REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR. CASE NO. 246 OF 2012

REPUBLIC ....APPLICANT

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY..............1ST RESPONDENT

CITY COUNCIL OF NAIROBI.......................................2ND RESPONDENT

IKON PRINTS MEDIA COMPANY LIMITED...............3RD RESPONDENT

Ex-parte

AMICA BUSINESS SOLUTIONS

(AS CONSOLIDATED WITH)

JR CASE NO. 202 OF 2012

REPUBLIC ....APPLICANT

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY....................RESPONDENT

ALLIANCE MEDIA KENYA LIMITED ....1ST INTERESTED PARTY

MAGNATE VENTURES LIMITED......................2ND INTERESTED PARTY

IKON PRINTS MEDIA COMPANY LIMITED ...3RD INTERESTED PARTY

Ex-parte

REAL DEALS LIMITED

(AND ALSO AS CONSOLIDATED WITH)

PETITION NO. 245 OF 2012

LOOK MEDIA LIMITED ....1ST PETITIONER

STANDARD GROUP LIMITED ....2ND PETITIONER

WIDEREACH LIMITED ....3RD PETITIONER

SUPREME OUTDOOK..4TH PETITIONER

LIVE AD LIMITED ....5TH PETITIONER

KREMM INVESTMENT LIMITED ....6TH PETITIONER

CONSUMERLINK COMMUNICATIONS LTD....................7TH PETITIONER

ADSITE LIMITED..8TH PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY................1ST RESPONDENT

ATTORNEY GENERAL ....2ND RESPONDENT

CITY COUNCIL OF NAIROBI.............................1ST INTERESTED PARTY

IKON PRINTS MEDIA COMPANY.....................2nd INTERESTED PARTY

<u>JUDGEMENT</u>

Through a consent entered by the parties herein on 10th October, 2012 this matter **(Judicial Review Case No. 246 of 2012 Republic vs. Kenya National Highways Authority (1st respondent) City Council of Nairobi (2nd respondent) and Ikon Prints Media Company Limited (3rd respondent) ex-parte Amica Business Solutions)** was consolidated with **Judicial Review Case No. 202 of 2012** and **Petition No. 245 of 2012.** The parties in JR No. 202 of 2012 are Republic vs. Kenya National Highways Authority (Respondent) and Alliance Media Kenya Limited (1st Interested party), Magnate Ventures Limited (2nd Interested Party) and Ikon Prints Media Company Limited (3th interested party) ex-parte Real Deals Limited. In Petition No. 245 of 2012 the matter is between Look Media Limited, Standard Group Limited, Widereach Limited, Supreme Outdoor Limited, Live Ad Limited, Kremm Investment Limited, Consumerlink Communications Limited and Adsite Limited being the 1st to 8th petitioners against Kenya National Highways Authority (1st respondent) and the Attorney General (2nd respondent) with the City Council of Nairobi, Ikon Prints Media Limited and Alliance Media Kenya Limited being the 1st to 3rd interested parties respectively. Due to the medley of the parties in these matters and in order not to let any party slip off the court's radar, I will refer to the parties by their names.

For avoidance of doubt, I will outline the prayers and the positions of the parties in each individual file before analyzing the issues and reaching a decision on all the three matters.

I will start with the lead file namely JR No. 246 of 2012. Through the notice of motion dated 12th June, 2012 Amica Business Solutions Limited (Amica) seeks orders as follows:-

1. An order of *certiorari* be issued removing into the High Court and quashing the entire decision of the 1st Respondent contained in the letter dated the 10th day of November, 2011 from the 1st Respondent to the 3rd Respondent authorizing the 3rd Respondent to erect and maintain billboards

and gantries on road reserves on various roads in the City of Nairobi

2. An order of *certiorari* be issued removing into the High Court and quashing the entire decisions of the 2nd Respondent contained in the letters dated the 23rd day of April, 2012 and the 2nd day of May, 2012 from the 2nd Respondent to the 3rd Respondent authorising the 3rd Respondent to erect and maintain billboards and gantries on road reserves on various roads in the City of Nairobi

3. An order of *mandamus* be issued compelling and directing the 2nd Respondent to direct the removal and/or remove all billboards and gantries erected and maintained by the 3rd Respondent on road reserves on various roads in the City of Nairobi pursuant to the authorization and/or approval contained in the letters dated the 23rd day of April, 2012 and the 2nd day of May, 2012 from the 2nd Respondent to the 3rd Respondent.

4. The costs of this Application be paid by the Respondents jointly and severally.

The application is supported by the grounds on its face and which grounds bring out the exparte applicant's case in the following words:-

1. The 3rd Respondent claims to have been authorised by the 1st and 2nd Respondents to erect and maintain billboards and gantries on road reserves on various roads in the City of Nairobi.

2. Any such lawful authorization that could have been by the 3rd Respondent (sic) had to comply with The Constitution of Kenya, 2010, the Kenya Roads Act No. 2 of 2007, The Local Government Act Cap. 265, The Public Procurement and Disposal Act No. 3 of 2005 all of which mandate the 1st and 2nd Respondents to procure the use of their facilities and services in a fair, equitable, transparent, competitive and cost effective manner.

3. The authorization was given to the 3rd Respondent without tendering.

4. The authorization given to the 3rd Respondent does not take into account the fact that the power of control of outdoor advertising vests upon County Governments only and not the 1st Respondent.

