



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 53 OF 2015**

**REPUBLIC .....APPLICANT**

**VERSUS**

**NATIONAL WATER CONSERVATION &**

**PIPELINE CORPORATION .....1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY MINISTRY**

**OF ENVIRONMENT WATER & NATURAL  
RESOURCES.....2<sup>ND</sup> RESPONDENT**

**AND**

**EVANS NGIBUINI.....1<sup>ST</sup> INTERESTED PARTY**

**JUSTUS WABUYABO.....2<sup>ND</sup> INTERESTED PARTY**

**RUTH MWANIKI.....3<sup>RD</sup> INTERESTED PARTY**

**MICHAEL OCHIENG .....4<sup>TH</sup> INTERESTED PARTY**

**JACKLINE MUSYOKI .....5<sup>TH</sup> INTERESTED PARTY**

**JUDAH ABEKAH .....6<sup>TH</sup> INTERESTED PARTY**

**ALOME ACHAYO.....7<sup>TH</sup> INTERESTED PARTY**

**ELISHA OKECH .....8<sup>TH</sup> INTERESTED PARTY**

**PHILIP LANGAT .....9<sup>TH</sup> INTERESTED PARTY**

**MASMEC LIMITED .....10<sup>TH</sup> INTERESTED PARTY**

**JUDGEMENT**

1. In the pleadings filed in Court, the ex-parte Applicant Oscar Juma Oyomba introduces himself as an adult citizen of the Republic of Kenya and a taxpayer. The 1<sup>st</sup> Respondent, National Water Conservation & Pipeline Corporation is a state corporation whose key mandate is to construct dams, water pans and drill boreholes with a view to delivering on the Government's responsibility to meet Kenyans' right to safe water in sufficient quantities. The 2<sup>nd</sup> Respondent is the Cabinet Secretary for Environment, Water and Natural Resources. The 1<sup>st</sup> to 9<sup>th</sup> interested parties namely Evans Ngibuini, Justus Wabuyabo, Ruth Mwaniki, Michael Ochieng, Jackline Musyoki, Judah Abekah, Alome Achayo, Elisha Okech and Philip Langat all participated in the process for the recruitment for the post of the Managing Director of the 1<sup>st</sup> Respondent. The 10<sup>th</sup> Interested Party is a limited liability company and was at the material time contracted by the 1<sup>st</sup> Respondent to recruit its Managing Director.
2. The Applicant's case is that the 1<sup>st</sup> Respondent tasked the 10<sup>th</sup> Interested Party to recruit a candidate to fill the post of its Managing Director which felt vacant in March, 2014. After conducting interviews the 10<sup>th</sup> Interested Party listed nine candidates against their scores as follows:

1. Evans Ngibuini	77.83%
2. Justus Wabuyabo	74.11%
3. Ruth Mwaniki	71.61%
4. Michael Ochieng	68.11%
5. Jackline Musyoki	67.78%
6. Judah Abekah	65.83%
7. Alome Achayo	56.67%
8. Elisha Okech	56.67%
9. Philip Langat	52.56%

3. According to the Applicant, the score of each candidate is validly expected to serve as a guide for the Board of Directors ("the Board") of the 1<sup>st</sup> Respondent while forwarding three names to the 2<sup>nd</sup> Respondent for appointment of the Managing Director. The Applicant contended that instead of forwarding the names of the three top candidates, the Board instead forwarded names of candidates who had scored less than 70% whereas it is a requirement that for one to be appointed or reappointed as a managing director or chief executive officer of a state corporation, the person must have scored a minimum marks of 70%.
4. The Applicant asserted that the Board's decision is subject to judicial review on various grounds. The first ground cited by the Applicant is that the decision of the Board was unreasonable and breached the legitimate expectation of the candidates that the names of the top three performers would be recommended for appointment. The Applicant averred that the decision of the Board breached the practice and convention of forwarding the names of the three top candidates to the 2<sup>nd</sup> Respondent from which list the Managing Director of the 1<sup>st</sup> Respondent would be picked.
5. The Applicant further contended that the Board's admission that it failed to conduct proper or due diligence on the prospective candidates, prior, during or after the interview process rendered its decision flawed. The Applicant also asserted that the decision of the Board was improper and in breach of regulations as the meeting in which the decision was made was not properly convened nor were the proceedings and record thereof properly maintained.
6. The second ground the Applicant relied on is that the decision was *ultra vires*. According to the Applicant the Board arrogated itself powers it did not have under the State Corporations Act (SCA). The Applicant asserted that the decision to recommend the appointment of a candidate who scored less than 70% as the 1<sup>st</sup> Respondent's Managing Director offends the provisions of the SCA. Further, that the term of the Board expired on 9<sup>th</sup> February, 2015 and this renders its decision which was made on the same date tainted with ulterior motives.
7. The third ground on which the orders are sought is that of "abdication". According to the Applicant, no enquiry on the suitability of the candidates was made with the Ethics and Anti-Corruption Commission or the relevant professional bodies and the due diligence alluded to by the Board is a sham based on the personal considerations of the directors. The Applicant argued that

