



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 252 of 2012

**MARSON INTERGRATED  
LIMITED.....PETITIONER**

**VERSUS**

**MINISTER FOR PUBLIC WORKS.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is yet another matter in which citizens seek to test the extent to which the state and state organs are willing to abide by the letter and the spirit of the Constitution of Kenya 2010 and the national values and principles enshrined in it.
2. The petitioner filed this matter under certificate of urgency on the 13<sup>th</sup> of June 2012. When the matter came up before me on the 21<sup>st</sup> June 2012 for inter partes hearing in the presence of Mr. Kakoi for the respondent and Ms. Muigai who indicated that she was watching brief for the Interested Party, I gave directions with regard to the filing of replying affidavits by the respondents and the Interested Party and directed that the status quo as at that date should be maintained. The status quo then was that the Board of the Kenya National Construction Authority, to the Chairmanship of which the 2<sup>nd</sup> respondent had appointed the Interested Party, had not yet been inaugurated. By consent of the parties, hearing of the petition was set for the 27<sup>th</sup> of June 2012.
- 3 In the petition dated the 13<sup>th</sup> of June 2012, the petitioner seeks the following orders:
  - (a) **A declaration that the appointment and/ or inclusion of Kennedy Onditi by the 1st Respondent as a Board member of the National Construction Authority vide Kenya Gazette Notice No 7265 dated 29th May, 2012 and published on 31st May 2012 for a period of three (3) years with effect from 8th June 2012 is contrary to Article 10(2), 47(1), 73 and 232 of the Constitution of Kenya 2010 and is therefore null and void**
  - (b) **A declaration that the appointment of Kennedy Onditi by the 1st Respondent to be the chairperson of the Board of the National Construction Authority vide Kenya Gazette Notice No 7264 dated 29th May, 2012 and published on 31st May, 2012 for a period of three (3) years with effect from 8th June 2012 is contrary to Article 10(2), 47(1), 73 and 232 of the Constitution of Kenya, 2010 and is therefore null and void.**
  - (c) **Costs of the suit and an order for the refund of filing fees aid for this petition.**

**(d) Or such other order(s) as this Honourable court shall deem just.**

4 A replying affidavit sworn by **George Ngonga Macgoye** was filed on behalf of the respondents, but the Interested Party did not file a response nor did he actively participate in the proceedings, relying instead on the affidavit filed on behalf of the respondents. At the hearing, of the petition, his counsel associated herself with the submissions made by the respondents.

**The Petitioner's Case**

5. In his submissions on behalf of the petitioner, Mr. Kamotho relied on the affidavit of **Samson Njoroge Gakere** dated 13<sup>th</sup> June 2012. He submitted that the petition involves a state corporation known as the National Construction Authority (Hereafter referred to as “**NCA**”) established under the National Construction Authority Act of 2011. The Authority is to be managed by a Board established under section 7 of the Act. The Act is specific on the membership of the board. The Minister is supposed to appoint 7 persons to serve on the Board from persons nominated by organizations set out in the 1<sup>st</sup> Schedule to the Act. The 7 nominating bodies are supposed to nominate 3 persons each, from which the Minister is required to pick 1 for appointment. One such organization empowered to nominate a member to the NCA Board is the Kenya Association of Building and Civil Contractors (**KABCEC**).

6. By a letter dated 22<sup>nd</sup> February 2012, the Minister requested **KABCEC** to submit 3 names for consideration. The letter, which is annexure SNG3 in the affidavit of Samson Njoroge Gakere, was clear that the nominations should be guided by Chapter 6 and 13 of the Constitution. Pursuant to an annual general meeting of **KABCEC**, the organisation nominated 3 persons by letter dated 25<sup>th</sup> April 2012. One of the persons nominated was the Interested Party, Kennedy Onditi.

7. Following the nomination, the petitioner raised a complaint by way of a letter dated 10<sup>th</sup> May 2012 which raised integrity issues regarding the Interested Party. After carrying out its investigations, **KABCEC** wrote a letter dated 15<sup>th</sup> May 2012 to the Minister that it had received a complaint and had resolved to withdraw the nomination of Kennedy Onditi as a nominee of **KABCEC**. **KABCEC** also wrote a further letter dated 25<sup>th</sup> May 2012 and informed the minister that it had held an Annual General Meeting and recommended that its preferred candidate would be Engineer Arbajn Shankla.

