REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS APPLICATION 185 OF 2011

IN THE MATTER OF ARTICLES 22,23 & 73 OF THE CONSTITUTION OF KENYA SECTION 6(1)(B) OF THE KENYA INFORMATION AND COMMUNICATIONS ACT (NO 2 OF 1998) SECTION 27(1) (C) OF THE STATE CORPORATIONS ACT CAP 446 OF THE LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES
AND

IN THE MATTER OF AN APPLICATION BY CONSUMERS FEDERATION OF KENYA (COFEK) FOR JUDICIAL REVIEW UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC .....APPLCIANT

VERSUS

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

MINISTER FOR INFORMATION & COMMUNICATION.....2ND RESPONDENT

COMMUNICATIONS COMMISSION OF KENYA .....3RD RESPONDENT

AND

EX-PARTE

CONSUMERS FEDERATION OF KENYA (COFEK)

Suing through its officials namely

STEPHEN MUTORO

EPHRAIM GITHINJI KANAKE and

HENRY MESHACK OCHIENG

JUDGEMENT

The prayers for consideration in this judgment are contained in the Amended Notice of Motion dated 30th November, 2011. In the said application Consumers Federation of Kenya (COFEK) suing through its officials is asking for:-

(a) An order of certiorari do and is hereby issued to quash the decision by the Minister for Information and Communication, the 2nd Respondent vide Kenya Gazette Notice No. 8925 dated 20th July, 2011 and published on 29th July, 2011 purporting to appoint Mr. Charles J. K. Njoroge to be the Director-General of the Communications Commission of Kenya for a period of three (3) years with effect from 7th July, 2011.

(b) An order of prohibition to prohibit Mr. Charles J. K. Njoroge to continue acting as the Director-General of the Communications Commission of Kenya.

(c) That an order of mandamus to compel the 3rd respondent's Board to competitively, transparently, fairly, through public participation and in an open manner interview and chose the best candidate for the position of Director-General of the Communications Commission of Kenya for a period of three (3) years within the provisions of the law and the Constitution.

(d) That an order of Mandamus be and is hereby granted compelling the Respondent, its servants, agents, employees or anybody else whatsoever acting on its behalf to forthwith re-admit and allow the Applicant to proceed with his studies thereat.

(e) That costs of the application to be award to the Applicant.

By consent entered in court on 24th April, 2012 the Ex-parte Applicant was allowed to withdraw prayer (d) of the application. The application is supported by an affidavit sworn by Stephen Mutero on 30th November, 2011 and other documents filed in the cause. The Attorney General, the Minister for Information & Communication (hereinafter simply referred to as the Minister) and the Communications Commission of Kenya (CCK) are the 1st to 3rd respondents respectively. Although Mr. Charles J. K. Njoroge has not been named in the application, he is the 4th Respondent in these proceedings having been granted leave to join the proceedings on 12th August, 2010.

The 2nd Respondent opposed the application through two replying affidavits sworn on 22nd August, 2011 and 19th October, 2011 by the Minister himself Honourable Samuel Lesuron Poghisio. CCK supported the application by way of a replying affidavit sworn by Engineer Philip Okundi the Chairman of the Board. The 4th Respondent opposed the application through a replying affidavit sworn by himself on 6th March, 2012.

The 4th Respondent was on 29th July, 2008 appointed as the Director-General of CCK for a term of three years. The term was to expire in July, 2011. On 29th December, 2010 the 4th Respondent wrote to the Chairman of the Board of CCK asking for renewal of his appointment for a further three years. On 9th March, 2011 the Chairman of the Board of CCK wrote to the Minister indicating that the Board had found the 4th Respondent's performance wanting. The letter therefore advised against the renewal of the 4th Respondent's contract. The Minister, however, through Gazette Notice No. 8925 dated 20th July, 2011 and published on 29th July, 2011 went ahead and appointed the 4th Respondent as the Director-General of CCK against the advice of the Board.

The Minister's action is what the Applicant challenges in these proceedings. Looking at the application, it emerges that this is essentially a judicial review application and in accordance with Rule 4(1) of Order 53 of the Civil Procedure Rules, 2010, an applicant can, at the hearing of the notice of motion, only rely on the grounds and relief set out in the statutory statement. The Applicant's statement of facts dated 5th

August, 2011 lists the grounds upon which the prayers are sought as follows:-

a) The 2nd Respondent ignored the decision and advice of the 3rd Respondent's Board vide the letter dated 9th March, 2011.

b)The 2nd Respondent decision is irrational and capricious.

c) The 2nd Respondent decision contravenes the circular of 23rd November, 2011 by Permanent Secretary and Secretary to the Cabinet and Head of the Public Service.

d)The 2nd Respondent decision is tantamount to impunity.