- the Board was aware of the identities of the nine shortlisted candidates at the time of inviting them for interviews and the fact that the Board made the decision on the eve of the end of its term can only lead to the conclusion that the decision was influenced by extraneous considerations not warranted by the law.
8. The fourth ground on which relief is sought is that of “insufficient enquiry”. On this ground, the Applicant asserted that the Board after conducting interviews on merit is bound by its process and cannot purport to introduce extraneous considerations at the tail end of the process. The Applicant submitted that the Board’s decision to recommend the appointment of the candidates ranked 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> was thus irrational and without basis in law or fact. Further, that by failing to make sufficient inquiry into the backgrounds of all the shortlisted candidates, the Board acted in breach of its statutory mandate and role.
  9. The Applicant asserted that there was conflict of interest in that the principal officer of the 10<sup>th</sup> Interested Party was also a director of a company which was a major supplier of the 1<sup>st</sup> Respondent and could not be deemed to be impartial in the selection process.
  10. Fifthly, the Applicant contended that the orders sought should be granted as the act of subjecting the candidates to a long, tedious and gruelling process without any intention of picking the best candidate resulted in substantive unfairness and illegality.
  11. Finally, the Applicant submitted that the process adopted by the Board in making the impugned recommendations did not conform to the national values espoused by Article 10 of the Constitution which requires transparency and accountability in decision making.
  12. The Applicant through the notice of motion application dated 27<sup>th</sup> February, 2015 therefore prayed for orders:

**“1. THAT this Honourable Court be pleased to issue an Order of Prohibition prohibiting the 2<sup>nd</sup> Respondent from acting on the recommendation of the Board of Directors of the 1<sup>st</sup> Respondent recommending the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Interested Parties as candidates for possible appointment to the position of Managing Director of the 1<sup>st</sup> Respondent;**

**2. THAT this Honourable Court be pleased to issue an Order of Certiorari to remove into this Honourable Court for the purposes of quashing the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and each of the Respondents appointing a Managing Director based on the names forwarded by the Board of Directors of the 1<sup>st</sup> Respondent;**

**3. THAT costs of this Application be provided for.”**

The application was supported by a statutory statement, the Applicant’s verifying affidavit, a supplementary affidavit and annexures thereto.

13. The 1<sup>st</sup> Respondent opposed the application through the replying affidavits sworn by the Chairman of the Board Dr Julius Kones on 2<sup>nd</sup> March, 2015 and 11<sup>th</sup> March, 2015 and a supplementary affidavit sworn by the same Chairman on 7<sup>th</sup> April, 2015.
14. The 1<sup>st</sup> Respondent’s case as gleaned from the said affidavits is that the Applicant’s application is defective as it did not comply with Order 53 Rule 7 of the Civil Procedure Rules, 2010 (CPR) which requires that the impugned decision should be annexed to the application.
15. On the facts of the matter, Dr Kones deposed that the post of the Managing Director of the 1<sup>st</sup> Respondent fell vacant on 3<sup>rd</sup> March, 2014. Subsequently, pursuant to interviews conducted for the appointment of the Managing Director he forwarded three names to the 2<sup>nd</sup> Respondent on 14<sup>th</sup> January, 2015. The Cabinet Secretary in exercise of her powers under Section 5(3) of the SCA appointed the 5<sup>th</sup> Interested Party, Engineer Jacqueline K Musyoki as the Managing Director for a period of three years.
16. It was the Chairman’s case that he notified the 5<sup>th</sup> Interested Party of her appointment on 19<sup>th</sup>

