valid and sufficient to bar the appointment, the intended appointment ought not to be made... It seems to me therefore that the primary responsibility lay on the 1st respondent, and indeed on any other state officer making a similar appointment, to put in place a mechanism for recruitment or appointment of

members of Boards of state corporations that would allow for public participation and consideration of the suitability and integrity of potential appointees as the Constitution now demands... It may seem that the Constitution has imposed an irksome and onerous burden on those responsible for making public appointments by requiring that they make the appointments on the basis of clear constitutional criteria; that they allow for public participation; and that those they appoint meet certain integrity and competence standards. This burden, however, is justified by our history and experience, which led the people of Kenya to include an entire chapter on leadership and integrity in the Constitution... In the present case, as the respondents tacitly concede, there are serious unresolved questions with regard to the integrity of the Interested Party which do not appear to have been considered by the 1st respondent in making the appointment to the Chairmanship of the Athi Water Services Board. It is the duty of the 1st respondent to consider the issues and, in exercise of the powers vested in her office under section 51 of the Water Act, applied in accordance with the Constitution, make a determination of the suitability of the Interested Party under Chapter 6 of the Constitution...In the premises, this petition succeeds to the extent that the Court finds that the 1st respondent failed to act in accordance with the Constitution, and her appointment of the Interested Party as Chairman of the Athi Water Services Board fell below the standard set by the Constitution... In the present case, the Court has found that no inquiry was made with regard to the suitability of the Interested Party under the Constitution, a responsibility that fell on the 1st respondent under the provisions of the Water Act as read with section 7 of the 6th Schedule to the Constitution. The responsibility still remains to make that inquiry. It is a responsibility that the Court does not deem proper to assume, but should require its proper exercise by the office vested with the authority to exercise it- the 1st respondent.”

42. The learned Judge relied on International Centre for Policy and Conflict & 4 Others -vs- Hon. Uhuru Kenyatta and Others, Petition No. 552 of 2012 where it was held:

“On the issue canvassed by the parties on the threshold of integrity required to be met, we note that the purpose of Chapter Six is to set higher standards of integrity for persons seeking to serve as State officers. Integrity is the firm adherence to moral and ethical values in one’s behaviour. Integrity is therefore not only about an individual’s own perception about the correctness or appropriateness of their conduct, but also has a fundamental social and public quality to it. It is our view that as the society also expects certain values to be upheld, the integrity provisions of the Constitution demand that those aspiring to State office be like Caesar’s wife: they must be beyond reproach.”

43. I also agree with the decision in David Kariuki Muigua –vs- Attorney General & Another Petition No. 161 of 2011, which dealt with an appointment by the Minister for Industrialisation of the Chairman of the Standards Tribunal, and in which the Court observed at Paragraph 13 and 15 as follows:

13. “However, it would be expected that the Minister, in making the appointments to the Tribunal, would be guided by the national values and principles set out in Article 10 of the Constitution, in particular participation of the people, equity, good governance, integrity, transparency and accountability. Section 7(1) of Schedule 6 provides that

‘All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.’

Any appointments under the Standards Act should have been done in conformity with the provisions of the constitution and should have observed the national values and principles.

15. There is no evidence that there was a competitive process that would enable public

participation in the process and show the transparency and accountability required under the Constitution, thereby giving legitimacy to the appointment of the petitioner. Like his successor, the petitioner was appointed on the basis of a Gazette Notice; the basis of the appointment, the criteria followed in appointing him and the other members of the Tribunal was, from all appearances and regrettably so, more in keeping with the old order that preceded and indeed gave impetus to the clamour for the new Constitution when public officers were appointed at the whim of the Minister or President. To uphold the appointment of the petitioner would be to give a seal of approval to the old order. It is imperative that all public appointments are made in accordance with constitutional values and principles.”

44. The old order which was being referred to was the system under the retired Constitution where appointments to public offices were not based on any known legal or Constitutional criteria but were, in practice, largely based on ethnicity, social status or origin, political affiliations, friendship and cronyism. It was in appreciation that such a system was not conducive to national development and public interest that the people of this Republic in retiring the former Constitution and enacting unto themselves the current Constitution decided to expressly provide for a clear criteria of appointments to public and State offices. The will of the people as expressed in the current Constitution must be obeyed and any decision taken which contravenes that will, must be quashed. For the umpteenth time I wish to draw the attention of the executive to the decision of **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010** where in his usual blunt style he cautioned:

“The new Constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the right enshrined under the Bill of Rights is to perpetuate a fundamental breach of the constitution and to legalise impunity at very young age of our constitution. That kind of behaviour, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers. It also raises basic issue of whether a President who has just been sworn in and agreed to be guided by the provisions of the Constitution can allow his agents to breach it with remarkable arrogance or ignorance. All these, are issues which require sober and attentive judicial mind in order to address the rights and obligations of all parties involved...*Prima facie* the allegations contained in this application is serious indictment on the institution of the Presidency and whether he is protecting, preserving and safeguarding the interests, rights and obligations of all citizens as contained in the new constitution. This application is a clear indication that the security arms of this country have not tried to understand and appreciate the provision of this new Bill of Rights. It also shows yester years impunity are still thriving in our executive arm of the government.”

