



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 45 OF 2016

IN THE MATTER OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 24, 27, 43, 47, 48, 50(1), 73, 75, 93(2), 159, 165, 201, 210, 226, 232, 34, 236, 258, AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 19, 24, 27, 34(5), 43, AND 47, AND THE ALLEGED VIOLATION OF THE VALUES, PRINCIPLES, PROCEDURES, AND PROCESSES IN ARTICLES 3(1), 4(2), 10, 93(2), 201, 210, 226, 236, AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 5A(1), 6D, AND 84W, OF THE KENYA INFORMATION AND COMMUNICATIONS ACT

IN THE MATTER OF THE LEGAL AND CONSTITUTIONAL VALIDITY OF STRIPPING THE COMMUNICATIONS AUTHORITY OF KENYA OF ITS INDEPENDENCE THROUGH THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT 2015, AND DECLARING VACANCIES IN THE POSITIONS OF MEMBERS OF THE BOARD VIDE GAZETTE NOTICE NO. 698 OF 5TH FEBRUARY 2016

IN THE MATTER OF THE LEGAL AND CONSTITUTIONAL VALIDITY OF EXEMPTING AIRTEL NETWORKS KENYA LIMITED FROM PAYING US\$ 27 MILLION OWED TO THE COMMUNICATIONS AUTHORITY OF KENYA IN LICENSE FEES, AND OF APPOINTING NEW MEMBERS TO THE BOARD OF THE COMMUNICATIONS AUTHORITY OF KENYA VIDE GAZETTE NOTICE NO. 3152 OF 4TH MAY 2016.

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

~ VERSUS ~

COMMUNICATIONS AUTHORITY OF KENYA...1ST RESPONDENT

THE CS INFORMATION,

COMMUNICATION AND TECHNOLOGY.....2ND RESPONDENT

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

AIRTEL NETWORKS KENYA LIMITED.....4TH RESPONDENT

BEN NGENE GITUKU.....5TH RESPONDENT

FRANCIS W. WANGUSI.....6TH RESPONDENT

AND

WILBERT KIPSANG CHOGE.....1ST INTERESTED PARTY

KENNEDY MONCHERE NYAUNDI.....2ND INTERESTED PARTY

GRACE MWENDWA MUNJURI.....3RD INTERESTED PARTY

HELLEN KINOTI.....4TH INTERESTED PARTY

BEATRICE OPEE.....5TH INTERESTED PARTY

PETER MUNYWOKI MUTIE.....6TH INTERESTED PARTY

ADRIAN KAMOTHO NJENGA.....7TH INTERESTED PARTY

PAUL KUKUBO.....8TH INTERESTED PARTY

MUGAMBI NANDI.....9TH INTERESTED PARTY

KENTICE L. TIKOLO.....10TH INTERESTED PARTY

DAVID CHERUIYOT KITUR.....11TH INTERESTED PARTY

LEVI OBONYO OWINO (PROF).....12TH INTERESTED PARTY

CHRISTOPHER GUYO HUKA.....13TH INTERESTED PARTY

PATRICIA W. KIMAMA.....14TH INTERESTED PARTY

PRINCIPAL SECRETARY

NATIONAL TREASURY.....15TH INTERESTED PARTY

CAROLE KARIUKI.....16TH INTERESTED PARTY

JUDGEMENT

The Parties

1. The Petitioner herein, **Okiya Omtatah Okoiti**, pleads that he is a resident of Nairobi City County is a law abiding citizen of Kenya, a public spirited individual, and a human rights defender. He is the Executive Director of Kenyans for Justice and Development Trust, which is a legal trust, incorporated in Kenya and founded on republican principles and was set up with the purpose of promoting democratic governance, economic development, and prosperity.

2. The 1st Respondent – **The Communications Authority of Kenya** – (hereinafter referred to as “the Authority”) is described as the independent regulatory authority (converged regulator) for the communications sector in Kenya, established pursuant to Article 34(5) of the Constitution by the Kenya Information and Communications Act (KCA) No. 2 of 1998, as amended by the **Kenya Information and Communications (Amendment) Act 2009**, and further by the **Kenya Information and Communications (Amendment) Act 2013**. Among others, the Authority’s responsibilities entail protecting consumer rights within the communications environment, and monitoring the activities of licensees to enforce compliance with the licence terms and conditions as well as the law.

3. The 2nd Respondent – **The Cabinet Secretary Information, Communication and Technology** – (hereinafter referred to as “the CS”) is described a State Officer in charge of the State Department responsible for the effective utilisation and application of ICTs across multi-faceted service delivery and internal government operations. Pursuant to Section 6B of the **Kenya Information and Communications Act 2013** (hereinafter referred to as “the Act”), he has the mandate to appoint the independent members of the Authority’s Board of Directors.

4. The 3rd Respondent – **The Hon. Attorney General** – is sued in this Petition as the legal adviser and representative of the Government of Kenya, tasked with promoting, protecting and upholding the rule of law and defending the public interest, within the meaning of Article 156 of the Constitution.

5. The 4th Respondent – **Airtel Networks Kenya Limited (or Airtel Kenya)** – (hereinafter referred to as “Airtel”) is a Mobile (and Fixed/Landline) Phone Service Provider on a variety of platforms operating in Kenya. The company has been sued for failing/refusing to pay some US\$27 million owed to the Authority in frequency license fees.

6. The 5th Respondent – **Ben Ngene Gituku** – is the Chairman of the Board of Directors of the Authority in which the management of the Authority is vested. He is sued herein for allegedly colluding with nefarious forces out to compromise the Authority since on 20th April 2016, he released a Press Statement justifying the irregular waiver of some Kshs 2.7 billion in frequency licence fees owed to the 1st Respondent by the 4th Respondent. It is pleaded that he also admitted at a Press Conference he and the Director General held on 20th April 2016 that the 1st to 6th Interested Parties were being hounded out of office because of the controversy surrounding the frequency license fees owed by the 4th Respondent.

7. The 5th Respondent – **Francis W. Wangusi** – is the Director General of the Authority (hereinafter referred to as the Director General) and is accused of irregularly and illegally awarding Airtel Kenya a waiver of some Kshs 2.7 billion in frequency licence fees owed to the 1st Respondent by the 4th Respondent. He also admitted at a Press Conference he and the Chairman held on 20th April 2016 that the 1st to 6th Interested Parties were being hounded out of office because of the controversy surrounding the frequency license fees owed by the 4th Respondent.

8. The 1st to 6th Interested Parties – **Peter Muniwoki Mutie, Kennedy Monchere Nyaundi, Wilbert Kipsang Choge, Grace Mwendwa Munjuri, Hellen Kinoti, Beatrice Opee**– it is pleaded are the bona-fide independent members of the Board of Directors of the Authority whom the CS purportedly sacked by declaring vacancies in their positions, and proceeded to replace them with new appointments to the Board, being the 8th to 14th Interested Parties.

9. The 7th Interested Party – **Adrian Kamotho Njenga** – was the successful ex-parte Applicant in JR No. 401 of 2014 who applied to be enjoined to these proceedings as an Interested Party.

10. The 8th to 14th Interested Parties – **Paul Kukubo, Mugambi Nandi, Kentice L. Tikolo, David Cheruiyot Kitur, Levi Obonyo Owino (Prof), Christopher Guyo Huka, Patricia W. Kimama** – it is pleaded were irregularly, on 29th April 2016, vide Gazette Notice No. 3152 of 4th May 2016, purportedly appointed the new independent members of the Board of Directors of the Communications Authority of

Kenya by the CS and were on 10th May 2016 officially inaugurated them into office by the CS.

11. The 15th Interested Party – **Principal Secretary/National Treasury** – (hereinafter referred to as “the PS”) is a state officer who is the administrator in charge of the National Treasury which formulates financial and economic policies and oversees effective coordination of Government financial operations. He wrote the letter Ref: ZZ/MOF 331/04, dated November 18, 2015, addressed to the Director General of the 1st Respondent, demanding payment to the Exchequer by the 4th Respondent of US\$ 27 million frequency licence fees.

12. The 16th Interested Party – **Carole Kariuki** – is described as the Chairperson, Selection Panel for the Appointment of Members of the Board of Communications Authority of Kenya who published the herein impugned Gazette Notice No. 1267, dated 25th February, 2016.

Petitioner’s Case

13. The facts of this petition, according to the petitioner herein, **Okiya Omtatah Okoiti**, are that on Saturday, February 06, 2016, national newspapers carried news items stating that the Authority’s Board of Directors had allegedly been disbanded by the CS who purported to have withdrawn appeals pending in the Court of Appeal which were filed severally by the Authority and by the 1st – 7th Interested Parties. It was averred that the alleged withdrawal of the appeals is a nullity in law since neither the Authority and the 1st – 6th Interested Parties approved the action. Further and in particular:

- a. There is no resolution of the independent Board of the Authority approving the withdrawal.
- b. There is no resolution of the by the 1st – 6th Interested Parties approving the withdrawal.
- c. Matters concerning public law cannot be withdrawn by a party without the endorsement of a judge.
- d. The application purported to have been withdrawn had already been heard and determined and orders were issued, which vested rights in the 1st to 6th and 12th Interested Parties.
- e. On 26th February 2016, the 1st to 6th Interested Parties filed Civil Appeal No. 35 of 2016 which is pending in the Court of Appeal.

14. According to the Petitioner, the purported withdrawal of the two appeals violates the independence of the Authority as provided for in Article 34(5) of the Constitution and in section 5A(1) of the **Kenya Information and Communications Act** (hereinafter, “the KICA”) and the rights of the Authority and the 1st – 6th Interested Parties to a fair trial contrary to Article 25(c), 48, and 50(1) of the Constitution.

15. The Petitioner averred that on Tuesday, 5th February, 2016, the CS published a special issue of the Kenya Gazette Vol. CXVIII–No. 11 containing Gazette Notice No. 698, backdated to 4th February 2016, purporting to declare vacancies in the positions of members of the board, illegally and unconstitutionally claiming to disband the 1st Respondent’s Board of Directors.

16. According to the Petitioner, frequency spectrum is a finite resource essential for mobile, television, security, satellite communication, aviation, broadcast, etc. thus prices are set as so to incentivise the most efficient use of frequencies which frequencies are not cheap anywhere in the world. It was pleaded that Airtel is yet to renew its frequency licence with the Authority of Kenya. Instead, it is using the Essar Telekom YU’s licence, whose operating licence (not frequency licence) and subscribers it acquired, in a buyout deal of Essar’s operations with rival Safaricom Limited. Airtel, it was pleaded, was first issued with the license in 2000 for 15 years, when it launched operations locally as Kencell but has over the years changed ownership and subsequently re-branded as Celtel, then Zain and now Airtel Kenya.

17. It was pleaded that the 1st to 6th Interested Parties are being irregularly and unlawfully removed from their offices as members of the 1st Respondent's Board for insisting that any applicable fees must be paid by Airtel before their licence is renewed and that the Essar licence they are currently operating under was not automatically transferable. It was reiterated that the purportedly disbanded Board's stand on the explosive matter of the outstanding Airtel frequency fees is the issue that prompted its disbandment. To the petitioner, the CS's decision to purport to fire and replace the Authority's Board is a deliberate attempt to get a subservient Board which will, among others, irregularly allow Airtel to operate without paying frequency licence fees. In the Petitioner's case, by refusing to pay the licence fees due, Airtel is denying Kenyans the much needed government revenue for development.

18. It was pleaded that on 9th February 2016, Airtel lodged an appeal with the CS for a waiver of the Kshs. 2.1 billion frequency licence fee demanded by the Authority. Vide a special issue of the Kenya Gazette Vol. CXVIII–No. 19 containing Gazette Notice No. 1267, dated to 25th February 2016, the Director General published a list of applicants and another of shortlisted candidates for appointment to the position of members of the Authority's Board of Directors.