- January, 2015. The 1<sup>st</sup> Interested Party who was acting as the Managing Director was on 19<sup>th</sup> February, 2015 deployed to his previous position in the Department of Finance.
17. Dr Kones averred that the Applicant has not met the threshold for issuance of orders of prohibition and certiorari for several reasons; that the relevant statute, rules and regulations do not provide that the top candidate shall be appointed to the position of the Managing Director; that the pass mark is the prerogative of the Board and there is no law or regulation which fixes the pass mark at 70% as alleged and in this case the Board set the pass mark at 65% and all the three candidates whose names were forwarded to the Cabinet Secretary had passed the pass mark; that there is no evidence that the Board breached any provisions of the Kenyan Constitution; that the Board carried out due diligence on all candidates by looking at the certified copies of the candidates' academic certificates, considering reports from the Ethics and Anti-Corruption Commission, Higher Education Loans Board, the Police and Kenya Revenue Authority and inquiring into the previous work records of all the candidates; and that the term of the Chairman expires on 12<sup>th</sup> February, 2016.
  18. On the letter dated 11<sup>th</sup> February, 2015 originating from the office of the Inspector General (Corporations) in the Office of the Deputy President, addressed to the 2<sup>nd</sup> Respondent, Dr Kones averred that the same was an afterthought as it was written more than one month after the interview process was completed and any queries regarding the interview process ought to have been raised with the Board during the interviews. Dr Kones deposed that the said letter was intended to muzzle and interfere with the processes, operations and independence of the Board and was thus illegal, unconstitutional and misplaced in the circumstances.
  19. Finally, Dr Kones averred that certain documents exhibited by the Applicant were not official documents and they should be expunged from the court record.
  20. The 2<sup>nd</sup> Respondent opposed the application through a replying affidavit sworn by the Ministry's Principal Secretary, James Teko Lopoyetum on 11<sup>th</sup> March, 2015 and filed in Court on 12<sup>th</sup> March, 2015. The Principal Secretary deposed that the 2<sup>nd</sup> Respondent is mandated under the provisions of Section 5(3) of the SCA and the Head of Public Service's Circular referenced OP/CAB.9/L dated 9<sup>th</sup> May, 2008 to appoint the Managing Director of the 1<sup>st</sup> Respondent upon recommendations of its Board.
  21. According to Mr. Lopoyetum, the 2<sup>nd</sup> Respondent received a letter dated 14<sup>th</sup> January, 2015 from the Chairman of the 1<sup>st</sup> Respondent's Board forwarding three names recommended by the Board for consideration and possible appointment of one of them as the Managing Director. The letter was accompanied by the copies of the curriculum vitae of each of the three candidates and a signed copy of the resolutions of the Board. After due consideration of the three candidates the 2<sup>nd</sup> Respondent wrote to the Chairman of the 1<sup>st</sup> Respondent's Board on 27<sup>th</sup> January, 2015 communicating the decision to appoint Engineer Jacqueline K Musyoki as the Managing Director for a period of three years with effect from the date of signing of the contract with the Board. Subsequently, the 1<sup>st</sup> Respondent entered into a contract with the nominee through a letter of appointment dated 19<sup>th</sup> February, 2015.
  22. Mr Lopoyetum averred that Engineer Jacqueline K Musyoki was ranked second in the list submitted by the 1<sup>st</sup> Respondent's Board and her appointment was made on 27<sup>th</sup> January, 2015 before the letter of the Inspector-General (Corporations) was received on 14<sup>th</sup> February, 2015.
  23. According to the 2<sup>nd</sup> Respondent's Principal Secretary, the appointment of the 5<sup>th</sup> Interested Party was made upon the consideration that the 1<sup>st</sup> Respondent is an institution with serious management challenges necessitating the appointment of a Chief Executive Officer who is not only able but has been tested and has demonstrated the capacity to meet the institution's mandate. Also taken into account was the fact that the 5<sup>th</sup> Interested Party had performed well as the Chief Executive Officer of Water Services Trust Fund where she had led the organization for six years championing good governance and developing confidence with several development partners thus increasing funding from Kshs. 300 million to Kshs.3 billion. Further, that she had implemented water projects which had enabled three million poor Kenyans access water and sanitation thus greatly contributing towards universal access by 2020.
  24. The Principal Secretary wrapped up the 2<sup>nd</sup> Respondent's case by averring that the 2<sup>nd</sup>