8. Despite the withdrawal of the nomination of the Interested Party by his nominating organisation, the 1<sup>st</sup> respondent went ahead and on the 29<sup>th</sup> of May 2012, appointed Kennedy Onditi as the Chairperson and member of the Board of the Authority for a period of 3 years. This was by way of Gazette No 7264 and Gazette Notice No 7265 of 31<sup>st</sup> May 2012.

9. The petitioner contends that it was unprocedural for the Minister to appoint the Interested Party when his nomination had long been withdrawn and the Minister informed well before he made the appointment by way of Gazette Notice on the 31<sup>st</sup> of May 2012.

10. Further, according to the petitioner, the appointment of the Interested Party as a member of the Board and as Chairman of the Board was unprocedural because Section 7 of the Act requires that to qualify for appointment as a member of the Board, one must be a holder of a Higher Diploma in a relevant field and have at least 10 years' experience in the construction industry. The petitioner avers that whereas the Interested Party joined the Kenya Polytechnic in 1999, he did not qualify and did not pass the exams set by the Kenya National Examination Council (**KNEC**). In support of this contention, the petitioner produced a letter (SNG14) showing that **KABCEC** wrote to **KNEC** and was sent the results of the Interested Party (SNG15) which show that the Interested Party failed the examination for the Higher National Diploma, and does not therefore have the Higher National Diploma required for one to qualify as a member of the National Construction Authority.

11. The petitioner also pointed out that the Interested Party had lied to the Minister. In the *Curriculum Vitae* (CV) submitted to the Minister, (SNG17), the Interested Party indicates under “Professional Qualifications’ that he obtained a Higher National Diploma in 2001 from the Kenya Polytechnic

University which is not the case and is contradictory to what annexure SNG15 shows.

12. The petitioner contends therefore that this, together with the statement in the CV that he was the Managing Director of Contemporary Electrical Enterprises Ltd, a company with over twenty years' experience in the construction industry, shows that the Interested Party had tailored his CV to mislead as the said company, as can be noted from its certificate of incorporation (SNG18), was only incorporated in 2004.

13. The petitioner therefore contends that the Minister violated Article 10 of the Constitution on the national values and principles by appointing the Interested Party yet he had doubtful academic and professional qualifications.

14. Further, the Minister was in breach of the provisions of Article 47 by appointing the Interested Party whose name had been withdrawn by the nominating organisation and not only appointing him to the Board but also naming him the Chairman yet there were others who had been properly nominated and who had much better qualifications than the Interested Party.

15. The petitioner also contends that the appointment was in breach of Chapter 6 of the Constitution as the Interested Party does not meet the constitutional threshold for public officers. The basis of this contention is that the Certificate from the Kenya Polytechnic is falsified, as is the CV. Further, the petitioner claims that the Interested Party does not meet the threshold of integrity. This contention arises in respect of a tender which the petitioner obtained documents for with the understanding that the Interested Party would, upon obtaining the contract, 'give' him some of the proceeds from the contract. The Interested Party, according to the petitioner, did not give him anything from the contract. He was therefore not a man of integrity and the Minister had breached the provisions of Article 232(1) as the Interested Party does not have high professional and ethical standards.

16. On the response by the respondents, the petitioner argues that while the respondent talks of the Interested Party having an 'equivalent qualification,' what he has is a degree from Moi University, a Masters of Business Administration (Executive) which, according to the petitioner, is not in the 'relevant' field as required under the Act.

17. The petitioner relied on the decision of the High Court in the case of **George Githinji Wangundu –v- Coffee Board of Kenya Petition No 255 of 2011 at Para 80 and Republic –v- Attorney General ex parte Consumer Federation of Kenya** Judicial Review No 185 of 2011 and asked the court to allow the petition and grant the prayers sought.

18. The respondents' case as presented by Mr. Kakoi and as set out in the replying affidavit of **George Ngonga Macgoye**, a Senior Under Secretary in the Ministry of Public Works, is that the respondents acted in compliance with the requirements of the Constitution and the National Construction Authority Act in appointing the Interested Party to the Board and as its Chairman. According to the respondents, the Interested Party was qualified as required under the Act as he holds a Master of Business Administration (Executive) from Moi University, which is a higher qualification than a National Higher Diploma.

19. Mr. Kakoi submitted that section 7(5) of the Act requires that the persons should be a holder of a higher diploma in a relevant field, that 'relevant field' has not been defined, and that the qualification that the Interested Party had was higher than the higher diploma. He referred to annexure SNG 19 which contained the names of the people nominated to the National Construction Authority and pointed out that all the people came from different backgrounds and sectors; that the respondents' interpretation of 'relevant field' is that it should not be restricted to the engineering sector; and that the Minister, in making the appointment, had accepted the MBA (Executive) from Moi University as sufficient qualification.