e) The 3rd Respondent is under legal duty to recruit its Director-General in a competitive, transparent, fair and open manner.

f) The 2nd Respondent purported to ignore the 3rd Respondent's Board decision.

g)The 3rd Respondent ought to be allowed to recruit a suitable candidate for the office of the Director-General of the Communications Commission of Kenya within the provisions of the law and the constitution.

h)The 1st Respondent is under constitutional duty to give the 2nd and 3rd Respondents the best legal advice on the recruitment of the 3rd Respondent's Director-General.

i) The respondents have a constitutional duty to uphold the rule of law, the provisions and the spirit of the constitution. The constitution demands that public participation in public recruitment is paramount.

j) Every citizen is directly or indirectly affected by the decisions made by the 3rd Respondent which must exercise its regulatory role diligently and efficiently. This is critical in determining the information disseminated to Kenyans.

k) The 3rd Respondent plays a Key role in regulating and upholding freedom and independence of electronic, print and all other types of media. Therefore, there is need to comply with the due process of the law in recruiting its Director-General.

l) As a result of the 3rd Respondent's decision rejecting re-appointment of its Director-General, his relationship with the Board is not good thus adversely affecting the operations and performance of the 3rd respondent.

m) The 2nd Respondent's decision is illegal, unjustified, unlawful, capricious, unreasonable, irrational, malicious, in bad faith, unilateral, biased and amenable to judicial review.

n)The 2nd Respondent's decision is illegal, unjustified, unlawful, capricious, unreasonable, irrational, malicious, in bad faith, unilateral, biased and amenable to judicial review.

o)Unless the application is urgently heard and determined, the petitioners and the people of Kenya will suffer great loss and damage.

The above quoted grounds clearly bring out the Applicant's case. As already stated, the 3rd Respondent (CCK) supports the application. I therefore need not state the 3rd Respondent's case.

The 1st, 2nd and 4th respondents oppose the application and their grounds of opposition are best brought

out in the replying affidavit sworn by the Minister on 19th October, 2011. In paragraph 2 of the said affidavit the Minister avers that the application should be dismissed because:-

(i) The Petitioner's Notice of Motion application though purporting to be brought under Articles 22 and 23 of the Constitution the application is not an application that is envisaged and mandatorily required by Articles 22 and 23 of the Constitution as read with Section 19 of the Sixth Schedule to the Constitution. The application is fatally defective and offends the said Articles 22 and 23 and Section 19 which require that an application under Article 23 for alleged infringement of rights under Article 22 be brought by way of a Petition.

(ii) In any event the Petitioners have not shown by their pleadings any specific right of theirs or of those they purport to litigate for that has been violated by the 2nd Respondent the Minister for Information and Communications and the manner or extent of the violation.

(iii) Article 73 of the Constitution is not justiciable on its own in an application under Article 23 of the Constitution as the Article does not grant rights.

(iv) The Notice of Motion application remains what it purports to be, that is, an application for judicial review orders and the purported Petitioners are applicants for orders of judicial review.

(v) The Court lacks jurisdiction to grant constitutional remedies provided for under Articles 23(3) (a) to (e) of the Constitution in an application for judicial review under the Law Reform Act and Order 53 of the Civil Procedure Rules, 2010.

(vi) The Notice of Motion is fatally defective and unsustainable for failure by the Petitioners to enjoin the Republic. The Petitioners have therefore not invoked the court's special jurisdiction for judicial review. Consequently, the court lacks jurisdiction to entertain the application.

(vii) The application offends Rule 1(2) of Order 53 of the Civil Procedure Rules, 2010 and is fatally defective and unsustainable. The application is not accompanied by a verifying affidavit to verify the facts the Petitioners rely on.

(viii) The court lacks jurisdiction in an application for judicial review such as the Petitioner's to grant the petitioners the prayer that "an order of prohibition to prohibit Mr. Charles J. K. Njoroge to continue acting as the Director-General of the Communications Commission of Kenya". Such an order is a prohibitory injunction that can only be granted in a suit commenced by Plaint under Order 4 of the Civil Procedure Rules, 2010 or in a Constitutional Petition.

(ix) In any event an order of prohibition is not available to the Petitioners as prohibition orders look to the future and prohibit what is intended to happen before it is done. The order cannot be issued to affect what has already been done such as the appointment of the Director-General of the 3rd Respondent by the Minister. The power to prohibit cannot be exercised retrospectively.

(x) The remedies of certiorari, prohibition and mandamus are made not only for excess of jurisdiction or absence of it but also for a departure from rules of natural justice or in contravention of the laws of the land. The Petitioners have not shown by their own pleadings that in making the appointment of the Director-General the Minister acted in excess of jurisdiction or without jurisdiction or in contravention of any specific provisions of the Constitution or any other law or departed from the rules of natural justice.