- Respondent had not received any complaint regarding the recruitment process from either the members of the 1<sup>st</sup> Respondent's Board or from any of the shortlisted candidates.
25. Among the ten interested parties, it is only the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 10<sup>th</sup> interested parties who participated in these proceedings. The 1<sup>st</sup> and 3<sup>rd</sup> interested parties supported the application whereas the 5<sup>th</sup> and 10<sup>th</sup> interested parties opposed it.
  26. The 1<sup>st</sup> Interested Party swore a replying affidavit on 10<sup>th</sup> March, 2015. Initially, his counsel Mr Kamunya had on 20<sup>th</sup> February, 2015 indicated that the 1<sup>st</sup> Interested Party did not wish to participate in the case and sought to be excused from the proceedings. His request was granted. However, on 6<sup>th</sup> March, 2015 the 1<sup>st</sup> Interested Party sought to return to the matter and his request was once again allowed.
  27. It appears that the 1<sup>st</sup> Interested Party's desire to rejoin the case was driven by the need to respond to Dr Julius Kones' replying affidavit of 3<sup>rd</sup> March, 2015 and that of James Teko Lopoyetum sworn on 4<sup>th</sup> March, 2015. It should be noted at this stage that the replying affidavit sworn on 4<sup>th</sup> March, 2015 by James Teko Lopoyetum was expunged from the Court record on 12<sup>th</sup> March, 2015 and replaced by that sworn by the same James Lopoyetum on 11<sup>th</sup> March, 2015. Consequently, the contents of replying affidavit of the 1<sup>st</sup> Interested Party in so far as they relate to the expunged replying affidavit of James Teko Lopoyetum will be ignored.
  28. Upon perusal of the replying affidavit of the 1<sup>st</sup> Interested Party, I note that the same is geared towards establishing the *status quo* that prevailed on 20<sup>th</sup> February, 2015 when the Court issued an order for maintenance of the *status quo* pending *inter partes* hearing of the issue as to whether leave to apply for judicial review would operate as stay. Dr Julius Kones had averred that the prevailing *status quo* was that the 5<sup>th</sup> Interested Party was the Managing Director of the 1<sup>st</sup> Respondent on that day. The 1<sup>st</sup> Interested Party disputed this deposition and averred that he was the Acting Managing Director of the 1<sup>st</sup> Respondent on 20<sup>th</sup> February, 2015 when the order of maintenance of *status quo* was issued. Nothing much turns on this question since the Court after hearing the parties on 12<sup>th</sup> May, 2015 stayed the appointment of the 5<sup>th</sup> Interested Party pending the hearing of the substantive notice of motion.
  29. Turning to the core issues in the application, the 1<sup>st</sup> Interested Party averred that the letter purportedly signed on 19<sup>th</sup> February, 2015 appointing the 5<sup>th</sup> Interested Party as the Managing Director of the 1<sup>st</sup> Respondent had no legal effect since the term of office of the Board had expired on 9<sup>th</sup> February, 2015 and as such there was no Board in place to sign the contract on the said date.
  30. On the letter dated 11<sup>th</sup> February, 2015 from the office of the Inspector General (Corporations), the 1<sup>st</sup> Interested Party asserted that the Inspector General was simply playing his role of supervising state corporations and the letter cannot be declared "illegal, unconstitutional and misplaced" by the Chairman of the Board.
  31. On the claim that he was disqualified as his performance was below par, the 1<sup>st</sup> Interested Party averred that this was contrary to available evidence as he had been rated "very good" by the Performance Contracting Division of State Corporations on 5<sup>th</sup> August, 2014 and even the Chairman of the Board had acknowledged, when redeploying him, that during his time as the Acting Managing Director he had steered "the corporation to the satisfaction of the Board."
  32. Counsel for the 3<sup>rd</sup> Interested Party indicated that his client was relying on the pleadings of the Applicant and the replying affidavit of the 10<sup>th</sup> Interested Party.
  33. The 5<sup>th</sup> Interested Party opposed the application through her replying affidavit filed on 5<sup>th</sup> March, 2015. She averred that the 2<sup>nd</sup> Respondent recommended her appointment on 27<sup>th</sup> January, 2015 and her appointment was indeed effected by the Board of the 1<sup>st</sup> Respondent on 19<sup>th</sup> February, 2015. It is her view that an order of prohibition cannot issue as she is already appointed the Managing Director of the 1<sup>st</sup> Respondent.
  34. Among the exhibits annexed to the 5<sup>th</sup> Interested Party's affidavit are minutes of the Board meetings held on 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> January, 2015. The minutes contained the resolutions of the