19. It was disclosed that on 20th April 2016, the Director General released a Press Statement justifying the irregular waiver of some Kshs 2.7 billion in frequency licence fees owed to the Authority by airtel. He also admitted that the 1st to 6th Interested Parties were being hounded out of office because of the controversy surrounding the irregular waiver of frequency license fees owed to the Authority by Airtel. On 25th April 2016, the 1st, 3rd, 4th, and 6th Interested Parties issued a counter Press Statement on the controversy surrounding the irregular waiver of frequency license fees owed to the Authority by Airtel. They also released a letter Ref: ZZ/MOF 331/04 written by the 15th Interested Party, dated November 18, 2015, addressed to the Director General, demanding payment to the Exchequer by Airtel of US\$ 27 million frequency licence fees. Further, on Tuesday, 4th May 2016, the CS published a special issue of the Kenya Gazette containing Gazette Notice No. 3152 backdated to 29th April 2016, purporting to appoint the 8th to 14th Interested Parties to positions of members of the board, illegally and unconstitutionally claiming to establish a new Board of Directors of the 1st Respondent.

20. In the Petitioner's view, the purported disbandment of the Board is contemptuous of the orders of the Court of Appeal which restored the Board into office pending the hearing and determination of two appeals lodged severally by the Authority and the 1st – 6th and 12th Interested Parties, against the decision in JR No. 401 of 2014. In the Petitioner's view, the claim (in the mass media) that the Board was disbanded because the appeals pending in the Court of Appeal were withdrawn is false since the Authority and the 1st – 6th and 12th Interested Parties, who severally filed the two appeals, did not in any way whatsoever initiate, approve or authorize any withdrawal(s) hence the purported disbanding of the Board of Directors of the Authority by the CS is *ultra vires* the Constitution and the KICA and, therefore, null and void and of no consequence in law.

21. It was the Petitioner's case that Article 34(5)(a) of the Constitution establishes the 1st Respondent as a body independent of control by government, political interests or commercial interests while section 5A (1) of the KICA as amended in 2013 provides that, "*the Authority shall be independent and free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions.*" Further, section 6D (2) – (7) of the KICA provides an elaborate procedure for the removal of a member of the Board of the 1st Respondent, including the requirement for a recommendation by an independent tribunal appointed by the President that a member of the Board be removed from office. It was therefore contended that the clandestine attempt to disband the Board contrary to the law is part and parcel of a spirited campaign to hide the fact that the Authority and the 1st – 6th and 12th Interested Parties are under siege by corruption cartels within and without government.

22. Citing areas of contention the Petitioner contended that the disbandment has been precipitated by infighting between the Chairman (the 5th Respondent) and other Board members, instigated by insidious but powerful cartels and government officials keen to compromise the independence of the Board of the

Authority so that they can hijack the mandate of the Authority in discharging its key functions as an independent statutory regulatory organ.

23. The Petitioner argued that whereas the Constitution demands that the regulator should be free of Government, political or commercial control, the amendments wrought to the KICA by the SLMAA are designed to achieve the complete opposite. To him, the unilateral move by the 2nd and 3rd Respondents to withdraw the two appeals in the Court of Appeal without reference to both the Board of the Authority and to the 1st – 7th Interested Parties, if true as reported in the media, is highhanded and oppressive, and contrary to Article 73(1)(b) which states that Authority assigned to a State officer vests in the State officer the responsibility to serve the people, rather than the power to rule them. It was further averred that to the extent that Airtel's refusal to pay frequency licence fees denied the government the funds it requires for development, Article 43 of the Constitution on Economic and social rights. The Petitioner asserted that disbanding the Board of the Authority is violative of Articles 4(2), 10 and 47 of the Constitution on the rule of law to the extent that it is in contempt of the orders of the Court of Appeal and, further, there is no provision in law for disbanding the Board in the manner it is being done by the 2nd Respondent which action is violative of Section 6D of the KICA which secures the independence of the Board through vesting the individuals members of the Board with security of tenure by laying out an elaborate process for the removal of the Chairman and each member of the Board from office. In this respect the Petitioner contended that on Article 236 of the Constitution is violated to the extent that the 1st – 7th Respondents are being victimized by being dismissed for having performed the functions of office in accordance with the Constitution and the KICA.

24. It was averred that stripping the Authority of its independence through the SLMAA 2015 violates Article 34(5)(a) of the Constitution and section 5A of the KICA, which jointly state clearly that the Authority shall be independent and free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions. It was pleaded that by enacting the SLMAA, to amend the KICA contrary to Article 34(5)(a), the National Assembly violated Article 93(2), which decrees that Parliament shall perform its functions in accordance with the Constitution. To the extent that the amendments to the KICA were sneaked into Parliament through the SLMAA, Articles 4(2), 10, 118(1), 201(1), and 232(d) on transparency, accountability and public access and participation were violated. Further by failing and/or refusing to collect from Airtel Networks Kenya Limited the US\$27 million owed to the 1st Respondent in license fees, Article 210 was violated to the extent that the waiver was not as provided by legislation and violated Article 201(d) which decrees that public money shall be used in a prudent and responsible way and Article 43 by denying the State the funds it requires to ensure economic and social rights.

25. According to the Petitioner, the amendments wrought to the KICA by the SLMAA, violates Article 24, which sets the threshold for legislation limiting a right and fundamental freedom in the Bill of Rights, and also states that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity. However, the joint actions of illegally disbanding the Board of the 1st Respondent and stripping it of its independence fly in the face of Article 259(1) which decrees that the Constitution shall be interpreted in a manner that— (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.

26. While reiterating the foregoing the Petitioner relied on section 6(1) of the KICA, on the Board of the Authority, which states:

The management of the Authority shall vest on the Board, which shall consist of—

(a) a chairperson appointed by the President in accordance with section 6B;

(b) the Principal Secretary for the time being responsible for matters relating to broadcast, electronic, print and all other types of media;

(c) the Principal Secretary for the time being responsible for matters relating to finance;

(d) the Principal Secretary for the time being responsible for matters relating to internal security; and

(e) seven persons appointed by the Cabinet Secretary in accordance with section 6B.

27. To the Petitioner, the Board is the only centre of power at the Authority hence the executive organ or the management of the Authority cannot under the law be directed by the parent ministry on anything, let alone on the appointment or tenure of members of the Board. Decisions of the Board are paramount as per the provisions of the Act as read with Article 34(5) of the Constitution. In the performance of their clerical functions, management is under instruction of the Board which implements decisions made by the Board but does not have the capacity to make decisions that bind the 1st Respondent.

28. It was therefore submitted that when a suit is filed in Court against the Authority, only the Board, by a resolution, has the capacity to make a decision whether or not to defend the case. Also only the Board can make the decision to institute proceedings or to terminate/withdraw proceedings it has filed hence such decisions cannot be made by the management.

29. It was submitted that though on **29th May 2015**, the High Court nullified the appointment to the Board of the 1st – 6th and 12th Interested Parties, the Court on various dates granted orders staying the implementation of the decision. The 1st – 6th and 12th Interested Parties, as Members of the Board, resolved to appeal the High Court decision vide a Notice of Appeal dated 4th June 2015, and lodged it in the High Court on 5th June 2015. Later, and acting not as the Board but in their private capacities as individuals, the 1st – 6th and 12th Interested Parties appealed the decision vide a Notice of Appeal dated 9th June 2015 and lodged it in the High Court on 12th June 2015. Vide an application dated 15th June 2015, the Authority implementing the resolution of the Board to appeal the judgment in **Ex-parte Adrian Kamotho Njenga** (supra), filed Civil Application No. NAI 157 of 2015 (UR 28 of 2015), **Communications Authority of Kenya v Adrian Kamotho Njenga & 10 others [2015] eKLR**, seeking orders “staying the judgment and Decree of the superior court issued on 29th of May 2015 pending the hearing and final determination of the intended appeal which application was allowed by the Court of Appeal.

30. It was submitted that since the decision to appeal the judgment in **Ex-Parte Adrian Kamotho Njenga** (supra) was made by a resolution of the Board during the stays granted by the High Court, only the same Board could instruct management to withdraw it. Hence the purported withdrawal of the application/intended appeal was done without lawful and/or proper instructions. Since the Notice of Appeal dated 4th June 2015 and the Application dated 15th June 2015 were filed pursuant to the resolution and instructions of the Board of the 1st Respondent, the same could only be validly withdrawn in similar manner. But in the current circumstances, the 1st – 6th and 12th Respondents did not authorize such an undertaking, making any purported withdrawal a nullity in law. It was submitted that the three alternate directors and the Chairman do not constitute the Board of the 1st Respondent and have no capacity to act as the Board without the independent members since the quorum for board meetings is five (5) members out of the total eleven (11).

31. It was however submitted that since the Board was firmly in place, the only means available to anybody who wished to remove the 1st – 6th and 12th Interested Parties from office as members of the Board through administrative means was via a tribunal as provided for under Section 6D of the KICA. However, on 29th April 2016, in a case of clear political interference with the activities of the Board, contrary to articles 34(5) and 47 of the Constitution, and sections 5(A) and 6D of the KICA, the 2nd Respondent purported to appoint the 8th – 14th Interested Parties as new members of the Board, replacing the 1st – 6th and 12th Interested Parties.

32. It was submitted that the purported appointment, which is being challenged in these proceedings, was a culmination of the following administrative actions:

1) On 2nd February 2016, the Attorney General gave an advisory to the 2nd Respondent to the effect that, “the appeal is weak and you are best served reconsidering the same subject to concurrence by the Communications Authority who had also filed a notice of appeal on the matter. If the Communications Authority is agreeable you may withdraw the Notices of Appeal and initiate a fresh process of appointments pursuant to the relevant statutory provisions.”

2) On 3rd February 2016, the learned Counsel for the 1st Respondent, acting without instructions from the 1st Respondent (because the Board never instructed them), and contrary to the advice of the Attorney General, filed a *Notice of Withdrawal of the Application* in the Court of Appeal, purporting to withdraw the application which had already been heard and determined by the Court, and subsisting orders were in force. The learned counsel invoked Rule 68(1) and (2) of the Court of Appeal Rules 2010. The purported withdrawal of the Application is a nullity in law for being premised on the wrong law, i.e., Rule 68(1) and (2) of the Court of Appeal Rules, which provide for the withdrawal of appeals not of applications. The purported withdrawal could only have been made pursuant to Rule 81 not Rule 68(1) and (2).

3) There is no evidence before this Court of compliance with Rule 81, showing that those purporting to have withdrawn the appeals wrote to all parties who had been served. Further, it is the Application not the Notice of Appeal that was purportedly withdrawn.

4) Strangely, in what was a clear fraud on the Kenyan public, and an incontrovertible evidence of political interference with the CA, the Honourable Attorney General, clearly acting against his own advisory opinion, wherein he clearly states that only two Notices of Motion were filed, one by the CA and another by the 1st -6th and 12th Interested Parties in their private capacities, purported to also withdraw a non-existent Notice of Motion, purportedly filed by the Ministry. Ministry never filed a Notice of Appeal dated 3rd June 2015 as claimed in the 2nd Respondent’s Replying Affidavit dated 11th February 2016.

5) On 4th February 2016, vide Gazette Notice No. 698, published in a special issue of the Kenya Gazette of 5th February 2016, the 2nd Respondent declared vacancies in the positions of members of the Board of the 1st Respondent and invited applications for filling the same.

6) On 25th February 2016, vide Gazette Notice No. 1267, published in a special issue of the Kenya Gazette of 26th February 2016, the 16th Interested Party printed the names of all applicants and shortlisted candidates for vacancies on the Board.