5. The authorization given by the 1st Respondent to the 3rd Respondent does not take into account the fact that the powers of licensing and control of outdoor advertising and physical planning are powers exercisable by the 2nd Respondent only.

6. Both the 1st and 2nd Respondents have acted unlawfully and ultra vires in authorizing the 3rd Respondent to erect and maintain billboards and gantries on road reserves on various roads in the City of Nairobi without tendering.

7. Both the 1st and 2nd Respondents have acted unlawfully, without and exceeded of their powers in authorizing the 3rd Respondent to erect and maintain billboards and gantries on road reserves on various roads in the City of Nairobi without tendering,

8. Both the 1st and 2nd Respondents have failed and frustrated their legitimate expectation by the public in failing to procure the use of their facilities and services in a fair, equitable, transparent, competitive and cost effective manner and have aided the 3rd Respondent in defrauding the public.

9. The 2nd Respondent is mandated and obliged by the Physical Planning Act, Cap. 286 of The Laws of Kenya to remove the offending billboards and gantries but has failed in its duty to do so.

10. Leave to commence these judicial review proceedings was granted on the 12th day of June, 2012.

The application is also supported by the chamber summons application for leave and a statutory statement all dated 12th June, 2012 together with a verifying affidavit sworn by the applicant's director Mr. Joseph Ndichu. I find that the applicant's case has been clearly captured by the grounds in support of the notice of motion which I have already reproduced above. The Kenya National Highways Authority (KeNHA) opposed the application through an affidavit sworn on 12th September, 2012 by Joseph Simiyu Khisa who identified himself as a manager at the Planning Section of KeNHA. It is KeNHA's case that it has powers under the Kenya Roads Act, 2007 (KRA) to grant approval to a person and/or body to lay structures or carry out any kinds of works on, over or below the roads and road reserves under its control and this is the authority it exercised in granting Ikon Prints Media Company Limited (IKon) permission to erect gantries and billboards on road reserves. KeNHA avers that any party interested in utilizing its road reserves applies to it for permission and it grants permission upon the conditions and requirements set out in the KRA being met by the applying party. According to KeNHA its practice is neither monopolistic nor single sourcing and it cannot qualify as a "procurement" or "disposal " as defined in the Public Procurement and Disposal Act, 2005 (PP&DA). KeNHA further argues that it is not expected to know which parts or sections of its road reserves suit various parties and it cannot therefore be in a position to comply with the requirements of the PP&DA. KeNHA further argues that it is for any interested party upon identifying a suitable section to apply and this process is not time bound as business opportunities do not present themselves to parties at the same time. KeNHA denies backdating the letter dated 10th November, 2011 which approved Ikon's application. It further argues that Ikon's application met the requirements of the KRA and that is why it approved the same. As for the letter dated 29th May, 2012 in which it (KeNHA) indicated to the City Council of Nairobi (Council) that advertisement on Nairobi–Thika Road would be subjected to competitive bidding, KeNHA stated that competitive bidding is only specific to this road which is a new super highway and its design included the installation of advertisement billboards. KeNHA submits that in granting permission, it prescribes certain requirements which are meant to take care of the safety on the road and environmental conservation. KeNHA also stated that it is the responsibility of the Council to approve placement of advertisements on billboards and gantries. It has not therefore usurped the powers of the Council by approving construction of billboards and gantries on road reserves. KeNHA informed the court that it treats all the parties equally and fairly. KeNHA also told the court that Amica had not applied for permission to construct billboards and gantries on road reserves and it cannot cry foul when other parties are granted permission to put up billboards and gantries. KeNHA further informed the court that Amica lacks locus standi since it has not established that it had presented an application for use of the road reserves. It has therefore not demonstrated sufficient interest in the matter and neither has it established that it has been directly affected by the decision complained of. KeNHA also argues that Amica's application is statute barred since its prayer for an order of certiorari was brought over six months after the challenged decision was made. KeNHA therefore asks the court to dismiss Amica's application with costs.

The Council opposed the application through an affidavit sworn by its director of Legal Affairs Mr. A. J. Owour on 30th of July, 2012. It is the Council's case that the granting of advertisement rights falls under the jurisdiction of KeNHA as provided by the KRA and this is why the Council wrote a letter dated 8th June, 2012 to an association known as Outdoor Advertising Association of Kenya informing it that the issue of construction of advertisement structures on road reserves fell under the jurisdiction of KeNHA. The Council also averred that the granting of advertisement rights by KeNHA is not an act of procurement capable of breaching the PP&DA as purported by Amica.

The Council also opposed the application through a further affidavit sworn by its Acting Legal Affairs Director Mr. Karisa Iha on 1st October, 2012. Through the said affidavit the Council states that the application offends the provisions of Order 53 Rule 2 of the Civil Procedure Rules, 2010 (CPR) and Section 9(3) of the Law Reform Act (LRA) Cap. 26 Laws of Kenya and the same should be dismissed in *limine*. The Council also avers that it has prescribed regulations and policy guidelines regarding advertisements on road reserves, but the approval and construction of gantries and billboards on road reserves is the exclusive mandate of KeNHA. The Council states that it has the sole mandate of approving

display of advertisement messages on gantries and billboards on road reserves.