- Board on the names to be recommended to the Cabinet Secretary for appointment as the 1<sup>st</sup> Respondent's Managing Director. The reasons for the disqualification 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> interested parties are also given in those minutes.
35. Dr M A S Waweru, the Managing Director of the 10<sup>th</sup> Interested Party swore a replying affidavit dated 4<sup>th</sup> March, 2015. Through the said affidavit he disclosed that the 10<sup>th</sup> Interested Party was retained by the 1<sup>st</sup> Respondent to shortlist and conduct interviews for the positions of Managing Director and senior managers. He averred that although he is the Managing Director of the 10<sup>th</sup> Interested Party, the 10<sup>th</sup> Interested Party is an independent entity with its own Board. Further, that the company in which he is a director is just one of the many suppliers of the 1<sup>st</sup> Respondent on a willing buyer willing seller basis. The company is also not the only supplier to the 1<sup>st</sup> Respondent and as the parties are dealing in an open and competitive manner no conflict of interest would arise. It is the case of the Managing Director of the 10<sup>th</sup> Interested Party that the company won the tender after a competitive process.
36. It is the 10<sup>th</sup> Interested Party's case that its duty was limited to evaluating and interviewing the candidates and presenting a report to the 1<sup>st</sup> Respondent and that is what it did. It is the 10<sup>th</sup> Interested Party's case that it accorded all the candidates an equal and unbiased opportunity during the interviews. The 10<sup>th</sup> Interested Party contends that its mandate ended once it presented a report to the 1<sup>st</sup> Respondent.
37. From the pleadings filed in this matter it is apparent that the issues narrow down to the validity of these proceedings and the availability of judicial review orders in the circumstances of this matter.
38. The 1<sup>st</sup> Respondent raised a preliminary objection about non-compliance with Order 53 Rule 7 CPR. That rule requires that a copy of the impugned decision be lodged with the Court or an explanation given for failure to avail the decision. Reliance is placed on the decisions in **Republic v Chairman Provincial Land Disputes Appeals Tribunal Rift Valley Province & 2 others exparte Madayang Tuliakong [2014] eKLR** and **Republic v Minister of Roads and Public Works & another ex-parte Kyevaluki Services Limited HC Misc. Civil Appeal No. 365 of 2010 ([2012] eKLR)**. The import of the two decisions is that failure to exhibit the impugned decision is fatal to a judicial review application.
39. In my view, in applying Rule 7 the Court has to be alive to the circumstances of the case before it. In the case before me, at the time the Applicant approached the Court it was not clear whether or not the 2<sup>nd</sup> Respondent had appointed the Managing Director of the 1<sup>st</sup> Respondent. The Applicant was, however, aware that the names of three candidates had been forwarded to the 2<sup>nd</sup> Respondent by the Board of the 1<sup>st</sup> Respondent. Ideally it would be an arduous task to expect an ordinary citizen to lay hands on correspondences between public servants. In my view, Rule 7 should not be interpreted so as to deny a citizen who approaches the Court in good faith the opportunity of commencing judicial review with a view to righting wrongs committed by State officers. However, the Applicant herein has demonstrated by the annexures to his application, that he is not an ordinary citizen since he had access to privileged communication between State officers.
40. In this case for instance, the respondents and the 5<sup>th</sup> Interested Party have exhibited the 5<sup>th</sup> Interested Party's letter of appointment. That letter is the subject of these proceedings and I do not think that the decision in this matter should be based on non-compliance with Order 53 Rule 7 CPR since the impugned decision is already before the Court. I think the mischief that the Rule intended to address was to ensure that the Court does not issue an order of certiorari without having the benefit of perusing the decision it is being asked to quash.
41. The key question in this matter is whether the orders of judicial review are available to the Applicant. For orders of judicial review to issue, an applicant must establish illegality and or unreasonableness and or procedural impropriety by a public body.
42. In the case of **Municipal Council of Mombasa v Republic & Umoja Consultants Limited, Nairobi Civil Appeal No. 185 of 2001 ([2002] eKLR)** the Court of Appeal stated that in judicial review:

**“The court would only be concerned with the process leading to the making of the**

decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

43.The scope and reach of judicial review is well settled. Lord Diplock in the famous case of **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935** summarized the purpose of judicial review thus:

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety.”.....