(xi) The action by the Board of Directors of the Communications Commission of Kenya to appoint an acting Director-General while there is in office a substantive Director-General appointed by the Minister amounts to usurpation of the appointing powers of the Minister under the Kenya Information and Communications Act. The Board's decision to appoint and the

appointment of the acting Director-General is illegal and null and void.

The other grounds on which the application is opposed are found in paragraph 14 of the said replying affidavit as follows:-

(i) The Minister has already appointed the Director-General of the said Commission in accordance with the Constitution and the law.

(ii) The power to appoint the Director-General is statutorily vested in the Minister and not in the Board of the Communications Commission of Kenya.

(iii) By Section 6 (1) (b) of the Kenya Information and Communications Act the Minister's power to appoint the Director-General of the Board of the Communications Commission of Kenya is not delegable.

(iv) The Petitioners have failed to show any evidence of breach by the 2nd Respondent of the Constitution and the law in appointing the Director-General Charles J. K. Njoroge.

(v) An order of mandamus is issued and can only be issued where there is a duty imposed by statute on a public body or person to do an act and that person has failed or refused to do the act. There is no statutory duty imposed on the Board of the 3rd Respondent to appoint the Director-General of the 3rd Respondent.

Further grounds in opposition to the application are found in paragraph 18 of the Minister's replying affidavit in the following words:-

(i) The Petitioners must be deemed to be the same parties to the suit in High Court Miscellaneous Civil Application No. 137 of 2011 filed by Ibrahim Mwangi Athumani because all of them are litigating over the same issues and they purport to litigate in the public interest as their locus standi. Consequently, the doctrine of res judicata applies to this suit.

(ii) This court lacks jurisdiction to entertain the Petitioner's Notice of Motion application because the Petitioners are bound by the decision and the orders of the Court (Musinga, J) referred to in paragraph 17 of this Affidavit. The issues in this suit are res judicata by virtue of Section 7 of the Civil Procedure Act.

(iii) The Court ought to guard against multiplicity of suits and forum shopping.

(iv) In the alternative, by Section 6 of the Civil Procedure Rules this court lacks jurisdiction to entertain the Petitioners' suit as the subject matter of this suit is still pending before the Court of Appeal. The Petitioners ought to have sought to be enjoined in Constitutional Application No. 1 of 2011 filed by Ibrahim Mwangi Athumani and seek to have the suit transferred from the Court of Appeal to the Supreme Court.

(v) The Petitioners' suit ought to be struck out and dismissed in limine as the suit is an abuse of the process of the court, vexatious and amounts to forum shopping, playing lottery with the courts and it is a waste of the court's valuable juridical time.

On top of the grounds of opposition contained in the Minister's replying affidavit, the 4th Respondent in his replying affidavit sworn on 6th March, 2012 averred that the Board of CCK had no performance measurement tool for assessing him at the time of the purported assessment and the alleged assessment cannot be used to measure his performance as the Director-General of CCK. The 4th Respondent submits that the Board of CCK and in particular its Chairman treated him unfairly.

Having brought out the positions of the parties, I now move to frame the issues for determination in this

case. I have looked at the issues framed by the parties and come to the conclusion that there are three main issues for the determination of this court:-

(a) Whether this application is bad in law;

(b) Whether the Minister abused his powers by appointing the 4th Respondent against the advice of the Board of CCK; and

(c) Who should meet the costs of this litigation?

The advocates on record submitted extensively on the identified issues. I thank them for clearly illuminating for me the path which I will take in this judgement.

Is the application before this court bad in law? This question leads to two questions namely whether the application meets the threshold required in a constitutional petition and whether the Ex-parte Applicant's failure to disclose the pendency of proceedings before the Supreme Court allegedly involving the same parties and on the same subject matter is an abuse of the court process. The respondents who oppose this application argue that although the Applicant indicated that the application is brought under articles 22,23 and 73 of the Constitution, the application itself does not expressly state the provisions of the Constitution that have been violated by the Applicant. The said respondents also fault the Applicant for generally claiming that the Constitution was contravened without pinpointing the particular transgressions. The respondents argue in the alternative that the Applicant cannot rely on Article 73 of the Constitution because the same is not yet operative since Parliament is yet to enact legislation in accordance with Article 80 to operationalise the said Article.

The Applicant responded to these submissions by taking refuge under Article 159(2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. I am of the view that Article 159(2)(d) of the Constitution did not in one fell swoop do away with all the rules of procedure. If that was so then litigation would have taken a slippery road and chaos would result in the field of the practice of law. I believe the said provision of the Constitution is only meant to assist parties who have made small mistakes in procedure. The issues raised by the 1st, 2nd and 4th respondents are matters that go to the substance of the case and Article 159 (2) (d) of the Constitution cannot come to the aid of the Applicant.

