



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURT
MISC. CIVIL APPLICATION NO. 48 OF 2014

REPUBLIC.....APPLICANT

-VERSUS-

**THE CABINET SECRETARY MINISTRY OF
INFORMATION AND COMMUNICATION.....1ST RESPONDENT**

**INFORMATION & COMMUNICATIONS TECHNOLOGY AUTHORITY.....2ND
RESPONDENT**

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

PROF. TIMOTHY WAEMA

ESTHER NJERI KIBERE

BERTHA JOSEPH DENA

PROF. ELIJA OMWENGA

DAVID MUGO

UGAS SHEIKH MOHAMMED.....INTERESTED PARTIES

EXPARTE:

ADRIAN KAMOTHO NJENGA

DR. SALESIO MBOGO KURIA

ROMANA WAMBUI GATHITU (Suing as the Registered Officials of

**INFORMATION COMMUNICATION TECHNOLOGY ASSOCIATION OF
KENYA)**

JUDGEMENT

1. By a Notice of Motion dated 12th February, 2014, the *ex parte* applicants herein, **Adrian Kamotho Njenga, Dr. Salesio Mbogo Kuria and Romana Wambui Gathitu** seek the following orders:

1. An order of certiorari to remove into this Honourable Court and quash the decision and Gazette Notice No. 404 dated 16th January, 2014 by the 1st Respondent appointing the Interested Parties as members of the Information Communication Technology Authority (ICTA) Board.

2. Costs and incidental to the application be provided for.

3. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn by **Adrian Kamotho Njenga**, the Secretary General and one of the registered officials of the Information Communication Technology Association of Kenya (hereinafter referred to as the Association) on 5th February, 2014.

3. According to the deponent, the association was registered by the Registrar of Societies on 20th February, 2007 and in its Constitution, the Association has as part of its objectives to liaise with government and Public Bodies in deliberation and formulation of policies generally in regard to Information Communication Technology related issues” and also to “To sensitize and educate the public within ICT business participation on their roles in ensuring responsible use of ICT resources”.

4. In executing its mandate to its membership, who are drawn from the ICT sector, the Association of necessity keeps abreast with all the relevant policy formulations and decisions by the government relating to the ICT sector and it was while executing its mandate in this respect that the Association came to know of the Gazettement of the appointments of the interested parties in this suit as members of the ICT Board by the 1st Respondent vide Gazette Notice No. 404 of 2014, purportedly pursuant to **Information and Communications Technology Authority (ICTA) Order, 2013** – Legal Notice No. 183 (hereinafter referred to as the Order).

5. Upon scrutinizing the said appointments against the relevant provisions in the Order, the Association was alarmed at certain glaring illegalities and it swiftly, vide a letter dated 27th January, 2014, wrote to the 1st Respondent alerting him of its concerns and inviting him to address the same.

6. However, while awaiting response to the said letter from the 1st Respondent, the Association was taken aback to discover that the 1st Respondent had in utter disregard of the concerns raised, proceeded to launch the board to which he had appointed the interested parties which event was extensively covered in the media, and launch marked the formal green light to the board to start operating.

7. According to the deponent, the actions of the 1st Respondent reek of irrationality; abuse of power or impunity; illegality; are tainted with bias and are in flagrant disregard for the rule of law for the reasons that the appointments are ultra vires the provisions of Section 6(2)(e) of the Order in that the 1st and the 4th interested parties are public officers being in employment as lecturers at the University of Nairobi which is a Public Institution, by dint of Article 260 of the Constitution hence ought not to have been appointed as members of the board and that the profiles of the two appointees have been posted to the 2nd Respondent's official website www.icta.go.ke as at 4th February, 2014 at 3.30pm. and though the applicants sought confirmation of this position from the University of Nairobi a response was yet to be

received; that the appointments violate the express provision of Section 6(3) of the Order in that the 1st Respondent appointed the interested parties as members of the ICTA Board all at once as opposed to appointing them at different times to safeguard against all the appointees retiring at the same time; and that the 1st Respondent disregarded concerns raised in the applicant's aforesaid letter and proceeded to launch Information and Communications Technology Authority (hereinafter referred to as the Authority).