20. On the contention by the petitioner that the certificate from the Kenya Polytechnic had been falsified and that the CV had been intended to mislead, it was the respondents' case that the petitioner

had the obligation to prove the falsification of the certificate, and that the CV was not intended to deceive the Minister into believing that the Interested Party had a Higher National Diploma: the entry on 1999-2001 in annexure 5NG 17, the CV prepared by the Interested Party, was intended only to show that he attended the course for the Higher National Diploma, not that he passed the examination for it.

21. The Interested Party had the requisite professional experience, according to the respondents, and the fact that his company had been incorporated in 2004 did not indicate that his experience was from that date. He had been employed in 1997 and therefore had the requisite professional qualifications and experience.

22. On the allegations by the petitioner that the Interested Party had no integrity as he had swindled it sums arising out of a contract they were to perform together, Mr. Macgoye deponed that the respondents read malice in bringing the petition and deponed at length on the circumstances surrounding the contract to supply installation of 30 m High Mast Monopole Lights placed by Kenya Ports Authority.

23. The respondents further submit that the professional body, KABCEC, by a letter dated the 20<sup>th</sup> of June 2012, withdrew its objection to the appointment of the Interested Party.

### **Determination**

24. The court notes that the Interested Party has chosen not to respond to the allegations of fact made against him and has been content to rely on the affidavit sworn by an under-secretary in the 1<sup>st</sup> respondent. While Mr. Kakoi submitted that Mr. Macgoye was competent to respond on behalf of the Minister for Public Works, it is doubtful that the same can be said with respect to the averments touching on the Interested Party. As Mr. Macgoye correctly swears at paragraph 4 of his affidavit, he is a stranger to the averments contained in the affidavit by the petitioner. Any averments that he makes with regard to the Interested Party's educational and professional qualifications can only, at best, be described as hearsay.

25. Order 19 Rule 3(1) of the Civil Procedure Rules provides with regard to affidavits that "**Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.**" The only person who can correctly swear and controvert the matters in the petition regarding the Interested Party's educational and professional qualifications, and with regard to the petitioner's complaint to the KABCEC Board, was the Interested Party. That he elected not to do so essentially leaves the averments by the petitioner unchallenged.

26. It was important that the Interested Party address himself to the issues raised by the petitioner as this petition will stand or fall on the question whether the appointment of the Interested Party met the constitutional and statutory requirements for one to serve on the Board of the National Construction Authority. The issues that arise for determination are:

- i) Did the Interested Party have the requisite academic and professional qualifications to be appointed to the Board of the National Construction Authority?**
- ii) Does the Interested Party meet the integrity test in Chapter 6 and 13 of the Constitution?**
- iii) Did the Minister act procedurally in appointing the Interested Party to the Board after his name had been withdrawn by the nominating professional body?**

### **Educational and Professional Qualifications**

27. The National Construction Authority is established under Section 3 of the National Construction Authority Act, 2011, which came into effect on the 8<sup>th</sup> of June 2012. The object and functions of the Authority are provided under Section 5 of the Act.

28. Section 7 of the Act provides for the composition of the NCA Board and provides as follows:

**7. (1) There shall be a Board of the Authority which shall consist of --**

**(a) a chairperson, who shall be appointed by the Minister from among the members appointed under paragraph (g);**

**(b) the Permanent Secretary in the Ministry for the time being responsible for matters relating to public works;**

**(c) the Permanent Secretary in the Ministry for the time being responsible for matters relating to roads;**

**(d) the Permanent Secretary in the Ministry for the time being responsible for matters relating to local government;**

**(e) the Permanent Secretary to the Treasury;**

**(f) the Permanent Secretary in the Ministry for the time being responsible for housing;**

**(g) seven members comprising representatives of each of the organizations specified in Parts I and II of the First Schedule and appointed by the Minister from amongst three persons nominated by each of the organizations; and**

**(h) two members appointed by the Minister to represent groups with special interests in the construction industry.**

29. It is common ground that the Interested Party was appointed under the provisions of Section 7(1)(g). Part 1 of the First Schedule provides that nominations for members of the NCA shall be made by the Architectural Association of Kenya, the Institution of Engineers of Kenya, the Institute of Quantity Surveyors of Kenya and the Law Society of Kenya. Part II of the Schedule requires nominations to be made by the Kenya Federation of Master Builders, the Kenya Association of Building and Civil Engineering Contractors, the Roads and Civil Engineering Contractors Association.