I have carefully looked at the application placed before me and I find that the same is a judicial review application and not a constitutional petition. The same clearly meets the standards of a judicial review application. I agree with the respondents that a constitutional petition has to meet certain parameters. The fact that the Applicant has quoted constitutional provisions does not however make the application a constitutional petition.

Courts are creatures of the Constitution and their primary task is to uphold and protect the Constitution. Judicial officers walk, sleep and dream the Constitution. Even if a party does not quote the provisions of the Constitution, a court of law will always ensure that its decision is in tandem with the Constitution. I therefore find the objection raised by the respondents untenable. The application is proper and merits the attention of this court.

Did the Applicant abuse the process of the court by filing this application when there was another case before the Supreme Court? The respondents say the Applicant abused the court process by filing this case when a similar matter was pending before the Supreme Court. The respondents told the court that a similar application had been filed in this Court but the leave that was granted was set aside by the Court after it was discovered that there was a matter pending before the Supreme Court on the same issue.

I have perused the papers in **H.C. J.R MISC. APPLICATION NO. 37 OF 2011, IBRAHIM MWANGI ATHUMANI V. THE MINISTER FOR INFORMATION AND COMMUNICATION** and **SUPREME COURT CONSTITUTIONAL APPLICATION NO. 1 OF 2011, IN THE MATTER OF ADVISORY OPINIONS OF THE COURT UNDER ARTICLE 163 (6) OF THE**

CONSTITUTION AND IN THE MATTER OF THE COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION AS THE APPLICANT. In H.C.J.R. Misc. Application No. 37 of 2011 the leave granted to the applicant (Ibrahim Mwangi Athumani) to commence judicial review proceedings was set aside after the court (Musinga, J) was alerted to the existence of Supreme Court Constitutional Application No. 1 of 2011. The said case was therefore not decided on merits. It cannot therefore be said that this matter is res judicata on that ground alone. Secondly, it must be noted that the applicant in that case is different from the Applicant herein. It cannot therefore be said that the two applications are between the same parties. The two applications are also not the same because the Applicant in J.R. No. 37 of 2011 was trying to stop the Minister from reappointing the 4th Respondent herein as the Director-General of CCK but in the case before me the Applicant is asking the court to quash the decision of the Minister reappointing the 4th Respondent as the Director-General of CCK.

As for the case before the Supreme Court, it can be seen from the papers filed by Ibrahim Mwangi Athumani that he was seeking the audience of the Supreme Court to participate in a matter that had been filed by the Commission for the Implementation of the Constitution. In that case he wanted the Supreme Court to interpret whether the threatened reappointment of the 4th Respondent by the Minister contrary to the advice of the Board of CCK was in contravention of Articles 73, 259 and 232(2) of the Constitution. On 8th July, 2011 the Court of Appeal which was sitting as the Supreme Court stood over the application *sine die* on the ground that the Supreme Court had been constituted and the Court of Appeal sitting as the Supreme Court no longer had jurisdiction to handle the matter. From the papers filed in court, it is clear that up to the time this application was argued before me no further steps had been taken in the matter before the Supreme Court. The respondents did not deem it necessary to apply for the stay of this matter pending the determination of the petition before the Supreme Court. In any case the application of Ibrahim Mwangi Athumani in the Supreme Court could have been overtaken by events since the Minister acted on his threat and actually appointed the 4th Respondent herein as the Director-General CCK. It should also be noted that the Applicant herein is different from the Applicant who was seeking audience in the Supreme Court. I therefore find that the filing of this application by the Applicant even when there were two other cases already filed does not amount to an abuse of the court process. The Applicant before me specifically seeks to quash the decision of the Minister to reappoint the 4th Respondent whereas the applicant in the other cases was trying to stop the Minister from reappointing the 4th Respondent. I know that a multiplicity of suits between the same parties on the same subject matter should be discouraged by the courts. In this matter I am however of the opinion that the Applicant cannot be said to have filed several suits on the same subject matter because this is the only case that the Applicant has brought to court on the issue.

The respondents also argue that the application is bad in law because the same is wrongly titled. It is well known that in judicial review applications the applicant is the Republic and the respondent is the public body against whom orders are sought. The aggrieved person who files the application is named as the ex-parte applicant. In the case before me the Republic has been omitted from the proceedings and the aggrieved party named as the applicant instead of being named as the ex-parte applicant. This is not proper. The question is whether the Applicant should be locked out of the corridors of justice for this mistake. In judicial review proceedings the Republic is a nominal party. The actual complainant is the ex-parte applicant. I am of the view that failure to properly title an application should not be used to inflict a fatal blow on an applicant's case. The respondents have not suffered any prejudice because of this mistake. This is where the court applies Article 159(2)(d) of the Constitution. Justice must be done without undue regard to procedural technicalities. This particular objection to the Applicant's case is therefore found wanting and the same is dismissed.