8. It was deposed that the mandate of the board appointed is stated to be the responsibility to manage the Authority which in turn and pursuant to the provisions of Section 4 of the Order, literally is the lead government agency in the ICT Sector in Kenya. The import of this is that the interested parties shall be at the helm of the entire ICT Sector in Kenya and therein lay the gravamen of the need for strict adherence to the law if the said appointments are to be sustained.

9. To the applicants, it is thus imperative that this Honourable court intervenes to stop the perpetuation of the illegality by granting order sought herein.

1st and 3rd Respondents' Case

10. In opposition to the application the 1st and 3rd Respondents filed a replying affidavit sworn by **Joseph Tiampati Ole Musuni**, the Principal Secretary in the Ministry of Information, Communications and Technology on 3rd April, 2014.

11. According to him, the Cabinet Secretary, Ministry of Information, Communications and Technology in accordance with the statutory duty placed upon him under paragraph 6(2)(e) of the Order appointed the interested parties to the Board of the Authority vide Gazette Notice No. 404 of 2014 in exercise of its statutory mandate.

12. According to him the allegations raised by the applicants that the 1st and 4th interested parties are public officers thus do not qualify being appointed as Board Members does not hold. In his view Article 260 of the Constitution defines "public office" as an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by Parliament. It was therefore his view that the contention by the applicants that the 1st and 4th Interested Parties are employees on Permanent and Pensionable terms at the University of Nairobi thus public officers is not itself sufficient as per the aforementioned constitutional provisions.

13. According to him since the funds of a public university is received from different sources other than the sources mentioned in section 45 of the **University Act**, No. 42 of 2012, does not automatically make the 1st and 4th interested parties public officers and on that basis their appointment met threshold prescribed under paragraph 6(2)(e) aforesaid. In his view the appointment took into account the wider interests of the public in the information, Communication and Technology (ICT) sector by providing appropriate linkages amongst research institutions, the industry and the Government; a critical component for the success of the ICT sector, thus the appointment was based on the merits.

14. It was further deposed that the 1st and 4th interested parties were Board members whose terms had not expired by the time the Authority was established as a successor institution to the Kenya ICT Authority hence their appointments were a continuation of their un-expired terms and the appointment of the interested parties in that respect was not for the same term and is therefore not irrational as alleged.

15. According to him, the 1st Respondent was cognisant and did take into account the national values enshrined in Article 10 of the Constitution. On non-compliance with paragraph 6(e) of the said Order, it was contended that the same was an inadvertence and was never intended to circumvent the statutory provisions though in his view the said inadvertence was not a fatal commission that cannot be ameliorated or that would occasion the Applicants any prejudice and will be addressed appropriately.

16. According to the deponent, the 1st Respondent was duly authorised by the Order to make appointments and he lawfully exercised his authority in making the same and that he carried out his statutory mandate rationally and procedurally hence the allegations by the applicants are misconstrued and the application should be dismissed with costs.

2nd Respondent's Case

17. On the part of the 2nd Respondent, a replying affidavit was filed sworn by **Hon. Edwin Yinda**, the 2nd Respondent's Chairman on 7th March, 2014.

18. According to the deponent, the Authority was established by Legal Notice No. 183 of 2013 signed by His Excellency the President of the Republic as the successor body of the former Kenya ICT Board (KICTB), the e-government Directorate (e-Gov) and the Government Information Technology Services (GITS) with its functions provided for at Section 4 of the Order and include to a) set and enforce standards & guidelines for human resource, infrastructure, processes, systems, and technology for the public office and public service; b) deploy and manage all ICT staff in the public service; c) facilitate and regulate the design, implementation, and use of ICTs in the public service; d) Promote ICT literacy and capacity; e) promote e-Government services; f) facilitate optimal electronic form, electronic record and equipment and use in the public service; g) promote ICT innovation and enterprise; h) facilitate the establishment, development and maintenance of secure ICT infrastructure and systems; and i) supervise the design, development and implementation of critical ICT Projects across the Public service.

19. According to him, the Authority thus has the critical mandate to provide technical support for delivery of public services by use of information and communication technologies to all public institutions in the Country which mandate requires a high technical and experienced leadership team especially at Board level. Amongst its functions would therefore be designing and promotion of uniform technical standards in ICT infrastructure, systems and processes for the entire public service both at National and County Levels and this requires a highly competent and dedicated team at the Board level to articulate the Authority's vision and oversee its mandate. According to the deponent, among the current Strategic Objectives of the ICT Authority that is being articulated by the Board include:- (a) consistently delivering quality public ICT knowledge, infrastructure and systems to all Kenyans; (b) building excellent ICT skills and capacity for public service delivery and national development; (c) delivering business value and creating wealth for Kenya through ICT; (d) providing online services for citizens and businesses; and (e) providing effective and efficient back-office Government operations.