Ikon opposed the application by way of a notice of preliminary objection dated 18th December, 2012 and a replying affidavit sworn on the same date by its Director and Regional Manager Mr. Chukwuma Nduche. Ikon started by attacking the application for being statute barred. It informed the court that it was discharged from JR No. 202 of 2012 on the ground that the application for an order of certiorari was made out of time and the same was therefore statute barred. It therefore argues that Amica has no case against it in this matter. Ikon stated that KeNHA acted within the law in approving its application to construct gantries and billboards on road reserves. Ikon also stated that the Council was improperly brought into these proceedings as its role is to licence advertising and not erection of billboards and gantries on road reserves. Ikon also attacks Amica for being a busy body with no sufficient interest in the matter. It further argues that it has made huge investments and these proceedings are driven by malice with a view to stopping it from introducing gantries in the outdoor advertising industry. Finally Ikon submitted that the procedure it used to obtain permission from KeNHA for use of road reserves is the same procedure that has been used by other players in the industry.

In respect of JR No. 202 of 2012 the application for consideration is the amended notice of motion dated 23rd May, 2012 in which the ex-parte applicant Real Deals Limited (Real) seek orders as follows:-

1. An Order of *certiorari* be and is hereby issued to remove into High Court and quash the entire decisions of the Respondent contained in the letters dated 19th March, 2012 and 4th May, 2012, ~~10th November, 2011~~ from the Respondent to the 1st and 2nd ~~and 3rd~~ interested parties respectively, awarding the 1st and 2nd ~~and 3rd~~ interested parties contracts for the erection and maintenance of billboards and gantries on road reserves on various roads in Nairobi.

2. The cost of this Application be paid by the Respondent and the 1st and 2nd ~~and 3rd~~ Interested Parties jointly and severally

The application is supported by grounds on its face which can be summarized as follows:-

1. That KeNHA contravened the provisions of the Constitution, the KRA and the PP&DA in awarding rights to the 1st interested party, Alliance Media Kenya Limited (Alliance) and the 2nd interested party Magnate Ventures Limited (Magnate), through letters dated 19th March, 2012 and 4th May, 2012 respectively, to erect billboards and gantries on road reserves without tendering.

2. That KeNHA acted ultra vires since the award of the rights to the interested parties contravenes the Fourth Schedule, Part 3 of the Constitution which vests the power of control of outdoor advertising upon the counties.

3. That the terms and conditions set out in the contracts between KeNHA and the interested parties amount to an attempt by KeNHA to usurp the powers of licensing and control of outdoor advertising and physical planning which are not within its jurisdiction.

4. That KeNHA being a state organ has failed the legitimate expectation placed upon it to procure the use of its facilities and services in a fair, equitable, transparent, competitive and cost effective manner.

The application is also supported by a statutory statement dated 14th May, 2012 and a verifying affidavit sworn on the same day by Real's Director Mr. Jackson Mwangi. It is further supported by a further affidavit sworn by the said Jackson Mwangi on 7th August, 2012.

The starting point of Real's case is that KeNHA has no power to levy fees and charges for the erection and maintenance of billboards and gantries on road reserves for the reasons that the fees and charges purportedly demanded from the interested parties had not been approved by the Minister and neither had the same been gazetted as required by sections 22(2)(d) and 40(1) of the KRA. Real also avers that the

failure by KeNHA to tender for the rights awarded to the interested parties breached the provisions of the Constitution and the PP&DA. Real goes ahead to state that any revenue collected by KeNHA for any services rendered by it or for the use by any person of its facilities is a procurement in respect of which it is obliged by Article 227 of the Constitution and the PP&DA and the rules made thereunder to tender. Real further states that the award of rights to the interested parties to use KeNHA's facilities amounted to single sourcing which is contrary to the law and is to the detriment of other players in the outdoor advertising industry. It is Real's case that the powers of control of outdoor advertising are exercised by local authorities and KeNHA exceeded its jurisdiction by purporting to exercise such powers. Real further argues that the action of KeNHA amounts to preferential treatment of the interested parties and discrimination of the other players in the outdoor advertising industry. Real accuses KeNHA of degrading the environment by failing to subject to physical planning the sites awarded to the interested parties. It is Real's case that the issue of physical planning falls squarely under the jurisdiction of the Council. Real also states that it is aware that the policy of the Council does not allow the erection and maintenance of billboards and gantries on road reserves.

Real's application met strong resistance from the respondent and the interested parties. KeNHA (the respondent) opposed the application by way of a replying affidavit sworn by Joseph Simiyu Khisa on 18th June, 2012. Through the said affidavit KeNHA opposes each and every statement or allegation made by Real. KeNHA's response is almost in the same terms with its response to the application in JR No. 246 of 2012. I therefore do not find it necessary to state its response again.

Alliance (the 1st interested party) opposed the application by way of a replying affidavit sworn on 15th June, 2012 by its media specialist Mr. John Muswa. It is Alliance's case that it is settled practice in the outdoor advertising industry that where any party wishes to erect a billboard, it identifies a site and approaches the relevant owner of the site. Acting on this practice it identified the sites in question and approached KeNHA for permission to erect billboards and gantries. It was authorized to put up billboards and gantries subject to fulfilling the conditions contained in the approval letter. Alliance argues that KeNHA complied with the law and did not usurp the powers of the Council in authorizing it to erect the billboards and gantries. Alliance vehemently refuted the allegation that its dealings with KeNHA were corrupt or discriminatory. It informed the court that Real had not tendered any evidence to show that it had applied to erect gantries and billboards in the sites granted to it (Alliance). It cannot therefore be said that Real's application was rejected in favour of Alliance's application. Alliance distinguished the authorities cited by Real and argued that the circumstances surrounding those matters are different from the circumstances in the case before court.