The issue that will decide this case is whether the Minister abused his powers by appointing the 4th Respondent against the advice of the Board of CCK. Under this issue the questions to be answered are: Was the act of the Minister unconstitutional as alleged by the Ex-parte Applicant? Did the Minister exceed his statutory powers in making the appointment? Did the Minister follow the recommendations and guidelines set by the relevant organs of Government before reappointing the 4th Respondent? Was the Minister bound by the advice of the Board?

The Applicant submits that the appointment of the 4th Respondent by the Minister was un-procedural because it contravened a circular on reappointment of state corporations CEOs issued on 23rd November, 2010 by the Secretary to the Cabinet and Head of Civil Service. The Applicant also submits that the Minister acted with impunity by reappointing the 4th Respondent and if his action remains unchecked it will set bad corporate governance precedence. It is the Applicant's case that the Board of CCK was under a legal duty to recruit the Director-General of CCK in a competitive, transparent, fair and open manner. The Applicant finally submits that the actions of the Minister contravened various constitutional provisions and his decision is therefore unconstitutional.

In reply, the 1st, 2nd and 4th respondents argue that the Applicant has not pinpointed the particular provisions of the Constitution allegedly contravened by the Minister. The failure by the Applicant to pinpoint the particular provisions of the Constitution allegedly contravened by the Minister denied the respondents the fundamental right of knowing the case against them. The respondents submit that the Minister did not breach any law because the Kenya Information and Communications Act allows the Minister to appoint or re-appoint the Director-General of CCK. The respondents further submit that were this court to find that the Minister has no power to appoint the Director-General of CCK then that would amount to declaring the Kenya Information and Communication Act unconstitutional. Such action the respondents submit would go against the principle enunciated by Ibrahim, J (as he then was) in **KIZITO MARK NGAYWA V. THE MINISTER OF STATE FOR INTERNAL SECURITY & PROVINCIAL ADMINISTRATION AND ANOTHER [2011] eKLR** that:-

"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that if possible, a legislation should receive such a construction as will make it operative and not inoperative. There is a presumption of constitutionality of legislation; the onus is upon those who challenge the constitutionality of the legislation, they have to rebut that presumption."

In the alternative the respondents argue that Article 73 of the Constitution is yet to come into force due to the fact that Parliament is yet to enact the legislation envisaged by Article 80 so as to make that Article enforceable. The respondents fault the Applicant's claim that the decision of the Minister is illegal, unjustified, unlawful, capricious, unreasonable, irrational, malicious, in bad faith, unilateral and biased. The respondents argue that the Minister considered the advice of the Board and gave all the parties a chance to be heard. He also considered the leadership attributes of the 4th Respondent and the review of his performance by other independent bodies before deciding to re-appoint him. On the circular from the head of Public Service the respondents submit that the same is just an administrative guideline and cannot oust the clear provisions of the law. The respondents argue that the Minister was aware of wrangles between the 4th Respondent and some members of the Board of CCK and he decided to seek another opinion from the Performance Contracting Office in the Office of the Prime Minister and from the State Corporations Advisory Committee (SCAC). The respondents emphasize that the Minister considered the recommendation of the Board but reached a contrary conclusion for the reasons that:-

(a) There were no standard tools of evaluation at the time the Board evaluated the performance of the 4th Respondent. In fact the standard tools of evaluation were issued in June, 2011, long after the Board evaluated him in March, 2011.

(b) The Minister was aware of the wrangles between some members of the Board particularly the Chairman of the Board, Mr. Philip Okundi and the 4th Respondent.

(c) The Commission's performance was very good and very profitable under the watch of the 4th Respondent.

(d) The Minister was aware that at the time the Board evaluated the 4th Respondent he was out of the country on official duty and therefore did not have the chance to participate in the process.

(e) The Minister was also aware that the Board did not communicate its conclusion to the 4th Respondent and the 4th Respondent only came to learn of it through the media.

(f) The Minister considered the attributes of the 4th Respondent in reaching his conclusion.

(g) The Minister satisfied himself on the performance of the 4th Respondent having sought for more information and clarifications from the office of the Prime Minister, Performance Contracting Department and the State Corporations Advisory Committee.

The respondents argue that although the Minister considered the recommendation of the Board he was not bound by it. The respondents' case is that the Minister did not act with impunity and complied with the law in reaching his decision.

The respondents' case is that the Minister followed the correct procedure in reappointing the 4th Respondent and heard all the parties who were to be heard before reaching his decision. The respondents also say that the Minister took into consideration all the relevant matters and did not consider any irrelevant matter in arriving at the decision.