20. It was therefore the deponent's view that it is with this mind that the Cabinet Secretary appointed a diverse mix of Board Members that has a wealth of expertise and experience in ICT development and Policy formulation in the Country which all the Board members who have been named as interested parties in the is application possess in order to guide the Authority in delivering on its mandate to the people and Government of Kenya.

21. As regards the 1st and 4th Interested Parties, the deponent averred that the two are highly qualified Information Technology professionals with over 20 years of relevant teaching the industry experience in information Systems Development, Network Design and Implementation in ICT and E-learning and that their inclusion in the Board is highly critical for the success of the Board in delivering on its mandate as they bring on Board unmatched expertise.

22. He however admitted that the omission of members of the Academia as qualified to be Board Members in the establishing Order Legal Notice No. 183 of 2013 was an oversight. He however deposed that the Predecessor Organization to the ICT authority being the Kenya ICT Board had provision for appointment of public officers mainly from the academia to bring on board their expertise in the technical ICT sector and that the Board has since requested the 1st respondent to engage the 2nd respondent and the office of the president with a view to having the omission corrected.

23. As regards the appointments date and terms of the interested parties, he deposed that two Board

Members namely **Ms. Esther Kibere** and **Mr. David Mugowere** were Board member of the Kenya ICT Board and their terms had not expired by the time the ICT Authority was established as a successor institution to the Kenya ICT Authority. In the circumstances their appointments were a continuation of their un-expired terms and appointments of the interested parties in that respect was not for the same terms and is therefore not irrational as alleged by the applicants.

24. He asserted that the 1st Respondent was duly authorized by Legal Notice No. 183 of 2013 to make the appointments and he lawfully exercised his authority in making the appointments which appointments are substantially in accordance with the requirements of the Order and the interested parties are duly qualified to be so appointed.

Applicant's Submissions

25. On behalf of the Applicants it was submitted while conceding the critical role to be played by the 2nd Respondent in the ICT sector in Kenya asserted that this role in equal measure demands scrupulous adherence to the rule of law and that any iota of illegality in their formation or existence will bring the entire ICT Sector crumbling hence it is with utmost urgency that such illegality must be remedied. In support of this position the Applicants relied on the holding by **Nyamu, J** (as he then was) in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240** that:

“A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law.”

26. It was submitted that the contents of paragraph 8 of the replying affidavit sworn by **Edwin Yinda** ought to be expunged as the deponent was merely guessing the reason behind the 1st Respondent's action hence not within his knowledge and that this was contrary to Order 19 Rule 3(1) as given recognition in **Wamwere vs. Attorney General Misc. Application No. 224 of 2004.**

27. While not doubting the expertise of the interested parties, it was however submitted that the Order at section 6(2) expressly the appointment of public officers to serve as members of the 2nd Respondent and that the contention that the requirement for the exclusion of public officers was an oversight is a vain attempt to read out an express provision of the Order.

28. It was submitted that the deponent not being the appointing authority is precluded from making the bold statements it deposed in his affidavit. It was reiterated that the 1st and 4th interested parties being public officers, the appointment was wrongful and were ultra vires the provisions of the Order and on the authority of **Re Bivac International SA (Bureat Veritas) [2005] 2 EA** and the ***Keroche Industries Case*** (supra) cannot be sustained.

29. According to the Applicants and on the authority of **Zacharia Wagonza & Another vs. The Registrar Academic Kenyatta University Miscellaneous Application No. 155 of 2013**, the 1st Respondent's actions fit the irrationality bill in the manner of their wanton disregard of the empowering provisions of the Order and are in such manifest defiance of logic that even where a plain and simple reason is given of the manner in which the appointments is given in the order, the 1st Respondent still contravened it since there can be no more plain logic than a requirement that the appointments be done at different times to ensure that their expiry falls at different dates in order to guarantee continuity of the 2nd Respondent's existence and seamless transition upon retirement of its Board members.