7) On 29th April 2016, following a lifting by the Industrial Court of the temporary injunction it had imposed freeing the recruitment process, the 2nd Respondent, vide Gazette Notice No. 3152, published in a special issue of the Kenya Gazette of 4th May 2016, appointed the 8th – 14th Interested Parties to be members of the Board.

33. To the Petitioner submits the actions which were taken in quick succession resulting in the purported removal of the 1st – 6th and 12th Interested Parties as members of the Board, are a nullity in law *ab initio* and that the actions were and remain invalid in law for the following reasons:

a. It is not in dispute that at the time the 2nd Respondent, purportedly acting on the advice of the Attorney General, decided to discontinue/withdraw “all that application dated 15th June 2015,” the 1st – 6th Interested Parties had been reinstated as members of the Board in a decision the Court had made in the same application. Hence, it required a resolution of the same Board, which was validly in office, and the endorsement of the Court of Appeal, to discontinue/withdraw the application.

b. Since the Court of Appeal had heard and determined the 1st Respondent's application dated 15th June 2015, the same could not be withdrawn by any party or parties. The only action that could be taken would have been filing an application to set aside/vacate the ruling and the orders of the Court of Appeal.

c. The purported Notice of Withdrawal is not accompanied by a Notice of Motion, or any application, seeking any relief(s) from the Court.

d. The Court of Appeal had already expressed itself on the Application and its decision in Civil Application No. Nai 157 of 2015 cannot be so casually set aside unilaterally by a litigant or litigants acting outside the Court. Even where all litigants are in total agreement, Court decisions can only be set aside by the Court which made them, or by a higher Court, following due process in law, which includes moving the Court properly via an application to the Court. Litigants have no capacity to just notify the Court that they have set aside or vacated its orders, and that that is how matters will be.

e. To prove that their purported withdrawal was valid, the 2nd, 3rd, and 5th Respondents need to present for scrutiny by this Court the orders the Court of Appeal made setting aside or vacating stay orders the Court issued in Civil Application No. Nai 157 of 2015.

f. The 1st – 6th and 12th Interested Parties had jointly in their private individual capacities filed and duly served their own Notice of Appeal which was on record when Civil Application No. Nai 157 of 2015 was heard and determined, with their active participation. Hence, the Orders in Civil Application No. Nai 157 of 2015 did not only vest them with rights in their corporate capacity but also in their private capacities. And they could only be stripped of these rights via the same Court or the Supreme Court.

g. The irregular dismissal of the 1st – 6th and 12th Interested Parties affects, nay, undermines the public interest in the rule of law and the good governance of the 1st Respondent.

h. The very clear instructions of the Hon. Attorney General on how to withdraw the appeals was not followed at all: (i) The Board was not consulted to get its concurrence, and (ii) whatever was purportedly withdrawn did not have any impact on the two Notices of Appeal filed in matter in the High Court; on the orders of the Court of Appeal in Civil Application No. 157 of 2015.

i. The purported withdrawal was invalid as it was made under Rule 68 (1) and (2), which relates to criminal appeals, and not Rule 96 of the Court of Appeal Rules 2010.

j. The purported withdrawal was also invalid since copies of the purported Notice of Withdrawal were never and have never been served on the 1st – 6th Interested Parties herein who are also parties in those proceedings.

k. The purported withdrawal of the Application is also a nullity in law for being premised on Rule 68(1) and (2) of the Court of Appeal Rules, which provide for the withdrawal of appeals not of applications, or of Notices of Appeal.

l. The 2nd, 3rd and 5th Respondents have presented for scrutiny before this Court a copy of a document dated 3rd of February 2016 and filed in the Court of Appeal Registry on the same date, titled **Notice of Withdrawal of Application**, purporting to have “*wholly discontinued/withdrawn all that application dated 15th June 2015 and the intended appeal against the Respondents herein in this matter with no orders as to Costs.*”

m. The 2nd, 3rd and 5th Respondents are incomprehensibly urging this Honourable Court that their *Notice of Withdrawal of Application*, which is itself a nullity in law, which is structured like a

decision of the Court of Appeal, and in which they have usurped the powers of the Court to even declare that there are “no orders as to Costs,” vacated the orders of the Court of Appeal in Civil Application No. Nai 157 of 2015, staying the decision of this Court in JR No. 401 of 2014. And that as the inevitable consequence of their unilaterally vacating the orders, the 1st – 7th Respondents were effectively dismissed by the Judgment and Decree this Court delivered on 29th May, 2015 in JR No. 401 of 2014.

n. It is clear from above that no valid application was filed in the Court of Appeal Registry to discontinue/withdraw the intended appeals.

o. Since the proceedings at both the High Court and at the Court of Appeal concern(ed) public law, and public law matters affect other people not just the litigants, they cannot be withdrawn by notice filed in the registry. A judge must hear the parties on the application and make a decision either endorsing or rejecting the withdrawal.

p. Evidence that the appeals were not withdrawn includes the following actions which have taken place after the purported withdrawal, and which would be impossible if indeed the appeals had been withdrawn.

q. On 11th February 2016, the 1st – 6th and 12th Interested Parties filed a Notice of Motion application, dated 10th February 2016, in Civil Application No. NAI 157 of 2015 (UR 28/2016) seeking to commit the 2nd Respondent for contempt of court;

r. On 25th February 2016, the 1st – 6th and 12th Interested Parties filed Civil Appeal No. 35 of 2016 against the judgment and decree in JR Misc. Application No. 401 of 2014;

s. On 27th April 2016, the 1st – 6th and 12th Interested Parties filed Civil Application No. 103 of 2016 seeking to preserve the status quo as ordered on 31st July 2015 in Civil Application No. NAI 157 of 2015 (UR 28/2015) pending the hearing and determination of Civil Appeal No. 35 of 2016;

t. On 28th February 2016, the Petitioner filed a Notice of Motion Application dated 29th February 2016, in Civil Application No. NAI 157 of 2015 (UR 28/2016) seeking to be enjoined in the proceedings in Civil Appeal No. 35 of 2016.

34. According to the Petitioner, being parties to Civil Application No. NAI 157 of 2015, the rights of the 1st – 6th and 12th Interested Parties were violated and the parties were adversely affected by not being party to the purported withdrawal. To him, the orders of the Court of Appeal vested rights in the 1st – 6th and 12th Interested Parties, which rights could not be extinguished by administrative action. Only a judicial pronouncement by a competent Court could extinguish the rights. The 1st Respondent (even with the support of the 2nd Respondent) could not purport to arbitrarily revoke the orders of the Court of Appeal, without following the due process of law. All procedures related to the vacation of Court orders must be strictly adhered to.

35. It was submitted that being a mere advocate of the 1st Respondent, M/s. Mohammed & Kinuangui Advocates, had/has no capacity or locus in law to make decisions for the Authority. The learned counsel is only empowered to act on clear instruction of the Board channelled through the secretariat headed by the Director General. And the Director General too, being a mere clerk to the Authority, cannot make decisions for the Authority as he and the secretariat he heads only exist to implement decisions of the Board. To him, by dint of sections 107 – 109 and 120 of the **Evidence Act**, the burden of proof was on the Director General and M/s. Mohammed & Kinyanjui Advocates to demonstrate to the Court of Appeal that they were duly authorized by the Board to discontinue/withdraw the application.

36. It was contended that the purported withdrawal was also invalid for noncompliance with Order 9 Rule 2(a) and 2(c) of the **Civil Procedure Rules 2010** as read with Article 156 (4) and (6) of the Constitution

and that no evidence was placed before the Court of Appeal to demonstrate that the Board had duly authorized the purported withdrawal. Consequently, the purported withdrawal is also invalid for being contrary to Article 47 of the Constitution and the ***Fair Administrative Action Act 2015***, which gives effect to Article 47 of the Constitution.

37. The Applicant/Petitioner submitted that since the purported withdrawal of the appeals was and remains a nullity in law, the subsequent actions which were taken in quick succession resulting in the purported removal of the 1st – 6th and 12th Interested Parties as members of the Board, are equally nullity in law *ab initio*. The actions were and remain invalid in law, and this Court should not hesitate to restore them to their offices as members of the board. Accordingly, the 1st – 6th and 12th Interested Parties are the bona-fide members of the Board of the 1st Respondent, having been restored to that capacity following stay Orders issued by the Court of Appeal in Civil Application No. 157 of 2015, which suspended the execution of the orders issued by the High Court in JR Misc. Application No. 401 of 2014. Only the Court of Appeal Judges can vacate the orders of the Court, when properly moved. The Orders of a court cannot be vacated or varied by being withdrawn. It was contended that the attempt to withdraw the motions in the Court of Appeal has not been successful as the purported withdrawal has not been adopted by the court.

38. The Petitioner asserted that the 1st – 6th and 12th Interested Parties had discharged their mandate in an exemplary manner and should not be victimised contrary to Article 236 of the Constitution hence the this Court should restore them to office. In this respect it was submitted that Kenya is a constitutional democracy where the rule of law and due process are paramount as stated in the Court of Appeal decision in **Civil Application No. NAI. 43 of 2006 (24/2006), Christopher Ndarathi Murungaru vs. Kenya Anti-Corruption Commission & another [2006] eKLR.**

39. It was therefore contended that this Court should award **Prayers a – f and q – v.**

40. With respect to whether the process of amending and the amendments to the ***Kenya Information and Communications Act*** through the ***Statute Law (Miscellaneous Amendments) Act***, are violative of the Constitution (Payers g – j and n – o) it was submitted that the ***Statute Law (Miscellaneous Amendment) Bill, 2015*** was published on 18th September 2015 by the National Assembly, and the House debated and passed the Bill on 1st December, 2015.

41. It was contended that the Bill sought to make minor amendments to various statutory enactments, including to the Kenya Information and Communications Act. The Memorandum of Objects and Reasons of the Bill as published in a Special Issue of the Kenya Gazette – Supplement No. 164 (National Assembly Bills No. 57), according to the Petitioner falsely stated that the Bill was ***“in keeping with the practice of making minor amendments which do not merit the publication of a separate Bill and consolidating them into one Bill.”*** The Memorandum noted further, with regard to the KICA, that, ***“The Bill seeks to amend the Kenya Information And Communications Act, 1998 (No.2 of 1998) so as firstly to align it with the Competitions Act, 2014 in respect of the criteria for being a dominant market undertaking and secondly to harmonize the regulation making power so that it is exercised by the Cabinet Secretary in consultation with the Authority.”***

42. According to the Petitioner, clearly, the intent of the amendments was to concentrate power away from the 1st Respondent, contrary to Articles 34(5)(a) and 93(2) of the Constitution. To him, a function already given to the Commission by the Constitution cannot be re-assigned in any way, including through legislation, to the executive. It was therefore submitted that the fact that the impugned extensive controversial and substantive amendments to the KICA, affecting the constitutional independence of the Commission, were by trickery effected via a Miscellaneous Amendments Bill raise the all-important question of the validity of the National Assembly using omnibus bills to effect substantive amendments to specific parts of law. It was submitted that omnibus bills should deal with minor and non-controversial amendments hence the (miscellaneous amendments) process employed to amend the KICA was defective, fraudulent, and unconstitutional, hence, the outcome is a nullity in law *ab initio*.