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

44.The conditions for the issuance of judicial review orders were elaborated by Justice Kasule in the Ugandan case of **Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300** at pages 303 to 304 as follows:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service [1985] AC 2*; and also *Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR)*.

Illegality is when the decision making authority commits an error of law in the

**process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....**

**Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.**

**Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”**

45. In support of the allegation of illegality, the Applicant through his supplementary affidavit sworn on 30<sup>th</sup> March, 2015 exhibited a document Ref. No. OP CAB 9/1A dated 5<sup>th</sup> November, 2004 titled “GUIDELINES ON PROCEDURES FOR THE APPOINTMENT OF DIRECTORS, CHIEF EXECUTIVES AND MANAGERS OF STATE CORPORATIONS AND STATUTORY BOARDS”. At page 2 of that document the guidelines governing the appointment of Chief Executive Officers of state corporations are given as follows:

**“? Chief Executive Officers of State Corporations should be recruited competitively from the open labour market by the Boards of Directors in accordance with section 5(3) of the State Corporations Act, Cap 446;**

**?the recruitment may be carried out through reputable recruitment agencies; in the event a State Corporation is unable to retain the services of a recruitment agency, the Board of Directors may carry out the process of competitive recruitment;**

**?the recruiting agency or the Board of Directors as the case may be, will be required to short-list the top three (3) candidates for each position. The names of the three candidates should subsequently be referred to the parent Ministry to select a suitable candidate for appointment in accordance with relevant statutes after due consultation within Government;**

**?in addition to their service contracts appointees will be required to sign performance contracts which will form the basis of completion, renewal or termination of their service contracts; and**

**?Chief Executive Officers whose service contracts expire should be subjected to the above requirements.”**

46. A reading of the guidelines and the application of the same to the facts of this case does not disclose any breach of the same by the respondents. The top three candidates are picked by the Board of a state corporation after interviews have been conducted. Various factors have to be taken into account by a Board before the top three candidates are selected. One such factor is the issue of regional balance.

47. Section 5(3) of the State Corporations Act, Cap 446 states:

**“A state corporation may engage and employ such number of staff, including the chief executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve.”**

No evidence has been adduced to demonstrate that the above cited provision was breached.

48. The Applicant did not point to any other statute, circular, rules or regulations broken by the 1<sup>st</sup> Respondent. It may be argued that the appointment of the 5<sup>th</sup> Interested Party breached the directive of the Inspector-General (Corporations) contained in the letter dated 11<sup>th</sup> February, 2015. Such an argument fails for two reasons: firstly, the letter was received after the 2<sup>nd</sup> Respondent had conveyed the decision to appoint the 5<sup>th</sup> Interested Party to the 1<sup>st</sup> Respondent and secondly, a perusal of the letter shows that the same is a guide on how the recruitment should have been conducted. The author of the letter does not point to breach of any law or regulation by the respondents. If indeed there was non-compliance with any law or regulation, the Inspector-General of State Corporations has powers to take the necessary remedial action.
49. It must be remembered that when it comes to the management of state corporations, the buck stops with the Boards. The Board of a state corporation should have the leeway in the appointment of the Chief Executive Officer. Where the CEO does not perform to expectations, the Board is answerable to the taxpayers.
50. The other grounds upon which the Applicant seeks to overturn the decisions of the respondents is that they were unreasonable and breached the legitimate expectations of the candidates that the names of the top three candidates would be considered when appointing the Managing Director of the 1<sup>st</sup> Respondent.
51. Among the documents exhibited by the Applicant is a document marked "OJO2" titled "INTERVIEW FOR THE POSITION OF MANAGING DIRECTOR". At page 2 of the document is a list of ranking of candidates and their scores as follows:

1. Mr. Evans J W C Ngibuini	77.83%
2. Mr. Justus Ambutsi Wabuyabo	74.11%
3. Ms. Ruth W. Mwaniki	71.61%
4. Eng. Michael Owino Ochieng	68.11%
5. Eng. Jackline K Musyoki	67.78%
6. Eng. Judah Abekah	65.83%
7. Ms. Alome Kasera Achayo	56.67%
8. Eng. Elisha Okech	56.67%
9. Eng. Philip Kibet Langat	52.56%