30. It was submitted that the ICT Authority having been born out of an amalgamation of three bodies namely the Kenya ICT Board, Department of E-Government and the Government Information Technology Services which amalgamation rendered the Kenya ICT Board defunct, the issue of the

“unexpired term” simply does not arise under the ICT Authority which is principally a new legal entity with clear provisions on appointment of its Board members as there is no provision for such extension under the Order.

31. According to the Applicant, the provisions of Article 10 of the Constitution particularly on public participation and the rule of law are not in vain since the National Values and Principles of Governance which are also anchored in section 5(1) of the Order are meant to form the substructure/foundation of governance in all spheres while the rules i.e. statutes and subsidiary legislation come in to form the superstructure which must conform to the substructure if they are to be sustained. Therefore for the respondents to urge non-compliance with the said provisions is to abort the changes in governance as enshrined in the Constitution and any governance process or act that does not abide by the said values and principles whether justified in any written law or not, must be treated as being in contravention of the Constitution and must be nullified. It was therefore submitted that the justification based on obsolete subsidiary legislation indicates a resistance to the said change in governance and is unjustifiable.

32. With reference to the provisions of section 6(1)(e) of the *State Corporations Act*, Cap 446, it was submitted that the said section subjects the said Act to “any written law by or under which a state corporation is established or the articles of association” and in this case the said section must be subjected to the Order.

33. It was submitted that as far as the said interested parties are permanent employees of the University and all or part of the money used to run it is sourced from the consolidated fund then they are public officers within the meaning of Article 260 of the Constitution.

34. In the applicant’s view, the gravest absurdity to any judicial process and governance would be to uphold unconstitutional acts as not only would it set a bad precedent, but would heighten impunity hence the illegitimate acts of the 1st Respondent in appointing the interested parties cannot be salvaged by partial validation.

2nd and Interested Parties’ Submissions

35. On behalf of the 2nd Respondent and the interested parties, it was submitted that there is no legislative instrument that compels the 1st Respondent to consult any person before appointing Board Members to the 2nd Respondent. It was submitted that whereas section 5 of the *Statutory Instruments Act* provides for instances when a regulation making authority ought to consult, none of the said instances apply to the instant case.

36. Whereas the Order provides for appointment of staggered appointments of the Authority’s members, it was submitted that the Authority was established as a successor of the Kenya ICTA Board and it is recognised as best corporate governance practice that continuity of the boards is to be maintained through retention of some members during transition periods and that it was with this in mind that the 2nd and 5th Interested Parties whose terms remained unexpired were re-appointed.

37. To the 2nd Respondent and Interested Party the said action is in any case not fatally incurable and has been pointed out and moreover the same can be corrected by partial invalidity and in support of this position reliance was sought on **R vs. Bournemouth Licencing Justices exp Maggs [1963] 1 WLR 320** and **R vs. Home Secretary exp Pierson [1998] AC 539 at 592.**

38. It was submitted that since section 6(1)(e) of the *State Corporations Act* provides for membership of the Boards and that not more than three “shall be public officers appointed by the Cabinet Secretary” to the extent that section 6(2)(e) of the Order excludes public officers from the Board, under section 24(2) of the *Statutory Instruments Act* the provisions of the Order to that extent are null and void. In support of this position the cases of **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Miscellaneous Application No. 688 of 2006**, **Kenya Country Bus Owners’ Association vs. Cabinet Secretary For Transport & Infrastructure and Others Judicial Review Case No. 2 of 2014**

and **Republic vs. Cabinet Secretary for Transport & Infrastructure Judicial Review Case No. 124 of 2014** were cited.

39. It was submitted that the qualifications of the interested parties to sit on the Board was not questioned and in determining whether they ought to have been appointed, the Court ought to understand the intention of the drafters of the Order by taking into account legislative history, discussions by stakeholders, plain meaning rule, mansard records and legislative debates, policy rule and conflicting versions of the rule. In their view is the foregoing are considered it would be manifestly clear that the letter of the Order provides for one thing but the spirit of the law provides for quite another with the result that the appointments of the 1st and 4th Interested Parties were in keeping with the spirit of the law. To them if as the applicants propose, this Court requires the black letter compliance with the law then an absurdity will be the result. In support of these submissions reliance was placed on **Center for Rights Education and Awareness & Another vs. John Harun Mwau & 6 Others [2012] eKLR, Republic vs. Independent Electoral and Boundaries Commission ex parte Reuben Ombima Anjeyo [2012] KLR, Nderitu Gachagua vs. Thuo Mtahenge & 2 Others [2013] eKLR, Mhlungu & 4 Others and the State Case No. CCT/25/94 and Zuma & 2 Others and the State Case No. CCT/4/94.**

40. According to the 2nd Respondent and the interested parties the applicant's action of publishing articles in the media was calculated to embarrass, hinder or obstruct the court in the administration of justice.