43. According to the Petitioner, further particulars of invalidity include the following:

a. Hidden away in the ***Statute Law (Miscellaneous Amendments) Bill, 2015***, the far reaching controversial and substantive changes to the KICA were NOT subjected to effective public participation and stakeholder consultation. Generally, public participation ought to seek and facilitate the involvement of those potentially affected by or interested in a decision.

b. The amendments to the KICA were not miscellaneous but controversial and substantial and should not have been contained in the Statute Law (Miscellaneous Amendments) Bill. They required their own standalone bill as to attract the attention of the public and to have the time for debating them.

c. The Statute Law (Miscellaneous Amendments) provision is an editorial tool to be used to correct anomalies, inconsistencies, out-dated terminology or errors which are minor, non-controversial amendments to a number of statutes at once, in one bill, instead of making such amendments incrementally, when a particular statute is being amended in the context of a separate legislative initiative.

d. However the Statute Law (Miscellaneous Amendments) Bill, 2015 proposed and made far reaching amendments to many statutes, including the KICA.

e. Article 118 of the Constitution states that Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its committees. This was undermined by using an omnibus miscellaneous amendment bill to make controversial and substantive amendments to the KICA, which consequently deprived the public of their right of participation and debate in the process.

f. Generally public participation seeks and facilitates the involvement of those potentially affected by or interested in a decision and reliance was placed on the holding in **Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhehia Workers) vs. Salaries and Remuneration Commission, Petition No. 294 of 2013**, in which the Court held that:

“Public participation as a national value is recognized under Article 10 of the Constitution. The Constitution at Article 94 has vested legislative authority of the people of Kenya in Parliament and Article 118 has provided for public participation and involvement in the legislative business.”

g. The two Statute Law (Miscellaneous Amendments) Bills, 2015 have not been subjected to reasonable and meaningful public participation and stakeholder consultation. The impugned amendments were invalidated by the fact that there was NO compliance with the principle of public participation.

h. Constitutional audit by the responsible institution such as the Kenya Law Reform Commission is necessary to ensure that the proposed amendments to the law are in compliance with the Constitution. The same was inhibited due to the short period availed from the date of publication of the Statute Law (Miscellaneous Amendments) Bill 2015, taking into account several laws that were to be impacted by the proposed amendments to the law.

i. Statute Law amendments have become the avenue for sneaking offending clauses into the law as demonstrated in several instances such as in the case of security laws Amendment Act 2014.

j. Statute Law (Miscellaneous Amendments) Bill, 2015 amended, among others, by defining dominance in telecommunication sector and transfer of regulation from the Communication Authority of Kenya to Competition Authority of Kenya. Even if there were compelling reasons for the proposed amendments, the Cabinet Secretary for Ministry of Information, Communications and Technology by a letter dated 27th October 2015 disassociated himself from the proposed

amendments and took exception that such far reaching amendments can be proposed without the courtesy of according the line Ministry any opportunity for consultations.

k. Article 132(3) (c) of the Constitution states that the President shall by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. Hence the enquiry by the Cabinet Secretary to the Attorney General as to who is the originator of the amendments to KICA.

l. This clearly shows that office of the Attorney General has been infiltrated and captured by individuals and interest groups who by unknown means are able to ensure that they insert legislative proposals in Statute Law (Miscellaneous Amendments) Bills without both the knowledge and approval of Cabinet Secretaries of the line Ministries.

m. From the National Assembly, Official Report, Thursday, 29th October, 2015, it is clear that the MPs were aware of the unconstitutionality of the changes to the KICA.

44. It was submitted that the amendments to the KICA were not miscellaneous but controversial and substantial and should not have been contained in the Statute Law (Miscellaneous Amendments) Bill 2015. Hence, they are a nullity *ab initio*.

45. In his support the Petitioner cited *Law Society of Kenya v the Attorney General*, Constitutional Petition No. 3 of 2016, in which a five judge bench of this Court held that:

234. It is therefore clear that both on policy and good governance, which is one of the values and principles of governance in Article 10 of the Constitution, which values and principles form the foundation of our State and Nation as decreed in Article 4(2) of the Constitution, omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house-keeping amendments.

46. By giving the 2nd Respondent the authority to make decisions crucial to the day to day running of the Authority, it was submitted that the impugned amendments erode the autonomy granted to the 1st Respondent vide Article 34(5) of the Constitution. By dint of Article 93(2), Parliament cannot enact a law contrary to Article 34(5)(a) of the Constitution, without meeting the threshold for limiting rights provided in Article 24.

47. According to the Petitioner the impugned amendments wrought to the KICA by the SLMAA undermines the autonomy of the 1st Respondent in the following material ways:

a. Amendments to s. 2, s.84W(4), and s.84W(5): They take away the 1st Respondent's autonomous power to declare dominance in the sector, and subjects the Board to the Competition Authority of Kenya.

b. Amendments to s.5B(5), s.27D, s.40(1), s.46(1)(b), s.46(3), s.83C(2), s.83V, and s.85A(3)): They force the 1st Respondent to consult the 2nd Respondent before taking any action.

48. It was the contention of the Petitioner that stripping the Authority of its independence through the SLMAA 2015 violates Article 34(5)(a) of the Constitution and Section 5A of the KICA, which jointly state clearly that the 1st Respondent shall be independent and free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions. Further, by enacting the SLMAA, to amend the KICA contrary to Article 34(5)(a), the National Assembly violated Article 93(2), which decrees that Parliament shall perform its functions in accordance with the Constitution.

49. It was his case that the amendments to the KICA by the SLMAA, violates Article 24, which sets the

threshold for legislation limiting a right and fundamental freedom in the Bill of Rights, and also states that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity. It was however submitted that contrary to Article 24(2)(a) of the Constitution, the amendments to the KICA do NOT specifically express the intention to limit the enjoyment of rights in Article 34(5)(a) and the nature and extent of the limitation and that contrary to Article 24(2)(b) of the Constitution, the Statute Laws (Amendments) Bill 2015, is not clear and specific that the amendments to the KICA about limiting the enjoyment of rights in Article 34(5)(a).

50. The Petitioner alleged that copies of documents showing how vested interests have pushed the amendments in a manipulative manner are annexed to the Petition. To him, if this Court does not quash the amendments to the KICA, the public interest in the autonomy of the Board will be defeated by self-seekers and other “do-no-gooders” who are pushing the amendments, and will exploit them to undermine the intention of the sovereign people in Article 34(5)(a).

51. Accordingly, the Court was urged to award **Payers g – j and n – o**.

52. As regard the issue whether the 4th Respondent (Airtel) should be compelled to pay the US\$27 million licence fees to the 1st Respondent (Prayers k – m), the Petitioner relied on his affidavits in record. It was submitted that in granting the waiver, the Director General of the 1st Respondent violated Article 210 of the Constitution to the extent that the waiver was not as provided by legislation. The Article states categorically that:

No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

53. In the Petitioner’s view, given the incontrovertible evidence placed before this Honourable Court, it is obvious that Airtel should pay the outstanding and long overdue frequency licence fees. He also pointed out that the culpability of the 5th and 6th Respondents in the scam to grant Airtel an illegal waiver is communicated in the Press Statement by the 5th Respondent.

54. For reasons given above, it was submitted that the Court should award **Prayers k – m**.

55. Dealing with the issue whether the Board of the 1st Respondent should conclude and release the results for the forensic audits, including, where necessary, to the Director of Public Prosecutions and to the Ethics and Anti-Corruption Commission (prayer x). It was submitted that in the spirit of transparency, accountability and provision to the public of timely, accurate information pursuant to Article 10(2)(c), 73(d), and 232(f), the forensic audit report ought to be released to the public.

56. The Court was therefore urged to direct that the document should be released to the public, including being placed before the Director of Public Prosecutions and the Ethics and Anti-Corruption Commission for possible criminal investigations and criminal prosecutions.

57. For reasons given above, the Honourable Court was urged to award **Prayer x**.

58. As regards the issue of costs, it was submitted that it is trite law that costs follow the event hence the Petition should be allowed with the 1st, 2nd, 3rd, 4th, 5th, and 6th Respondents being condemned to bear costs.

59. The Court was therefore urged to determine the following questions:

A. Whether Gazette Notice No 698 of 5th February 2016 declaring vacancies in the positions of members of the Board of Directors of the 1st Respondent, is a nullity in law.

B. Whether the Honourable Court should quash Gazette Notice No 698 of 5th February 2016

declaring vacancies in the positions of members of the Board of Directors of the 1st Respondent.

B1. Whether Gazette Notice No. 1267 of 25th February 2016, giving a list of applicants and the shortlist and the interview dates of the 8th to 14th Interested Parties as new members of the Board of Directors of the 1st Respondent, is a nullity in law.

B2. Whether the Honourable Court should quash Gazette Notice No 1267 of 25th February 2016 appointing the 8th to 14th Interested Parties as new members of the Board of Directors of the 1st Respondent.

B3. Whether Gazette Notice No 3152 of 4th May 2016 appointing the 8th to 14th Interested Parties as new members of the Board of Directors of the 1st Respondent, is a nullity in law.

B4. Whether the Honourable Court should quash Gazette Notice No 3152 of 4th May 2016 appointing the 8th to 14th Interested Parties as new members of the Board of Directors of the 1st Respondent.

B5. Whether any actions and/or omissions by the 8th to 14th Interested Parties, while purporting to act as members of the Board of the 1st Respondent, are null and void *ab initio* and, therefore, of no consequence in law.

B6. Whether the purported licence fees waiver irregularly granted to the 4th Respondent is a nullity in law.

B7. Whether the 1st to 6th Interested Parties should be restored to office as the bona-fide members of the Board of Directors of the 1st Respondent.

C. Whether the amendments wrought to the Kenya Information and Communications Act through the Statute Law (Miscellaneous Amendments) Act 2015, are violative of Article 34(5) of the Constitution by imposing Government, political or commercial control over the 1st Respondent.

D. Whether by enacting the Statute Law (Miscellaneous Amendments) Act 2015, to amend the Kenya Information and Communications Act contrary to Article 34(5)(a), the National Assembly violated Article 93(2), which decrees that Parliament shall perform its functions in accordance with the Constitution.

E. Whether to the extent that the amendments to the Kenya Information and Communications Act were sneaked into Parliament through the Statute Law (Miscellaneous Amendments) Act 2015, Articles 4(2), 10, 118(1), 201(1), and 232(d) on transparency, accountability and public access and participation were violated.

F. Whether the amendments wrought to the Kenya Information and Communications Act by the Statute Law (Miscellaneous Amendments) Act 2015, violate Article 24, which sets the threshold for legislation limiting a right and fundamental freedom in the Bill of Rights.

G. Whether by failing and/or refusing to collect from Airtel Networks Kenya Limited the US\$27 million owed to the 1st Respondent in license fees, the Director General of the 1st Respondent violated Article 210 to the extent that the waiver was not as provided by legislation.

H. Whether the Honourable Court should quash the frequency license fees waiver and Order

the 4th Respondent (Airtel) to pay the US\$27 million due to the 1st Respondent.

I. Whether the Honourable Court should prohibit the 2nd and 3rd Respondents from interfering with the independence of the 1st Respondent as provided for in Article 34(5)(a) of the Constitution and Section 5A(1) of the Kenya Information and Communications Act.

J. Whether the Honourable Court should quash all amendments made on 15th December 2015 to the Kenya Information and Communications Act by the Statute Law (Miscellaneous Amendments) Act 2015.

K. Whether the bona-fide Board of the 1st Respondent should conclude and release the results for the forensic audits, including, where necessary, to the Director of Public Prosecutions and to the Ethics and Anti-Corruption Commission.

L. Whether the 2nd, 3rd, 4th and 5th Respondent should bear the costs of this Petition for being the parties directly responsible, through their actions and/or omissions, for the violations of the Constitution and the law which necessitated the Petitioner to seek remedy in the Honourable Court.