30. Section 7(5) provides as follows with regard to nominations under Part II of the First Schedule:

**(5) A person nominated by the associations set out in Part II of the First Schedule shall qualify for appointment as a member of the Board under paragraph (1)(g) if such person is the holder of a minimum of a Higher National Diploma in a relevant field or equivalent qualification and has at least ten years' practical experience in the construction industry.**

31. The provisions of the above section, particularly the use of the words in 'a relevant field' require, in my view, that anyone who is nominated by the professional organisations named in Part II of the First Schedule should have a minimum of a Higher National Diploma in the field to which the nominating organisation belongs. The plain and ordinary meaning of the word 'relevant', as defined in the Concise Oxford English Dictionary, Twelfth Edition, is 'closely connected or appropriate to the matter at hand', and in the Free Online Dictionary as 'having a bearing on or connection with the matter at hand.' In the case of the Interested Party, he had been nominated by the **Kenya Association of Building and Civil Engineering Contractors**. 'Relevant field' with regard to this body would require that he has a minimum of a Higher National Diploma in the field of building or civil engineering.

32. I arrive at this conclusion from a consideration of the provisions of the National Construction Authority Act, particularly Section 5 on the object and functions of the Authority, and the provisions of the First Schedule. The NCA has been given very technical functions with regard to the construction industry, functions that require that a large number of those who sit on its Board should have technical expertise and be nominated by bodies involved in the construction industry.

33. Does the Interested Party have a ‘*Higher National Diploma in a relevant field or its equivalent*’? The petitioner has deponed that the Interested Party does not have a Higher National Diploma in a relevant field. In annexure ‘SNG17’ which is the Interested Party’s CV is set out, under ‘Professional Qualifications, the statement: **1999-2001: Higher National Diploma, HND in Electrical Engineering (Power Option) at Kenya Polytechnic University College.**’

34. Annexure ‘SNG15’ titled “**Statement of Examination Results**” is a document addressed to the **Kenya Association of Building and Civil Engineering Contractors (sic)** by the Kenya National Examination Council with regard to the Interested Party’s examination results for the Higher National Diploma in Electrical Engineering (Power) for November, 2000, the examination centre being the Kenya Polytechnic. The statement shows the result as ‘**Fail.**’

35. According to the petitioner, the statement in the CV, which was the document availed to the Minister for Public Works by the interested Party, was intended to deceive the Minister that the Interested Party had the requisite qualifications. The Interested Party, as stated above, did not respond to the averments with regard to his qualifications by the petitioner. That the Interested Party does not have a Higher National Diploma ‘*in a relevant field*’ is not denied: Mr. Kakoi for the respondents submitted that the entry for 1999-2001 was not intended to indicate that the Interested Party had a Higher National Diploma; that it was not intended to deceive but was simply put there to show that he attended the course. With respect to Mr. Kakoi, an entry in a CV under “Professional Qualifications” can only be intended to show that one holds the particular qualifications set out, and if one sets out such qualifications without actually possessing them, then the intention can only be to (mis)lead those in receipt of the document into believing that the owner of the CV has those qualifications. At any rate, on the documents before the court and the submissions by Mr. Kakoi as adopted by Counsel for the Interested Party, the Interested Party did not have a **Higher National Diploma, HND in Electrical Engineering (Power Option)** as set out in his CV and as required under the Act.

36. The next question is whether the Interested Party has an ‘**equivalent qualification.**’ At paragraph 7 of his affidavit, **Mr. George Ngonga Macgoye** depones that the Interested Party holds a Degree in Master of Business Administration and annexes a certificate from Moi University for a **Masters In Business Administration (Executive)**. As stated above, averments by Mr. Macgoye on matters of fact which he can only swear to on the basis of information are basically hearsay. The court therefore has no information before it on the Degree that Mr. Macgoye alleges that the Interested Party possesses. However, the requirement under the National Authority Act is for an equivalent qualification ‘*in a relevant field.*’ Even were the court to accept the averments by Mr. Macgoye, does a **Masters of Business Administration (Executive)** meet the requirements of Section 5 of the National Authority Act?