Before proceeding to answer the questions outlined above, I must state that this case is not about the competence, qualification and leadership attributes of the 4th Respondent. As is the norm in judicial review proceedings, this case is only about the correctness of the procedure under which the 4th Respondent was reappointed by the Minister as the Director-General of CCK. The purview of judicial review was clearly captured by Lord Diplock in the case of **COUNCIL FOR CIVIL SERVICE UNIONS VS. MINISTER FOR CIVIL SERVICE [1985] A.C. 374, at 401D** when he stated that:-

"Judicial review has I think developed to a stage today when.....one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.....By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it .....By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness'.....it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it .....I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision."

The starting point is section 6(1) of the Kenya Information and Communications Act which provides that:-

"The management of the Commission shall vest in a Board of Directors of the Commission which shall consist of:-

(a) chairman who shall be appointed by the President;

(b) the Director-General who shall be appointed by the Minister;

(c)....."

A plain reading of the said provision clearly shows that the Minister is given the authority to appoint the Director-General of CCK. Section 7 of the said Act legislates on the powers of the board. The section does not indicate that the Board has power to appoint the Director-General. The Minister is therefore correct when he says that the Act gives him discretion when it comes to the appointment of the Director-General of CCK. However, discretion has to be exercised legally, reasonably and rationally.

The power granted to the Minister by the said Act appears to go against the circular dated 23rd November, 2010 issued by the Head of Public Service. The circular reads:-

"**PROCEDURE FOR REAPPOINTMENT OF SERVICE CHIEF EXECUTIVE OFFICERS IN STATE CORPORATIONS**

Your attention is drawn to the Terms and Conditions of Service for Chief Executive Officers of State Corporations as set out in the Guidelines issued by the Government on 23rd November, 2004 and this office circular Ref. No. OP/CAB. 9/1 of 9th May, 2008.

In regard to appointment of Chief Executive Officers (CEOs) the Guidelines stipulated the manner of their appointment and also renewal of the appointments upon expire of contract(s). In addition to the provisions in the guidelines and the circular cited above and for purposes of clarify it is emphasized that where a serving Chief Executive Officer (CEO) is keen on being reappointed for a further term the procedure below will apply:

a) The CEO wishing to be reappointed will indicate interest by writing to the Board at least six months before expiry of his/her term.

b) The Board will evaluate the performance of the CEO and make a report to the appointing authority with a recommendation on either renewal of termination of the contract upon expiry.

c) In the event that the Board does not recommend renewal of the contract the CEO will be required to proceed on terminal leave to pave way for the recruitment and appointment of a new CEO. This is important to ensure a smooth transition.

d) The Board will recruit an acting CEO, in consultation with the parent Ministry and the State Corporations Advisory Committee (SCAC) as provided for by Section 27 (1) (c) of CAP. 446 in a care taker position when the process of recruiting a new CEO is ongoing.

For avoidance of doubt, the position of Chief Executive Officers shall be declared vacant only when the Board of Directors has no intention to renew the appointment of the incumbent for a further term."

The circular was signed by Francis Muthaura, the Permanent Secretary/ Secretary to the Cabinet and Head of the Public Service. The said circular was issued in accordance with the State Corporations Act, Chapter 446, Laws of Kenya. Section 27(1) of the Act provides that:-

"The Committee shall advise on the matters and perform any functions it is required by this Act to perform and in addition shall –

(a).....
(b).....

(c) where necessary, advise on the appointment, removal or transfer of officers and staff of state corporations, the secondment of public officers to state corporations and the terms and conditions of any appointment, removal, transfer or secondment.

(d)....."

The Committee referred to in the above quoted section is the State Corporations Advisory Committee established under Section 26. Section 6 of the Act provides for the composition of the board of a state corporation. The chairman of the board of a state corporation is appointed by the President. One of the members of the board is the Chief Executive. The Act does not state who appoints the Chief Executive. The other members of the board are the Permanent Secretary of the parent Ministry, the Permanent Secretary to the Treasury and **"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."

Under Legal Notice No. 93 of 10th August, 2004 President Mwai Kibaki issued the State Corporations (Performance Contracting) Regulations, 2004. Among the responsibilities of the Board of Directors as provided by Regulation 4(2)(b) is the recruitment of staff including the Chief Executive of the state corporation.

The State Corporations Act, the regulations made thereunder and the guidelines clearly show that the Chief Executive of a state corporation should be recruited by the Board of Directors. According to the preamble the State Corporations Act was enacted to **"make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes."** CCK being a state corporation is therefore governed by the State Corporations Act. Its operations are therefore guided by both the State Corporations Act and the Kenya Information and Communications Act. It cannot be said that there is direct conflict between the two Acts because in appointing the CEO of CCK the Minister acts on the recommendation of the Board. This essentially means that it is the Board which recruits the CEO.