60. The Court was further urged to make the following declarations and issue the following orders:

a. A Declaration be and is hereby issued that Gazette Notice No 698 of 5th February 2016, declaring vacancies in the positions of members of the Board of Directors of the 1st Respondent, is a nullity in law.

a1) A Declaration be and is hereby issued that Gazette Notice No. 1267 of 25th February 2016, giving a list of applicants and the shortlist and the interview dates of the 8th to 14th Interested Parties as new members of the Board of Directors of the 1st Respondent, is a nullity in law.

a2) A Declaration be and is hereby issued that Gazette Notice No 3152 of 4th May 2016 appointing the 8th to 14th Interested Parties as new members of the Board of Directors of the 1st Respondent, is a nullity in law.

a3) A Declaration be and is hereby issued that any actions and/or omissions by the 8th to 14th Interested Parties, while purporting to act as members of the Board of the 1st Respondent, are null and void *ab initio* and, therefore, of no consequence in law.

a4) A Declaration be and is hereby issued that the purported licence fees waiver irregularly granted to the 4th Respondent is a nullity in law.

a5) A Declaration be and is hereby issued that the 1st to 6th Interested Parties should be restored to office as the bona-fide members of the Board of Directors of the 1st Respondent.

b) A Declaration be and is hereby issued that the amendments wrought to the Kenya Information and Communications Act through the Statute Law (Miscellaneous Amendments) Act, are violative of Article 34(5)(a) of the Constitution by imposing Government, political or commercial control over the 1st Respondent.

c) A Declaration be and is hereby issued that by enacting the Statute Law (Miscellaneous Amendments) Act 2015, to amend the Kenya Information and Communications Act contrary to Article 34(5)(a), the National Assembly violated Article 93(2), which decrees that Parliament shall perform its functions in accordance with the Constitution.

- d) A Declaration be and is hereby issued that to the extent that the amendments to the Kenya Information and Communications Act were sneaked into Parliament through the Statute Law (Miscellaneous Amendments) Act 2015, Articles 4(2), 10, 118(1), 201(1), and 232(d) on transparency, accountability and public access and participation were violated.
- e) A Declaration be and is hereby issued that the amendments wrought to the Kenya Information and Communications Act by the Statute Law (Miscellaneous Amendments) Act 2015, violate Article 24, which sets the threshold for legislation limiting a right and fundamental freedom in the Bill of Rights.
- f) A Declaration be and is hereby issued that by failing and/or refusing to collect from Airtel Networks Kenya Limited the US\$27 million owed to the 1st Respondent in license fees, the Director General of the 1st Respondent violated Article 210 of the Constitution to the extent that the waiver was not as provided by legislation.
- g) The Honourable Court do issue and hereby issues a mandatory order quashing the license fees waiver irregularly given to Airtel Networks Kenya Limited by the Director General of the 1st Respondent.
- h) The Honourable Court do issue and hereby issues a mandatory order compelling the 4th Respondent (Airtel) to pay the US\$27 million licence fees to the 1st Respondent.
- i) The Honourable Court do issue and hereby issues a mandatory order prohibiting the 2nd and 3rd Respondents from interfering with the independence of the 1st Respondent as provided for in Article 34(5) of the Constitution and Section 5A(1) of the Kenya Information and Communications Act.
- j) The Honourable Court do issue and hereby issues a mandatory order quashing all amendments made on 15th December 2015 to the Kenya Information and Communications Act by the Statute Law (Miscellaneous Amendments) Act 2015.
- k) The Honourable Court do issue and hereby issues a mandatory order compelling the Board of the 1st Respondent to conclude and release the results for the forensic audits, including, where necessary, to the Director of Public Prosecutions and to the Ethics and Anti-Corruption Commission.
- l) The Honourable Court do issue and hereby issues a mandatory order quashing the 2nd Respondent's Gazette Notice No 698 of 5th February 2016 declaring vacancies in the positions of members of the Board of Directors of the 1st Respondent.
- 11) The Honourable Court do issue and hereby issues a mandatory order quashing Gazette Notice No 698 of 5th February 2016 declaring vacancies in the positions of members of the Board of Directors of the 1st Respondent.
- 12) The Honourable Court do issue and hereby issues a mandatory order quashing the Gazette Notice No 1267 of 25th February 2016 appointing the 8th to 14th Interested Parties as new members of the Board of Directors of the 1st Respondent.
- 13) The Honourable Court do issue and hereby issues a mandatory order quashing the Gazette Notice No 3152 of 4th May 2016 appointing the 8th to 14th Interested Parties as new members of the Board of Directors of the 1st Respondent.
- 14) The Honourable Court do issue and hereby issues a mandatory order restoring the 1st to

6th Interested Parties to office as members of the Board of Directors of the 1st Respondent.

l5) The Honourable Court do issue and hereby issues a mandatory order prohibiting the Director General and the management of the 1st Respondent from denying the 1st to 6th Interested Parties access to their offices and ordering them to reinstate all services that the 1st to 6th Interested Parties are entitled to as members of the Board of the Communications Authority of Kenya, including providing an updated calendar of events, facilitating meetings, and providing medical, broadband and communications allowances.

m) The Honourable Court be pleased to issue any other or further remedy that the Honourable Court shall deem fit to grant in the interests of justice in the circumstances of this Petition.

n) The Honourable Court be pleased to issue an order ordering the 2nd, 3rd, 4th and 5th Respondents to bear the costs of this Petition for being the parties directly responsible, through actions and/or omissions, for the violations of the Constitution and the law which necessitated the Petitioner to seek remedy in the Honourable Court.

1st, 5th and 6th Respondents' Case

61. The 1st, 5th and 6th Respondents opposed the petition.

62. According to the said Respondents, the Petition herein fails to meet the threshold of a constitutional petition as enunciated in **Anarita Karimi-vs-Republic [1976-80] 1 KLR 1272** and later and more profoundly in the Court of Appeal decision in **Mumo Matemu-vs-Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012** and more recently upheld by the Supreme Court in **Communications Commission of Kenya & 5 Others-vs-Royal Media Services Limited & 5 others [2014] eKLR**.

63. this petition hopelessly fails to meet the threshold of a constitutional petition. All that the petitioner is seeking is a reinstatement of the interested parties to their positions as Board members of the Communications Authority of Kenya in a cleverly drafted petition disguised as a public interest “constitutional petition”.

64. It was averred that vide a judgment in **High Court Miscellaneous Civil Application No. 401 of 2014** delivered on the 29th May 2015, this Court effectively disbanded the 1st Respondent’s entire Board and that the 1st Respondent being aggrieved by the said Judgment filed a Notice of Appeal and an application for stay of execution pending appeal being Civil Application No. Nai 157 of 2015 in the Court of Appeal. Vide a Ruling dated 31st July 2015, the Court of Appeal ordered a stay of execution of the said judgment and effectively retained the 1st Respondent’s entire Board in office pending the hearing and determination of the intended appeal.

65. It was disclosed that vide a legal opinion dated 2nd February 2016, the 3rd Respondent advised the 2nd Respondent, to consider withdrawing the Notice of Appeal that gave rise to Civil Application No. Nai 157 due to the weakness of the intended appeal and initiate fresh recruitment of the 1st Respondent’s Board in tandem with the said judgment and the provisions of the ***Kenya Information and Communications Act***. Consequently on the 3rd February 2016, the 1st Respondent elected to heed the 3rd Respondent’s opinion and advise and instructed its Advocates to withdraw the intended appeal. The said Advocates therefore filed a Notice of Withdrawal of the Application and the Intended Appeal which Notice stated as follows:

“.....the Appellant/Applicant herein, COMMUNICATIONS AUTHORITY OF KENYA, has wholly discontinued/withdrawn all that application dated 15th June 2015 and the intended appeal against the Respondent herein in this matter with no order as to cost.”

66. In the said Respondents' view, clearly, the intention manifested was to withdraw the Application dated 15th June 2015 (the stay Application) and also the intended appeal. According to the said Respondents a court of law should not pay homage to procedural technicalities at the expense of substantive justice but should be able to discern the intention of the maker of a document (pleadings included) from the wording of the document and all the surrounding circumstances of the case so as to do justice to the parties. In their view, looking at the said Notice of Withdrawal as drafted and as filed, the intention of the maker as can be clearly discerned is that the Appellant/Applicant was abandoning/and or discontinuing the Stay Application together with the intended Appeal. Procedural defects (if any) in the said Notice would be cured by the maker's intention which is clearly manifested on the face of the Notice. The Respondents relied on Article 259 of the Constitution 2010 as read with section 3A of the Civil Procedure Act. Any reasonable person looking at the said Notice of Withdrawal would easily discern the intentions of the maker i.e. to withdraw both the Application and the Intended Appeal at the Court of Appeal.

67. It was further contended that since pursuant to Rule 82 of the Court of Appeal Rules, 2010, the substantive appeal must be filed within sixty days of filing of the Notice of Appeal, it reasonably follows that since the Notice of Appeal was lodged in the superior court on the 5th June 2015, the 1st Respondent herein opted not to institute a substantive appeal within the requisite time of sixty days and pursuant to Rule 83 of the **Court of Appeal Rules, 2010**, the said Notice of Appeal is deemed to have been withdrawn by effluxion of time and effectively discharging orders of stay of execution issued by the Court of Appeal.

68. It was therefore the said Respondent's position that the stay of execution pending appeal orders issued by the Court of Appeal on the 31st July 2015, have lapsed by effluxion of time and in effect reverted to the position *ante* when this had disbanded the 1st Respondent's Board vide his judgment delivered on the 29th May 2015 in **High Court Miscellaneous Civil Application No. 401 of 2014.**

69. It was therefore averred that it reasonably follows that the 2nd Respondent's decision to commence fresh recruitment of the 1st Respondent's Board was in tandem with the provisions of the **Kenya Information and Communications Act**, was devoid of any *mala-fides* nor illegality as alleged by the Petitioner herein.

70. It was in any case averred that the issue as to whether or not the intended appeal was validly withdrawn or whether the 1st Respondent is in contempt of the Court of Appeal Orders, are live issues before the Court of Appeal in Civil Application No. NAI 157 OF 2015 which is still pending determination and this Court is not the appropriate forum to ventilate the same.

71. The Respondents insisted that the disbandment of the 1st Respondent's Board was pursuant to the judgment of this Court which no other court has overturned or set aside to date and therefore the same cannot be construed as being unconstitutional.

72. It was their case that the inclusion of the word 'consultation' in the **Statute Law Miscellaneous Amendment Act 2015** does not *ipso facto* strip the 1st Respondent of its independence as the same merely connotes the seeking of an opinion, which opinion is not binding. The same is merely directory and not mandatory thus leaving the discretion with the 1st Respondent. To them, even with the amendments by the **Statute Law Miscellaneous Amendment Act 2015**, the 1st Respondent is merely obligated to inform the 2nd Respondent of its policies and therefore not stripped of its independence as envisaged by Article 34(5) of the Constitution of Kenya, 2010. To them, if indeed the intention of the legislature was that the 1st Respondent would be bound by such opinion of the 2nd Respondent, the **Statute Law Miscellaneous Amendment Act 2015** would have expressly provided as such.

73. It was asserted that the Petitioner herein has failed to demonstrate to this Court with reasonable precision which particular provisions of the Constitution of Kenya, 2010 have been violated by the 1st, 5th and 6th Respondents. Further, apart from citing omnibus provisions of the Constitution of Kenya, 2010, the Amended Petition provided neither particulars of the alleged complaints, the manner of alleged

infringement by the 1st, 5th and 6th Respondents or the jurisdictional basis of the action before this Court.

74. According to them, issues of grant of license, refusal or waiver of license fees for any of the licensees of the 1st Respondent are matters within the prerogative of the Board of the 1st Respondent and within its entrenched independence. It was averred that the issue of the licensing of the operations of the 4th Respondent is an ongoing process that is yet to be completed and it is premature to anticipate the outcome of the same at this stage. Further, it is trite law that where a power of licensing of a statutory body involves discretion, an order of mandamus cannot issue to compel the exercise of that discretion in a particular manner.