Determinations

41. I have considered the foregoing.

42. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Similarly, in **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held that it has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.

43. In this case, it is contended by the Applicants that the 1st and the 4th interested parties are public officers being in employment as lecturers at the University of Nairobi which is a Public Institution, by dint of Article 260 of the Constitution hence ought not to have been appointed as members of the Board. This submission was based on section 6(2)(e) of the Order which provides that the Board of the Authority shall consist of "not more than six persons, not being public officers, appointed by the Cabinet Secretary, by virtue of their specialist knowledge and distinguished service and experience of at least seven years in matters of information and communications technologies, e-Government, e-Commerce, law, finance, or human resources management."

44. That the interested parties are otherwise qualified save for the allegation that the 1st and the 4th interested parties are public officers is not doubted by the applicants. The Respondents and interested parties however contend that since the previous legal instrument permitted public officers to be members of the Board the Court ought to consider the spirit of the enactment and find that the appointment of the interested parties is proper. The general law of interpretation is that where the words of statute are plain there can be no more than one construction. With respect to past enactments it has always been a principle of interpretation that considerations stemming from legislative history must not override the plain words of a statute. Therefore where it is evident that a different and wider intention inspired a later Act, the intention of the Legislature as manifested in an earlier one will be of little assistance. The Respondents and interested parties argue that to interpret the section of the Order in such a way as to exclude public officers from the Board would amount to an absurdity. The law as I understand it is that for the Court to find that a literal interpretation of an enactment would lead to absurdity, the absurdity must be so plain as not to require detailed analysis in arriving thereat. For the Court to engage in an extensive analysis of the

enactment in order to find whether or not the same is absurd would amount to the Court usurping the legislative powers of the authority entrusted therewith and that is not the role of the Courts. The law in my view is that a law must not be interpreted in a manner that would render it meaningless or scandalous and that it must be interpreted to give meaning to the intention of the Legislature. However where the words clearly express the intention of the Legislature there is no room for any other interpretation. In this case it is clear that section 6(2)(e) of the Order excluded public officers from being appointed to the Board of the Authority and to interpret that section otherwise would amount to usurping the powers of the legislative authority.

45. It is however contended that the said section is ultra vires section 6(1)(e) of the *State Corporations Act*. Section 6(1):

(1) Unless the written law by or under which a state corporation is established or the articles of association of a state corporation otherwise require, a Board shall, subject to subsection (4), consist of-

(a) a chairman appointed by the President who shall be non-executive unless the President otherwise directs;

(b) the chief executive;

(c) the Permanent Secretary of the parent Ministry;

(d) the Permanent Secretary to the Treasury;

(e) not more than seven other members not being employees of the state corporation, of whom not more than three shall be public officers, appointed by the Minister.

46. What comes out clearly from the foregoing is that the general rule is that a Board of a State Corporation is to be composed of not more than three public officers appointed by the Minister unless the law by or under which a state corporation is established or the articles of association of a state corporation otherwise require. Section 2 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides that “written law” means -

(a) an Act of Parliament for the time being in force;

(b) an applied law; or

(c) any subsidiary legislation for the time being in force.;

47. Similarly section 32 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides:

A reference to a written law in another written law shall include a reference to subsidiary legislation made under the written law to which reference is made.