37. I have looked at the requirements of Moi University for the degree of Master of Business Administration (Executive). According to the information available on the University website, the degree is awarded by the Moi University School of Business and Economics. For one to be admitted to the programme, one must have ‘**A working experience of at least five years (post-qualification) in a significant managerial role. Plus;-**

**A degree in any discipline from a recognized university.**

**Or holder of a complete CPA/CPS (K) certificate or equivalent.**

**Or Higher National Diploma in Business studies (KNEC) or its equivalent.’**

38. The Interested Party has not sworn an affidavit with respect to his qualifications. All that the court has before it is that he does not have a Higher National Diploma in a relevant field as required under Section 5 of the National Construction Authority Act; further, going by the requirements for admission to the Moi University Master of Business Administration (Executive) programme, the Interested Party may not even have qualified for the Moi University Degree unless he had other qualifications that are not set out in his CV. In any event, in my view, even assuming, as deponed by Mr. Macgoye, he does

indeed have the MBA (Executive), given the requirements of the NCA Act, that would not be sufficient to qualify him for appointment under Part II of the First Schedule.

## **Integrity**

39. The petitioner contends that the Interested Party does not qualify to be appointed as a Board member of a public body because of integrity issues. He then sets out at paragraph 7 of his affidavit the matters which he views as indicating the lack of integrity on the part of the Interested Party, alleging, among other things, that the Interested Party swindled him with respect to a contract for supply and installation of 30 m High Mast Monopole Lights for the Kenya Ports Authority.

40. At paragraph 12 and 13 of his affidavit, the petitioner avers further as follows:

**12. THAT the appointment of Kennedy Onditi does not meet the qualifications set out in the Constitution of persons expected to serve as public officers in terms of high integrity and transparency. Article 73 of the Constitution of Kenya has set a firm threshold of the basic minimum of those to hold public office. A person who cannot be truthful about his academic and professional qualifications does not deserve a chance to serve the people of this country under the new dispensation and the false statements clearly raise doubt on the integrity and morality to lead the Authority.**

**13. THAT the appointment of Kennedy Onditi has violated Article 10 of the Constitution of Kenya, 2010 that outlines the national values and principles of governance such as fidelity to the rule of law, good governance, integrity, transparency and accountability.**

41. Article 73 of the Constitution with regard to leadership and integrity provides as follows at Section 73(2)

**(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;'**

42. The national values and principles of governance enshrined in Article 10 of the Constitution, which bind all persons and all state organs whenever they apply or interpret the Constitution or any law, or when they make or implement public policy decisions, include good governance, integrity, transparency and accountability.

43. The Interested Party, who alone could properly controvert the matters raised by the petitioner in his affidavit, has elected not to do so. Mr. Macgoye purports to do so in his affidavit in response, but with respect to him, he has no basis or capacity to make any averments with regard to the Interested Party's integrity or lack thereof. What the court is confronted with are unanswered averments by the petitioner that he was swindled by the interested party; that the Interested Party presented a CV intended to mislead the Minister with regard to his qualifications; that the Interested Party is not professionally qualified for the position of a Board Member of the NCA, let alone its chairmanship.

44. In the absence of an answer by the Interested Party, the only inference that the court can properly draw is that the allegations by the petitioner have a basis in fact, a basis that was sufficient for the nominating body, KABCEC, to withdraw the Interested Party's nomination and submit another name. On the facts before me, therefore, I find and hold that the Interested Party did not meet the integrity threshold set out in Article 73 of the Constitution and his appointment did not accord with the national values and principles set out in Article 10.

## **Appointment After Withdrawal of Nomination**

45. The Minister for Public Works appointed the Interested Party as a member of the Board and as its Chair on the 29<sup>th</sup> of May 2012. At the time of making the appointment, the Minister had been informed of the integrity issues relating to the Interested Party, and his name had been withdrawn by a letter dated 15<sup>th</sup> May 2012 by the nominating organisation. By its letter dated the 25<sup>th</sup> of May 2012, KABCEC had recommended that the Minister appoints one Arjan Shankla pursuant to a decision made at the organisation's Annual General Meeting held on May 8<sup>th</sup> 2012.

46. Whatever the merits or demerits of the complaint by the petitioner, and without its being controverted by the Interested Party, the Court is not able to judge one way or the other, the complaint appears to have been of sufficient concern to the nominating body, KABCEC, to lead to its withdrawal of the nomination of the Interested Party and recommendation of another member of the organisation. It appears clear that the Minister disregarded the matters raised by the nominating body, matters which had been raised well before he carried out the appointments on the 29<sup>th</sup> of May 2012. Why the Minister would disregard the wishes of the body which has the statutory duty to nominate a person to the Board and insist on appointing a person whose nomination the Board has withdrawn is unclear.