75. The said Respondents averred that the Petitioner's allegation that the 1st Respondent failed/refused to collect license fees from the 4th Respondent is not only misinformed but devoid of any constitutional issues. To them, under the presumption of constitutionality doctrine, the amendments wrought to the Kenya Information and Communications Act by the ***Statute Law (Miscellaneous Amendments) Act, 2015*** are presumed constitutional until the Petitioner satisfies this Court that the same are indeed unconstitutional.

76. It was contended that the petition is grossly defective as it has grossly violated the rule against misjoinder of causes of action. The petition seeks several and unrelated reliefs, based and supported by totally equally different sets of facts. This does not even meet the threshold of a constitutional petition wherein the reliefs sought and the facts in support thereof should be specific and clear in order to afford the Respondent the opportunity to defend itself. The said Respondents therefore took the position that the instant Petition is without merit, the same constitutes a flagrant abuse of the court process and is only liable for dismissal. The same issues of board appointments being raised in the present petition had been ventilated before the same court in Miscellaneous Application No. 401 of 2014 - **Republic vs. Cabinet Secretary Ministry of Information & Communications ex parte Adrian Kamotho Njenga** and a final determination made thereon.

77. It was submitted by the said Respondents that it is trite law that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed. In this respect the said Respondents relied on **Anarita Karimi Njeru -vs- The Republic (No. 1) [1976-80] 1 KLR 1272** at 1275, **Mumo Matemu-vs-Trusted Society of Human Rights Alliance & 5 others[2013] eKLR** and **Communications Commission of Kenya & 5 others-vs-Royal Media Services Limited & 5 Others [2014] eKLR**.

78. It was submitted that though in the instant case, the Petitioner at has given numerous particulars of alleged constitutional violations, it is however clear beyond peradventure that despite the said particulars captured under paragraphs 39 to 50, the Petitioner failed to demonstrate with particularity which constitutional provisions, if any, have been violated by the 1st, 5th and 6th Respondents. To them, the Amended Petition as drawn provides little or no particulars as to the allegations and the manner of the alleged infringements by the 1st, 5th and 6th Respondents. It is only at paragraph 51 (G) that the Petitioner attempts to state that the 5th Respondent violated Article 210 due to his alleged failure to collect licensing fees of USD. 27 Million from the 4th Respondent Company. It is however noteworthy that no particulars as to the alleged failure/refusal or alleged waiver by the 5th Respondent have been enumerated by the Petitioner. However, the Amended Petition dated 12th May 2016, does not meet the threshold of a constitutional petition as established in **Anarita Kirimi Njeru** (supra).

79. The Respondents cited Article 34(5) (a) of the Constitution of Kenya, 2010 states thus, "*Parliament shall enact legislation that provides for the establishment of a body, which shall-a) be independent of control by government, political interests or commercial interests;...*" Though the Petitioner's gravamen was that the ***Statute Law (Miscellaneous Amendments) Act 2015*** takes away the 1st Respondent's independence as envisaged by Article 34(5) (a) of the Constitution of Kenya, it was

submitted that the Petitioner fails to demonstrate in which manner the amendments wrought by the **Statute Law (Miscellaneous Amendments) Act, 2015** wither away the 1st Respondent's independence as envisaged by Article 34(5) (b) of the Constitution of Kenya, 2010. The said Respondents however discerned that the Petitioner's argument is perhaps informed by the inclusion by the **Statute Law (Miscellaneous Amendments) Act, 2015** of the words "*Cabinet Secretary in consultation with theimmediately before the word Authority*" under sections 5(B) (5), 27(D), 40(1), 46(1) (b), 46(3), 83(C) (2), 83V and 85A(3) respectively. Secondly under amendment of section 2 in regard to the definition of a dominant service provider that was donated to the sections 4 and 23 of the Competitions Act and by extension the Competition Authority. However of particular importance would be the amendments wrought to sections 84W (4) which provides that "*The Commission may in consultation with the Competition Authority and after due process declare a person or institution, by notice in the Gazette, to be a "dominant telecommunications Service provider...."*"

80. It was appreciated that previously under the Kenya Information and Communications Act, 1998, the 1st Respondent did not need to "consult" the Cabinet Secretary nor any other statutory body like the Competition Authority in the exercise of its functions until the onset of the new amendments. Consequently the gist of the amendments is that the 1st Respondent is now obliged to "consult" before exercising some of its mandate.

81. It was submitted that in order to determine whether the said consultation as envisaged by the **Statute Law (Miscellaneous Amendments) Act, 2015** is an affront to the "independence" envisaged by Article 34(5) (b) of the Constitution of Kenya, 2010 and whether the term "independent" as used under Article 34(5) (b) of the Constitution of Kenya, 2010 envisages total independence in the literal term, there is a need for statutory interpretation to ascertain the spirit and intention of the legislature when it passed the **Statute Law (Miscellaneous Amendments) Act, 2015**. It was averred that it is a cardinal rule of construction that words are to be used in their ordinary sense unless technical. Further, that the exact colour and shape of the meaning of any word in an enactment is not to be ascertained by reading it in isolation but must be viewed in the context of other enacting parts of the statute. See the treatise of **NS Bindra's Interpretation of Statues, 10th Edition** at 225-231. Consequently the learned authors of Black's Law Dictionary, 9th Edition, define "independent" as "*Not subject to the control or influence of another.*"

82. It was confirmed that at the promulgation of the Constitution of Kenya, 2010, the **Kenya Information and Communication Act, 1998**, was in force and at the particular time vested the 1st Respondent with the full mandate to exercise authority under the Act without any consultation whatsoever. It reasonably follows that at the promulgation of the Constitution of Kenya, 2010, there was no real need for an express constitutional provision as provided for under Article 34(5)(a) to ensure the "independence" of the 1st Respondent. It reasonably follows that there is need to ascertain the real intention of the legislature for enacting the **Statute Law (Miscellaneous Amendments) Act, 2015** to effect amendments to the **Kenya Information and Communications Act, 1998**.

83. In support of their submissions the said Respondents relied on **Heydon's Case, [1584] 76 ER 637** at 638, where Lord Coke formulated what came to be known as the *Mischief Rule* when he stated thus:

".....And it was resolved by them, that for the sure and true (a) interpretation of all statutes in general (be they penal(B) or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:- (b)1st What was the common law before the making of the Act, (c) 2nd What was the mischief and defect for which the common law did not provide. 3rd What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th The true reason of the remedy; and then the office of all the Judges is always to make such (d) construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro private commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono public...."

84. It was submitted that in the instant case, the **Statute Law (Miscellaneous Amendments) Act, 2015** has incorporated the word “consultation” into the **Kenya Information and Communication Act, 1998** which *prima facie* would seem to whittle down away the 1st Respondent’s independence as envisaged under Article 34(5) (a) of the Constitution of Kenya, 2010. To them, the learned authors of Black’s Law Dictionary define “consultation” as “*The act of asking the advice or opinion of someone.*” They also relied on the South African case of **Maqoma-vs-Sebe & Another, 1987 (1) SA** and **Agricultural, Horticultural & Forest Industry Training Board -vs- Aylesbury Mushrooms Ltd [1972] 1 All ER 280**.

85. Previously under **Kenya Information and Communication Act**, the 1st Respondent was not under any statutory obligation to consult anyone in defining dominance in the industry, the declaring of a licensee dominant and the power to make regulations under the Kenya Information and Communications Act. It was *prima facie* an independent body as envisaged by the provisions of Article 34(5) (a) of the Constitution of Kenya, 2010. The **Kenya Information and Communications Act** bequeathed to the 1st Respondent the sole mandate to govern the entire communication sector in Kenya coupled with the mandate to develop a conducive regulatory and licensing framework for the same. According to the Respondents, it follows that the mischief the legislature sought to cure is that since ICT is a highly sensitive industry it would not be prudent nor in the public interest to have one entity, with complete and infinite “independence”, control such a sensitive government resource. It reasonably follows that in order to cure the said mischief; the legislature passed the **Statute Law (Miscellaneous Amendments) Act, 2015** which *inter-alia* sought to have the 1st Respondent exercise its wide mandate in consultation with the 2nd Respondent herein.

86. It was however noted that the use of the term consultation is not couched in mandatory terms but is merely directory thus leaves the 1st Respondent with the discretion as to whether it would be bound by the any consultations emanating from its discussions with the 2nd Respondent. After all consensus or agreement emanating from the consultation is not a requirement envisaged under the **Statute Law (Miscellaneous Amendments) Act, 2015**. See **Musinga, J.** (as he then was) in **Centre For Rights Education & Awareness (CREW) & 7 Others -vs- Attorney General, [2011] eKLR**.

87. It was submitted that the independence of the 1st Respondent as envisaged by Article 34(5) (a) of the Constitution of Kenya, 2010 is still preserved.

88. With respect to the issue whether the 1st Respondent’s former Board validly disbanded and a new Board validly appointed, the said Respondents reiterated the foregoing and relied on the Court of Appeal in decision in **John Mutai Mwangi & 26 others vs. Mwenja Ngure & 4 Others [2016] eKLR** in which the rationale behind Rule 83 was stated as follows:

“This deeming provision appears to us to be inbuilt case-management system loaded into the Rules. It enables the Court, ideally, to clean up its records by striking out all the notices of appeals that have not been followed up, within 60 days, by records of appeal. It is a rule that telegraphs that notices of appeal should not be lodged in jest or frivolously, with no real or serious intention to actually institute appeals. The rationale of this is self-evident but made the more compelling by a recognition that mischievous or crafty litigants may be content to merely park the bus at appeal gate and not move thereafter – especially should they obtain some kind of stay or injunctive orders protective of their interests pending appeal. To that category of appellants, a delayed, snail speed or never-happen institution of the appeal means a perpetual enjoyment of interim relief. The rule was designed to give to such no succour. Under the rule, the Court deems and orders that a notice unbacked by institution of an appeal has been withdrawn. It essentially concludes that the intended appellant has abandoned his intention to appeal notwithstanding that he has not formally withdrawn the notice of appeal under Rule 81. The Court makes the order upon being moved by any party or, significantly, on its own motion. It is a clean-up exercise born by the need for rationality in appellate litigation and practice”.

89. It was therefore submitted that the process to appoint the 1st Respondent's new Board in tandem with the provisions of the Kenya Information and Communications Act (as amended by the Statute Law Miscellaneous Amendments Act, 2015) commenced with earnest in February 2016, way after the 1st Respondent failed to institute the substantive appeal after the requisite 60 days. It reasonably follows that the 1st Respondent's Board was lawfully disbanded vide the Ruling of this Honourable Court dated 15th May 2015 and a new Board comprising of the 8th to 16th Interested Parties lawfully constituted.

90. With respect to the issue whether the 5th or 6th Respondents grant the 4th Respondent any waiver on licensing fees, it was submitted that in a Board Paper No. 103/2015, the 1st Respondent's Board clearly considered the pros and cons of having to demand for USD. 20,025,000 from the 4th Respondent or abandon the same altogether. Considering what had transpired at the time and based on the legal analysis of the acquisition of Essar Telecom by the 4th Respondent, the 1st Respondent's Managements deemed it prudent in order not only to avoid unnecessary legal action from the 4th Respondent and also incur additional legal costs, the 1st Respondent's Management advised the 1st Respondent's Board that the demand for the license fees should be waived. The above notwithstanding it is without doubt that neither the 5th nor the 6th Respondents ever waived the license fees to the 4th Respondent as the said issue resulted in a deadlock at the 1st Respondent's Board and the matter held in abeyance thus culminating in the 4th Respondent seeking the 2nd Respondent's assistance in the same, which to date, has not been forthcoming.

91. In essence, no waiver has ever been granted by neither the 5th nor the 6th Respondents to the 4th Respondent Company as alleged by the Petitioner.