48. The next issue for determination is therefore under which written law is the Board of the Information and Communications Technology Authority. The Authority is clearly established under section 3 of the Order and as section 6(1)(e) sets out a composition of its Board which clearly provides otherwise as provide under section 6(1)(e) of the *State Corporations Act*, it is clear that the prevailing legal provisions are those of the Order. Since the *State Corporations Act* itself contemplates that the law establishing a State Corporation may itself provide for provisions which vary from section 6(1)(e) of the said Act, where the written law be it an Act of Parliament or a subsidiary legislation establishes a composition of its Board otherwise as under section 6(1)(e) of the Act such variation in my view cannot be said to be inconsistent with the Act so as to be void under section 24(2) of the *Statutory Instruments Act*. Accordingly, it is my view that the decisions in **Kenya Commercial Bank Ltd vs. Kenya National**

Commission on Human Rights Miscellaneous Application No. 688 of 2006, Kenya Country Bus Owners' Association vs. Cabinet Secretary For Transport & Infrastructure and Others Judicial Review Case No. 2 of 2014 and Republic vs. Cabinet Secretary for Transport & Infrastructure Judicial Review Case No. 124 of 2014 are distinguishable.

49. That then brings me to the issue whether the 1st and 4th interested parties are public servants. That the said interested parties are lecturers at the University of Nairobi which is a Public Institution is not seriously contested. However under Article 260 of the Constitution “public officer” means—(a) any State officer; or (b) any person, other than a State Officer, who holds a public office. A “public office” on the other hand is defined to mean “an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.”

50. The Respondents' contention is that since under section 45 of the *Universities Act*, No. 42 of 2012 the funds of a public university are received from different sources, it does not automatically make the 1st and 4th interested parties Public Officers. In other words what they contend, if I correctly understand them, is that there is a possibility that the 1st and 4th Respondents remuneration and benefits do not necessarily come from the Consolidated Fund or directly out of money provided by Parliament. Based on the material before me I am not convinced that the mere fact that the 1st and 4th interested parties may be permanent and pensionable employees of the University of Nairobi necessarily qualify them to be public officers as defined under Article 260 of the Constitution.

51. The next issue for determination is whether the 1st Respondent's appointments violated the express provision of Section 6(3) of the Order in that the 1st Respondent appointed the interested parties as members of the ICTA Board all at once as opposed to appointing them at different times to safeguard against all the appointees retiring at the same times. Section 6(3) of the Order provides:

“Members of the Board shall be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times.”

52. On the part of the 1st Respondent it was contended that the 2nd and 5th Interested Parties whose terms remained unexpired were re-appointed only for the unexpired term. This argument is with due respect strange. If the 1st and the 5th Respondents were continuing with their unexpired term what was the reason for their appointments? It is noteworthy that in the Gazette Notice No. 404 it was expressly indicated that the appointments were made pursuant to paragraph 6(2)(e) of the Order for a period of three (3) years, with effect from 17th January, 2014. There was no mention of some of the appointees being appointed for the unexpired term. Under section 6(2)(e) there was no unexpired term. Therefore the appointments had to adhere to section 6(3) of the Order and failure to do so means that the said appointments were tainted with procedural impropriety. As was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300:**

“Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.” [Emphasis mine].

53. It was further contended that the said appointments violated the values and principles of governance underpinned by Article 10 of the Constitution. The said Article provides:

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

54. It is clear that the appointment of the Board members of the Authority was made pursuant to a written law-subordinate legislation. Accordingly it was an act undertaken pursuant to application of the said law. Pursuant to Article 10 of the Constitution, the 1st Respondent was bound by the values and principles of governance in Article 10 of the Constitution one of which is the participation of the people. To argue that Article 10 aforesaid did not apply to the said appointment is in my view a misconception. The Respondents relied on section 5 of the **Statutory Instruments Act**. However, it is clear that the said section deals with consultations before making statutory instruments. The section is clearly inapplicable to these circumstances.

55. Under Article 73(2) of the Constitution the guiding principles of leadership and integrity which guides the exercise of public trust by a State Officer include objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices and selfless service based solely on the public interest, demonstrated by accountability to the public for decisions and actions.

56. In my view to exclude the public from the exercise of statutory powers constitutes improper exercise of power since it amounts to failure to consider a relevant factor, in this case public participation and transparency. In this case no lawful justification has been advanced which militated against the involvement of the public in the appointment of the interested parties.