52. At pages 2-4 of the same document, the reasons for the disqualification of Evans J W C Ngibuini, Justus Ambutsi Wabuyabo and Eng Michael Owino Ochieng are given. The Board then proceeds to list the names of Ms. Ruth W Mwaniki, Eng. Jackline K Musyoki and Eng. Judah Abeka in the order of merit. The reasons for picking the 5<sup>th</sup> Interested Party as the Managing Director are clearly explained in the replying affidavit sworn by James Teko Lopoyetum on 11<sup>th</sup> March, 2015. Those reasons have been reproduced in this judgement.
53. In **Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology Ex-parte Cecilia Mwathi and another [2008] eKLR** the grounds for grant of judicial review were enumerated as:

**"1. Where there is abuse of discretion.**

- 2. Where the decision maker exercises discretion for an improper purpose.**
- 3. Where the decision maker is in breach of duty to act fairly.**
- 4. Where the decision maker has failed to exercise statutory discretion reasonably.**
- 5. Where the decision maker acts in a manner to frustrate the purpose of the Act donating power.**
- 6. Where the decision maker fails to exercise discretion.**
- 7. Where the decision maker fetters the discretion given.**
- 8. Where the decision is irrational and unreasonable."**

54. None of those grounds has been established by the Applicant. Furthermore, I do not find anything

in the matter before me that points to any act of unreasonableness on the part of the respondents. The remit of the Court on the rationality question was addressed by D.S. Majanja, J in **Community Advocacy and Awareness Trust & 8 others v Attorney General [2012] eKLR** where he quoted with approval the South African case of **Pharmaceutical Manufacturers of SA: In re Ex Parte President of the Republic of South Africa 2000(2) SA 674 (CC)** and stated that:

***“I also adopt the words in the case of *Pharmaceutical Manufacturers of SA: In re Ex Parte President of the Republic of South Africa 2000(2) SA 674 (CC)* where the following was said in regard to the rationality requirement, “Rationality in this sense is a minimum threshold requirement applicable to the exercise of all power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of the Constitution and therefore unlawful. The setting of this standard does not mean the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary’s decision, viewed objectively, is rational, a Court cannot interfere with a decision simply because it disagrees with it or considers that the power was exercised inappropriately.”*”**

55.The Court has to be wary least it oversteps its boundaries. A decision by this Court to overturn the decisions of the respondents would amount to taking over their duties. This application amounts to an invitation of this Court to take over the boardroom affairs of the 1<sup>st</sup> Respondent. This is a temptation that must be resisted by a judicial review court since judicial review does not operate that way.

56.On the allegation that the legitimate expectations of the other candidates were breached, I do not find any support for this allegation. Appointment to a public office is done after consideration of several factors. The fact that a candidate has emerged at the top in an interview does not mean that the candidate has to be appointed. The proceedings of the Board prior to the forwarding of the names to the 2<sup>nd</sup> Respondent were confidential. As already noted, the Board gave reasons in its minutes for dropping the names of certain candidates. This Court cannot overlook those reasons and make a finding that the decision to overlook the particular candidates was unreasonable.

57.There is another disturbing thing about these proceedings. The Applicant had unhindered access to communication between state officers. Who was the supplier of the documents? The Applicant knows. Did the Applicant approach the Court in good faith? At page 296 paragraph 153, the learned authors of Halbury’s Laws of England Vol. 1(1) Administrative Law, 4<sup>th</sup> Edition, 2001 Reissue state that:

**“Where a person not entitled to do so acts in any of certain offices, the High Court may grant an injunction restraining him from so acting, and, if the case so requires, declare the office to be vacant. An application for such an injunction must be made by way of an application for judicial review. The order does not issue as a matter of course, and the applicant’s conduct and motives may be inquired into.”**

58.In a case like the one before me, an applicant needs to clearly show in what way the actions of a public body are in breach of the law. This is because there is the ever present risk that an applicant is litigating, not in the public interest, but as an agent of a disgruntled candidate. It must be clear that an applicant has no personal interest in the matter.

59.Once a judicial review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith. That is what I will do in this case. The Applicant’s case therefore fails and it is dismissed.

60.Despite the aspersions cast on the Applicant’s intentions by the respondents, I did not find any evidence that he filed this matter with ulterior motives. I will therefore give him the benefit of doubt and assume that this matter was filed with the legitimate intention of upholding the rule of law. For that reason, I direct each party to bear own costs of these proceedings.

Dated, signed and delivered at Nairobi this 13<sup>th</sup> day of May , 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**