Magnate (the 2nd interested party) responded to Real's application through a replying affidavit sworn on 7th September, 2012 by its Administration and Legal Services Manager Mr. Edwin W Sifuna. Through the said affidavit, Magnate introduces itself as a leading and very active player in the field of outdoor advertisement. Magnate paints Real as having little or no role to play in the industry. With this introduction, Magnate attacks Real's application as baseless since it has not disclosed to the court any loss or damage it may suffer following the permission granted to it by KeNHA to construct gantries and billboards on certain sites on road reserves. Magnate states that the application is incompetent in that Real failed to enjoin the Council as a party to the application but goes ahead to make allegations touching on the Council. Magnate's other defences against the application are brought out by Paragraph 9 of the replying affidavit in the following words:-

"9. That the 2nd Interested Party is not in cohort with the Respondent and has not:-

(i) engaged in any single sourcing for the use of the Respondent's facilities and services for a profit;

(ii) created a monopoly in its favour in the Out-Door Advertising industry;

(iii) enjoyed any preferential treatment in discrimination of the Applicant or at all;

(iv) engaged in any corrupt activity as to shield the Respondent from desired transparency or at all;

(v) created a clutter of Out-Door Advertisements in Nairobi;

(vi) endangered the natural environment or at all;

(vii) denied or encroached on the business of the City Council of Nairobi.

And the 2nd Interested Party challenges the Applicant to prove its allegations thereof;"

Ikon had been named as the 3rd interested party. It opposed the application through a replying affidavit sworn on 22nd May, 2012 by its Director and Regional General Manager, Mr. Chukuma Nduche. Ikon also filed a notice of preliminary objection dated 22nd May, 2012. On the same date Ikon also filed a notice of motion in which it sought an order setting aside the leave granted to Real to commence judicial proceedings in which it is named as an interested party. On 23rd May, 2012 Ikon (the 3rd interested party) was by consent removed from these proceedings. I therefore need not state the arguments of Ikon against the application.

Look Media Limited (Look Media), Standard Group Limited (Standard), Widereach Limited (Widereach), Supreme Outdoor Limited (Supreme), Live Ad Limited (Live Ad), Kremm Investment Limited (Kremm) Consumerlink Communications Limited (Consumerlink) and Adsite Limited (Adsite) who are the 1st to 8th petitioners respectively in Petition No. 245 of 2012 through the petition dated 11th June, 2012 seek orders as follows:-

(a) An order of certiorari to quash the 1st Respondent's decision authorizing, permitting, or in any way allowing the putting up of billboards and placing of advertisement on gantries erected on road reserves or in any other manner whatsoever.

(b) A declaration that the 1st Respondent's decision to authorize the erection or putting up of gantries and other advertising signs on road reserves or the placing of advertisements on the gantries constructed on road reserves contravenes the Petitioners' rights protected under 10, 27, 35(3), 40, 46, 47 and 227 of the Constitution of Kenya, 2010.

(c) An order restraining the Respondents, either by themselves, their servants or assigns or any other person(s) whatsoever from authorizing, permitting, facilitating the erection of billboards or advertisement signs on gantries or road reserves either in furtherance of the decision made by the 1st Respondent to permit a few advertisers to put up gantries, billboards or other advertising materials on the road reserves on national roads or otherwise at all.

(d) A declaration that the 1st Respondent's decision to authorize the placing of advertisements on the gantries constructed on road reserves is *ultra vires* its mandate as set out in the Kenya Roads Act.

(e) General damages for breach of the Petitioners' constitutional rights.

(f) Costs of this Petition

(g) Any other orders or relief which this Honourable Court may deem fit to grant

The petition is supported by an affidavit sworn by James Rwambo the Managing Director of Kremm, a chamber summons application dated 11th June, 2012, grounds on the face of the chamber summons and an affidavit in support of the chamber summons application sworn by James Rwambo on 11th June, 2012. The application is also supported by the supplementary affidavit of James Rwambo sworn on 18th

June, 2012. Looking at the pleadings I find that the petitioners' case is clearly brought out by the grounds in support of the chamber summons application dated 11th June, 2012. The said grounds are:-

(a) The Petitioners/Applicants are engaged in the advertising business in the Republic of Kenya.

(b) The Applicants have at all times complied with the regulations and policy guidelines for advertising within the City of Nairobi issued by the Interested Party.

(c) The said policy guidelines require all outdoor advertisements to be erected on private property adjoining the roads upon entering into agreements with the property owners and that approvals be obtained from the Interested Party.

(d) The policy guidelines prohibit the erection of advertisements on road reserves.

(e) The Applicants, in compliance with the Interested Party's guidelines have entered into contracts with private land owners of properties adjoining the roads at huge costs.

(f) On or about 19th March 2012, the 1st Respondent purported to allow a select group of advertisers to erect gantries for purposes of displaying advertising signs on road reserves and allocated them national roads to erect the said gantries.

(g) The said letters of authority were issued in contravention of the Applicants' rights as enshrined under Articles 27, 35, 40, 46, 47 and 227 of the Constitution.