The question is whether the Minister exercises untrammeled power when appointing the Director-General. The Minister appears to say he has absolute power and he is not accountable to anybody. I think that submission is fallacious. In appointing the Director-General of CCK the Minister is exercising administrative power. The said power is governed by the two Acts of Parliament already cited. Whenever a public officer exercises administrative power, he should do so reasonably, rationally and within the confines of the law. He should take into account all relevant matters before reaching his decision. In making the decision he is expected not to take into account irrelevant matters. If a citizen of this country believes that the power bestowed upon a public officer has been abused, he can move the court by way of judicial review and ask for a review of the decision in question.

The power given to the Minister is never exercised in a vacuum. The law provides a framework upon which the power is exercised. The Board is the bridge between CCK and the parent Ministry. The Board deals with the management staff and where action has to be taken the Board takes action. As for the CEO the Board will make a decision and inform the Minister about the same. If it is about appointment or termination of service the Minister acts on the decision of the Board. The Board is the best placed body to recruit members of staff including the Chief Executive Officer. Only in exceptional circumstances and for reasons to be shared with the Board in writing will the Minister go against the decision of the Board. In such a situation the Minister still has to refer the issue back to the Board for a decision. The 4th Respondent was indeed aware of this procedure and that is why he addressed his application for reappointment to the Board and not to the Minister as can be seen from his letter. The 4th Respondent's application for reappointment was actually addressed to the correct office. The Board proceeded in the right manner by assessing the 4th Respondent and forwarding its recommendations to the Minister. The Board did this through its letter dated 9th March, 2011. The Minister acknowledged receipt of the said letter and promised to get back to the Board. The Minister did not get back to the board but instead consulted other state organs on the performance of the 4th Respondent. The Minister later overturned the recommendation of the Board and reappointed the 4th Respondent.

Considering what took place was the Minister's decision rational and reasonable? I do not think so. For the Minister to overturn the decision of the Board he must have good reasons for doing so and those reasons must be shared with the Board in writing. It appears the Minister did not write to the Board to explain why he had gone against its decision. He therefore breached one of the principles of good governance namely that every administrative decision should be accompanied with reasons. Writing about the principles of good administration, B. L. Jones & K. Thompson, in Garner's Administrative Law, 8th edition at Pages 57 & 58 state that :-

"Obviously every administrator should observe any procedural rules laid down for him in any relevant statutes or regulations and he must keep to the common law rules of natural justice;

equally, where a reasonable expectation that a certain line of conduct will be followed, this should not be departed from without very good reason .....

However, the formalized requirements enforceable in the courts are not alone sufficient to guarantee good administration. A member of the executive in his relations with the public should strive to ensure that his decisions are fair, even handed and logical; even though the courts may only intervene in cases of substantial departures from these objectives. He should be prepared to give reasons for and justify his decisions when called upon, and in many circumstances he should give reasons before he is asked to do so".

Failure to give reasons in a situation where the Board was the best placed organ to recruit the Director-General meant that the Minister acted unreasonably. His action was arbitrary and any independent observer can read bad faith in whatever he did. When it comes to the appointment of the Director-General of CCK the Minister and the Board are like Siamese twins. One cannot live without the other however much they detest each other. The Board interviews the Director-General and recommends his appointment to the Minister who formalises the appointment. The Minister can for good reason reject the selected candidate and ask the Board to reconsider its decision. It is all about consultation and working together for the benefit of the organization and the people of Kenya who are the ultimate beneficiaries of well managed state corporations. The board of a state corporation is no longer an appendage of the Minister or the parent Ministry. The board is capable of making independent decisions which should be observed and respected by all concerned. At the end of the day the board is answerable to the public. The day is nigh when board members will face criminal charges in connection with the operations of state corporations.

The Minister gave this court the reasons which made him disregard the recommendations of the Board. I must state that he has given the reasons too late in the day. He ought to have given those reasons to the Board before overturning its decision. I will nevertheless consider those reasons and see if they have any merit. He told the court that there were wrangles in the Board and he was aware of differences between the 4th Respondent and the Chairman of the Board. This is not a good reason for going against the decision of the Board. In accordance with Paragraph 3(7) of the First Schedule of the Kenya Information and Communications Act, the decisions of the Board are made by the majority of the members. The Chairman does not make the decision alone. Even if the Chairman had problems with the 4th Respondent he had no capacity to make any decision alone. There is no evidence that he was a member of the ad hoc committee formed to evaluate the performance of the 4th Respondent. The Minister also argued that he obtained information from other sources showing that the 4th Respondent was a diligent and productive CEO. This could be true but why did he not share this information with the body which had found his performance wanting? Those who worked with the 4th Respondent on a regular basis were the best placed people to measure his performance. The Minister also argued that the 4th Respondent was not given an opportunity to present his case. When he applied for reappointment he stated the reasons why he thought he deserved another term. It is assumed that the Board took those reasons into consideration before reaching its decision. It cannot be said that he did not present his side of the case.