92. It was therefore submitted that the Petitioner's allegation that the 1st Respondent failed/refused to collect licenses fees from the 4th Respondent is not only misinformed, reeks of gross *mala-fides* but devoid of any constitutional issues.

93. The 1st, 5th and 6th Respondents therefore prayed that the petition be dismissed with costs.

8th to 14th Interested Parties' Case

94. The Petition was similarly opposed by the 8th to 14th Respondents.

95. According to them, they are members of the Board of Directors of the 1st Respondent, an independent statutory body established under section 3(1) of the ***Kenya Information and Communications Act, Cap 411A*** Laws of Kenya (hereinafter "*KICA*").

96. They averred that the 1st Respondent was established pursuant to and in compliance with the provisions of Article 34(5) of the Constitution of Kenya with the mandate to, amongst other functions, licence and regulate telecommunications, radio communications and postal services in the Republic of Kenya. Most significantly, the 1st Respondent is responsible for the allocation and management of frequency resource which is critical to the security of the nation and the safety of its population which mandate is undertaken under the management of the Board of Directors constituted under section 6 of KICA.

97. It was averred by the said Respondents that following the declaration of vacancies in the Board resulting from the withdrawal of the aforesaid Notice of Appeal on 3rd February 2016, vacancies occurred in the office of members of the Board of the 1st Respondent's as contemplated under section 6B of the KICA. On 5th February 2016, vacancies were declared for the positions of the members of the Board of the Authority vide Gazette Notice No. 698 of 2016 in accordance with Section 6B of the KICA and the 2nd Respondent constituted a selection panel in accordance with section 6B(6) of KICA for the purposes

of selecting suitable candidates for appointment as members of the Board which selection panel was chaired by the 16th Interested Party. It was disclosed that vide Gazette Notice No. 1267 of 2016, the Selection Panel published the names of all applicants for the position of members of the Board of the 1st Respondent and further listed all the names of the applicants who had been shortlisted for interviews which included some of the members of the former Board such as the 5th Respondent.

98. It was averred that the 8th to 14th Interested Parties herein were among the applicants shortlisted by the selection panel and invited for interviews as per the schedule to Gazette Notice No. 1267 of 2016 and they were declared the successful candidates after the said interviews and were appointed as members of the Board of Directors vide Gazette Notice No. 3152 of 2016. It was therefore their view that they were legally appointed to the position of Board Members of the 1st Respondent, having followed due process of the law.

99. The said Interested Parties contended that the process of their appointment to the Board was legal and nothing has been placed before this Court to demonstrate how the 8th to 14th Interested Parties are in office illegally as alleged or at all and thus the Petition herein is not merited.

100. The said interested parties nevertheless took the view that the Amended Petition is fatally defective as it is drawn in an omnibus manner that prejudices the 8th to 14th Interested Parties' right to adequately and appropriately defend the Amended Petition. **Additionally the omnibus Amended Petition is incapable of proper adjudication by this Honourable Court for the following reasons:**

a. The Petitioner seeks reliefs which are completely divergent and require the consideration of multiple judicial principles as demonstrated herein below:

i. The Petitioner seeks the reinstatement of the 1st to 6th Interested Parties to the Board of the 1st Respondent while this Honourable Court quashed their appointments in the first place. The issues arising for determination include jurisdiction of this Honourable Court.

ii. Further, an order is sought against an alleged waiver of license fees by the 1st Respondent to the 4th Respondent which would require evidence to show the existence of such a waiver and also that the same would not be within the mandate of the 1st Respondent.

iii. The Petitioner also seeks an order against the 6th Respondent for alleged failure to collect license fees which would require an analysis of evidence to show that the 6th Respondent's mandate includes collection of license fees.

iv. Additionally, the Petitioner seeks to quash the amendments to the KICA by the Statute Law (Miscellaneous Amendments) Act, 2015 which requires an analysis of whether or not the said amendments are unconstitutional as alleged and the principles applicable to such a situation will have to be argued and considered.

v. As concerns the 8th to 14th Interested Party, the Petitioner seeks to quash the appointments of the 8th to 14th Interested Parties to the Board of the 1st Respondent on the basis of alleged existence of Court of Appeal cases. This would require an analysis of whether this Honourable Court has jurisdiction where the issues in question is the existence or otherwise of proceedings in the Court of Appeal.

vi. Randomly, the Petitioner without reason also seeks an order for completion and release by the Board of the 1st Respondent of forensic audits allegedly conducted internally which bring in the issues of whether this Honourable Court can grant such an order.

b. It is clear from the foregoing that the Amended Petition is meant to be an all-cure omnibus

Petition whose intention is to obtain at least one order in the ensuing melee of prayers.

c. It is improper for a party in its pleadings, to make ‘omnibus’ applications, with ambiguous prayers as the Petitioner has clearly done in the present Amended Petition, hoping that the Court will grant at least some.

101. The Interested Parties therefore averred that the Amended Petition is general, imprecise, unclear and uncertain with respect to the allegations made against the 8th to 14th Interested Parties and should be struck out at this point for being incurably defective.

102. Apart from the foregoing the said Interested Parties reiterated the averments made by the above Respondents and prayed that the petition be dismissed with costs.

4th Respondent’s Case

103. The petition was opposed by the 4th Respondent, **Airtel Networks Kenya Limited**.

104. According to **Airtel**, before this Court is an Amended Petition dated 12th May 2016 seeking at least twenty (20) reliefs as against persons named, some of whom have no contractual nor legal relationship. It was its view that the reliefs sought herein are in conflict with the rights afforded to **Airtel** under the Constitution, 2010 and stated statutes and urged the Court, while determining the Petition, to be alive to the real motivation behind the filing of these proceedings and express itself whether as a country, we have reached a state of affairs by which issues lacking a constitutional moment are clothed as such simply because persons are not bold enough to face consequences of frivolous Proceedings and allegations as against law abiding citizens.

105. It was averred that the filing of this Petition was prompted by the commencement of the appointment process of the 1st Respondent’s board members yet the 4th Respondent is not a person serving in the Selection Panel established under section 6B(2) of the **Kenya Information and Communication Act** number 2 of 1998 (hereinafter referred to as “**the Act**”). To the extent that the Petition largely concerns the appointment procedure of the 1st Respondent’s board members, the failure to enjoin the Panel tasked with the appointment process is fatal to these proceedings and the Court should find as much at the preliminary stage.

106. It was contended that the body mandated by law to issue licences and regulate persons in the telecommunication and postal business is the 1st Respondent. In executing this powers, the Act does allow it to exercise discretion and act independently and relied on section 25(5) of the Act, which Parliament legislated as follows:

“...The Authority may renew, vary, modify or revoke any licence granted under this Act in accordance with the provisions of this Act”.

107. It was contended that the decision to renew or modify a licence issued under the Act are a matter of discretion to be exercised by the Authority while the day to day running of the Authority under section 11 of the Act is vested in the Director General who just like any board member enjoys immunity for personal liability for acts done whilst discharging duties assigned to it. The Director General thus does communicate to Third Parties decisions of the Authority. A board member does not communicate a decision nor does he make a decision on licensing. It was averred that under the Act, a license issued can either be conditional or unconditional. Section 23 provides that a new licence issued **may** include a condition requiring the licensee to “...to pay such fees as the Authority may prescribe...” hence the section does envisage discretion on the part of the Authority.

108. It was contended that the order sought as against the 4th Respondent assumes that there is a duty placed upon it to pay such monies which is not factual. According to **Airtel**, neither the Executive nor the Judiciary can and should delve into the licensing powers of the Authority. A directive by the Executive is

a frowned upon if it has the effect of directing the Authority on how to discharge its duties. Similarly, this Court should resist the temptation of issuing orders that would be in conflict with the provisions of section 5A of the Act which guarantees the independence of the Authority.

109. It was averred that the Petitioner is asking this Court to allow the Executive to order and direct the Authority on how to discharge its duties under the Act and this surely cannot be a constitutional moment that necessitates the intervention of this Court.

110. According to **Airtel**, the Court cannot assume the role of the Authority on licensing matters as this would be against statute. Similarly, Judicial Review orders cannot be issued to direct a public body on how to discharge a duty. Neither the Court and/or the Treasury should dictate the Authority on which conditions to impose while issuing, varying or modifying licences.

111. In support of its position, Airtel relied on the decision of **Lenaola, J** (as he then was) held in Petition Number 59 of 2015 - **Okiya Omtatah Okoiti vs. Communications Authority of Kenya & Others**:

“In that regard, in Truth Justice and Reconciliation Commission vs Chief Justice of the Republic of Kenya & Another (2012) eKLR, Warsame, J (as he then was) stated as follows;

“Though as courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which are dear to them must be addressed, the meddlesome interlopers having absolutely no grievances but who file claims for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the court corridors filing vexatious and frivolous cases. This criminally wastes the valuable time of the court and as a result of which genuine litigants standing outside the court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice.”

112. It was Airtel’s case that the Petitioner has no serious case to pursue and more likely than not he was pursuing publicity for self in the name of unnamed poor people and prayed that the Amended Petition be dismissed with costs to the 8th to 14th Interested Parties.

Determinations

113. I have considered the issues raised in this Petition.

114. It was contended that the Petitioner herein has failed to demonstrate to this Court with reasonable precision which particular provisions of the Constitution of Kenya, 2010 have been violated. Whereas it is prudent that the applicant or petitioner ought to set out with a reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. This is not to say that the Court ought to encourage and condone sloppy and carelessly drafted petitions. What it means is that:

“the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice.”

See **Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2**

Others Civil Appeal (Application) No. 152 of 2009.

115. It must similarly be remembered that a High Court is by virtue of the provisions of Article 165 of the Constitution a Constitutional Court and therefore where a constitutional issue arises in any proceedings before the Court, it is enjoined to determine the same notwithstanding the procedure by which the proceedings were instituted.

116. In my view where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained of would amount to this Court shirking its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former. Mine is not a lone voice shouting in the wilderness. The Court of Appeal in **Peter M. Kariuki vs. Attorney General [2014] eKLR**, declined to adopt the **Anarita Karimi** (supra) position, line, hook and sinker when it expressed itself *inter alia* as follows:

“Although section 84(1) was, on the face of it, abundantly clear, it was, from the early days of post independence Kenya constitutional litigation, interpreted in a rather pedantic and constrictive manner that made nonsense of its clear intent. Thus in decisions like ANARITA KARIMI NJERU V REPUBLIC (NO. 1), (1979) KLR 154, the High Court interpreted the provision narrowly so as to deny jurisdiction to hear complaints by an applicant who had already invoked her right of appeal...The narrow approach in ANARITA KARIMI NJERU was ultimately abandoned in Kenya, in favour of purposive interpretation of Section 84(1).”

117. I associate myself with the decision in **Nation Media Group Limited vs. Attorney General [2007] 1 EA 261** to the effect that.

“A Constitutional Court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite the appropriate section of the law underpinning the application, the application ought to proceed to substantive hearing... Although the application may be vague for citing the whole of Chapter 5 of the Constitution, however the prayers sought are specific and they refer to freedom of expression guaranteed under the Constitution.”

118. I must however underscore the need for pleadings to be as precise as possible and this requirement applies both to civil proceedings as in any other proceedings including constitutional petitions. The system of pleadings, it is important to note, operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases. (See **Bullen & Leake and Jacob: Precedents of Pleadings**, 2th edn. page 3). The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded. (See **Esso Petroleum Co. Ltd vs. Southport Corporation [1956] AC 218 at 238.**)

119. To that extent I associate myself with the decision in **Mumo Matemu-vs-Trusted Society of Human Rights Alliance & 5 others[2013] eKLR**, that:

“Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party.”