45. Whereas the learned Judge was dealing with violation of the provisions under the Bill of Rights, it is my view that his holding applies *mutatis mutandi* to the need to uphold the values and principles of governance and by extension the Constitution as a whole. After all under Article 1 of the Constitution, sovereign power belongs to the people of Kenya and though that power is delegated to the three State organs – Parliament, the Executive and the Judiciary - that sovereign power is to be exercised only in accordance with the Constitution and the said State organs are enjoined to perform their functions in accordance with the Constitution.

46. In this case the President was under a duty to uphold the Constitutional and statutory provisions relating to the appointment of the interested party and to consider the relevant qualifications required under the law before appointing or nominating the interested party to the said position. The applicant has averred on oath that the interested party was not suitable for the position. The Respondents have not controverted this averment which is on oath. There is no evidence of what considerations, if at all, the President took into account in appointing the interested party. As was held in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090:**

“In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good

reasons.”

47. Judicial review, it has been held, stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43.**
48. In this case the appointment of the interested party was not shown to have complied with the Constitutional and statutory provisions enumerated herein above. The relevant considerations were not taken into account before his appointment. See **Padfield vs. Minister of Agriculture and Fisheries [1968] HL** quoted in **Republic vs. Judicial Commission of Inquiry into Goldenberg Affair [2007] 2 EA 392.**
49. Having considered the issues raised herein, I am not satisfied that that both the Constitutional and relevant statutory provisions relating to the appointment of the interested party to the position the subject of these proceedings were not adhered to. Where there is non-compliance with the provisions of the law the minimum that the executive can do is to give some rational grounds for the action otherwise the Court may well be entitled in concluding that there was no reason for acting in the manner it did in which case the decision may well be found to be grossly unreasonable since that is the only term that can be applied to an action taken in breach of the law. Whereas the President had the power to appoint the Chairman of the Anti-Counterfeit Agency, that appointment had to be in compliance with the Constitution and the relevant Legislation since, as I have stated herein above, the President in undertaking his executive functions does so on behalf of the people of the Republic of Kenya and has to bow to the will of Kenyans as expressed in their document delegating their sovereign powers to *inter alia* the executive, the Constitution. It is the Constitution which sets out the terms under which the delegated sovereign power is to be exercised and those to whom the power is delegated must adhere to it and where certain powers are not expressly delegated, resort must be had to the people by way of a referendum.
50. This power, which power is not donated by the Constitution, but only recognised by and reserved thereunder was appreciated in **Ms. Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010 [2010] 1 KLR 834:**

“With respect to the juridical status of the concept of the constituent power of the people, the point of departure must be an acknowledgement that in a democracy, and Kenya is one, the people are sovereign. The sovereignty of its people; the Republic is its people, not its mountains, rivers, plains, its flora and fauna or other things and resources within its territory. All Government power and authority is exercised on behalf of the people. The second step in the recognition that the sovereignty of the people necessarily betokens that they have a constituent power – the power to constitute and/or reconstitute, as the case may be, their framework of government. That power is a primordial one. It is the basis of the creation of the Constitution and it cannot therefore be conferred or granted by the Constitution. Indeed it is not expressly textualised by the Constitution and, of course, it need not be. If the makers of the Constitution were to expressly recognise the sovereignty of the people and their constituent power, they would do so only *ex abundanti cautela* (out of excessiveness of caution)...The people’s constituent power is therefore above the Constitution itself. This is the power that enables the people to take part in a referendum and this power cannot be legislated upon by Section 43 of the Constitution to disenfranchise the very sovereign people from using their constituent power exercisable only through a referendum. There can be no doubt therefore that a referendum is clearly distinct from National Assembly and Presidential Elections. A referendum only comes and applies when the Constitution is to be made, altered or replaced. Indeed in some cases it may never come in one’s lifetime.

51. In our case the Constitution has set out clear guidelines on how executive power is to be exercised and unless the executive exercise of power complies with both the letter and the spirit of the Constitution, such action is liable to be quashed.

52. In this case the appointment of the interested party was not in compliance with Articles 10, 129 and 232 of the Constitution as well as section 7(3) of the *State Corporations Act* as read with section 6(1) of the *Anti-Counterfeit Act, 2008*. It follows that the appointment of the interested party cannot be allowed to stand.

Order

53. Based on the material before me I find merit in Notice of Motion dated 30th June, 2015 and I grant following orders:

1. **An order of certiorari is hereby issued bring into this Court for the purposes of being quashed Gazette Notice No. 2831 dated 17th April 2015 published on 27th April 2015 appointing the Interested Party as the Chairman of the Board of Directors of the 2nd Respondent.**
2. **Having granted the order quashing the decision, it is not upon me to direct the Respondents on manner in which they ought to exercise their discretionary powers. I however decline to grant the prohibitory orders in the manner sought herein.**
3. **The applicant will have the costs of these proceedings.**

54. It is so ordered.

Dated at Nairobi this 16th day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okoth for the Applicant

Cc Mutisya