The basic law of this country is the Constitution. Any law which contravenes the Constitution is null and void. The Constitution has various provisions regarding the exercise of power by state officers. It is important that those particular provisions be reproduced in this judgment. Article 10 outlines the national values and principles of governance in the following words:-

"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 marginalized;

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

(d) sustainable development."

The responsibilities of leadership found in Article 73 are:-

"73.(1) Authority assigned to a State officer-

(a) is a public trust to be exercised in a manner that-

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include-

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by-

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties.

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people."

The values and principles of public service are found in Article 232:-

"232. (1) The values and principles of public service include-

(a) high standards of professional ethics;

(b) efficient, effective and economic use of resources;

(c) responsive, prompt, effective, impartial and equitable provision of service

(d) involvement of the people in the process of policy making;

(e) accountability for administrative acts;

(f) transparency and provision to the public of timely, accurate information;

(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) representation of Kenya's diverse communities ; and

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of-

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

(2) The values and principles of public service apply to public service in-

(a) all State organs in both levels of government; and

(b) all State corporations.

(3) Parliament shall enact legislation to give full effect to this Article."

The interpretation of the Constitution is governed Article 259 (1) which states:-

"This Constitution shall be interpreted in a manner that-

(a) promotes its purposes, values and principles.

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

(c) permits the development of the law; and

(d) contribute to good governance."

The above cited provisions of the Constitution speak to both the citizens and those who have been given the responsibility of managing the affairs of this country. Greater responsibility is placed on the rulers when they are exercising their powers over the people of Kenya. The protection and enforcement of the Constitution is the duty of every citizen. A reading of the cited articles of the Constitution shows that a State officer like the Minister is expected to adhere to the rule of law, promote good governance, transparency, accountability, integrity and good administrative practices. Although Parliament is yet to enact legislation to give full effect to some of the provisions of the Constitution, the Constitution is already speaking. It is alive and kicking and the sooner every Kenyan accepts and appreciates this fact the better for everybody.

Every public appointment is now subject to the principles and values of the Constitution. Mumbi Ngugi, J put it well when she observed in High Court Petition No. 161 of 2011, **DAVID KARIUKI MUIGUA V. ATTORNEY GENERAL AND THE MINISTER FOR INDUSTRIALIZATION** that:-

"**There is no evidence that there was a competitive process that would enable public participation in**

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

I do not find any reason to depart from the views of the learned Judge and I adopt her views in this case.

In **DEMOCRATIC ALLIANCE VS. THE PRESIDENT OF THE RSA & OTHERS (263/11) [2011] ZASCA 241** M. S. NAVSA, JA of the Supreme Court of Appeal of South Africa addressed the issue of the impact of constitutional provisions on the exercise of public power and concluded that a democratic society that has sworn fidelity to the Constitution abhors arbitrariness and lack of accountability. I find myself persuaded by those views. Actions of the Executive must be analyzed and justified. Only once a decision meets the rationality test will the court down its judicial review tools. Whether a decision is rational and reasonable will be judged using the principles and values found in the Constitution and the tools found in the field of judicial review.

In the case before me, I must state that by failing to take into account the recommendations of the Board the Minister ended up making a decision in respect of which he ignored relevant matters. In doing so, he proceeded contrary to the principles and values of the Constitution. He therefore misapprehended the powers granted to him by the Kenya Information and Communications Act and acted irrationally.

Whenever a public body exceeds its mandate, this court will not hesitate to call for its decision for purposes of quashing it. Although the Minister has power to appoint the Director-General of CCK, he abused the said power by rejecting the recommendation of the Board not to reappoint the 4th Respondent. His actions also went against the principles of good governance, adherence to the rule of law, transparency, accountability and integrity as envisaged by the Constitution. The only solution available is therefore to allow prayer (a) of the Applicant's notice of motion and I so do. Having quashed the Minister's decision I find prayers (b) and (c) superfluous save to state that the 3rd Respondent is expected to internalize and apply the Constitution when carrying out its operations.

I cannot allow my fingers to leave the keyboard without saying something about the Applicant. The Applicant has been accused of being driven by malice in bringing this application. To me however the Applicant has come out as a vigilant protector of the Constitution of this country. Where those who have been anointed to protect and uphold the Constitution fail to do so, organizations like the Applicant should receive a pat on the back for being vigilant and alert as the implementation of the Constitution gets into high gear. Such organizations represent the majority of Kenyans who watch helplessness and in anguish as the rulers lord over them as if nothing happened on 27th August, 2010.

This matter raised matters of great public interest. It is assumed that the Applicant litigated in good faith. I will therefore make no orders on costs.

Dated and signed at Nairobi this 17th day of May , 2012.

W. K. KORIR
JUDGE