(h) Advertisements set up on gantries across the roads endanger road safety as they distract road users through reflections, diversion of attention and obstruction of vision.

(i) **The letters of authority issued by the 1st Respondent were issued in excess of the 1st Respondent's authority and contrary to the Interested Party's advertisement policy. The power to permit or control advertisements in Nairobi lies exclusively with the Interested Party, as such the 1st Respondent's actions were *ultra vires.***

(j) The erection of advertisements which would include road signs and traffic information is a function of the 1st Respondent. The same constituted works which qualified for procurement under the Public Procurement and Disposal Act. No procurement was conducted as such the grant of the letters of authority amounted to an illegality.

(k) The 1st Respondent has acted unreasonably within the *Wednesbury's* principle of unreasonableness.

(l) The Applicants are apprehensive that if the conservatory orders sought herein are not granted, the Respondents are likely to continue issuing the said letters of authority to third parties. Further, the third parties issued with the letters of authority will commence the erection of the gantries and advertising on road reserves. Such an eventuality will endanger road safety, result in blockage of the Applicants' advertisements in the private properties adjoining the road and ultimately make their products more costly and uncompetitive thereby causing the Applicants to suffer irreparable loss which cannot be adequately compensated by an award of damages.

(m) No prejudice will be suffered by the Respondents if the orders sought herein are granted.

When the petition was first filed, the City Council of Nairobi (the Council) was the only interested party named in the petition. On 10th July, 2012 Ikon Prints Media Company Limited (Ikon) and Alliance Media Kenya Limited (Alliance) were allowed to come on board as the 2nd and 3rd interested parties respectively. The Council is therefore the 1st interested party in respect of the petition.

The respondents and the interested parties opposed the petition. KeNHA (the 1st respondent) responded through a replying affidavit sworn on 6th July, 2012 by its manager at the Planning Section Mr. Joseph Simiyu Khisa. KeNHA adopted the response it made to the application in JR No. 246 of 2012. KeNHA, however, went ahead to further rebut the petitioners' case by making the following statements in the replying affidavit:-

"18. THAT the Petitioners have insinuated in their Supporting Affidavit that the parties who were granted approvals were only required to pay an application fee of Kshs. 10,000/= and Kshs.5,000/= per square meter for commercial advertisements or bill boards thus giving an impression that the parties grained cheaply. The truth is that the said applicants, after getting approval from the 1st Respondent, were required to seek further approvals for advertisement from the Interested Party to which they were to pay an annual advertisement fee which in some instances could be as high as Kshs,3,332,000/-. Annexed and marked "JSK4" is a copy of a letter of approval by the Interested Party............

24. THAT interestingly MR. STANLEY KINYANJUI, the Secretary General of the Outdoor Advertising Association of Kenya who signed the letter marked 'JR6' and annexed to the Petitioners' Supplementary Affidavit dated 18th June, 2012 is associated with Magnate Ventures Ltd where he is the Managing Director, a company which applied for and was granted approval by the 1st Respondent to erect gantries and billboards. It is noteworthy that the said Association is housed and shares one physical and postal address with the said company. Copies of applications and approval are herewith annexed and marked "JSK5".............

32. THAT the Petitioners are guilty of material non-disclosure as it (sic) intentionally failed to inform the court that ADSITE LIMITED, the eighth Petitioner, indeed applied to the 1st Respondent to be allowed to erect gantries and use its facilities. Annexed and marked "JSK6" is copy of its application."

The Attorney General (2nd respondent) opposed the petition through the grounds of opposition dated 3rd August, 2012. It is the Attorney General's case that the petition does not disclose any denial, violation, infringement or threat to the petitioners' fundamental rights and freedoms. The Attorney General also states that the actions complained of by the petitioners constitute the legitimate obligations of KeNHA under the relevant statutes and there are therefore no triable issues raised by the petitioners.

The Council opposed the application through a replying affidavit sworn on 18th July, 2012 by its Director of Physical Planning Mr. Tom Odongo. Through the said affidavit the Council informs the court that it has made and published well-known regulations and policy guidelines regarding advertisements within Nairobi and specifically on road reserves along the highways and all the other roads. The Council also told the court that it has no role to play in the approval and construction of gantries since that role belongs to KeNHA. Its role is only limited to the component of display of advertisements. The other objections to the petition by the Council are similar to those made in response to the application in JR No. 246 of 2012.

Ikon opposed the petition through an affidavit sworn on 28th November, 2012 by its Auditor Mr. Robert Kamwara. Ikon's response is similar to the response in JR No. 246 of 2012. Through the affidavit Ikon demonstrates that other players in the outdoor advertising industry have been advertising on road reserves contrary to the claim by the petitioners that this has not been the case. Prior to filing the replying affidavit, Ikon had on 1st October, 2012 filed grounds of objection which grounds are similar to the contents of the replying affidavit.

Magnate opposed the petition through a replying affidavit sworn on 28th September, 2012 by its media specialist Mr. John Muswa. Magnate informed the court that it applied for sites for constructing gantries and billboards by writing to KeNHA as was the practice. It submitted that the procedure used by KeNHA for receiving and approving erection of gantries and billboards does not fall in the purview of "procurement or disposal" as defined in the PP&DA. Magnate attacked the petitioners for bringing this

petition in bad faith with a view to locking out competitors from the outdoor advertising industry.