57. As was held by this Court in **Republic vs. The Attorney General & Another ex parte Hon. Francis Chachu Ganya, Nairobi High Court (Judicial Review Division) Miscellaneous Application No. 374 of 2012:**

“One of the issues raised in these proceedings is that the ex parte applicants were not consulted before the decision affecting them was made. It is not in dispute that under Article 10 of the Constitution the national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, enacts, applies or interprets any law or makes or implements public policy decisions. It is also true that under Article 10(2) of the Constitution, national values include participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised and good governance, integrity, transparency and accountability. Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate their views. This requirement is also to be found in section 13(2)(b) of the *Trust Land Act* which provides that “the Council shall bring the proposal to set apart the land to the notice of the people concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered”. In *Republic vs. Ministry of Finance & Another Ex Parte Nyong’o Nairobi HCMCA No. 1078 of 2007 (HCK) [2007] KLR*

299, the Court held:

“Good public administration requires a proper consideration of the public interest. There is considerable public interest in empowering the public to participate in the issue. It ought to be the core business of any responsible Government to empower the people because the government holds power in trust for the people. People’s participation will result in the advancement of the public interest. Good public administration requires a proper consideration of legitimate interests.”

Once public participation is attained and the decision making authority after considering the views expressed makes a decision, the issue whether or not such decision ought to have been made, can no longer be a subject of judicial review since the decision is no longer questionable on the process of arriving thereat but can only be questioned on the merits and that is not within the realm of judicial review. In the replying affidavit filed by the interested party there are minutes of meetings involving the local administrative authorities, members of the community, councillors and the interested party. Whereas the adequacy and extent of the participation of the community in the said meetings and in the decision making process may be challenged, that challenge, in my view would go to the merits rather than to the process that was followed.”

58. As the appointment of the interested parties was both unlawful and tainted with procedural impropriety the issue of partial invalidity does not arise.

59. Those entrusted with public offices ought to remember as was stated in a majority judgement by the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** that Kenya’s Constitution of 2010 is a transformative charter and in that decision the Court cited **Karl Klare**, in his article, **“Legal Culture and Transformative Constitutionalism,”** *South African Journal of Human Rights*, Vol. 14 (1998), 146 at p.147 where the learned author expressed himself as follows with respect to the Constitution of South Africa:

“At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent. By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.”

60. In the above the Supreme Court expressed itself as follows:

“The history of political change in South Africa will remain highly relevant for those African countries, like Kenya, seeking to evolve democratic constitutional systems out of a past of skewed and repressive governance. And by the settled technique of the comparative method in law, we draw from that country’s achievements in constitutional precedent. We in this Court, conceive of today’s constitutional principles as incorporating the transformative ideals of the Constitution of 2010: we bear the responsibility for casting the devolution concept, and its instruments in the shape of county government, in the legitimate course intended by the people. It devolves upon this Court to signal directions of compliance by State organs, with the principles, values and prescriptions of the Constitution; and as regards the functional machinery of governance which expresses those values...this Court bears the legitimate charge of showing the proper course...The context and terms of the new Constitution, this Court believes, vests in us the mandate when called upon, to consider and pronounce ourselves upon the legality and propriety of all constitutional processes and functions of State organs. The effect, as we perceive it, is that the Supreme Court’s jurisdiction includes resolving any question touching on the mode of discharge of the

legislative mandate. It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the “internal procedures” of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation. Such a perception is vindicated in comparative experience. The Supreme Court of Zimbabwe, in *Biti & Another vs. Minister of Justice, Legal and Parliamentary Affairs and Another* (46/02) (2002) ZWSC10 ...held: “In a constitutional democracy it is the Courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament....In *Smith vs. Mutasa* it was specifically held that the Judiciary is the guardian of the Constitution and the rights of citizens....”

61. The Supreme Court went on to hold that it makes practical sense that the scope for the Court’s intervention in the course of a running legislative process, should be left to the discretion of the Court, exercised on the basis of *the exigency of each case*. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution. It emerges that Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation.

Order

62. In the result the order which commends itself to me and which I hereby grant is an order of certiorari removing into this Court for the purposes of being quashed the decision and Gazette Notice No. 404 dated 16th January, 2014 by the 1st Respondent appointing the Interested Parties as members of the Information Communication Technology Authority (ICTA) Board which decision is hereby quashed.

63. The applicants will also have the costs of this application to be borne by the 1st Respondent.

Dated at Nairobi this 7th day of August 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kabagi for the Applicant

Ms Sirai for the 1st and 3rd Respondents

Miss Gitari for the 2nd Respondent and Interested Parties

Cc Kevin