120. However where the proceedings can be salvaged by way of further and better particulars or amendment, that option ought to be resorted to first. In this case, there was no allegation that the Respondent and the interested party were disabled from adequately answering the allegations made by the Petitioners. Accordingly, I am not inclined to disallow the application on the ground of lack of precision.

121. It is clear that one of the substantive issues raised in this petition revolves around the status of the matter that was filed before the Court of Appeal. It is the Petitioner's case that the process through which the said proceedings were purportedly terminated was unlawful and therefore the process of recruitment of the new members of the 1st Respondent was null and void.

122. In order to determine this issue this Court would be forced to make determinations in respect of the status of the said appellate process and proceedings. With due respect this Court has no jurisdiction to determine such an issue. It is only the Court of Appeal that is properly seized of jurisdiction to interpret its proceedings and to determine the legality or otherwise thereof. This Court, in my respectful view, is not competent to interpret the decision of the Court of Appeal where the parties are not clear on the same and where the decision itself may be subject of more than one interpretation. Such a matter can only be dealt with by the Court and preferably the bench that dealt with the matter, if the members of that bench are still in that Court. See **Bearing House (1985) Ltd. & 4 Others vs. Reliance Bank Ltd. Civil Application No. Nai. 245 of 2000.**

123. It follows that I cannot embark on the discourse whether the appointment of the interested parties as members of the Board of the 1st Respondent was lawful.

124. As regards the licensing of the 4th Respondent, **Airtel**, it is important that the Court clearly demarcates its jurisdiction to deal with matters which are purely commenced as constitutional disputes and matters which are ordinary civil litigation. Whereas it is true that even in ordinary civil disputes constitutional issues may arise, to set out to litigate civil disputes by way of constitutional petitions in my view amounts to abuse of the process of the Court. It was this appreciation that led to the holding in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235** where the Court expressed itself as hereunder:

“Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process...A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action...The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.”

125. In the same vein, this Court has previously held in **John Harun Mwau vs. Peter Gastrow & 3 Others [2014] e KLR** that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter:-

Courts will not normally consider a constitutional question unless the existence of a remedy

depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”

126. I also agree with the position adopted by **Lenaola, J** (as he then was) held in Petition Number 59 of 2015 - **Okiya Omtatah Okoiti vs. Communications Authority of Kenya & Others** where he expressed himself as hereunder:

“In that regard, in Truth Justice and Reconciliation Commission vs Chief Justice of the Republic of Kenya & Another (2012) eKLR, Warsame, J (as he then was) stated as follows;

“Though as courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which are dear to them must be addressed, the meddlesome interlopers having absolutely no grievances but who file claims for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the court corridors filing vexatious and frivolous cases. This criminally wastes the valuable time of the court and as a result of which genuine litigants standing outside the court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice.”

127. It is my view that such decisions as the grant of refusal to grant an adjournment have some constitutional appendage with respect to the right to fair hearing. However to elevate the same to a constitutional issue would amount to trivialising the court’s jurisdiction to apply and interpret the Constitution. Therefore where a matter may be properly determined by a normal civil suit, the same ought to be dealt with thereunder unless it is shown that there is a constitutional moment, the litigants are better off pursuing their grievances before the normal civil courts. My view is supported by the decision of the South African Constitutional Court in **NM & Others vs. Smith and Others (Freedom of Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC)** where the Court stated:

“It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.”

128. Similarly in **Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755**, Georges, CJ held as follows;

“It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so... Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

129. I have considered the issues with respect to the licensing **Airtel** and whether the licensing fee ought to have been waived. The state of the pleadings themselves do not adequately render themselves to a proper investigation as to whether the waiver, if it was ever granted is lawful. Whereas the Petitioner contends that there was a waiver, the Respondents contend that no final decision has been made on the issue and that in fact the issue is still being interrogated.

130. In the premises I cannot based on the affidavit evidence before me make a definite conclusion that there was in fact a waiver. Without such a determination the legality or otherwise of the purported waiver cannot be determined.

131. The next issue is the constitutionality of the amendments to the *Kenya Information and Communications Act* through the *Statute Law (Miscellaneous Amendments) Act*. It is now trite that the procedure of legislation by way of Statute Law Miscellaneous legislation ought to avail only in cases of minor non-controversial amendments and this was appreciated when it was indicated in the Memorandum of Objects and Reasons of the Bill as published in a Special Issue of the Kenya Gazette – Supplement No. 164 (National Assembly Bills No. 57), where it was stated that the Bill was **“in keeping with the practice of making minor amendments which do not merit the publication of a separate Bill and consolidating them into one Bill.”** The Memorandum noted further, with regard to the KICA, that, *“The Bill seeks to amend the Kenya Information and Communications Act, 1998 (No.2 of 1998) so as firstly to align it with the Competitions Act, 2014 in respect of the criteria for being a dominant market undertaking and secondly to harmonize the regulation making power so that it is exercised by the Cabinet Secretary in consultation with the Authority.”*

132. That this [minor non-controversial amendments] is the norm is clearly discernible from the practice adopted in most jurisdictions, though the practice is not consistent. According to the *Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 21, October 2007, pp. 5-6:*

“An omnibus bill is an avenue for making general housekeeping amendments to legislation. It is designed to make only relatively minor, non-controversial amendments to various acts and to repeal acts that are no longer required. Omnibus bills assist in expediting the government’s legislative program and parliamentary business by reducing the number of separate amendment bills that deal with relatively minor amendments and repeals. They also help to weed out spent or redundant legislation from the statute book. The Department of the Premier and Cabinet has overseen the preparation of the bill to try to ensure that amendments about which there is some contention or complexity, or that make some substantive change to the law, are not included”.

133. This position is similar to that adopted by the Canadian Legislature in regard to omnibus bills as expounded in *Canadian Miscellaneous Statute Law Amendment Program* that only minor, non-controversial amendments are allowed to be made to a number of federal statutes at once in one bill. According to the program, to qualify, a Bill must not be controversial, not involve the spending of public funds, not prejudicially affect the rights of persons, or create new offences or subject a new class of persons to an existing offence. However, the practice in the United States of America as stated by **Louis Massicotte, *Omnibus Bills in Theory and Practice***, Canadian Parliamentary Review, Vol. 36 No. 1 2013, p. 14, is varied with some states permitting omnibus bills and other restricting bills to a single issue. This was the position in a 1901 American case of **Commonwealth vs. Barnett** (199 US. 161) where it is stated that:

“Bills, popularly called omnibus bills, became a crying evil, not only from the confusion and distraction of the legislative mind by the jumbling together of incongruous subjects, but still more by the facility they afforded to corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits”.

134. While there is no internationally accepted position on the legality of omnibus bills, the reality is that they are used in many jurisdictions and noted by **Louis Massicotte** (supra) that:

“From the point of view of the government, omnibus bills have plenty of advantages....First, they save time and shorten legislative proceedings by avoiding the preparation of dozens of distinct bills necessitating as many second reading debates. Second, omnibus bills generate embarrassment within opposition parties by diluting highly controversial moves within a

complex package, some parts of which are quite popular with the public or even with opposition parties themselves. [On why omnibus bill are objectionable] The real question, however, beyond the convenience of the government or of the opposition parties, may well be: is the public interest well served by omnibus bills? Take for example the clause-by-clause study in committee. When a bill deals with topics as varied as fisheries, unemployment insurance and environment, it is unlikely to be examined properly if the whole bill goes to the Standing Committee on Finance. The opposition parties complain legitimately that their critics on many topics covered by an omnibus bill have already been assigned to other committees. The public has every interest in a legislation being examined by the appropriate bodies.”

135. It is therefore clear that both on policy and good governance, which is one of the values and principles of governance in Article 10 of the Constitution, which values and principles form the foundation of our State and Nation as decreed in Article 4(2) of the Constitution, omnibus amendments in the form of Statute Law Miscellaneous legislations ought to be confined only to minor non-controversial and generally house-keeping amendments.

136. To determine the propriety of the procedure adopted in this instance one needs to examine the impact and the import of the amendments. Article 34(5) of the Constitution provides as follows:

(5) Parliament shall enact legislation that provides for the establishment of a body, which shall

(a) be independent of control by government, political interests or commercial interests;

(b) reflect the interests of all sections of the society; and

(c) set media standards and regulate and monitor compliance with those standards.

137. That the 1st Respondent herein, **Communications Authority of Kenya** is the body contemplated under the above Article is not in doubt. It is also not in doubt that before the contentious amendments, under the **Kenya Information and Communications Act, 1998**, the 1st Respondent did not need to “consult” the Cabinet Secretary nor any other statutory body like the Competition Authority in the exercise of its functions. Consequently the gist of the amendments was that the 1st Respondent is now obliged to “consult” both the Cabinet Secretary and the Competition Authority before exercising some of its mandate.

138. The question that arises is whether the requirement for consultation introduced by the amendments has the effect of eroding the independence of the 1st Respondent as envisaged under Article 34(5)(a) of the Constitution.

139. The issue before me is not whether the said amendment was constitutional. Rather the question is whether such an amendment ought to have been introduced by way of a Statute Law Miscellaneous Amendment Bill. The Respondents contend that the mere fact that there is a requirement for consultation does not necessarily bind the 1st Respondent to such course. I agree with the holding in **Maqoma -vs- Sebe & Another, 1987 (1) SA**, where **Pickard, J.** observed *inter-alia* that:

“It seems that ‘consultation’ in its normal sense without reference to the context in which it is used, donates a deliberate getting together of more than one person or party...in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word ‘consultation’ in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.”

140. However, in the English case of **A.H.F.I. Training Board vs. Aylsbury Mushrooms Ltd [1972] 1 WLR 190**, a Minister had a statutory power to make training orders for the mushroom industry, but only provided he first engaged in consultations with organizations representative of the industry. Since he had not consulted, with the mushroom growers, his training scheme was declared invalid. It was held:

“The essence of consultation is the communication of a genuine invitation, extended with a receptive Minister of Town and County Planning. If the invitation is once received, it matters not that it is not accepted and no advice proffered. Were it otherwise, organizations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding, there can be no consultation.”

141. It is therefore my view and I hold that the position of the Respondents that the inclusion of the word ‘consultation’ in the ***Statute Law Miscellaneous Amendment Act 2015*** does not *ipso facto* strip the 1st Respondent of its independence as the same merely connotes the seeking of an opinion, which opinion is not binding, cannot be true. To contend that even with the amendments by the ***Statute Law Miscellaneous Amendment Act 2015***, the 1st Respondent is merely obligated to inform the 2nd Respondent of its policies and therefore not stripped of its independence as envisaged by Article 34(5) of the Constitution of Kenya, 2010, cannot be taken as a serious argument. In my view there is a world of difference between a requirement that the 2nd Respondent be informed or notified of the 1st Respondent’s action and a requirement that the 1st Respondent consults the 2nd Respondent before undertaking its constitutional and statutory mandates.

142. In my view the amendments introduced to ***Kenya Information and Communications Act*** through the ***Statute Law (Miscellaneous Amendments) Act*** had an impact on Article 34(5) of the Constitution. In my view an amendment that has an impact on either the letter or the spirit of the Constitution however remotely cannot be termed as “*minor non-controversial and generally house-keeping amendments.*”

Order

143. Therefore while I decline to grant the other orders sought in the petition, I hereby quash all amendments made on 15th December 2015 to the ***Kenya Information and Communications Act*** by the ***Statute Law (Miscellaneous Amendments) Act 2015***.

144. The costs of the petition are awarded to the Petitioner to be borne by the 2nd Respondent.

145. It is so ordered.

Dated at Nairobi this 6th day of June, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ochwa or Mr Ahmednasir for the 1st, 5th and 6th Respondents

Mr Luseno for the 4th Respondent

Miss Okimaru for the 8th to 14th interested parties

CA Mwangi