Having gone through the pleadings and the submissions made herein, I am of the view that the issues for determination are:-

1. Whether KeNHA has authority to give approvals for the use of road reserves.

2. Whether the approvals given to the interested parties ought to have been subjected to the procurement process provided by the PP&DA;

3. Whether there is breach of any of articles 10, 27, 35(3), 40, 46, 47 and 227 of the Constitution.

4. Whether the applicants and the petitioners have locus standi;

5. Whether KeNHA in issuing the approvals to the interested parties usurped the role of the Council; and

6. Who should meet the costs of these proceedings?

The advocates for the parties filed submissions and cited authorities in the three matters. Though I may not directly refer to the submissions and authorities I will bear them in mind when making my decision.

In my view the starting point is the issue of locus standi. The respondents and interested parties argued that the applicants and petitioners did not have locus standi to file these matters. The applicants clearly responded to this issue through Mr. Havi who acted for Amica. He cited the decision of D.K. Maraga, J (as he then was) in **REPUBLIC v MUNICIPAL COUNCIL OF MOMBASA AND ANOTHER, EX-PARTE UNIKEN MARKETING SERVICES LIMITED [2007] eKLR** in which he held that:-

"**So in Kenya now, any person, other than an officious intervenor or way farer or a crank or other mischief maker meddling in a matter that does not concern him at all with sufficient interest qualified to maintain an action for judicial redress of public injury arising from breach of a public duty or violation of some provision of law and to seek enforcement of such public duty or observance of such legal provision. The right considered sufficient for bringing or maintaining a proceeding of this nature is not necessarily a right in the juristic sense. It is enough if one discloses that one has a personal interest alone or with others in the matter, which involves loss of some personal benefit or advantage or curtailment of a privilege, liberty or franchise.**

The sufficiency of the interest required to give a person standing is a matter of mixed law and fact to be determined by the court upon due consideration of the facts and circumstances of each case."

The learned Judge then went ahead to cite with approval the decision of the Indian Supreme Court in the case of **S. P. Gupta and others vs. President of India, AIR 1981 (SC) 149** and continued thus:-

"In this case the Ex-parte Applicant as a ratepayer or even as a public spirited body interested in the vindication of the law has *locus standi* to bring this application.

Even if I am wrong on the view I hold that the law on *locus standi* has generally developed to a point that any public spirited individual, even without suffering personal injury or loss, has a right to commence legal proceedings and enforce public law rights and it is held that we are to stick to the old English Act of 1938 criterion of a person aggrieved, I still find that the Ex-parte Applicant is such an aggrieved person. How is the Ex-parte Applicant an aggrieved person?

It is the Ex-parte Applicant's case that it is engaged in the trade and business of advertising and that by circumventing the public procurement rules the Council denied it the opportunity of bidding for the services the Company is rendering to the Council under the Contract. If I find that the project comprised in the Contract is indeed a public procurement then the failure to comply with the public procurement rules occasioned the Ex-parte Applicant loss of a business opportunity

as it did not know about the project and it is therefore a person aggrieved perfectly entitled to receive to bring this proceedings.

In the circumstances I find the Ex-parte Applicant has *locus standi* to bring this application and I accordingly overrule Mr. Kiragu Kimani's preliminary objection on the issue."

I entirely agree with the learned Judge that in matters where a matter of public interest is in issue, it is enough for an applicant to simply demonstrate sufficiency of interest. The applicants and the petitioners have demonstrated that they have an interest in the outdoor advertisement industry. Their livelihood revolves around this particular industry. It is also noted that KeNHA is a public body and its operations are a matter of public interest. It cannot be allowed to operate like a private entity. In my opinion therefore, the applicants and petitioners have the standing to file these matters and that is my finding on this issue.

Not far removed from the issue of locus standi is the question as to whether Amica's application against Ikon breaches the six months rule in so far as the application for an order of certiorari is concerned. Section 9(3) of the Law Reform Act, Cap. 26 provides that:-

"In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

Counsel for Amica submitted that the above quoted law does not apply to the decisions made by KeNHA. He argued that the six months limitation period provided by Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, 2010 applies only to "any judgement, order, decree, conviction or other proceedings" and decisions of that kind. He argued that the rule does not relate to administrative decisions, reports or letters like the one the applicant is seeking to quash in this case. He buttressed his argument by referring the Court to the decision in the case of **REPUBLIC v JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & 3 OTHERS ex-parte MWALULU & 8 OTHERS (2004) eKLR** where the Court observed that:-

"A careful scrutiny of s 9 of the Law Reform Act, pursuant to which Order 53 Rules were made and in particular rules 2 and 7 which it is contended denies this court jurisdiction to grant or give the orders of certiorari outside 6 months reveals that only formal judgments, orders decrees, conviction or other proceedings of an inferior court or tribunal fall within the six months period stipulated."