47. I have considered the provisions of the Act with regard to nominations to the Board and I find nothing that would allow the Minister to disregard the wishes of the nominating body and insist on making an appointment that was contrary to the decision of the annual general meeting of the body. Clearly, the appointment of the Interested Party was unprocedural and made in violation of the Minister's powers under the National Authority Act.

48. Mr. **George Ngonga Macgoye** has deponed that KABCEC has since reconfirmed its nomination of the Interested Party and withdrawn its letter dated 15<sup>th</sup> May 2012, thereby reconfirming the nomination of the Interested Party by way of a letter dated 20<sup>th</sup> June 2012. The letter, addressed to the Permanent Secretary, Ministry of Public Works, is in the following terms:

**Further to our letter of 15<sup>th</sup> May 2012, we had a meeting with Mr. Ken Onditi and he has explained his position with respect to the allegations by Samson Njoroge Gakeri of Marson Integrated Ltd.**

**The matter was discussed in presence of three members of the executive committee, and pending further investigations we hereby withdraw our letter dated 15<sup>th</sup> May 2012.** (Underlining mine)

49. Three observations can be made with regard to this letter. The first is that it was written after the appointments and after this petition was filed in court. The appointments had been made on the 29<sup>th</sup> of May 2012. The Minister did not, at that time, act in accordance with the requirements of the Act and the Constitution in making the appointment. The letter of 20<sup>th</sup> June 2012 could not cure the appointment made on 29<sup>th</sup> May 2012.

50. The second observation is that the letter was written at the request of the Interested Party in the presence of three members of the executive committee. The petitioner submitted at the hearing, and this seems a fairly sound contention, that the executive committee cannot overturn a decision of the annual general meeting of the nominating organisation.

51. The third observation is that the letter of the 20<sup>th</sup> June 2012, even had it been acceptable as regularising the act of the Minister in appointing the Interested Party, would not have given the Interested Party a clean bill of health. It purports to withdraw the letter of 15<sup>th</sup> May 2012 '**pending further investigations.**' Clearly, even in the minds of the three members of the executive committee who purport to withdraw the decision of the nominating body, there were still questions that needed to be addressed with regard to the suitability of the Interested Party.

52. The new Constitution presents this country with an opportunity to ensure that persons are

appointed to public office, in the words of Article 73(2), on the ‘...**basis of personal integrity, competence and suitability.**’ In the instant case, the Minister has appointed a person whose professional competence as required under the National Construction Authority Act has been put to question, and whose integrity is ‘***pending further investigations***’ by the executive committee of the body that had initially nominated him, while the annual general meeting of the same organisation withdrew his nomination two weeks prior to his purported appointment. Yet, this is the person that the Minister has chosen to appoint not only as a member of the board, but also as the Chairman of a new authority to oversee a sector where lack of integrity and standards, as submitted by the respondents, has led to the deaths and injury of many Kenyans.

53. All the above matters can lead to only one conclusion: that the appointment of the Interested Party as a member and Chairman of the National Construction Authority can only have been done on the basis of considerations other than those enshrined in the Constitution; it lacks the transparency required under the national values and principles; is not in accord with Article 73 and 232 of the Constitution, and to allow it to stand would be to violate and undermine the Constitution and the functioning of the newly established National Construction Authority even before it begins its work.

54. In the circumstances, I find that this petition has merit and grant orders as follows:

**i) The appointment of Kennedy Onditi by the 1<sup>st</sup> Respondent as a Board Member of the National Construction Authority vide Kenya Gazette Notice No 7265 dated 29<sup>th</sup> May, 2012 and published on 31<sup>st</sup> May 2012 for a period of three (3) years with effect from 8<sup>th</sup> June 2012 is contrary to Article 10(2), 47(1), 73 and 232 of the Constitution of Kenya 2010 and is therefore null and void.**

**ii) The appointment of Kennedy Onditi by the 1<sup>st</sup> Respondent to be the chairperson of the Board of the National Construction Authority vide Kenya Gazette Notice No 7264 dated 29<sup>th</sup> May, 2012 and published on 31<sup>st</sup> May, 2012 for a period of three (3) years with effect from 8<sup>th</sup> June 2012 is contrary to Article 10(2), 47(1), 73 and 232 of the Constitution of Kenya, 2010 and is therefore null and void.**

55. The petitioner shall have the costs of the petition.

56. I am grateful to the parties for their diligence in prosecuting this petition.

**Dated, Delivered and Signed at Nairobi this 19<sup>th</sup> day of July 2012**

**MUMBI NGUGI  
JUDGE**