With respect I must state that the decision in the above quoted case does not appear to capture the correct position in so far as the six months rule is concerned. My opinion is that the six months rule applies to all applications for an order of certiorari. In the case of **NAKUMATT HOLDINGS LIMITED v COMMISSIONER OF VALUE ADDED TAX [2011] eKLR** the Court of Appeal held that:-

"An application for an order of judicial review is intended to be a quick and inexpensive procedure to aid a party who, in a way, is in distress. That is why, for instance, in the case of certiorari, there is a time limit within which such an application has to be made. The proceedings for an order of judicial review are commenced by a chamber summons for leave to bring, such an application, which is normally made *ex parte*. That is the procedure the appellant adopted, and because its intended application for which leave was sought, was for an order of *certiorari*, time was of the essence. An application for an order of *certiorari* has, by dint of the provisions of section 9 (3) of the Law Reform Act as also order 53 rule 2 of the Civil Procedure Rules, to be brought within six months of the decision sought to be quashed. The decision which the appellants want quashed was

made on 13th March 2006. So the appellant had up to early September 2006 to bring an application for judicial review. As stated earlier the application for leave was made on 20th May 2003, which was timeous. Leave was refused on 6th June 2003 and an application for review of that order was dismissed on 27th June 2003. A record of appeal in this matter was filed on 27th August 2003, before the limitation period for bringing an application for an order of certiorari expired. As at the hearing of this appeal on 9th March 2011, that period had long expired."

It is important to note that in the above cited case the decision that was being challenged by the appellant was the decision of the Commissioner of Value Added Tax and not a judgement, order, decree, conviction or other proceedings. My understanding of the decision of the Court of Appeal is that a party who seeks an order of certiorari must bring the application within six months from the date of the decision. I will however add that in some cases one would say that the application should be filed within six months from the date the decision is made known to the claimant. In respect of Amica's application, I therefore find that Ikon is correct when it argues that the application offends the six months rule.

Does KeNHA have the power to authorize the use of road reserves? This question will be answered together with the question as to whether KeNHA usurped the role of the Council by authorizing the interested parties to construct billboards and gantries on road reserves. KeNHA is established under the KRA and its main mandate is to manage, develop, rehabilitate and maintain national roads. It is empowered under Section 49 of the said Act to grant approvals to any person or body to lay structures or carry out any kind of works over or below roads or road reserves. This mandate is given in the following words:-

"49.(1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission-

(a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;

(b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or

(c) give permission for erecting, constructing laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in building restriction area, or for any structural alteration or addition to any structure or other thing so situated."

Clearly the above quoted Section gives KeNHA the power to grant the interested parties the authority to construct billboards and gantries on road reserves. Looking at the submissions of the applicants and the petitioners it appears that they conceded to this obvious fact and I need not say more.

Did KeNHA in authorizing the interested parties to construct billboards and gantries usurp the powers of the Council? Going through the submissions of all the parties in these matters, it becomes clear that they are all in agreement that the power to authorize advertisements within the jurisdiction of the city of Nairobi belongs to the Council. What KeNHA did was simply to grant the interested parties permission to put up structures. The interested parties will still have to obtain permission from the Council to place advertisements on the structures. It should, however, be noted that it would be unreasonable for the Council to deny the interested parties the licence to advertise and yet they have been granted permission to construct billboards and gantries. I think that explains the reason why the interested parties had to seek the consent of the Council. Whatever the case, it is clear that the KeNHA did not usurp the powers of the Council in allowing the interested parties to put up the billboards and gantries on road reserves.

At this stage I want to address the issue of the Council's policy on outdoor advertisements. The applicants and the petitioners argued that KeNHA flouted the Council's policy by allowing the interested parties to construct billboards and gantries on road reserves. It is interesting to note that the said policy has been ignored by all the players in the outdoor advertisement industry. May be it is a high time that the Council

sat down with stakeholders and came up with an implementable policy. As for the cases before me, I must state that the arguments of the applicants and the petitioners are premature. The Council is yet to make decisions on the issue of advertisements on the billboards and gantries.

Issues have been raised about the impact of the billboards and gantries on road safety and the environment. The applicants and petitioners argued that the advertisements on the billboards and gantries may distract the attention of the drivers. They however did not avail any evidence to support this contention. There was also no evidence placed before the court to support the claim that the structures to be put up by the interested parties are likely to have a negative impact on the environment. This court cannot make decisions based on speculations. The applicants and petitioners were under a legal duty to prove what they alleged. They failed to do so.

The applicants and petitioners also accused KeNHA of breaching various provisions of the Constitution. These are articles 10, 27, 35(3), 40, 46, 47 and 227. I will address articles 10 and 227 later. Article 27 is about equality and freedom from discrimination. The applicants and petitioners argued that KeNHA discriminated against them by authorizing the interested parties to construct structures on road reserves. Going through the submissions of the parties, it has clearly emerged that the practice in the outdoor advertising industry is that whenever a company is interested in putting up billboards and/or gantries at a certain location, it applies to KeNHA for permission. KeNHA would then consider the application and grant permission if it meets its conditions and requirements. KeNHA and the interested parties have clearly demonstrated that some of the petitioners were aware of this procedure and had even put the same into use. There is no evidence that KeNHA in any way acted in a discriminatory manner against any of the applicants and petitioners. The applicants and the petitioners did not place before the court any application that had been rejected by KeNHA. They have not laid a foundation which can make this court conclude that they were discriminated against. I therefore find that Article 27 of the Constitution has not been violated by any of the respondents or interested parties.

Article 35(3) provides that the **"state shall publish and publicise any important information affecting the nation."** The applicants and the petitioners have not demonstrated how this particular provision has been breached. The KRA clearly provides the mandate of KeNHA. The Act of Parliament which created KeNHA is a public document. KeNHA cannot be accused of failing to publicize its mandate. I therefore find that Article 35(3) of the Constitution has not been breached.

The Constitution through Article 40 provides for protection of the right to property. It is the applicants' argument that by allowing the interested parties to put up billboards and gantries on road reserves, KeNHA has contravened their right to own property. It is important to elaborate a little bit on this argument. KeNHA is a recent creation of statute. Prior to the arrival of KeNHA, the players in the outdoor advertising industry used to enter into leases with landholders whose properties are adjacent to the road and construct billboards on those properties. One of the arguments of the applicants and the petitioners is that they have entered into long term leases at high costs and the interested parties have been favoured in that they pay less to KeNHA. They therefore argue that their right to own property has been breached. The respondents and the interested parties submitted that the applicants and the petitioners have no property to be protected. This argument is surely wrong. The applicants and the petitioners have property in the billboards which they have constructed. The only question is whether KeNHA has breached those property rights. In my view no property rights have been breached. What the applicants and the petitioners ought to know is that the business equation has changed. Their competitors have found a cheaper way of doing things. What they ought to do is to change their business strategies. They cannot hope to salvage their businesses by seeking constitutional protection. There was an argument that some of the billboards and gantries being constructed on road reserves may obstruct the applicants' billboards. I think this is a speculative argument. If and when a particular billboard is obstructed, the way forward is for the aggrieved party to file a commercial dispute against the company whose billboard is causing the obstruction.

Article 46 talks about consumer rights. The applicants and petitioners did tell the court in what sense the rights of the consumers had been breached by KeNHA's actions. I therefore find that there is no breach of Article 46 of the Constitution.

Through Article 47, the Constitution provides for fair administrative action. Again the applicants and the petitioners have not shown the court why they believe that the action of KeNHA amounts to unfair administrative action. I thus find that Article 47 of the Constitution has not been breached.

I will now go back to articles 10 and 227 of the Constitution. Article 10 provides that:-

"10. (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."

The national values and principles which are relevant for the purpose of this judgement are those found in Article 10(2)(c) namely good governance, integrity, transparency and accountability. KeNHA has been accused of acting in a corrupt manner and favouring the interested parties. It has denied these allegations. It may well be true that it has acted above board in all its transactions. The way it has conducted its business is however not in tandem with the spirit of the Constitution. Its mechanism for the award of rights to utilize road reserves is opaque. The light of the Constitution ought to be shone on this particular area of its operations. I will not be wrong to say that the way it has operated is devoid of the key values and principles of good governance. At the very least it ought to have indicated to all and sundry that it intended to grant permission for the use of road reserves in the manner in question. All interested parties would then have had the opportunity of expressing their interests. That is the only way one would conclude that its operations are transparent and accountable.

Article 227 of the Constitution speaks to state organs and public entities in the following words:-

"227. (1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

(*a*) categories of preference in the allocation of contracts;

(*b*) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;

(*c*) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and

(*d*) sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices."

KeNHA is a public entity and it has a duty to comply with the Constitution and the PP&DA. It has been argued by Mr. Kiplagat for KeNHA that parties interested in utilization of road reserves make applications and are served on first come first served basis and it would be difficult to subject such rights to competitive bidding. I do not buy that argument. These proceedings by themselves have clearly shown that there is stiff competition for the use of road reserves in urban areas. That is why the players in the outdoor advertisement industry have entered into leases with private landholders. KeNHA can make money by subjecting the utilization of road reserves to competitive bidding. It cannot be allowed to turn around and now claim that it is impracticable to subject this resource (road reserves) to competitive bidding. In fact through its letter dated 29th May, 2012 it clearly indicated to the Council that granting of advertisement rights in respect of Nairobi-Thika highway would be subjected to competitive bidding. It is the duty of KeNHA as a public entity to ensure that it complies with the letter and spirit of the Constitution. I therefore agree with the applicants and the petitioners that KeNHA has in the past acted in breach of the provisions of articles 10 and 227 of the Constitution.

This is a court of justice and a court of justice wields the sword of justice in a manner that delivers justice to all the parties before it. The respondents and interested parties have shown that the process used by KeNHA to grant permission to the interested parties to put up structures on road reserves is a process that has been in place since KeNHA came into existence. Some of the applicants and petitioners have used the same process in the past. The letters dated 10th May, 2012 and 29th May, 2012 addressed to KeNHA by Supreme and Adsite respectively clearly confirms this fact. In respect of these two applicants one can say that they brought their applications in bad faith. It is also noted that the practice used by KeNHA was applied to all the players in the industry without any discrimination. It would therefore be unjust for this court to terminate the agreements already entered into between KeNHA and the interested parties. For the foregoing reasons I dismiss the two judicial review applications. The petition also fails in so far as the orders sought are directed at the agreements entered between KeNHA and the interested parties.

However, it has been established that KeNHA has been acting in contravention of the Constitution. That being so, I issue a declaration that its system/procedure of award of rights for erection of billboards and gantries for advertisement purposes is in breach of articles 10 and 227 of the Constitution and therefore unconstitutional. KeNHA is therefore directed to henceforth cease using the said procedure and put in place mechanisms for ensuring compliance with the Constitution. Wide and extensive consultations are required and I hope KeNHA will adhere to this principle of good governance.

These matters have raised issues of great public interest and as such each party is ordered to meet own costs of the proceedings.

Dated, signed and delivered at Nairobi this 8th day of, March 2013

W. K. KORIR,

JUDGE